Docket #268 Date Filed: 11/15/2022

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Zosano Pharma Corporation,[1]	Case No. 22-10506 (JKS)
Debtor.	

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTOR'S CHAPTER 11 PLAN OF LIQUIDATION

The above-captioned debtor and debtor-in-possession (the "**Debtor**" or "**Plan Proponent**") in the above-captioned chapter 11 case (the "**Chapter 11 Case**"), by and through its undersigned counsel, hereby submits this memorandum of law in support of confirmation of the *Chapter 11 Plan of Liquidation of Zosano Pharma Corporation* [Docket No. 232] (as may be amended or supplemented, the "**Plan**")[2] pursuant to sections 1125 and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**"). In support of the Plan, the Plan Proponent relies on (i) the *Declaration of Adam Gorman on behalf of Kurtzman Carson Consultants LLC Regarding Voting and Tabulation of Ballots Cast on the Chapter 11 Plan of Liquidation* [Docket No. 267] (the "**Voting Certification**") and (ii) the *Declaration of Steven Lo in Support of Confirmation of the Chapter 11 Plan of Liquidation* [Docket No. 266] (the "**Lo Declaration**"). In further support of the Plan, the Plan Proponent respectfully represents as follows:

[1] The business address and the last four (4) digits of the Debtor's federal tax identification number is Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555 (8360).

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan.

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I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Debtor and the Debtor's Business

1. Prior to the commencement of the Chapter 11 Case on June 1, 2022 (the "**Petition Date**") and until the closing of the sale referenced below, the Debtor was a clinical-stage biopharmaceutical company focused on providing rapid systemic administration of therapeutics and other bioactive molecules to patients using its proprietary transdermal microneedle system.

2. A more complete description of the Debtor's business, capital structure, and the circumstances leading to the Chapter 11 Case may be found in the *Declaration of Steven Lo in Support of the Debtor's Chapter 11 Petition and Requests for First Day Relief* [Docket No. 15], filed on June 2, 2022.

B. The Chapter 11 Case and Sale

3. On the Petition Date, the Debtor filed a voluntary petition for relief with the Bankruptcy Court under chapter 11 of the Bankruptcy Code. Through the closing of the sale detailed below, the Debtor operated its business and managed its property as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. Patheon Manufacturing Services LLC ("**Patheon**") filed a motion to convert the Case to Chapter 7, which has been adjourned and has not been adjudicated. No unsecured creditors' committee was formed in this Chapter 11 Case.

5. The Debtor filed this Chapter 11 Case with the goals of selling all or certain of its assets through section 363 of the Bankruptcy Code, liquidating any remaining assets, and winding down its operations in an orderly manner. To this end, on June 8, 2022, the Debtor filed the *Motion of the Debtor for Entry of Orders (I) (A) Approving Bid Procedures for the Sale of Assets of the Debtor, (B) Establishing Procedures for the Debtor to Enter Into a Stalking Horse Agreement with Bid Protections, (C) Approving Alternate Liquidation Sales Conducted by a Sale*

Agent, (D) Establishing Assumption and Assignment Procedures, (E) Establishing Notice Procedures, and (F) Granting Related Relief; and (II) (A) Authorizing the Sale of Assets of the Debtor Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Granting Related Relief [Docket No. 44] (the "**Sale Motion**"). As set forth in the Sale Motion, the Debtor sought to sell its assets pursuant to section 363 of the Bankruptcy Code in a flexible manner allowing for a sale of all or any combination of its assets.

6. On July 1, 2022, the Bankruptcy Court entered an order, among other things, (i) approving certain procedures relating to the sale of the Debtor's assets, (ii) scheduling a hearing on July 28, 2022 to consider approval of a proposed sale of the Debtor's assets (the "**Sale Hearing**"), and (iii) approving the form and manner of notice of any auction for the Debtor's assets and the Sale Hearing [Docket No. 111] (the "**Bid Procedures Order**"). The Bid Procedures Order fixed July 18, 2022 (the "**Bid Deadline**") as the deadline for the submission of bids for the Debtor's assets. On the Bid Deadline, the Debtor received two (2) offers for its assets; the Debtor determined that both of the offers were Qualified Bids (as defined in the Bid Procedures Order).

7. In accordance with the Bid Procedures Order, on July 20, 2022, the Debtor conducted an auction for its assets among the two bidders. At the conclusion of the auction, the Debtor determined that Emergex USA Corporation ("**Emergex**" or the "**Purchaser**") provided the highest and best offer for certain of the Debtor's assets, and Emergex was designated as the successful bidder [Docket No. 116].

8. As set forth in the asset purchase agreement with Emergex (the "**Asset Purchase Agreement**"), in exchange for $1,000,000 and other consideration (the "**Sale Proceeds**"),

Emergex purchased substantially all of the Debtor's assets. The Asset Purchase Agreement did not contemplate the transfer of, among other assets, any causes of action under chapter 5 of the Bankruptcy Code (e.g., for recovery of preferential payments from creditors).

9. At the conclusion of the Sale Hearing, the Bankruptcy Court approved the proposed sale to Emergex. On August 8, 2022, the Bankruptcy Court entered the Sale Order [Docket No. 164]. The sale closed on August 15, 2022.

C. The Plan Process

10. After consummating the sale, the Debtor worked toward preparing an orderly wind-down of the Chapter 11 Case and the filing of a liquidating Chapter 11 plan.

11. On August 25, 2022, the Debtor filed the *Chapter 11 Plan of Liquidation of Zosano Pharma Corporation* [Docket No. 178] (the "**Original Plan**") and the *Disclosure Statement for Chapter 11 Plan of Liquidation of Zosano Pharma Corporation* [Docket No. 179] (the "**Original DS**").

12. On August 31, 2022, the Debtor filed the *Motion of the Debtor for Entry of an Order (I) Approving Adequacy of Disclosure Statement, (II) Approving Solicitation and Notice Procedures for Confirmation of the Chapter 11 Plan of Liquidation, (III) Approving Ballot and Notice Forms in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 183] (the "**Motion for Approval and Solicitation Procedures**") requesting, among other things, (i) approval of the adequacy of the disclosure provisions in, and procedures for solicitation of votes with respect to, the Original DS, and (ii) the scheduling of a hearing to consider on the confirmation of the Original Plan (the "**Hearing**").[3]

[3] Also referred to herein as the "Confirmation Hearing."

13. On October 7, 2022, the Court entered the *Order (I) Approving Adequacy of Disclosure Statement, (II) Approving Solicitation and Notice Procedures for Confirmation of the Debtor's Plan of Liquidation, (III) Approving Ballots and Notice Forms in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 227] (the "**Procedures Order**").

14. On October 10, 2022, the Debtor filed the First Amended Disclosure Statement for Chapter 11 Plan of Liquidation of Zosano Pharma Corporation [Docket No. 231] (the "**DS**") and the Plan.

15. Patheon requested certain edits to the Original Plan, and the Plan incorporates changes requested by Patheon.

16. In accordance with the Procedures Order, on October 13 and 18, 2022, the Voting Agent served the Solicitation Package on holders of General Unsecured Claims in Class 3 and holders of Subordinated Claims in Class 4 entitled to vote to accept or reject the Plan, the Non-Voting Notice Package on holders of clams and interests not entitled to vote on the Plan and the Objection Deadline and Hearing Notice on creditors identified in the Debtor's Schedules, parties that filed a proof of claim in the Chapter 11 Case, parties that requested notice pursuant to Bankruptcy Rule 2002, the IRS, the U.S. Trustee, and the Securities and Exchange Commission [Docket Nos. 232 & 248].

17. On November 3, 2022, the Debtor filed the *Plan Supplement to Chapter 11 Plan of Liquidation of Zosano Pharma Corporation* [Docket No. 261] ("**Plan Supplement**"), (i) designating SierraConstellation Partners, LLC, the Debtor's Court-approved financial advisor in the Chapter 11 Case, to serve as the Liquidating Trustee, (ii) disclosing the terms of compensation for the performance of liquidating trustee services, (iii) disclosing the terms of the

Liquidating Trust Agreement, and (iv) the proposed Confirmation Order (the "**Proposed Confirmation Order**").

18. Pursuant to the *Notice of Hearing to Consider Confirmation of the Chapter 11 Plan Filed by the Debtor and Related Voting and Objection Deadlines* filed by the Debtor on October 15, 2022 [Docket No. 238], the Confirmation Hearing has been scheduled for November 18, 2022, at 1:30 p.m. (prevailing Eastern Time).

19. On November 15, 2022, the Debtor filed the Voting Certification [Docket No. 267].

20. As is apparent from the Voting Certification, Class 3 has accepted the Plan.

II. ARGUMENT IN SUPPORT OF THE PLAN

A. The Plan Complies with the Formal Requirements for Confirmation Under the Bankruptcy Code and Rules

21. The Plan satisfies the basic formal and procedural requirements for confirmation under the Bankruptcy Code and Bankruptcy Rules because it:

- Designates Classes of Claims and Interests subject to section 1122 of the Bankruptcy Code as required by section 1123(a)(1).
- Specifies which Classes of Claims and Interests are unimpaired by the Plan (i.e., Classes 1 and 2) as required by section 1123(a)(2) of the Bankruptcy Code.
- Specifies the treatment of impaired Claims and Interests (i.e., Classes 3, 4, and 5) as required by section 1123(a)(3) of the Bankruptcy Code.
- Provides for equal treatment of Claims and Interests within a particular Class as required by section 1123(a)(4) of the Bankruptcy Code.
- Provides adequate means for the Plan's implementation (including, without limitation, the appointment of the Liquidating Trustee with the powers and duties set forth in the Plan) as required by section 1123(a)(5) of the Bankruptcy Code.
- Does not provide for the issuance of securities, so does not implicate the requirements of section 1123(a)(6) of the Bankruptcy Code with respect to the issuance of securities.

- Provides for the appointment and approval of the compensation of the Liquidating Trustee by the Court, thus complying with the requirement in section 1123(a)(7) of the Bankruptcy Code that the manner of selection of any officer under the Plan are "consistent with the interests of creditors and equity security holders and with public policy."

- Provides for Court approval of pre-confirmation professionals' fees and expenses, as required by section 1129(a)(4) of the Bankruptcy Code.

- Provides for payment in full of Administrative Expense Claims, Priority Claims, and Secured Tax Claims as required by section 1129(a)(9) of the Bankruptcy Code.

- Has been accepted by at least one impaired Class of Claims of the Debtor, without counting any acceptance by an insider, as required by section 1129(a)(10) of the Bankruptcy Code.

- Provides for payment of all fees payable under 28 U.S.C. § 1930 as required by section 1129(a)(12) of the Bankruptcy Code.

- Does not implicate the requirements of sections 1129(a)(6) (regarding rate changes subject to regulatory approval), (a)(13) (regarding retiree benefits), (a)(14) (regarding domestic support obligations), (a)(15) (regarding individual debtors), (a)(16) (regarding not-for-profit entities), or (d) (applicable only where a governmental unit objects)[4].

- Is the only plan in the Chapter 11 Case, thus satisfying the "one plan" limitation imposed by section 1129(c) of the Bankruptcy Code.

22. In addition, the Plan Proponent has complied with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, including sections 1125 and 1126 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018 regarding the disclosures in, and solicitation of votes on, the Plan. Accordingly, the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied. *See, e.g.*, *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (finding section 1129(a)(2) satisfied where debtors complied with all provisions of the Bankruptcy Code and the Bankruptcy Rules governing notice, disclosure and solicitation relating to plan). And, as will be shown by evidence at the

[4] And in any event, the evidence at the Confirmation Hearing will show that the principal purpose of the Plan is not the avoidance of taxes or the application of section 5 of the Securities Act of 1933. *See* 11 U.S.C. § 1129(d).

Confirmation Hearing, the Plan Proponent proposed the Plan "in good faith and not by any means forbidden by law" as required by section 1129(a)(3). *See In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) ("The good faith standard requires that the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." (internal quotation marks, citation omitted)); *see also In re Century Glove, Inc.*, Nos. 90-400 (SLR), 90-401 (SLR), 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) (finding good faith should be evaluated in light of the totality of circumstances surrounding confirmation).

B. The Plan Satisfies the Best Interests Test

23. Section 1129(a)(7) of the Bankruptcy Code requires that each holder of a Claim or Interest that has not accepted the Plan "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of th[e Bankruptcy Code] on such date . . . ." The evidence at the Confirmation Hearing will establish that this "best interests test" is satisfied (i) with respect to all holders of impaired Claims in Class 4 that have not accepted the Plan, because they will receive under the Plan at least as much as they would receive in a chapter 7 liquidation of the Debtor, and (ii) with respect to holders of impaired Claims in Class 4 and impaired Interests in Class 5, because they would not receive anything in a chapter 7 liquidation in any event.

C. The Plan is Feasible

24. Section 1129(a)(11) of the Bankruptcy Code requires the Court to determine that confirmation of the Plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

25. In the context of a liquidating plan, this "feasibility" requirement is established by demonstrating that the debtor is able to satisfy the conditions precedent to effectiveness of the plan and has sufficient funds to meet its post-confirmation date obligations to pay for the costs of administering and fully consummating the plan and closing the chapter 11 case. *See In re NexPak Corp.*, No. 09-11244 (PJW), 2010 WL 5053973, at *6 (Bankr. D. Del. May 18, 2010) (finding plan feasible where "[t]he Plan properly provides for the means for the Plan Administrator to complete the liquidation of the estates and to make the distributions to creditors according to the Plan and the relative priorities of the parties"). The evidence at the Confirmation Hearing will establish that the Debtor will likely satisfy or waive the conditions precedent to the Effective Date, set forth in Section 12.1 of the Plan, and the Plan Administrator will have sufficient funds to administer and consummate the Plan and to close the Chapter 11 Case. Moreover, confirmation of the Plan cannot be followed by any liquidation beyond that prescribed by the Plan, nor would confirmation be followed by the need for further financial reorganization. As such, the Plan will satisfy the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

D. The Plan Satisfies the "Cramdown" Requirements With Respect to the Deemed Rejecting Class

26. Class 5 (Interests) (the "**Deemed Rejecting Class**") will receive no distributions under the Plan and are therefore deemed to have rejected the Plan. *See* 11 U.S.C. § 1126(g). Since the Plan does not satisfy the requirement of section 1129(a)(8) of the Bankruptcy Code with respect to all impaired Classes, it must be confirmed under the "cramdown" provisions of section 1129(b).

27. Section 1129(b) permits confirmation of a chapter 11 plan in circumstances where the plan is not accepted by all impaired classes of claims and equity interests, so long as "the

plan does not discriminate unfairly, and is fair and equitable, with respect to" each non-accepting impaired class. 11 U.S.C. § 1129(b)(1). Thus, the Court may cram down the Plan over the non-acceptance of the Deemed Rejecting Class if the Plan does not "discriminate unfairly" against and is "fair and equitable" with respect to each such Class. The Plan satisfies those requirements, and thus can be crammed down on the Deemed Rejecting Class.

(1) *The Plan Does Not Discriminate Unfairly*

28. The requirement in section 1129(b)(1) of the Bankruptcy Code that a plan not discriminate unfairly against impaired, dissenting classes focuses on the treatment of the dissenting class relative to other classes having similar legal rights. *See* H.R. Rep. No. 95-595, at 416-417 (1977) ("The plan may be confirmed . . . if the class is not unfairly discriminated against with respect to equal classes if junior classes will receive nothing under the plan."); *see also In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 62 (Bankr. S.D.N.Y. 1990) (same). Section 1129(b)(1) of the Bankruptcy Code does not prohibit *all* discrimination among classes; it prohibits only discrimination that is "unfair" with respect to the class or classes that do not accept the plan. *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990). Thus, a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if classes comprising similarly situated claims or interests receive treatment under the plan that is not equivalent, and there is no reasonable basis for the disparate treatment. *See, e.g.*, *In re Kennedy*, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); *In re Resorts Int'l*, 145 B.R. 412, 481 (Bankr. D.N.J. 1990).

29. Here, the "unfair discrimination" requirement does not apply to the Deemed Rejecting Class, because there are no other Classes of Claims or Interests of the Debtor that have similar legal rights to the rights of that Class. Thus, there would be no basis for the Deemed Rejecting Class to assert that its treatment under the Plan is the result of unfair discrimination compared to similarly situated Classes.

(2) *The Plan is Fair and Equitable*

30. Under section 1129(b)(2)(B)(ii) of the Bankruptcy Code, a plan is fair and equitable with respect to a dissenting class of claims if the holders of any claim or interest that is junior to the claims of such class will not receive or retain any property on account of such junior claim or interest. Moreover, under section 1129(b)(2)(C)(ii) of the Bankruptcy Code, a plan is fair and equitable with respect to a dissenting class of interests if no class junior to such class receives or retains any property under the plan. 11 U.S.C. § 1129(b)(2)(C)(ii); *see In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 352 (Bankr. D. Del. 1998) ("[W]here an estate is solvent . . . unsecured and undersecured creditors' claims must be paid in full . . . before equity holders may participate in any recovery."); *In re Union Meeting Partners*, 165 B.R. 553, 569 (Bankr. E.D. Pa. 1994) (a plan is not fair and equitable if it violates the "absolute priority rule").

31. The "fair and equitable" requirement is satisfied with respect to Class 4 because no Class of Claims junior to the Subordinated Claims or holders of Interests are receiving anything under the Plan. The requirement is satisfied with respect to Class 5 because there is no Class of Claims or Interests junior to that Class receiving anything under the Plan. Therefore, in accordance with section 1129(b) of the Bankruptcy Code, this Court may cram down the Plan on the Deemed Rejecting Class.

E. The Plan's Permissive Provisions Are Appropriate Under Section 1123(b) of the Bankruptcy Code

32. In addition to requiring certain provisions to be included in a chapter 11 plan, section 1123 of the Bankruptcy Code *permits* the inclusion of certain enumerated provisions (e.g., for impairment or non-impairment of claims and interests, treatment of executory contracts and unexpired leases, compromise of claims, or sale of assets), as well as "any other appropriate provision not inconsistent with the applicable provisions of th[e Bankruptcy Code]." *See* 11

U.S.C. § 1123(b). As is customary, the Plan contains several permissive provisions permitted by section 1123(b)'s discretionary authority, all of which are appropriate and not inconsistent with the applicable provisions of the Bankruptcy Code. Certain of these provisions are discussed below.

(1) *Rejection of Executory Contracts*

33. To the extent the Plan is confirmed, Article V of the Plan provides for the rejection of all executory contracts and unexpired leases to which the Debtor is a party other than executory contracts or unexpired leases that have previously been assumed.

(2) *Release Provisions*

34. Article IX.B of the Plan provide for "debtor releases" and "third-party releases" in favor of the Debtor's current and former directors, managers, officers, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns (collectively, the "**Released Parties**"). The non-Debtor parties deemed to provide releases to the Released Parties are creditors who either (a) do not "opt out" of providing the releases or (b) do not object to providing the releases (collectively, the "**Releasing Parties**").

35. In approving debtor releases and third-party releases, a court may consider a number of factors, including: (i) the substantial contribution of the releasees since the petition date; (ii) the essential nature of the releases to the approval of the plan; and (iii) whether a substantial majority of the creditors supports the plan. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 935-36 (Bankr. W.D. Mo. 1994)). The Court may also consider whether such releases are consensual. The Plan Proponent submits that the release provisions in the Plan are proper in

light of these considerations, particularly given (i) the acceptance of the Plan by the voting Class and (ii) that holders of Claims in the voting Class were able to "opt out" of providing releases by checking the appropriate box on their respective Ballot, and (iii) that holders of Claims in non-voting Classes were able to object to providing releases. *See, e.g.*, *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013) (approving release with opt-out feature); *In re Electroglas, Inc.*, No. 09-12416 (PJW), 2010 WL 2821868, at *10 (Bankr. D. Del. May 26, 2010) (same); *In re Latham Int'l, Inc.*, No. 09-14490 (CSS), 2010 Bankr. LEXIS 3188 at *38 (CSS) (Bankr. D. Del. Jan. 21, 2010) (same). The release provisions are an integral part of the Plan.

(3) *Exculpation Provision*

36. Article IX.D. of the Plan provides for limited exculpation from "any Cause of Action for any claim or Claim related to any act or omission in connection with, relating to, or arising out of, the Chapter 11 Case, the formulation, preparation, dissemination, negotiation, or Filing of the Debtor's in- or out-of-court restructuring efforts, the Sale, the Sale Documents, the Plan, the Plan Supplement, or any restructuring transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Sale, the Sale Documents, the Plan, the Plan Supplement, the Chapter 11 Case, the Filing of the Chapter 11 Case, the pursuit of Confirmation, the pursuit of the Sale, the pursuit of consummation, the administration and implementation of the Plan, including the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence or omission taking place on or before the Effective Date," except to the extent such liability results from an act or omission constituting "actual intentional fraud, willful misconduct, or gross negligence."

37. The parties entitled to the benefit of this exculpation are (i) the Debtor, (ii) the Debtor's directors and officers during the Chapter 11 Case, and (iii) the Retained Professionals —in essence, the panoply of persons who might be pursued by a hypothetical plaintiff as secondarily liable for an act or omission of the Debtor in connection with the Chapter 11 Case, where primary liability would be foreclosed by principles of fiduciary law.

38. In the seminal case of *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000), the Third Circuit Court of Appeals upheld a chapter 11 plan's exculpation of a creditors' committee and its professionals against a challenge that such exculpation was inconsistent with section 524(e) of the Bankruptcy Code, which provides that the discharge of a debtor from a debt in bankruptcy does not "affect the liability of any other entity on . . . such debt." The *PWS Holding* court held that, because creditors' committees (and by extension, their professionals) have qualified immunity from liability for acts and omissions taken within the scope of their authority as bankruptcy estate fiduciaries, the exculpation provision at issue did not "affect the liability of" the committee members or their professionals—rather, it merely restated the standard for holding them liable under principles of fiduciary law, which would require a showing of gross negligence or willful misconduct. *See* 228 F.3d at 245-47. Like the exculpation provision in *PWS Holding*, the exculpation provision in the Plan merely restates the standard of liability that would apply with respect to claims against estate fiduciaries for acts or omissions in connection with the Chapter 11 Case (or in the case of related parties, the standard of liability that would apply to hold them secondarily liable for acts or omissions of the estate fiduciaries), including an appropriate carve-out for gross negligence or willful misconduct. Accordingly, the Plan Proponent submits that the exculpation provision is both "appropriate" and "not inconsistent with

the applicable provisions of th[e Bankruptcy Code]," and thus is expressly permitted by section 1123(b)(6).

III. RESERVATION OF RIGHTS

39. The Debtor expressly reserves its right to amend or supplement this Confirmation Memorandum at or prior to the Combined Hearing. Nothing contained herein shall constitute a waiver of any of the rights and remedies of the Plan Proponent, and all such rights and remedies are hereby expressly reserved.

IV. CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter the Proposed Confirmation Order confirming the Plan and grant such other and further relief as is just and proper.

Dated: November 15, 2022

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