Docket #0685 Date Filed: 08/13/2020

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

In re:	)	Chapter 11
STAGE STORES, INC., *et al.*,[1]	)	Case No. 20-32564 (DRJ)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW
IN SUPPORT OF CONFIRMATION OF THE JOINT SECOND AMENDED CHAPTER 11 PLAN OF STAGE STORES, INC. AND SPECIALTY RETAILERS, INC.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Stage Stores, Inc. (6900) and Specialty Retailers, Inc. (1900). The Debtors' service address is: 2425 West Loop South, Houston, Texas 77027.

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Stage Stores, Inc. and Specialty Retailers, Inc. (together, the "Debtors" or "Stage Stores") file this memorandum of law (this "Memorandum") in support of confirmation of the *Joint Second Amended Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc.* (as may be modified, amended, or supplemented from time to time, the "Plan") to be filed prior to the Confirmation Hearing.[2] In support of confirmation of the Plan, and in response to unresolved objections thereto (collectively, the "Objections"),[3] the Debtors filed substantially contemporaneously herewith the *Declaration of Elaine D. Crowley Chief Restructuring Officer of Stage Stores, Inc., in Support of Confirmation of the Joint Amended Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc.*, (the "Crowley Declaration").

Preliminary Statement

1. Confirmation of the Plan represents the best available path to conclude these chapter 11 cases and maximize creditor recoveries. Substantially all of the Debtors' stakeholders agree; the Committee, the U.S. Trustee, the prepetition lenders, landlords, trade creditors, and more than 99% of general unsecured creditors support or do not oppose the Plan. Specifically, more than 99% of general unsecured creditors in number, and over 94% in amount, voted to accept the Plan.[4][5] And 100% of the Debtors' prepetition secured lenders voted in support of the Plan. The Plan also satisfies the statutory requirements for confirmation, as described herein.

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[2] Capitalized terms used but not defined in this Memorandum have the meanings ascribed to them in the Plan.

[3] A summary chart of the Objections is attached hereto as **Exhibit A**. The Debtors have also received a number of informal objections from various parties in interest.

[4] Even when not including the 6749 votes cast by alleged class action claimants, more than 86.82% of general unsecured creditors in number, and over 89.36%, in amount, voted to accept the Plan.

[5] On August 12, 2020, the Committee filed the *Statement of Official Committee of Unsecured Creditors in Support of Chapter 11 Plan* [Docket No. 682].

2. Although certain parties objected to the Plan on discreet issues, no party is objecting to confirmation as a whole. Nor could they reasonably do so. Confirmation of the Plan is the best and only alternative to maximize value for the Debtors' estates and bring these chapter 11 cases to an expeditious resolution. Other alternatives necessarily mean more cost to the Estates, more time in chapter 11, and more uncertainty for stakeholders. Accordingly, the Plan should be confirmed.

I. Procedural Background.

3. On May 10, 2020, (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On May 11, 2020, the Bankruptcy Court entered an order [Docket No. 45] authorizing procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). On May 20, 2020, the United States Trustee for the Southern District of Texas (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors' Committee") pursuant to section 1102 of the Bankruptcy Code [Docket No. 274].

4. On July 1, 2020, the Bankruptcy Court entered the *Order Approving (I) the Adequacy of the Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto* [Docket No. 540] (the "Disclosure Statement Order"). The Disclosure Statement Order approved, among other things, the proposed procedures for solicitation of the Plan and related notices, forms, and ballots (collectively, the "Solicitation Packages").

5. The deadline for all Holders of Claims and Interests entitled to vote on the Plan to cast their ballots (the "Voting Deadline") and the deadline for parties in interest to file objections to confirmation to the Plan (the "Confirmation Objection Deadline") were both August 7, 2020, at 4:00 p.m., prevailing Central Time. On August 12, 2020, the Debtors filed the *Certification of P.*

Joseph Morrow IV With Respect to the Tabulation of Votes on The Joint Amended Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc. [Docket No. 679] (the "Voting Report"), which is summarized below in detail. The hearing on confirmation of the Plan (the "Confirmation Hearing") is scheduled for August 14, 2020, at 2:30 p.m., prevailing Central Time. Substantially concurrently with the filing of this Memorandum, the Debtors submitted a proposed order confirming the Plan (the "Confirmation Order").

II. Solicitation and Notification Process.

6. In compliance with the Bankruptcy Code, only Holders of Claims and Interests in Impaired Classes receiving or retaining property on account of such Claims or Interests were entitled to vote to accept or reject the Plan.[6] Holders of Claims and Interests were not entitled to vote if their rights are Unimpaired under the Plan (in which case they were conclusively presumed to accept the Plan) or Impaired and not entitled to receive a distribution under the Plan (in which case they were conclusively deemed to reject the Plan). The voting results, as reflected in the Voting Report, are summarized as follows:[7]

Plan Class	Plan Class Name	ACCEPT		REJECT		Result
		Number (% of Voting)	Amount (% of Voting)	Number (% of Voting)	Amount (% of Voting)	
3	Prepetition Secured Claims (Specialty Retailers, Inc.)	1 (100%)	$232,101,725.02 (100%)	0 (0%)	$0 (0%)	**Accepts**
3	Prepetition Secured Claims (Stage Stores, Inc.)	1 (100%)	$232,101,725.02 (100%)	0 (0%)	$0 (0%)	**Accepts**
4[8]	General Unsecured Claims (Specialty Retailers, Inc.)	7134 (99.36%)	$66,235,042.97 (95.06%)	46 (0.64%)	$3,445,365.89 (4.94%)	**Accepts**

[6] *See* 11 U.S.C. § 1126.

[7] *See* Voting Report

[8] This Class 4 tabulation summary includes the 6,749 individual votes for the aggregated amount of $34,832,644.77 against each debtor with respect to the general unsecured claims of individuals from *Crosby et al. vs. Stage Stores Inc.* (18-CV-503 M.D. Tenn.). Excluding these claimants, the result are as follows: 89.33% in number and 90.11% in amount accept.

Plan Class	Plan Class Name	ACCEPT		REJECT		Result
		Number (% of Voting)	Amount (% of Voting)	Number (% of Voting)	Amount (% of Voting)	
4[9]	General Unsecured Claims (Stage Stores, Inc.)	7098 (99.26%)	$63,867,593.05 (94.86%)	53 (0.74%)	$3,458,061.93 (5.14%)	**Accepts**

7. As set forth above and in the Voting Report, all of the Impaired Classes entitled to vote on the Plan voted overwhelmingly to accept the Plan.

III. Resolution of Confirmation Objections.

8. The Debtors have resolved certain informal and formal objections to the Plan. While some objections remain unresolved as of the date hereof, the Debtors expect to resolve such issues prior to the confirmation hearing. A chart attached hereto as **Exhibit A** (the "Response Chart") contains a summary of the formal objections received by the Debtors' and the responses and resolutions thereto. The Debtors will continue to work with objecting parties in the hopes of reaching a consensual resolution but respectfully submit that any and all outstanding objections should be overruled.

Argument

9. To confirm the Plan, the Bankruptcy Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[10] As described in detail below, the Plan complies with all relevant provisions of the Bankruptcy Code and all other applicable law. The Plan far exceeds the preponderance of evidence standard set

[9] This Class 4 tabulation summary includes the 6,749 individual votes for the aggregated amount of $34,832,644.77 against each debtor with respect to the general unsecured claims of individuals from *Crosby et al. vs. Stage Stores Inc.* (18-CV-503 M.D. Tenn.). Excluding these claimants, the result are as follows: 86.82% in number and 89.36% in amount accept.

[10] *See In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003).

forth in the Bankruptcy Code. The Debtors thus respectfully request that the Bankruptcy Court confirm the Plan.

I. The Plan Satisfies Each Requirement for Confirmation.

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

10. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code.[11] The principal aim of this provision is to ensure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan of reorganization.[12] Accordingly, the determination of whether the Plan complies with section 1129(a)(1) of the Bankruptcy Code requires an analysis of sections 1122 and 1123 of the Bankruptcy Code.

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

11. Section 1122 of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[13] Because claims only need to be "substantially" similar to be placed in the same class, plan proponents have broad discretion in determining to classify claims together.[14]

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[11] 11 U.S.C. § 1129(a)(1).

[12] *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5936, 6368.

[13] 11 U.S.C. § 1122(a).

[14] *See In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 860 (Bankr. S.D. Tex. 2001) (recognizing that section 1122 is broadly permissive of any classification scheme that is not specifically proscribed, and that substantially similar claims may be separately classified).

12. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Interests into a number of separate Classes, with each Class differing from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria.[15] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

Class 1: Other Secured Claims;

Class 2: Other Priority Claims;

Class 3: Prepetition Secured Claims;

Class 4: General Unsecured Claims;

Class 5: Intercompany Claims;

Class 6: Intercompany Interests;

Class 7: Interests in Stage Stores; and

Class 8: Section 510(b) Claims;

13. Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests in such Class (other than Administrative Claims, Priority Tax Claims, and Professional Fee Claims which are addressed in Article II of the Plan and are not required to be designated as separate Classes by section 1123(a)(1) of the Bankruptcy Code). In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests. For example, the classification scheme distinguishes between Holders of Other Secured Claims (Class 1) and Prepetition Secured Claims (Class 3) because the Prepetition Secured Claims are Claims held by

[15] Plan, Art. III.

the Prepetition Secured Parties arising under, derived from, secured by, or based on the Prepetition Financing Documents while the Other Secured Claims arise from other security interests not related to the Prepetition Financing Documents.

14. Accordingly, the Claims or Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests in each such Class and the distinctions among Classes are based on valid business, factual, and legal distinctions. For the foregoing reasons, the Plan satisfies section 1122 of the Bankruptcy Code. No party has asserted otherwise.

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

15. The seven applicable requirements of section 1123(a) of the Bankruptcy Code generally relate to the specification of claims treatment and classification, the equal treatment of claims within classes, and the mechanics of implementing a plan. The Plan satisfies each of these requirements. No party has asserted otherwise.

16. ***Specification of Classes, Impairment, and Treatment.*** The first three requirements of section 1123(a) are that a plan specify (a) the classification of claims and interests, (b) whether such claims and interests are impaired or unimpaired, and (c) the precise nature of their treatment under the plan.[16] The Plan, in particular Article III, sets forth these specifications in detail in satisfaction of these three requirements.[17]

17. ***Equal Treatment.*** The fourth requirement of section 1123(a) is that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a

[16] 11 U.S.C. § 1123(a)(1)-(3).

[17] Plan, Art. III.B.1–B.8.

particular claim or interest agrees to a less favorable treatment."[18] The Plan meets this requirement because Holders of Allowed Claims or Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such Holders' respective Class. Thus, the Plan satisfies section 1123(a)(4).

18. ***Adequate Means for Implementation.*** The fifth requirement of section 1123(a) is that a plan must provide adequate means for its implementation.[19] Article IV of the Plan, in particular, sets forth the means for implementation of the Plan. It also describes the means for the cancellation of existing securities and implementation of the transactions provided for in the Plan, including: (a) the funding of the Reserves; (b) the Wind Down; and (c) the Dissolution of the Debtors and the Wind-Down Debtors. In addition to these core transactions, the Plan sets forth the other critical mechanics of the Debtors' emergence, such as the retention and vesting of Causes of Action in the Wind-Down Debtors, the establishment and termination of certain agreements, and the settlement of Claims and Interests. Thus, the Plan satisfies section 1123(a)(5).

19. ***Non-Voting Stock.*** The sixth requirement of section 1123(a) is that a plan must contemplate a provision in the reorganized debtor's corporate charter that prohibits the issuance of non-voting equity securities or, with respect to preferred stock, adequate provisions for the election of directors upon an event of default.[20] Here, the Plan contemplates the Debtors' Wind-Down pursuant to which there will be no new corporate charter, and no issuance of new

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[18] 11 U.S.C. § 1123(a)(4).

[19] 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) specifies that adequate means for implementation of a plan may include: retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; cancellation or modification of any indenture; curing or waiving of any default; amendment of the debtor's charter; or issuance of securities for cash, for property, for existing securities, in exchange for claims or interests or for any other appropriate purpose. *Id.*

[20] 11 U.S.C. § 1123(a)(6).

securities.[21] Therefore, the requirement of section 1126(a)(6) that the debtor's corporate charter prohibit the issuance of non-voting equity or securities is inapplicable.

20. ***Selection of Officers and Directors.*** Finally, section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan."[22] The Plan provides that on the Effective Date, the authority, power, and incumbency of the persons acting as directors and officers of the Wind-Down Debtors shall be deemed to have resigned, solely in their capacities as such, and a representative of the Plan Administrator shall be appointed as the sole manager and sole officer of the Wind-Down Debtors and shall succeed to the powers of the Wind-Down Debtors' directors and officers.[23] The Plan Administrator was appointed by agreement of the Debtors, the Committee, and the Prepetition Agents, and the identity and terms of compensation of the Plan Administrator were disclosed in the Plan Supplement [Docket No. 639].[24] Thus, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

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

21. Section 1129(a)(2) of the Bankruptcy Code requires that plan proponents comply with the applicable provisions of the Bankruptcy Code. Case law and legislative history indicate this section principally reflects the disclosure and solicitation requirements of section 1125 of the

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[21] Plan, Art. IV.E.

[22] 11 U.S.C. § 1123(a)(7).

[23] Plan, Art. IV.D.

[24] *See* Plan Supplement Ex. C

Bankruptcy Code,[25] which prohibits the solicitation of plan votes without a court-approved disclosure statement.[26]

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

22. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan of reorganization "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."[27] Section 1125 of the Bankruptcy Code ensures that parties in interest are fully informed regarding the debtor's condition so they may make an informed decision whether to approve or reject a plan.[28]

23. Section 1125 of the Bankruptcy Code is satisfied here. Before the Debtors solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order.[29] The Bankruptcy Court also approved the contents of the Solicitation Packages provided to Holders of Claims and Interests entitled to vote on the Plan, the notices provided to parties not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan.[30] The Debtors, through their Notice Claims and Balloting Agent, complied with the content and delivery requirements of the

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[25] *See 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.").

[26] 11 U.S.C. § 1125(b).

[27] *Id.*

[28] *See Matter of Cajun Elec. Power Co-op., Inc.*, 150 F.3d 503, 518 (5th Cir. 1998) (finding that section 1125 of the Bankruptcy Code obliges a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

[29] *See* Disclosure Statement Order [Docket No. 540].

[30] *See id.*

Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code.[31] The Debtors also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. Here, the Debtors caused the same Disclosure Statement to be transmitted to all parties entitled to vote on the Plan.[32]

24. Based on the foregoing, the Debtors have complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order. No party has asserted otherwise.

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

25. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject a plan.[33] Accordingly, the Debtors did not solicit votes on the Plan from the following Classes:

Class	Claim / Interest	Status	Voting Rights
1	Other Secured Claims	Unimpaired	Not Entitled to Vote (Presumed to Accept)
2	Other Priority Claims	Unimpaired	Not Entitled to Vote (Presumed to Accept)
5	Intercompany Claims	Impaired	Not Entitled to Vote (Deemed to Reject)
6	Intercompany Interests	Impaired	Not Entitled to Vote (Deemed to Reject)
7	Interests in Stage Stores	Impaired	Not Entitled to Vote (Deemed to Reject)
8	Section 510(b) Claims	Impaired	Not Entitled to Vote (Deemed to Reject)

[31] *See Supplemental Certificate of Service* [Docket No. 649] (the "Solicitation Affidavit").

[32] *See id.*

[33] *See* 11 U.S.C. § 1126.

26. The Debtors solicited votes only from Holders of Claims in Classes 3 and 4 (together, the "Voting Classes") because each of these Classes is impaired, or could potentially have been be impaired, and entitled to receive a distribution under the Plan.[34] The Voting Report reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.[35] As set forth in the Voting Report and summarized above, each of the Voting Classes in which at least one vote was cast overwhelmingly voted to accept the Plan. Based on the foregoing, the Debtors have satisfied the requirements of section 1129(a)(2). No party has asserted otherwise.

C. The Debtors Proposed the Plan in Good Faith and Not by Any Means Forbidden by Law (Section 1129(a)(3)).

27. Section 1129(a)(3) of the Bankruptcy Code requires that the proponent of a plan propose the plan "in good faith and not by any means forbidden by law."[36] In assessing the good faith standard, courts in the Fifth Circuit consider whether the plan was proposed with "the legitimate and honest purpose to reorganize and has a reasonable hope of success."[37] A plan must also achieve a result consistent with the Bankruptcy Code.[38] Whether a plan is proposed in good faith must be determined in light of the totality of the circumstances of the cases.[39]

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[34] *See* Plan, Art. III.A–B.

[35] A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of section 1126, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of section 1126, that have accepted or rejected such plan. 11 U.S.C. § 1126(c). A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan. 11 U.S.C. §1126(d).

[36] 11 U.S.C. § 1129(a)(3) .

[37] *See In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985).

[38] *See In re Block Shim Dev. Company-Irving*, 939 F.2d 289, 292 (5th Cir. 1991).

[39] *See id.*; s*ee also Pub. Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983); *Cypresswood Land Partners, I*, 409 B.R. at 425.

28. Here, the Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' Estates and to effectuate a successful chapter 11 proceeding for the Debtors. The Plan was the product of extensive negotiations conducted at arm's length among the Debtors and certain of their key stakeholders. Further, the Debtors incorporated comments from various stakeholders into the Plan and Confirmation Order. The overwhelming support of the Plan by the Voting Classes is strong evidence that the Plan has a proper purpose. Thus, the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

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

29. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be approved by the Bankruptcy Court as reasonable or subject to approval by the Bankruptcy Court as reasonable. The Fifth Circuit has held this is a "relatively open-ended standard" that involves a case-by-case inquiry and, under appropriate circumstances, does not necessarily require that a bankruptcy court review the amount charged.[40] As to routine legal fees and expenses that have been approved as reasonable in the first instance, "the court will ordinarily have little reason to inquire further with respect to the amount charged."[41]

30. In general, the Plan provides that Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code. Moreover, Article II.B of the Plan provides that

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[40] *See Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.),* 150 F.3d 503, 517-18 (5th Cir. 1998) ("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.").

[41] *Id.* at 517.

Professionals shall file all final requests for payment of Professional Fee Claims no later than 45 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Fee Claims.[42] Payment of such fees will be made from the Professional Fee Escrow Account pending Bankruptcy Court approval.

31. For the foregoing reasons, the Debtors submit that the Plan complies with section 1129(a)(4) of the Bankruptcy Code. No party has asserted otherwise.

E. The Debtors Have Complied with the Bankruptcy Code's Governance Disclosure Requirement (Section 1129(a)(5)).

32. Because the Plan provides for the liquidation of the Estates' assets and resignation of the Debtors' officers, directors, and managers, section 1129(a)(5) of the Bankruptcy Code does not apply. To the extent section 1129(a)(5) of the Bankruptcy Code applies to the Wind-Down Debtors, the Debtors have satisfied the requirements of this provision by, among other things, disclosing the identity and terms of compensation of the Plan Administrator in the Plan Supplement.[43] No party has asserted otherwise.

F. The Plan Does Not Require Government Regulatory Approval of Rate Changes (Section 1129(a)(6)).

33. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change provided for in the plan. No such rate changes are provided for in the Plan. Thus, section 1129(a)(6) of the Bankruptcy Code is inapplicable to these chapter 11 cases. No party has asserted otherwise.

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[42] Plan, Art. II.B.

[43] *See* Plan Supplement Ex. C

G. The Plan Is in the Best Interests of Holders of Claims and Interests (Section 1129(a)(7)).

34. The best interests of creditors test requires that, "[w]ith respect to each impaired class of claims or interests," members of such class that have not accepted the plan will receive at least as much as they would in a hypothetical chapter 7 liquidation.[44] The best interests test applies to each non-consenting member of an impaired class, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[45]

35. As set forth in the Disclosure Statement, the Debtors are in the process of selling substantially all of their assets and winding down operations. As a result, a chapter 7 proceeding would do nothing more than create additional costs associated with converting to a chapter 7 liquidation. These additional costs would likely include a percentage fee based on disbursements, as well as additional professional fees associated with a chapter 7 trustee selecting advisors. While information regarding the additional costs are speculative, the costs are clearly higher and more burdensome for the Debtors' estates than the current proposed Plan (which do not have such incremental costs).[46] Accordingly, the Plan satisfies the best interests test. Certain Holders of Claims in Class 4 at each Debtor voted to reject the Plan.[47] With respect to the Holders of Claims

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[44] 11 U.S.C. § 1129(a)(7).

[45] *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1159 n. 23 (5th Cir. 1988) (stating that under section 1129(a)(7) of the Bankruptcy Code a bankruptcy court was required to determine whether impaired claims would receive no less under a reorganization than through a liquidation).

[46] *See* Disclosure Statement Art. XI.B.

[47] *See* Voting Report.

that did not vote to accept, the Plan meets the best interests test because it will provide a substantially greater return to Holders of Claims than would a liquidation under chapter 7 of the Bankruptcy Code.[48]

36. Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the best interests test. No party has asserted otherwise.[49]

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

37. The Bankruptcy Code generally requires that each class of claims or interests must either accept the plan or be unimpaired under the plan.[50] As discussed above, each of the Voting Classes overwhelmingly voted to accept the Plan in both amount and number.

38. Holders of Claims and Interests in classes 5, 6, 7, and 8 are impaired and deemed to have rejected the Plan and, thus, were not entitled to vote. Although the Plan does not satisfy section 1129(a)(8) of the Bankruptcy Code, the Plan is confirmable nonetheless because it satisfies sections 1129(a)(10) and 1129(b) of the Bankruptcy Code.

I. The Plan Complies With Statutorily Mandated Treatment of Administrative and Priority Tax Claims (Section 1129(a)(9)).

39. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy

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48 *See* Disclosure Statement Art. XI.B.

49 *See In re Neff*, 60 B.R. 448, 452 (Bankr. N.D. Tex. 1985) *aff'd,* 785 F.2d 1033 (5th Cir. 1986) (stating that "best interests" of creditors means "creditors must receive distributions under the Chapter 11 plan with a present value at least equal to what they would have received in a Chapter 7 liquidation of the Debtor as of the effective date of the Plan"); *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("Section 1129(a)(7)(A) requires a determination whether 'a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.'") (internal citations omitted).

50 11 U.S.C. § 1129(a)(8).

Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—which generally include domestic support obligations, wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—*i.e.*, priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.

40. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. First, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each Holder of an Allowed Administrative Claim will receive Cash equal to the amount of such Allowed Administrative Claim on the Effective Date, or as soon as reasonably practicable thereafter, or at such other time as defined in Article II.A of the Plan. Second, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no Holders of the types of Claims specified by 1129(a)(9)(B) are Impaired under the Plan.[51] Finally, Article II.A of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each Holder of an Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section

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

1129(a)(9)(C) of the Bankruptcy Code. Thus, the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders (Section 1129(a)(10)).

41. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan. As detailed herein and in the Voting Report, each of the Voting Classes has voted to accept the Plan, exclusive of any acceptances by insiders, which includes an accepting Voting Class at each Debtor. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code. No party has asserted otherwise.

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

42. Feasibility refers to the Bankruptcy Code's requirement that plan confirmation must not be "likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . , unless such liquidation or reorganization is proposed in the plan."[52] To satisfy this standard, the Fifth Circuit has held that a plan need only have a "reasonable probability of success."[53] Indeed, a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility.[54] In particular, according to Fifth Circuit law, "[w]here the projections are credible, based upon the balancing of all testimony,

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[52] 11 U.S.C. § 1129(a)(11).

[53] *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997) (quoting *In re Landing Assocs., Ltd.*, 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993)).

[54] *In re Star Ambulance Service, LLC*, 540 B.R. 251, 266 (Bankr. S.D. Tex. 2015).

evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible."[55]

43. The Plan is feasible. Through the Plan, the Debtors will pay Other Secured Claims, Priority Claims, and Prepetition Secured Claims in full.[56] The Debtors will pay Allowed Administrative Claims and Allowed Priority Tax Claims in full pursuant to Article II.A of the Plan.[57] The Debtors will also establish and fund the Professional Fee Escrow Account to pay Professional Fee Claims.[58] The Debtors have therefore established that the Wind-Down Debtors will have sufficient funds to satisfy all requirements and obligations under the Plan. Thus, the Plan satisfies the feasibility requirement under section 1129(a)(11) of the Bankruptcy Code and Fifth Circuit Law. No party has asserted otherwise.

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

44. The Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.[59] The Plan includes an express provision requiring payment of all such fees.[60] The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code. No party has asserted otherwise.

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55 *T-H New Orleans*, 116 F.3d at 802.

56 *See* Plan Art. III.B.

57 *See* Plan Art. II.A.

58 *See* Plan Art. II.B.

59 11 U.S.C. § 1129(a)(12) .

60 Plan, Art. XII.C.

M. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code.

45. The Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.[61] Section 1114(a) of the Bankruptcy Code defines retiree benefits as medical benefits.[62] The Debtors do not have any remaining obligations to pay retiree benefits (as defined in section 1114 of the Bankruptcy Code) or will not have any such obligations as of the Effective Date. Therefore, section 1129(a)(13) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases or the Plan.

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

46. A number of the Bankruptcy Code's confirmation requirements are inapplicable to the Plan. Section 1129(a)(14) of the Bankruptcy Code does not apply because the Debtors are not subject to any domestic support obligations.[63] Section 1129(a)(15) of the Bankruptcy Code is inapplicable because no Debtor is an "individual" as defined in the Bankruptcy Code.[64] Section 1129(a)(16) of the Bankruptcy Code is inapposite because the Plan does not provide for any property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.[65]

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61 11 U.S.C. § 1129(a)(13).

62 Section 1114(a) defines "retiree benefits" as: ". . . .payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title." 11 U.S.C. § 1114(e) (emphasis added).

63 *See* 11 U.S.C. § 1129(a)(14).

64 *See* 11 U.S.C. § 1129(a)(15).

65 *See* 11 U.S.C. § 1129(a)(16).

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

47. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied. A plan that all impaired classes have not accepted (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code) can still be confirmed if that plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects the plan (or is deemed to reject the plan) if it follows the "absolute priority rule." The absolute priority rule provides that a junior stakeholder (e.g., an equity holder) may not receive or retain property under a plan of reorganization "on account of" its junior interests unless all senior classes either (a) are paid in full or (b) vote in favor of the plan. The Debtors submit that the Plan satisfies the "fair and equitable" requirement with respect to all rejecting classes and does not discriminate unfairly.

48. The Plan is fair and equitable to Holders of Claims and Interests in the Rejecting Classes: with respect to each Rejecting Class, no Holder of a Claim or Interest in a class junior to such Rejecting Class will receive or retain any property under the Plan on account of such junior Claim or Interest. No party has asserted otherwise.

49. Similarly, the Plan does not discriminate unfairly with respect to the Rejecting Classes because the Plan's classification scheme rests on legally permissible rationale and all similarly-situated Holders of Claims and Interests will receive substantially similar treatment. No party has asserted otherwise.

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

50. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. Section 1129(c) of the Bankruptcy Code, which prohibits confirmation of multiple plans, is not implicated because there is only one proposed chapter 11 plan.[66]

51. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no governmental unit or any other party has requested that the Bankruptcy Court decline to confirm the Plan on such grounds. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

52. Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' chapter 11 cases is a "small business case."[67]

53. In sum, the Plan satisfies all of the Bankruptcy Code's mandatory chapter 11 plan confirmation requirements.

II. The Plan's Release, Exculpation, and Injunction Provisions Are Appropriate and Comply with the Bankruptcy Code.

54. The Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any appropriate provision not inconsistent with the applicable provisions of this title."[68] Among other discretionary provisions, the Plan contains certain Debtor and consensual third-party releases,[69] an exculpation provision, and an injunction

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66 11 U.S.C. § 1129(c).

67 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,490,925 (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101(51D)(B).

68 11 U.S.C. § 1123(b)(1)-(6).

69 Plan, Art. VIII.

provision.[70] These provisions comply with the Bankruptcy Code and prevailing law, and no party has objected to these provisions. Moreover, the overwhelming approval of the Plan by the Debtors' economic stakeholders strongly supports the conclusion that the release and exculpation provisions are appropriate.

A. The Debtor Release Is Appropriate and Complies with the Bankruptcy Code.

55. Article VIII.C of the Plan provides for releases by the Debtors of the Release of any and all Causes of Action, including any derivative claims, the Debtors could assert against the Released Parties and Related Parties (the "Debtor Release"). The Debtor Release releases, among others, Debtors, the Wind-Down Debtors, and their Estates, and any affiliate of any of the foregoing.[71] The Debtor Release is an essential *quid pro quo* for the Released Parties' contributions to the Debtors' chapter 11 cases. Moreover, based on the Debtors' analysis, the Debtor Release greatly benefits the Debtors' Estates.

56. The Bankruptcy Code supports the inclusion of debtor releases in a chapter 11 plan. Section 1123(b)(3)(A) of the Bankruptcy Code states that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." This provision allows the Debtors to release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[72] In determining the appropriateness of such releases, courts in the Fifth Circuit generally consider whether the release

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[70] *Id.*

[71] The foregoing description is meant as a summary of the operative Plan provisions only. Certain of the Released Parties are defined as such in multiple capacities. To the extent there is any conflict between the foregoing summary and the definition of "Released Party" contained in Article I of the Plan, the Plan shall control.

[72] *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (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, 259 (Bankr. N.D. Tex. 2007); *In re Mirant Corp.*, 348 B.R. 725, 737-39 (Bankr. N.D. Tex. 2006); *In re General Homes Corp.*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991).

is (a) "fair and equitable" and (b) "in the best interests of the estate."[73] The "fair and equitable" prong is generally interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule (discussed above).[74] Courts generally determine whether a debtor release is "in the best interest of the estate" by considering the following factors:

a. the probability of success of the litigation being settled;

b. the complexity and likely duration of the litigation, any attendant expense, inconvenience, or delay, and possible problems collecting a judgment;

c. the interest of creditors with proper deference to their reasonable views; and

d. the extent to which the settlement is truly the product of arm's-length negotiations.[75]

Ultimately, courts afford debtors some discretion in determining for themselves the appropriateness of granting plan releases of estate causes of action.[76]

57. The Debtor Release easily meets the controlling standard. As an initial matter, the Debtor Release is "fair and equitable" and complies with the absolute priority rule. None of the Voting Classes under the Plan voted to reject the Plan, and all of the Non-Voting Classes were deemed to accept the Plan.

58. In addition to being fair and equitable, the Debtor Release is in the best interest of the Debtors' Estates. The Debtors do not believe they have any colorable Claims or Causes of Action against any of the Released Parties that would inure material benefit to creditor recoveries

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[73] *Mirant*, 348 B.R. at 738. *see also Heritage*, 375 B.R. at 259.

[74] *Mirant*, 348 B.R. at 738.

[75] *Id*. at 739-40 (citing *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop.* (*In re Cajun Elec. Power Coop.*), 119 F.3d 349, 355-56 (5th Cir. 1997)).

[76] *See General Homes*, 134 B.R. at 861 ("[t]he court concludes that such a release is within the discretion of the Debtor").

were such Claims and Causes of Action pursued.[77] Further, to the extent any such Claims and Causes of Action exist, the probability of success in litigation with respect to Causes of Action the Debtors may have against the Released Parties is low, and prosecution of any potential Causes of Action released under the Debtor Release would be complex and time consuming and could mire the Debtors and parties in interest in litigation rather than effectuation of an orderly Wind Down. In fact, many of the parties related to the Debtors, such as current and former directors, managers, officers, equity holders (in their capacities as such), and employees may have indemnification rights against the Debtors under applicable agreements for, among other things, all losses, damages claims, liabilities, or expenses, including defense costs, for claims subject to the release provisions of the Plan.[78] As such, those indemnification claims could directly affect the Debtors' estates and, in the case of the Debtor Release, undermine any attempt to collect on released Causes of Action. Simply put, the Debtors do not believe they have any material Causes of Action against any of the Released Parties that would justify the risk, expense, and delay of pursuing any such Causes of Action.

59. Such releases are permissible under applicable Fifth Circuit law and as a compromise under the Bankruptcy Code, and have been approved in numerous chapter 11 cases.[79]

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[77] *See* Crowley Declaration ¶ 29.

[78] *See Id.*

[79] *See, e.g.*, *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jan. 22, 2019) (not carving out from the releases actual fraud, willful misconduct, and gross negligence); *In re Gastar Exploration Inc.*, No. 18-36057 (MI) (Bankr. S.D. Tex. Dec. 21, 2018) (same); *In re Cobalt Int'l Energy, Inc*., No. 17-36709 (MI) (Bankr. S.D. Tex. April 5, 2018) (same); *In re Seadrill Ltd.*, No. 17-60079 (DRJ) (Bankr. S.D. Tex. Sep. 12, 2017) (same); *In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Jun. 14, 2017) (same); *In re CJ Holding Co.*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Jul. 20, 2016) (same); *In re Linn Energy, LLC*, No. 16-60040 (DRJ) (Bankr. S.D. Tex. May 11, 2016) (same).

60. Accordingly, the Debtors submit that the Debtor Release is consistent with applicable law, represents a valid settlement and release of claims the Debtors may have against the Released Parties pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, is a valid exercise of the Debtors' business judgment, and is in the best interests of their estates.

B. The Third-Party Release Is Consensual, Appropriate, and Complies with the Bankruptcy Code.

61. Article VIII.D of the Plan provides that each Releasing Party shall release any and all causes of action (based on or relating to or in any manner arising from the matters listed therein) such parties could assert against the Released Parties (the "Third-Party Releases").[80] "Most courts allow consensual non-debtor releases [like the releases here] to be included in a plan."[81] In *Republic Supply*, the Fifth Circuit found that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted and confirmed as an integral part of a plan of reorganization."[82]

62. Consensual third-party releases in bankruptcy depend on proper ***process*** for notice and consent—*i.e.*, whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look over it, [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[83] Courts acknowledge

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[80] The foregoing description is meant as a summary of the operative plan provisions only. Certain of the Releasing Parties are defined as such in multiple capacities. To the extent there is any conflict between the foregoing summary and the definition of "Releasing Party" contained in Article I of the Plan, the Plan shall control.

[81] *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007).

[82] *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

[83] Confirmation Hr'g Tr. at 47, *In re Energy & Exploration Partners, Inc.*, No. 15-44931 (Bankr. N.D. Tex. April 21, 2016) [Docket No. 730]; *see also* Confirmation Hr'g Tr. at 77, *In re Seadrill Ltd.*, No. 17-60079 (Bankr. S.D. Tex. April 17, 2018) ("I think that in order for the Debtor to move forward, it needs all of its resources focused on achieving commercial success, not looking over their shoulder . . . to worry about where's the next indemnification or contribution claim coming from. I do think that the process has been transparent, and that has always been and will remain my primary number one concern is that is the process transparent to someone who wishes to have a voice, have an opportunity to stand up and say, I don't want to be included.").

that parties in interest can waive their rights if they do not take action.

63. Here, the Third-Party Releases easily satisfy these noticing requirements. All parties in interest were provided extensive notice of these chapter 11 cases, the Plan, and the deadline to object to confirmation of the Plan. With respect to the Third-Party Release, each of the Disclosure Statement (transmitted to all members of Voting Classes and otherwise publicly available), the notice of non-voting status (transmitted to all members of Classes 1, 2, 7, and 8 and otherwise publicly available), and the Confirmation Hearing Notice (transmitted to ***all*** parties in interest) contained explicit bold-faced type alerting the recipient that the Plan contains Release, Exculpation, and Injunction Provisions and advising such recipients to review and consider the Plan carefully.

64. As set forth in the Voting Report, in addition to serving full solicitation packages on all voting parties, the Debtors' Notice Claims and Balloting Agent (Kurtzman Carson Consultants LLC) timely (a) served opt out forms on all members of Classes 1, 2, 7, and 8 and (b) served the Confirmation Hearing Notice on all parties in interest. The Debtors also published the Confirmation Hearing notice in the national edition of *The New York Times*[84] and provided free access to all documents on their restructuring website. The Debtors took all steps reasonably practicable under the circumstances to ensure the broadest possible notice to parties in interest.

65. Other factors support the approval of the Third-Party Releases. ***First***, the Third-Party Releases are sufficiently specific, listing potential Causes of Action to be released so as to put the Releasing Parties on notice of the released claims.[85] ***Second***, the Third-Party Releases

[84] *Affidavit of Publication* [Docket No. 564].

[85] *See, e.g.*, *FOM Puerto Rico S.E. v. Dr. Barnes Eyecenter Inc. (In re Dr. Barnes Eyecenter)*, 255 F. App'x 909, 912 (5th Cir. 2007) (finding release language that provided for release of any and all claims "based in whole or in part on any act or omission, transaction, or occurrence from the beginning of time through the Effective Date

were negotiated heavily and are integral to the Plan. The Third-Party Releases were and are key components of the Debtors' chapter 11 cases and a key inducement to bring all stakeholder groups to the bargaining table.

C. The Exculpation Provision Is Appropriate and Complies with the Bankruptcy Code.

66. Article VIII.E of the Plan provides that each Exculpated Party shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with these chapter 11 cases and certain related transactions, except for acts or omissions that are determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence (the "Exculpation Provision").[86] The Exculpated Parties include the Debtors, the Committee, the Prepetition Secured Parties, and the Plan Administrator.

67. At the outset, it is important to underscore the difference between the Third-Party Release and the Exculpation Provision. Unlike a release, the Exculpation Provision does not affect the liability of Exculpated Parties *per se*, but rather sets a standard of care of actual fraud, willful misconduct, or gross negligence in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors' chapter 11 cases.[87] A bankruptcy court has the power to approve an exculpation provision in a chapter 11 plan because it cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good faith.[88] Thus, an exculpation provision represents a

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in any way relating to [the debtor], its Bankruptcy Case, or the Plan" sufficiently specific to meet the *Republic Supply* standard).

[86] The foregoing description is a summary of the operative plan provisions only. To the extent there is any conflict between the foregoing summary and the definition of "Exculpated Party" contained in Article I of the Plan, the Plan shall control.

[87] *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246 (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.").

[88] *See* 11 U.S.C. § 1129(a)(3).

legal conclusion that flows inevitably from several different findings a bankruptcy court must reach in confirming a plan.[89] Once the court makes its good faith finding, it is appropriate to set the standard of care of the parties involved in the formulation of that chapter 11 plan.[90] Exculpation provisions, therefore, appropriately prevent future collateral attacks against fiduciaries of the Debtors' estates. Here, the Exculpation Provision is likewise appropriate and vital because it provides protection to the Exculpated Parties who served and assisted with the chapter 11 process and transition into the Wind Down.

68. There can be no doubt that the Debtors themselves are entitled to the relief embodied in the Exculpation Provision. Granting such relief falls squarely within the principles underlying the Bankruptcy Code.[91] Even courts in the Fifth Circuit that have approached plan exculpation provisions with skepticism have done so *only* where the provision at issue exculpates *non-debtor* parties.[92] The *Pacific Lumber* court also carved out an exception in favor of 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; *i.e.*, excluding acts of actual fraud, willful misconduct, or gross negligence.[93]

69. Exculpation provisions are essential to ensure that capable individuals are willing to manage and assist a debtor in the chapter 11 context.[94] The Debtors' directors, officers, and

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89 *See* 11 U.S.C. § 157(b)(2)(L).

90 *See* PWS, 228 F.3d at 246-247 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . .").

91 *See Bank of New York Trust Co. v. Official Unsecured Creditors' Comm*. (*In re The Pacific Lumber Co.*), 584 F.3d 229, 252 (5th Cir. 2009).

92 *See, e.g., id.* at 251-52.

93 *Id.* at 253.

94 *See In re Chemtura Corp.*, 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010) (recognizing that "exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get

other agents and advisors have made substantial contributions to the success of the Debtors' chapter 11 cases. The Debtors' directors and officers have gone to great lengths and were integral to ensure that the Debtors' business continued to operate smoothly during the chapter 11 cases, and transition into the Wind Down, thereby preserving value for the benefit of all parties in interest. The Debtors could not have developed the Plan without the support and contributions of the Exculpated Parties. To the extent the Debtors acted in good faith, the Debtors' management and professionals should presumptively not be subject to liability.[95] Insofar as any Exculpated Parties do not, strictly speaking, owe fiduciary duties to the Debtors, they were integral participants to the settlement embodied by the Plan and are therefore properly included in the Exculpation Provision. This court has confirmed numerous plans with identical and similar exculpation provisions.[96] In sum, then, the Exculpation Provision complies with the Bankruptcy Code and *Pacific Lumber* and its progeny.

D. The Injunction Provision Is Appropriate and Complies with the Bankruptcy Code.

70. The injunction provision set forth in Article VIII.F of the Plan (the "Injunction Provision") merely implements the Plan's discharge, release, and exculpation provisions by permanently enjoining all Entities from commencing or maintaining any action against the Debtors, the Reorganized Debtors, the Released Parties, or the Exculpated Parties on

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the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision makers in the chapter 11 case").

95 *Id.*; *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).

96 *See, e.g.*, *In re Parker Drilling Company* No. 18-36958 (MI) (Bankr. S.D. Tex. Mar. 7, 2019) *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jan. 22, 2019); *In re GenOn Energy, Inc., No.* 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017); *In re Ultra Petroleum Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. March 14, 2017); *In re Goodrich Petroleum Corp.*, No. 16-31975 (MI) (Bankr. S.D. Tex. Sept. 28, 2016); *In re Midstates Petroleum Co., Inc.*, No. 16-32237 (DRJ) (Bankr. S.D. Tex. Sept. 28, 2016).

account of, or in connection with, or with respect to, any such Claims or Interests discharged, released, exculpated, or settled under the Plan. The Injunction Provision is a necessary part of the Plan precisely because it enforces the discharge, release, and exculpation provisions that are centrally important to the Plan. Further, as described above, the injunction provided for in the Plan is consensual as to any party that did not specifically object thereto. Accordingly, to the extent the Bankruptcy Court finds that the Plan's exculpation and release provisions are appropriate, the Debtors respectfully request that the Bankruptcy Court approve the Injunction Provision.[97]

III. The Remaining Objections Should Be Overruled

71. LV Legion, LLC ("LV Legion") and Silver City ETR Investors, LLC ("Silver City") generally assert that Article V.A of the Plan impermissibly extends the time by which the Debtors may seek to assume or reject Executory Contracts and Unexpired Leases.[98] The Effective Date of the Plan is not a certain date but is predicated on conditions precedent including with respect to the Debtors' Plan: (a) the Prepetition Secured Claims being paid in full in Cash; and (b) all going out of business sales at the Debtors' stores having been completed and all of the Debtors' stores having been vacated, as set forth more fully in Article IX.A of the Plan.[99] The Bankruptcy Code does not require anything more (nor would such a requirement be workable in practice). The Debtors will consummate the Plan in a timely manner, but the date on which these conditions precedent will be fulfilled cannot be known with certainty. In any event,

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[97] *See, e.g.*, *In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-02 (Bankr. W.D. Tex. 2011) ("[T]he Fifth Circuit does allow permanent injunctions *so long as there is consent* . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing.") (citing *Pacific Lumber*, 584 F.3d at 253; *In re Pilgrim's Pride Corp.*, No. 08-45664, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010).

[98] *See LV Legion, LLC's Objection to Joint Amended Chapter 11 Plan* [Docket No. 658] ¶¶ 12-16; *Silver City ETR Investors, LLC's Objection to Joint Amended Chapter 11 Plan* [Docket No. 659] ¶¶ 13-17.

[99] *See* Plan Art. IX.A

contemporaneously herewith, the Debtors will file a notice of rejection of executory contracts and unexpired leases providing the proposed date of rejection for the Debtors' store leases, thereby providing landlords with notice of the proposed date such leases will be rejected. The amended Plan does not allow the Debtors to extend those dates without the consent of the applicable landlords.

72. LV Legion and Silver City argue further that Article V.A of the Plan impermissibly extends the automatic stay under section 362 of the Bankruptcy Code.[100] The Plan does not. Rather, the Plan includes an injunction that effectuates the settlements, treatments, and releases of Claims and Interests under the Plan. Without the injunction, parties could collaterally attack the core of the Plan—the treatment of Claims against the Debtors.

73. Finally, LV Legion and Silver City argue that the Plan does not inform creditors of available recourses in the event that the Debtors do not perform their obligations with respect to the rejection of Executory Contracts and Unexpired Leases. This objection is misguided. In a hypothetical scenario where the Debtors failed to satisfy their obligations under the Plan, LV Legion and Silver City may seek remedies in this Court. That is true of any chapter 11 plan.

IV. Modifications to the Plan.

74. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. When the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors

[100] *Objection of Galleria 2425 Owner, LLC to Confirmation of Joint Amended Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc.* [Docket No. 666] ¶¶ 14-15; *Joinder in Objection to Confirmation of Joint Amended Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc.* [Docket No. 667];

and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not materially and adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[101]

75. The Debtors filed a modified version of the Plan to address and settle various formal and informal objections. Such modifications do not rise to the level of materiality that would require the Debtors to re-solicit acceptances for the Plan. Accordingly, the Debtors submit that no additional solicitation or disclosure is required on account of these modifications and that such modifications should be deemed accepted by all creditors that previously accepted the Plan.

Waiver of Bankruptcy Rule 3020(e)

76. To implement the Plan, the Debtors seek a waiver of the 14-day stay of an order confirming a chapter 11 plan under Bankruptcy Rule 3020(e). The Debtors' timely emergence from chapter 11 is an important component of their chapter 11 efforts, and requiring the Debtors to pause before confirmation would be prejudicial to all parties in interest that continue to incur the cost and expense of the Debtors' chapter 11 cases.

Conclusion

77. For the reasons set forth herein, the Debtors respectfully request that the Bankruptcy Court confirm the Plan and enter the Confirmation Order.

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[101] *See, e.g.*, *In re Am. Solar King Corp.*, 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988) (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not require additional disclosure or resolicitation); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. at 857 (same). *See also In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation).

Houston, Texas
August 13, 2020

/s/ *Matthew D. Cavenaugh*

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Certificate of Service

I certify that on August 12, 2020, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Matthew D. Cavenaugh
Matthew D. Cavenaugh

EXHIBIT A

Objection Chart

EXHIBIT A

Objection Chart

Objecting Party	Objection	SSI Response / Modified Language
• *Texas Taxing Authorities* [Docket No. 657]	• The Texas Taxing Authorities object to the Plan to the extent that does not properly protect their right to payment on account of their tax Claims.	• **Resolved**. The Texas Taxing Authorities have agreed to the inclusion of language in the Order resolving the objection. *See* Confirmation Order at ¶¶ 140–141.
• *LV Legion, LLC* [Docket No. 658] • *Silver City ETR Investors, LLC* [Docket No. 659]	• LV Legion, LLC and Silver City ETR Investors, LLC filed substantially similar objections asserting that: • The Plan impermissibly extends the time by which the Debtors may seek to assume or reject Executory Contracts and Unexpired Leases. • The Plan impermissibly extends the automatic stay under section 362 of the Bankruptcy Code; and • The Plan does not inform creditors of available recourses in the event that the Debtors do not perform their obligations with respect to the rejection of Executory Contracts and Unexpired Leases.	• The Effective Date is not a date certain, but rather a date following the satisfaction of certain conditions precedent. See Plan at Art. IX. The Bankruptcy Code does not require anything more (nor would such a requirement be workable in practice). • The Debtors will file a rejection notice providing the proposed date of rejection for the Debtors' store leases prior to the confirmation hearing. • In a hypothetical scenario where the Debtors failed to satisfy their obligations under the Plan, LV Legion and Silver City may seek remedies in this Court.
• *LaSalle Shopping Center LLC* [Docket No. 661]	• LaSalle Shopping Center LLC filed a limited Objection to the Plan on the grounds that it did not receive a "form to assert its administrative claim."	• To the extent that LaSalle Shopping Center wishes to assert an administrative claim it may make a request for payment of its administrative expenses in accordance with section 503 of the Bankruptcy Code. The Debtors have been in contact with counsel for LaSalle Shopping Center and will work to resolve this Objection in advance of Confirmation.
• *Galleria 2425 Owner, LLC* [Docket No. 666]	• Galleria 2425 Owner, LLC and Brookfield Property Retail, Inc. filed substantially similar objections asserting that:	• The Debtors will file a rejection notice listing all proposed lease rejection dates prior to the confirmation hearing.

Objecting Party	Objection	SSI Response / Modified Language
• *Brookfield Property Retail, Inc.* [Docket No. 667]	• The Plan improperly seeks to extend Debtors' time to assume and reject leases beyond Confirmation. • The releases under the Amended Plan are overly broad. • As of the Confirmation Hearing (not the Effective Date), Debtors will lose their ability to assume and assign any of their Unexpired Leases, thus foreclosing any further potential to conclude a "going concern" sale and save literally thousands of jobs. Simply put, there will be no opportunity under the Bankruptcy Code to "pivot" to a potential sale transaction that includes assignments of Unexpired Leases once Debtors confirm their Amended Plan.	• The Debtors and the objecting parties are working to resolve the objection to the releases. • The Debtors have removed language regarding a potential sale from the Plan.
• *Acadia Realty Limited Partnership, Brixmor Operating Partnership LP, CenterCal Properties, LLC, Centennial Real Estate Company, LLC, Gateway Plaza LLC, Gemini Rosemont Commercial Real Estate, New Market Properties, LLC, SP Porters Vale LLC, The Macerich Company, Tred Avon LLC, Venturepoint, and Weitzman* [Docket No. 668]	• Acadia Realty Limited Partnership, Brixmor Operating Partnership LP, CenterCal Properties, LLC, Centennial Real Estate Company, LLC, Gateway Plaza LLC, Gemini Rosemont Commercial Real Estate, New Market Properties, LLC, SP Porters Vale LLC, The Macerich Company, Tred Avon LLC, Venturepoint, and Weitzman object to the Plan to the extent that: • The Plan impermissibly extends the time by which the Debtors may seek to assume or reject Executory Contracts and Unexpired Leases. • Acadia Realty Limited Partnership, Brixmor Operating Partnership LP, CenterCal Properties, LLC, Centennial Real Estate Company, LLC, Gateway Plaza LLC, Gemini Rosemont Commercial Real Estate, New Market Properties, LLC, SP Porters Vale LLC, The Macerich Company, Tred Avon LLC, Venturepoint, and Weitzman also object to the releases and other provisions contained in Article VIII of the Plan.	• The Debtors will file a rejection notice listing all proposed lease rejection dates prior to the Confirmation Hearing. • The Debtors and the objecting parties are working to resolve the objection to the releases.
• *Jones Lang LaSalle Americas, Inc. and National Retail Properties LP* [Docket No. 678]	• Jones Lang LaSalle Americas, Inc. and National Retail Properties LP join the objection of Galleria 2425 Owner, LLC [Docket No. 666] and further object as follows:	• The Debtors will file a rejection notice listing all proposed lease rejection dates prior to the confirmation hearing.

Objecting Party	Objection	SSI Response / Modified Language
	• Jones Lang LaSalle Americas, Inc. and National Retail Properties LP further object to and do not consent to the release and other nonconsensual provisions of Article VIII of the Amended Plan. • The Debtors may intend to pay Landlords only for the time the Debtors are occupying the space while conducting the GOB sales, not for the entire month.	• The Debtors and the objecting parties are working to resolve the objection to the releases. • The Debtors will address payment of post-Effective Date Administrative Claims through the claims process.