Docket #0550 Date Filed: 01/23/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
NVN Liquidation, Inc., *et al*., f/k/a NOVAN, INC.,[1]	)	Case No. 23-10937 (LSS)
	)	(Jointly Administered)
Debtors.	)	

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION PROPOSED BY THE DEBTORS

January 23, 2024
Wilmington, Delaware

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[1] The Debtors in these Chapter 11 Cases, along with the last four digitals of the Debtors' federal tax identification number (if applicable), are: NVN Liquidation, Inc., (f/k/a Novan, Inc.) (7682) and EPI Health, LLC (9118). The corporate headquarters and the mailing address for the Debtors is P.O. Box 64, Pittsboro, NC 27312.

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INTRODUCTION

1. On July 17, 2023 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code") in this Court, thereby commencing these chapter 11 cases (the "Chapter 11 Cases"). On November 22, 2023, the Debtors filed their *Combined Disclosure Statement and Chapter 11 Plan of Liquidation Proposed by the Debtors* (as may be amended, modified, or supplemented and including all exhibits and supplements thereto, the "Combined Disclosure Statement and Plan" or "Disclosure Statement" or "Plan")[2] (D.I. 438), along with a motion for interim approval of the Combined Disclosure Statement and Plan (D.I. 439). On December 13, 2023, the Debtors filed a revised version of the Plan (D.I. 459, as further amended on January 17, 2024 [D.I. 529] and January 22, 2024 [D.I. 542]). On December 19, 2023, the Court granted interim approval of the Plan (D.I. 476) (the "Interim Approval and Procedures Order") and permitted the Debtors to solicit the Plan (D.I. 498). On January 11, 2024, the Debtors filed with the Court the Plan Supplement (D.I. 522), which disclosed the identity of the Liquidating Trustee and attached a copy of the Liquidating Trust Agreement (as amended on January 22, 2024 [D.I. 543]), which discloses the compensation terms for the Liquidating Trustee.

2. The hearing on the Combined Disclosure Statement and Plan (the "Confirmation Hearing") is scheduled for January 25, 2024 at 10:00 a.m. (prevailing Eastern time). In connection with the Confirmation Hearing, the Debtors submit this memorandum of law (the "Memorandum") in support of entry of an order approval the Combined Disclosure Statement and

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[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Combined Disclosure Statement and Plan. Uses of the term Disclosure Statement are references to the disclosure portions of the Combined Disclosure Statement and Plan while uses of the term Plan are in reference to the chapter 11 plan portions of the Combined Disclosure Statement and Plan.

Plan on a final basis. This Memorandum addresses the requirements set forth in the Bankruptcy Code for final approval of the Disclosure Statement and final confirmation of the Plan.

3. The Debtors have submitted a proposed order for final approval of the Disclosure Statement and confirmation of the Plan (the "Confirmation Order"). The Debtors consensually resolved all but two of the comments of the U.S. Trustee, as reflected in the proposed Plan modifications filed on January 17 and 22, 2024 [D.I. 529 and 542]. The last two unresolved comments of the U.S. Trustee are found in their limited objection [D.I. 534] (the "UST Objection") filed on January 19, 2024.

4. For the reasons specified at the end of this Memorandum, the U.S. Trustee's remaining objections with respect to (i) the Liquidating Trustee's "sole and exclusive" right to file claim objections and (ii) which parties must receive service of a motion to extend the claims objection deadline should be overruled.

THE PLAN HAS BEEN ACCEPTED BY THE VOTING CLASSES

5. As evidenced by the Voting Certification (defined below), the Debtors and their advisors identified and classified the Holders of Claims and Interests entitled to vote in the voting Classes as of the Voting Record Date and in accordance with the classification scheme of the Plan. Kurtzman Carson Consultants LLC (the "Voting Agent") distributed the solicitation version of the Combined Disclosure Statement and Plan in accordance with the Plan's classification scheme and the Interim Approval and Procedures Order.

6. Holders of NVN Unsecured Claims (Class 3) and Holders of EPI Unsecured Claims (Class 4) (collectively, the "Voting Classes") were the only Holders of Claims and Interests entitled to vote to accept or reject Plan. All other Holders of Claims or Interests were not entitled to vote on the Plan because these Holders either (a) hold a Claim that is not classified under the Plan, (b) hold a Claim that is unimpaired under the Plan and are conclusively presumed to accept

the Plan under section 1126(f) of the Bankruptcy Code, or (c) hold an Interest that is impaired under the Plan, are not receiving a distribution, and are deemed to reject the Plan under section 1126(g) of the Bankruptcy Code.

7. In connection with the Plan and in advance of the Voting Record Date, on December 15, 2023, the Debtors filed the *Debtors' First Omnibus (Non-Substantive) Objection to Proofs of Claim Based on Insufficient Documentation and Equity Interests* (D.I. 470) (the "First Omnibus Objection"); the *Debtors' Second Omnibus (Non-Substantive) Objection to Proofs of Claim Based Upon Equity Interests* (D.I. 471) (the "Second Omnibus Objection"); the *Debtors' Third Omnibus (Non-Substantive) Objection to Proofs of Claim Based Upon Equity Interests* (D.I. 472) (the "Third Omnibus Objection"); and the *Debtors' Objection to Proof of Claim Filed by Armistice Capital Master Fund Ltd*. (D.I. 473, the "Amistice Objection," and together with the First Omnibus Objection, Second Omnibus Objection, and the Third Omnibus Objection, the "Equity Objections") seeking to disallow those proofs of claim that would otherwise permit their holders to vote as Class 3 NVN Unsecured Claims where the underlying asserted "claims" were in fact based upon equity interests in Debtor NVN Liquidation, Inc., f/k/a Novan, Inc. The Debtors received certain formal and informal responses to certain of the Equity Objections. On January 10, 2024, the Debtors filed an omnibus reply in further support of the Equity Objections (D.I. 520).

8. The Debtors solicited votes on the Plan from Holders of Claims in Impaired Classes 3 and 4. The voting results, as reflected in the *Declaration of Darlene S. Calderon with Respect to the Tabulation of Votes on the Combined Disclosure Statement and Chapter 11 Plan of Liquidation Proposed by the Debtors* (D.I. 538) (the "Voting Certification") submitted by the Debtors' Voting Agent substantially contemporaneously herewith, are summarized as follows:

Class	Description	Number Accepting	Number Rejecting	Amount Accepting	Amount Rejecting	Class Voting Result
		%	%	%	%	
3	NVN Unsecured Claims	16	2	$7,535,150.08	$36,816.25	ACCEPTS
		88.89%	11.11%	99.51%	0.49%	
4	EPI Unsecured Claims	8	1	$4,666,660.19	$7,350.00	ACCEPTS
		88.89%	11.11%	99.84%	0.16%	

9. As shown above and in the Voting Certification, the Voting Results reflect acceptance of the Plan by the Voting Classes.

ARGUMENT

I. THE COURT HAS JURISDICTION AND NOTICE HAS PROPERLY BEEN GIVEN.

A. Jurisdiction and Venue

10. This Court has jurisdiction over these Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2), and the Bankruptcy Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed.

B. Notice and Solicitation

11. In accordance with the Interim Approval and Procedures Order and Bankruptcy Rule 3017(d), the Debtors, through their Voting Agent, served ballots and associated solicitation documents, as appropriate, on all Holders of Claims and Interests in the Debtors as follows: (1) for all parties in Classes 1, 2, 5 and 6, the Combined Hearing Notice and Notice of Non-Voting Status; (2) for all parties in Classes 3 and 4 entitled to vote pursuant to the relevant provisions of the Bankruptcy Code, the Combined Hearing Notice, Combined Disclosure Statement and Plan, Interim Approval and Procedures Order (excluding any exhibits attached thereto), the appropriate Ballot with a pre-addressed, pre-stamped return envelope, and a letter

from the Creditors' Committee in support of the Plan; (3) for (i) the U.S. Trustee, (ii) all entities that are party to executory contracts and unexpired leases with the Debtors, (iii) all entities that are party to litigation with the Debtors, (iv) all current and former employees, directors and officers (to the extent that contact information for former employees, directors and officers is available in the Debtors' records), (v) all regulatory authorities that regulate the Debtors' businesses, (vi) the Office of the Attorney General for the State of Delaware, (vii) the office of the attorney general for each state in which the Debtors maintain or conduct business, (viii) the taxing authorities for the jurisdictions in which the Debtors maintain or conduct business, (ix) the Department of Justice and (x) all parties who filed a request for service of notices under Bankruptcy Rule 2002 no later than 3 days after the entry of the Interim Approval and Procedures Order, the Combined Hearing Notice.

C. Adequate Notice of Confirmation Hearing

12. In accordance with Bankruptcy Rules 2002, 3018, 3019, 6004, 6006, 9007, and 9014 and the Interim Approval and Procedures Order and the Solicitation and Tabulation Procedures set forth therein, adequate notice of the time for filing objections to confirmation of the Combined Disclosure Statement and Plan on any ground, including adequacy of the disclosures therein, was provided to all Holders of Claims and Interests and other parties in interest entitled to receive such notice under the Bankruptcy Code and the Bankruptcy Rules. No other or further notice of the Confirmation Hearing was necessary or required.

II. THE DISCLOSURE STATEMENT CONTAINS ADEQUATE INFORMATION PURSUANT TO SECTION 1125

13. Bankruptcy Code section 1125(b) requires that, before soliciting votes on a plan, the plan proponent must provide a disclosure statement that contains adequate information regarding the proposed plan.[3] Section 1125(a) defines "adequate information" as:

> information of the kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a)(1).

14. The amount and type of information required to satisfy section 1125(a) must be determined on a case-by-case basis. The legislative history of section 1125 indicates that the threshold of what constitutes "adequate information" is flexible and based on the circumstances of each case. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 409 (1977). Courts also have broad discretion to determine what constitutes adequate information necessary to satisfy the requirements of section 1125(a). *See In re Phoenix Petroleum Co*., 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) ("The general language of the statute and its surrounding legislative history make clear that the

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[3] Local Rule 3017-2(c) permits the filing of a combined plan and disclosure statement and approval of a disclosure statement on an interim basis if the requirements of Local Rule 3017-2(a) are met. In keeping with Local Rule 3017-2(c), the Debtors sought interim approval of the Combined Disclosure Statement and Plan and now seek final approval of the Combined Disclosure Statement and Plan under Bankruptcy Code section 1125 at the Hearing after full notice to all creditors.

determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.") (internal quotations omitted); *see also In re 3DFX Interactive, Inc*., 2006 Bankr. LEXIS 1498 (N.D. Cal. 2006) ("Section 1125 affords the Bankruptcy Court substantial discretion in considering the adequacy of a disclosure statement . . . 'adequate information' within the meaning of § 1125(a)(1) is not a static concept: Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis.") (internal quotations omitted). This grant of discretion was intended to facilitate a debtor's effective emergence from chapter 11 in the broad range of businesses in which chapter 11 debtors engage. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 408-409 (1977). A disclosure statement must provide creditors entitled to vote on the plan with information that is "reasonably practicable" to permit an "informed judgment." *Cohen v. Tic Fin. Sys. (In re Ampace Corp.)*, 279 B.R. 145, 158 n.26 (Bankr. D. Del. 2002). The general purpose of the disclosure statement is to set forth sufficient facts to permit a creditor to make an informed evaluation of the merits of the plan. *See Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94, 100 (3d Cir. 1988); *Phoenix Petroleum*, 278 B.R. at 392.

15. To determine whether a disclosure statement contains adequate information, courts typically expect the following elements to be included in a disclosure statement, where applicable to the circumstances of the case: (a) the events leading to the filing of a bankruptcy petition; (b) a description of the available assets and their values; (c) the anticipated future of the company; (d) the source of information stated in the disclosure statement; (e) a disclaimer; (f) the present condition of the debtor while in chapter 11; (g) the scheduled claims; (h) the estimated return to creditors under a chapter 7 liquidation; (i) the accounting method utilized to produce financial information and the name of the accountants responsible for such

information; (j) the future management of the debtor; (k) the chapter 11 plan or a summary of it; (l) the estimated administrative expenses, including attorneys' and accountants' fees; (m) the collectability of accounts receivable; (n) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the plan; (o) information relevant to the risks posed to creditors under the plan; (p) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (q) litigation likely to arise in a non-bankruptcy context; (r) tax attributes of the debtor; and (s) the relationship of the debtor with affiliates. *See Phoenix Petroleum*, 278 B.R. at 393, n.6.

16. Here, the Combined Disclosure Statement and Plan contains adequate information, as required by section 1125, so that creditors were able to make an informed decision in voting to accept or reject the Plan. The Combined Disclosure Statement and Plan is comprehensive and contains the type of information described above. The Combined Disclosure Statement and Plan includes complete discussions of: (a) significant events preceding the Debtors' Chapter 11 Cases; (b) the Debtors' prepetition operations and capital structure; (c) a liquidation analysis; (d) the Combined Disclosure Statement and Plan's designation and treatment of Claims and Interests; (e) a detailed description of the method to fund the Combined Disclosure Statement and Plan and make Distributions to creditors; (f) a description of the nature and extent of likely claims against the Debtors' estates, including administrative claims; (g) provisions governing releases, injunctions and exculpations; (h) the risk factors affecting the Plan; and (i) the federal tax consequences related to the Combined Disclosure Statement and Plan.

17. Accordingly, the Debtors respectfully submit that the Combined Disclosure Statement and Plan contains adequate information within the meaning of section 1125 and should be approved.

III. THE PLAN MEETS ALL APPLICABLE REQUIREMENTS OF THE BANKRUPTCY CODE.

18. To confirm the Plan, the Court must find that the provisions of section 1129 of the Bankruptcy Code have been satisfied by a preponderance of the evidence.[4] The Debtors submit that based on the record of the Chapter 11 Cases and the Debtors' arguments as set forth herein, the applicable burden is clearly satisfied and the Plan complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code. This Memorandum addresses each confirmation requirement individually.

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

19. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code. The principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan.[5] Consequently, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the

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[4] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Tribune Co.*, 464 B.R. 126, 151–52 (Bankr. D. Del. 2011) *("Tribune I")*, *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011). Preponderance of the evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("The preponderance-of-the-evidence standard results in roughly equal allocation of the risk of error between litigants.") (citations omitted).

[5] The legislative history of section 1129(a)(1) explains that this provision is intended to draw in the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan of reorganization, respectively. S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977); *In re S & W Enters.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was more directly aimed at were Sections 1122 and 1123.").

Bankruptcy Code. As explained below, the Plan complies with sections 1122 and 1123 in all respects.

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

20. 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." 11 U.S.C. § 1122(a).

21. The Third Circuit "permits the grouping of similar claims in different classes[]" as long as those classifications are reasonable.[6] The classifications, however, cannot be "arbitrarily designed" to secure the approval of an impaired class when "the overwhelming sentiment of the impaired creditors [is] that the proposed reorganization of the debtor would not serve any legitimate purpose."[7] Accordingly, the Third Circuit has held that the only requirement for classification is that it be "reasonable."[8] Separate classes of similar claims are reasonable when each class represents "a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed."[9] Courts have recognized that this gives both the debtor and the bankruptcy court considerable discretion in determining whether similar claims may be separately classified.[10] Furthermore, if it is evident

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6 *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987); *see also In re Tribune Co.*, 476 B.R. 843, 854–55 (Bankr. D. Del. 2012) ("*Tribune II*").

7 *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993).

8 *In re Coastal Broad. Sys., Inc.*, 570 F. App'x 188, 193 (3d Cir. 2014) ("Although not explicit in § 1122, a corollary to that rule is that the 'grouping of similar claims in different classes' is permitted so long as the classification is 'reasonable.'").

9 *Id.* at 159.

10 *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 224 (Bankr. D.N.J. 2000).

based on the voting results that the debtor would have an impaired accepting class regardless of the chosen classification scheme, then any challenge to the classification scheme is moot because the plan would have been accepted even if the classes were constituted differently.[11]

22. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 because the Claims or Interests in each Class are substantially similar to the other Claims or Interests in such Class. Moreover, the Plan's classification of Claims and Interests into six Classes satisfies the requirements of section 1122 of the Bankruptcy Code because the Claims and Interests in each Class differ from the Claims and Interests in each other Class in a legal or factual nature or are based upon other relevant criteria. Furthermore, because all voting Classes have accepted the Plan, any hypothetical challenge to the classification scheme is moot, as any change in the classification scheme would not affect the voting results or the existence of an impaired, accepting class.

23. For these reasons, the Debtors submit that the Plan's classification scheme is necessary, reasonable and appropriate under the facts and circumstances of the Chapter 11 Cases and applicable Third Circuit law, and should be approved.

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[11] *See, e.g.*, *In re Heritage Org., L.L.C.*, 375 B.R. 230, 302 (Bankr. N.D. Tex. 2007) (rejecting challenge to classification scheme where voting results would be the same regardless of whether classes were combined or separate); *In re New Midland Plaza Assocs.*, 247 B.R. 877, 892 (Bankr. S.D. Fla. 2000) ("The Court holds that because the City, like the general trade creditors, voted in favor of the Plan, the issue of gerrymandering is moot, i.e., if the classes were combined, the Debtor would still have an impaired accepting class, and only one such class is necessary under § 1129(a)(10)."); *In re Dow Corning Corp.*, 244 B.R. 634, 645 n.5 (Bankr. E.D. Mich. 1999) (noting that a conclusion of gerrymandering would be counterintuitive where 24 of 33 classes had voted to accept a plan, most by overwhelming margins); *Beal Bank, S.S.B. v. Way Apts., D.T. (In re Way Apts., D.T.)*, 201 B.R. 444, 451, 451 n.6 (N.D. Tex. 1996) (finding that separation of claims of large trade creditors and small trade creditors into two separate classes did not constitute gerrymandering because the "votes of the combined class would have resulted in acceptance"). *See also In re Abeinsa Holding, Inc*., 562 B.R. 265, 274–75 (Bankr. D. Del. 2016) (rejecting challenge to separate classification in part on the basis that, even without the challenge classification, the voting results would not change).

2. The Plan Satisfies the Mandatory Plan Requirements of Section 1123 of the Bankruptcy Code.

a. The Plan Satisfies the Requirements of Sections 1123(a)(1)-(3) of the Bankruptcy Code.

24. Sections 1123(a)(1)-(3) of the Bankruptcy Code require a plan to designate classes of claims and interests and specify whether each class of claims or interests is impaired or unimpaired under the plan. 11 U.S.C. § 1123(a)(1)-(3). The Plan designates six Classes of Claims and Interests, and identifies Classes 1 and 2 as Unimpaired and Classes 3, 4, 5, and 6 as Impaired. Accordingly, the Plan complies with sections 1123(a)(1)-(3) of the Bankruptcy Code.

b. The Plan Provides for the Same Treatment for Claims or Interests within the Same Class as Required by Section 1123(a)(4) of the Bankruptcy Code.

25. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The Plan meets this requirement because Holders of Allowed Claims or Interests will receive the same rights and treatment as other Holders of Allowed Claims or Interests in the same class.

c. The Plan Provides Adequate Means for Its Implementation as Required by Section 1123(a)(5) of the Bankruptcy Code.

26. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. 11 U.S.C. § 1123(a)(5). Article IX of the Plan, as well as other provisions thereof, provides for the means by which the Plan will be implemented. Among other things, Article IX of the Plan, and the exhibits, attachments, and Plan Supplement: (a) authorize the Debtors to execute the Liquidating Trust to wind down the Debtors' Estates as

expeditiously as reasonably possible after the Effective Date; (b) provide for the appointment of the Liquidating Trustee to administer the Liquidating Trust and make Distributions in accordance with the Plan and Liquidating Trust Agreement; (c) authorize the cancellation of agreements, securities and other documents; (d) establish certain reserves; and (e) assign the Retained Causes of Action to the Liquidating Trust for the benefit of the Liquidating Trust Beneficiaries.

d. The Plan Prohibits the Issuance of Nonvoting Equity Securities as Required by Section 1123(a)(6) of the Bankruptcy Code.

27. Section 1123(a)(6) of the Bankruptcy Code requires that the charter of the debtor, or the surviving corporation if the debtor is transferring all of its property or merging or consolidating with another entity, contain a provision prohibiting the issuance of nonvoting equity securities. 11 U.S.C. § 1123(a)(6). The Plan satisfies section 1123(a)(6) as the Debtors are not issuing nonvoting equity securities.

e. The Plan Contains Appropriate Provisions with Respect to the Selection of Post-Confirmation Directors and Officers as Required by Section 1123(a)(7) of the Bankruptcy Code.

28. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any director, officer or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123 (a)(7). The Plan Supplement identifies Alan D. Halperin as the Liquidating Trustee as of the Effective Date, which accords with Applicable Law, the Bankruptcy Code, the interests of creditors and equity holders and public policy.

3. The Plan Appropriately Contains Certain Discretionary Components Permitted by Section 1123(b) of the Bankruptcy Code.

29. Section 1123(b) of the Bankruptcy Code sets forth permissive components that may be incorporated into a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b), as follows:

(a) As permitted by section 1123(b)(1) of the Bankruptcy Code, and as described above, the Plan provides that (i) Classes 1 and 2 are Unimpaired and (ii) Classes 3, 4, 5, and 6 are Impaired;

(b) As permitted by section 1123(b)(2) of the Bankruptcy Code, and as detailed further below, the Plan provides for the rejection of all Executory Contracts, including unexpired leases, except to the extent previously assumed or rejected, or subject to a separate motion to assume or reject (filed prior to the Effective Date);

(c) As permitted by section 1123(b)(3) of the Bankruptcy Code, and as is described in further detail below, Section 10.6 of the Plan provides for a release of certain claims and causes of action owned by the Debtors, as specified therein;

(d) As permitted by section 1123(b)(5) of the Bankruptcy Code, and as described above, the Plan modifies the rights of Holders of Claims or Interests in the Impaired Classes, and leaves unaffected the rights of Holders of Claims or Interests in the Unimpaired Classes; and

(e) As permitted under section 1123(b)(6) of the Bankruptcy Code, Article X of the Plan contains release, exculpation, and injunctive provisions that are not inconsistent with the applicable provisions of the Bankruptcy Code and are essential to the Plan.

a. The Debtors' Proposed Assumption and Rejection of Executory Contracts and Unexpired Leases Pursuant to the Plan is an Appropriate Exercise of the Debtors' Business Judgment and Should Be Approved.

30. Under section 1123(b)(2) of the Bankruptcy Code, "a plan may, subject to section 365, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected." 11 U.S.C. § 1123(b)(2). Section 365(a) of

the Bankruptcy Code provides that a debtor, subject to the court's approval, may assume or reject any executory contract or unexpired leases. Bankruptcy courts generally approve of a debtor's decision to assume, assume and assign, or reject executory contracts or unexpired leases where such decision is made in the exercise of such debtor's sound business judgment and benefits its estate.[12] The business judgment standard requires that the court approve a debtor's business decision unless that judgment is the product of bad faith, whim or caprice.[13] As described above and in Article XI of the Plan, the Debtors have exercised their business judgment to reject all Executory Contracts and unexpired leases, subject to the applicable exceptions under Article XI of the Plan and the rejection of all remaining Executory Contracts and unexpired leases is in the best interest of the Debtors, their Estates and their creditors.

31. Accordingly, the rejection of the remaining Executory Contracts, including unexpired leases, under the Plan should be approved.

b. The Plan's Release, Exculpation, and Injunction Provisions are Necessary, Appropriate and Comport with Applicable Law.

32. As permitted under section 1123(b)(6) of the Bankruptcy Code, a plan may include other appropriate provisions not inconsistent with the applicable provisions of the Bankruptcy Code. Article X of the Plan includes provisions covering: (i) releases by the Debtors in favor of certain parties in interest (the "Debtors' Releases"); (ii) an exculpation provision; and (iii) an injunction provision prohibiting parties from pursuing Claims or Interests discharged or

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[12] *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *see also N.L.R.B. v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984); *In re ANC Rental Corp., Inc.*, 278 B.R. 714, 723 (Bankr. D. Del. 2002).

[13] *See In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001); *see also Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985).

otherwise released under the Plan. As set forth in full detail in the Combined Disclosure Statement and Plan, these releases, exculpations, and injunctions comply with the Bankruptcy Code and applicable non-bankruptcy law, and are necessary and integral components of the Plan. The releases in the Plan are in exchange for, and are supported by, fair, sufficient and adequate consideration provided by the parties receiving such releases, and are a good faith compromise of the Claims released. As is customary, the releases do not extend to Claims arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct, actual fraud or gross negligence as determined by a Final Order. Additionally, the releases are substantially consistent with release provisions in plans confirmed by this Court. As such, the releases, exculpations, and injunctions are appropriate and should be approved.[14]

(i) The Debtors' Releases are Necessary and Appropriate.

33. Section 10.6 of the Plan provides for the release and waiver of all Claims, Causes of Action, obligations, suits, judgments, damages, debts, rights, remedies and liabilities that could have been asserted by or on behalf of the Debtors or their Estates against any Released Party. The Debtors have proposed the Debtors' Releases based on their business judgment and submit that the Debtors' Releases are reasonable and satisfy the standard that courts generally apply when reviewing these types of releases.

34. Section 1123(b)(3)(A) specifically provides 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." 11 U.S.C. § 1123(b)(3)(A). Settlements pursuant to a plan are generally subject to the

[14] *See, e.g.*, *In re PWS Holding Corp*, 228 F.3d 224, 245 (3d Cir. 2000); *U.S. Nat'l Bank Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 142 (Bankr. D. Del. 2010); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110–11 (Bankr. D. Del. 1999).

same standard applied to settlements under Bankruptcy Rule 9019.[15] The Third Circuit applies a four factor balancing test for considering settlements under Bankruptcy Rule 9019, weighing:[16]

a. the probability of success in litigation;

b. the likely difficulties in collection;

c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

d. the paramount interest of the creditors.

Under the Plan, the Debtors propose to release certain parties—each, a Released Party[17]—from claims or causes of action that the Debtors may have. A plan that proposes to release a claim or a cause of action belonging to a debtor is considered a settlement for purposes of satisfying section 1123(b)(3)(A).[18]

35. The Debtors' Releases in the Plan represent a valid settlement of any Claims the Debtors may have against each Released Party pursuant to section 1123(b)(3)(A) and Bankruptcy Rule 9019. The Debtors believe that pursuing Claims, if any, against the Released Parties would not be in the best interest of their various stakeholders because the costs involved would likely outweigh any potential benefit from pursuing such Claims, and could have deleterious effects to the extent that they result in indemnity, advancement or contribution claims asserted back against the Debtors. Moreover, the Released Parties were integral to the development of the Plan and expected a release in exchange for their contributions to the Debtors and their Chapter

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15 *See Coram Healthcare*, 315 B.R. 321, 334 (Bankr. D. Del. 2004).

16 *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996).

17 Under the Plan, Released Party collectively means "(a) the Debtors, (b) the Creditors' Committee, (c) Ligand, and (d) the respective Related Persons and Professionals for each of the foregoing."

18 *See*, *e.g.*, *Coram Healthcare*, 315 B.R. at 334.

11 Cases. The Debtors do not believe that many of the parties would have participated in the process in the manner they have done without the expectation of the Debtors' Releases. For these reasons, the Debtors' Releases meet the standard for approval of a settlement under *Martin* and Bankruptcy Rule 9019.

36. In addition to analyzing debtor releases under the business judgment standard, some courts within the Third Circuit assess the propriety of a "debtor release" in light of five "*Zenith* factors" in the context of a chapter 11 plan:

a. Whether the non-debtor has made a substantial contribution to the debtor's reorganization;

b. Whether the release is critical to the debtor's reorganization;

c. Agreement by a substantial majority of creditors to support the release;

d. Identity of interest between the debtor and the third party; and

e. Whether a plan provides for payment of all or substantially all of the classes of claims in the class or classes affected by the release.[19]

37. No one factor is dispositive, nor is a plan proponent required to establish each factor for the release to be approved.[20]

38. Here, the Debtors submit that the Debtors' Releases are appropriate. First, each of the categories of the Released Parties has contributed significantly to the Debtors' chapter 11 efforts, including marketing and closing the Debtors' sale transactions (which are the sole source of creditor recoveries in these cases), negotiating and formulating the Plan and facilitating

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[19] *See In re Zenith Elecs. Corp*., 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.,* 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)); *Spansion, Inc.,* 426 B.R. at 143 n.47 (citing the *Zenith* factors).

[20] *See, e.g.*, *Wash. Mut.*, 442 B.R. at 346 ("These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the [c]ourt's determination of fairness."); *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that *Zenith* factors are not exclusive or conjunctive requirements).

the progress made during these Chapter 11 Cases. Such efforts include the following, among others:

Released Party	Consideration Provided
Ligand (i.e., the Prepetition Secured Party and the DIP Lender)	• Negotiating and agreeing to (a) a prepetition secured loan (the "Bridge Loan") to provide the Debtors with $3 million worth of liquidity; (b) providing a $15 million DIP Financing Facility consisting of (i) $12 million new money debtor-in-possession term loan and (ii) a conversion of the $3 million Bridge Loan obligations (as defined in the Final DIP Order) on a dollar-for-dollar basis, to fund these Chapter 11 Cases and the Ligand Sale transaction; and (c) engaging in negotiations with the Debtors and the Creditors' Committee which significantly improved the terms of the DIP Financing Facility. • Supporting a consensual liquidation of the Debtors' Estates.
The Creditors' Committee	• Expending time and effort to represent the interests of the general unsecured creditors. • Investigating potential causes of action and negotiating the retention of the Retained Causes of Action, which, if successful, will produce a greater recovery for the holders of Allowed General Unsecured Claims. • Actively supporting a consensual liquidation of the Debtors through the implementation of the Plan. • Negotiating in good faith the terms of the Liquidating Trust Agreement on behalf of the Liquidation Trust Beneficiaries.
Current and Former Directors, Officers, Agents, Members of Management and Other Employees of the Debtors	• Significant efforts on behalf of the Debtors prior to, and continuing throughout, these Chapter 11 Cases to effectuate the transactions set forth in the Plan. These efforts included, among other things, overseeing the marketing process (both prior to and during the bankruptcy proceeding) — all while working with a skeletal staff and significantly fewer resources. • Significant efforts in connection with the Sale Transactions and Plan processes to maximize value for the Debtors' Estates. In particular, the Debtors' directors, officers and employees were critical to maintaining and preserving the value of the SP206 assets and Rhofade assets—the Debtors' two assets that are providing 100% of the recovery to creditors in these cases. Such efforts included negotiating the business terms of the asset purchase

Released Party	Consideration Provided
	agreements, reviewing and responding to due diligence requests from numerous bidders, and overseeing the closings of both sales and ensuring a smooth transition process. • Ensuring the uninterrupted operation of the Debtors' business during these Chapter 11 Cases and preserving the value of the Debtors' estates in a challenging operating environment. • Assisting in substantial discovery efforts to permit the Creditors' Committee to conduct its investigation. • Attending Court hearing and numerous board meetings, including meetings on short notice, overnight and on weekends, related to these Chapter 11 Cases and sale process.
Professionals of the Debtors, Creditors' Committee, DIP Lender, and Prepetition Secured Party	• Active participation, negotiation and documentations of the transactions during the prepetition and postpetition periods.

39. The Debtors' Releases are also critical to the Plan as a whole and represent valid and appropriate settlements of claims the Debtors may have against the Released Parties. First, the Plan was reached after extensive arm's-length negotiations among the Debtors and the Creditors' Committee. The releases constitute an integral aspect of these negotiations. Third, the Debtors' Releases are limited in scope. As is customary, the releases do not extend to claims arising out of or relating to any act or omission of a Released Party that constitute willful misconduct, actual fraud or gross negligence. Additionally, the Debtors' Releases do not release direct claims held by third parties against any Released Party—such claims are preserved to the extent stakeholders object to, or opt out of, the Plan.

40. Importantly, the Creditors' Committee—the party with both an economic incentive and legal mandate to investigate potential claims—conducted an exhaustive investigation into the Debtors' affairs to determine whether there were potential claims against

Released Parties that could result in value for the Estates. The Creditors' Committee determined that the only potential claims with the potential for additional recoveries for unsecured creditors are those Retained Causes of Action that will be transferred to the Liquidating Trust on the Effective Date. As part of the investigation of the Creditors' Committee, over the course of several months, the Debtors produced extensive documentary discovery to the Creditors' Committee. In light of these facts, it is a valid exercise of the Debtors' business judgment to conclude that the pursuit of any claims which no party to date has been able to identify would be unlikely to benefit their estates and parties in interest, as the costs of pursuing and prosecuting such claims would almost certainly outweigh any potential benefit to the Debtors, their estates and parties in interest.

41. Finally, the propriety of the Debtors' Releases is also supported by the "identity of interest" that exists between the Debtors and their directors and officers arising out of certain indemnity relationships, which is another factor that courts have considered in approving debtor releases.[21] Under the Debtors' by-laws and indemnification agreements, the Debtors are generally required to indemnify their officers and directors. As a result of such indemnity obligations, the Debtors' assets could be depleted if these entities were sued and sought indemnification from the Debtors, resulting in reduced recoveries for creditors and interest holders.

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[21] *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the non[-]debtor receiving the release."); *see also In re Seaside Engineering & Surveying, Inc*., 780 F.3d 1070, 1079–80 (11th Cir. 2015) (finding identity of interest between debtor and released parties, who were debtor's key employees, where debtor would deplete its assets in defending released parties against litigation); *In re Mercedes Homes, Inc.*, 431 B.R. 869, 879–80 (Bankr. S.D. Fla. 2009) (finding identity of interest where debtors were required to indemnify released parties, the officers and directors, against claims or causes of action).

42. For the foregoing reasons, the Debtors submit that the U.S. Trustee's objection should be overruled and the Debtor releases are fair and reasonable and should be approved as a valid exercise of the Debtors' business judgment.

(ii) The Plan's Exculpation Provision Comports with Applicable Law and Should be Approved.

43. The Plan's exculpation provision is narrowly tailored and limited to parties who served in a fiduciary capacity in connection with the Debtors' Chapter 11 Cases. Specifically, "Exculpated Parties" is defined to mean, collectively, (a) D&Os, in their capacity as the directors and officers of the Debtors, who served during the Chapter 11 Cases, (b) the Creditors' Committee and its members, in their capacity as members of the Creditors' Committee, and (c) the Professionals. Additionally, the scope of the exculpation provision is limited to customary activities related to the Combined Disclosure Statement and Plan, and other acts or omissions during the administration of the Debtors' Estates or in contemplation of the Chapter 11 Cases. Moreover, the exculpation provision explicitly carves out willful misconduct, actual fraud, or gross negligence. Accordingly, the Debtors submit that the Plan's exculpation provision comports with Applicable Law and practice in this District, and should be approved.

(iii) The Plan's Injunction Provision Comports with Applicable Law and Should be Approved.

44. Article X of the Plan includes a provision enjoining parties from pursuing Claims discharged or Interests terminated under the Plan or taking any actions to interfere with the implementation or substantial Consummation of the Plan. This injunction provision is necessary to implement the Plan, and to preserve and enforce the Debtors' Releases and the exculpation provision, and is appropriately tailored to achieve these purposes. The injunction provision also

is a key component of the Plan, and is similar to those previously approved in this District. Accordingly, the Debtors submit that the Plan's injunction provision should be approved.

B. The Plan Complies with Section 1129(a)(2) of the Bankruptcy Code.

45. The Debtors satisfy section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan comply with the applicable provisions of the Bankruptcy Code. The legislative history of section 1129(a)(2) of the Bankruptcy Code indicates that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[22] As discussed above, the Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code regarding disclosure and solicitation of the Plan.

C. The Plan Has Been Proposed in Good Faith Pursuant to Section 1129(a)(3) of the Bankruptcy Code.

46. Section 1129(a)(3) of the Bankruptcy Code requires that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). In the Third Circuit, "good faith" requires that a "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 the purposes of the Bankruptcy Code.'"[23]

47. The Plan was proposed with the legitimate and honest purpose of maximizing the value of the Estates. Furthermore, the Plan is the result of good faith, arm's-length

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[22] S. Rep. No. 95-989, at 26 (1978); H.R. Rep. No. 95-595, at 407 (1977) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see In re Lapworth*, 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2).").

[23] *Zenith*, 241 B.R. at 107 (quoting *In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988)); *see also In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 347 (Bankr. D. Del. 1998) ("[C]ourts have held a plan is to be considered in good faith "if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.").

negotiations between the Debtors, the Creditors' Committee, and other parties in interest. The Plan negotiation process exhibits the Debtors' dedication to achieving the best possible result for all parties in interest, as the Debtors considered and incorporated input from various parties, and amended the Plan, to secure the optimal treatment for all parties in interest under the circumstances. That the Plan received near unanimous support from voting Classes 3 and 4 is a testament to, and evidences, the success of the negotiation process, as well as the fundamental fairness and good faith of the Plan. Finally, none of the transactions contemplated by the Plan are forbidden by law. Accordingly, the Plan has been proposed in good faith and otherwise satisfies section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Provides for Bankruptcy Court Approval of Payments for Services or Costs and Expenses Pursuant to Section 1129(a)(4) of the Bankruptcy Code.

48. Section 1129(a)(4) of the Bankruptcy Code requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). This section of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the bankruptcy court as to their reasonableness.[24] Under the Plan, all payments made or to be made by the Debtors for services or for costs or expenses in connection with these Chapter 11 Cases, including all Professional Fee Claims, have been approved by, or remain subject to approval of, the Court as reasonable, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

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[24] *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992); *In re Printing Dimensions, Inc.*, 153 B.R. 715, 719 (Bankr. D. Md. 1993).

E. The Plan Discloses Post-Effective Date Management Pursuant to Section 1129(a)(5) of the Bankruptcy Code.

49. Section 1129(a)(5) of the Bankruptcy Code requires: (i) that the proponent of a plan disclose the identity of any individual proposed to serve after confirmation as a director, officer, or voting trustee of the debtor; (ii) that the appointment of such individuals be consistent with the interests of creditors and shareholders and with public policy; and (iii) that the proponent disclose the identity of any insider that will be employed by the reorganized debtor and the nature of the compensation to be provided to such insider. 11 U.S.C. § 1129(a)(5).

50. The Debtors have satisfied the foregoing requirements. The Debtors have disclosed the identity of, and the terms of the proposed compensation to be paid to, the initial Liquidating Trustee in the Plan Supplement, and the appointment of the Liquidating Trustee will be approved in the Confirmation Order. The appointment of Alan D. Halperin to this role is consistent with the interests of the Debtors' creditors and the Holders of Interests and with public policy.

F. Section 1129(a)(6) is Not Applicable to the Plan.

51. Section 1129(a)(6) of the Bankruptcy Code is not applicable to the Plan because the Plan does not provide for rate changes subject to the jurisdiction of any governmental regulatory commission.

G. The Plan Satisfies the Best Interest of Creditors and Interest Holders Test Pursuant to Section 1129(a)(7) of the Bankruptcy Code.

52. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity security holders of the debtor. This "best interests" test, focusing on potential individual dissenting creditors, requires that each holder of a claim or equity

interest either accept the plan or receive or retain property under the plan that is not less than the amount such a holder would receive or retain in a chapter 7 liquidation.[25]

53. Under the best interest analysis, "the court must measure what is to be received by rejecting creditors . . . under the plan against what would be received by them in the event of liquidation under chapter 7."[26] Accordingly, the Court is required to "take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation."[27] In evaluating the liquidation analysis, the Court must remain cognizant of the fact that "[t]he hypothetical liquidation entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to chapter 7."[28] Under section 1129(a)(7), the liquidation analysis applies only to non-accepting holders of impaired claims or equity interests.[29]

54. The Liquidation Analysis annexed as Exhibit A to the Combined Disclosure Statement and Plan demonstrates that the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code and that under a chapter 7 liquidation Holders of Claims and Interests would not receive more than is projected under the Plan. As provided in more detail in the Liquidation Analysis, in the estimate under a chapter 7 liquidation, Holders of Allowed Claims in Class 3 are expected to receive a 0% recovery. In comparison, the Plan provides for Holders of Allowed

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25 *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) (noting that "the 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan").

26 *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007).

27 *See id.*

28 *See In re Affiliated Foods, Inc.*, 249 B.R. 770, 788 (Bankr. W.D. Mo. 2000) (internal citations omitted).

29 *See Drexel Burnham Lambert Grp.*, 138 B.R. at 761.

Claims in Class 3 to receive a small distribution. This demonstrates that Holders of Impaired Claims will not receive less under the Plan than they otherwise would in a liquidation under chapter 7. Additionally, absent the Allocation Settlement in the Chapter 11 Plan, the distribution to Class 4 would be materially impacted.

55. The uncontroverted assumptions and estimates in the Liquidation Analysis are appropriate in the context of the Chapter 11 Cases, and are based upon the knowledge and expertise of the Debtors' financial personnel who have extensive knowledge of the Debtors' business and financial affairs as well as relevant industry and financial experience. In light of the foregoing, the Plan satisfies the requirements of section 1129(a)(7).

H. Section 1129(a)(8) of the Bankruptcy Code Does Not Preclude Confirmation.

56. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either (a) has accepted the plan or (b) is not impaired by the plan. Classes 1 and 2 are not impaired under the Plan and Classes 3 and 4 have voted to accept the Plan. The remaining classes of Claims and Interests are Impaired and deemed to reject the Plan because they will not receive or retain any property on account of their Claims or Interests. However, the Plan is nonetheless confirmable because it satisfies section 1129(a)(10) and section 1129(b) of the Bankruptcy Code as discussed further below. Accordingly, section 1129(a)(8) does not preclude confirmation of the Plan.

I. The Plan Provides for Payment in Full of All Allowed Priority Claims Pursuant to Section 1129(a)(9) of the Bankruptcy Code.

57. As required by section 1129(a)(9) of the Bankruptcy Code, except to the extent that a Holder of a particular Claim has agreed to a different treatment of such Claim, Section 6.1 of the Plan provides for payment in full of the Allowed Administrative Claims and Section 6.3

of the Plan provides for payment in full of Allowed Tax Claims, or other appropriate treatment consistent with section 1129(a)(9). Therefore, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class of Claims That Is Entitled to Vote Will Have Accepted the Plan, Pursuant to Section 1129(a)(10) of the Bankruptcy Code.

58. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims under a plan, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). As noted above, Impaired Classes 3 and 4 have each voted to accept the Plan without regard to acceptance of the Plan by any insider, thereby satisfying section 1129(a)(10)'s requirement of an Impaired accepting Class.

K. The Plan Is Feasible Pursuant to Section 1129(a)(11) of the Bankruptcy Code.

59. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Finding "feasibility" of a chapter 11 plan does not require a guarantee of success by the debtor.[30] Rather, a debtor must demonstrate only a reasonable assurance of success.[31]

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[30] *See United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990); *IRS v. Kaplan (In re Kaplan)*, 104 F.3d 589, 597 (3d Cir. 1997); *see also In re U.S. Truck Co., Inc.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995) (holding that plan proponents were not required to presently guarantee the availability of refinancing necessary to make proposed balloon payment).

[31] *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988).

60. Moreover, a bankruptcy court is afforded considerable discretion in determining feasibility and will not be reversed unless it commits clear error.[32] This standard of review does not entitle an appellate court to reverse the lower court's finding simply because it would have decided the case differently.[33] Rather, great deference is owed to the trier of fact unless the reviewing court is "left with the definite and firm conviction that a mistake has been committed."[34] As such, the choice between two permissible views of the evidence cannot be set aside as clearly erroneous, even if the plan had only a marginal chance of success such that another fact finder would not have found the plan feasible.[35] In all events, "it is clear that there is a relatively low threshold of proof necessary to satisfy the feasibility requirement."[36] Thus, bankruptcy courts in this district have approved plans that were subject to uncertain and contingent future events.

61. Here, the Plan is feasible. The Plan provides for the liquidation of the Debtors and the distribution of their property in accordance with the priority scheme set forth in the Bankruptcy Code and the terms of the Plan. The ability for the Debtors to make distributions as described in the Plan does not depend on future earnings or operations—only the orderly

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32 *See*, *e.g.*, *In re W.R. Grace & Co.*, 729 F.3d 311, 349 (3d Cir. 2013); *In re Geijsel*, 480 B.R. 238, 257 (Bankr. N.D. Tex. 2012) ("[Feasibility] is a loose test; a court can weigh (or indeed ignore) various factors at its discretion.").

33 *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

34 *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

35 *In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1166 (5th Cir. 1993).

36 *Eddington Thread*, 181 B.R. at 833 (citing *Briscoe Enters.*, 994 F.2d at 1166); *see also In re Wash. Mut., Inc. (Wash. Mut. II)*, 461 B.R. 200, 252 (Bankr. D. Del. 2011), *vacated in part*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012); *Tribune I*, 464 B.R. at 185.

liquidation of the Debtors' assets. The Debtors further believe that the Effective Date is likely to occur.

62. Payment of the Debtors' assets to Holders of Claims that are Allowed as of the Effective Date in accordance with the Plan not subject to future events apart from occurrence of the Effective Date. In addition, inasmuch as the Debtors' assets have principally been liquidated and the Plan provides for the distribution of all of the Cash proceeds of the Debtors' assets to Holders of Claims that are Allowed as of the Effective Date, the Debtors have analyzed the ability of the Liquidating Trustee to meet its obligations under the Plan. Based on the Debtors' analysis, the Liquidating Trustee will have sufficient assets to accomplish its tasks under the Plan. In particular, the Plan provides for the establishment of certain reserves (the "Reserves") to set aside money and property sufficient to make required payments and distributions. The Debtors believe the Reserves are sufficient to pay and distribute the appropriate funds pursuant to the Plan and the Bankruptcy Code.

63. For the foregoing reasons, the Debtors believe that the Plan is feasible.

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

64. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the court at the hearing on confirmation of a plan, be paid or that provisions be made for their payment. 11 U.S.C. § 1129(a)(12). Section 6.1 of the Plan states that all such fees shall be paid on or before the Effective Date. Thus, the Plan satisfies the requirements of section 1129(a)(12).

M. Sections 1129(a)(13)-(16) of the Bankruptcy Code are Not Applicable to the Plan.

65. The Debtors (i) do not have any retiree benefits as that term is defined in section 1114(a) of the Bankruptcy Code; (ii) are not required to pay any domestic support obligations; (iii) are not individuals; and (iv) are not nonprofit corporations or trusts. Accordingly, sections 1129(13)-(16) are not applicable to the Plan.

N. Section 1129(b) of the Bankruptcy Code Is Satisfied.

66. Section 1129(b) of the Bankruptcy Code provides that when the requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8), a plan may be confirmed so long as the requirements set forth by section 1129(b) of the Bankruptcy Code are satisfied. See 11 U.S.C. § 1129(b). To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[37] *See* 11 U.S.C. § 1129(b)(1).

67. The Plan satisfies the requirements of section 1129(b) because the Plan does not discriminate unfairly and is fair and equitable with respect to each Class of Claims or Interests that is Impaired under, and has not accepted, the Plan. Classes 5 and 6 are the only Classes of Claims or Interests that are Impaired under and are deemed to reject the Plan. Initially, Class 5 is a class created to absorb any Claims subject to subordination under the provisions of the Bankruptcy Code. The Plan is fair and equitable with respect to Class 5 because, consistent with section 1129(b)(2)(B)(ii), no holder of any Claim or Interest that is junior to the Subordinated Claims will receive or retain under the Plan on account of such junior Claim or Interest any

[37] *Zenith*, 241 B.R. at 105.

property. Further, there is no Class of equal priority to Class 5, and therefore the Plan does not unfairly discriminate between Class 5 and any class of equal priority.

68. Section 1129(b) is similarly satisfied with respect to Class 6, which comprises Equity Interests. The Plan is fair and equitable with respect to Class 6 because, consistent with section 1129(b)(2)(C), no holder of any Interest that is junior to the Interests of such Class will receive or retain property under the Plan on account of such Interest. Further, there is no Class of equal priority to Class 6, and therefore the Plan does not unfairly discriminate between Class 6 and any class of equal priority.

O. Section 1129(c) of the Bankruptcy Code Does Not Apply.

69. Section 1129(c) of the Bankruptcy Code provides that the bankruptcy court may confirm only one plan. *See* 11 U.S.C. § 1129(c). Because the Plan is the only plan before the Court, section 1129(c) of the Bankruptcy Code does not apply.

P. The Plan Complies with Section 1129(d) of the Bankruptcy Code Because It is Not an Attempt to Avoid Tax Obligations.

70. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act of 1933. The Plan meets these requirements because, as discussed above, the Plan has been proposed in good faith and not for the avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act of 1933, nor has there been any filing by any governmental agency asserting such avoidance.

IV. THE UST OBJECTION SHOULD BE OVERRULED

71. The U.S. Trustee has two unresolved objections to the Plan. First, the U.S. Trustee objects to the language in Section 12.6 of the Plan that provides that the Liquidating Trustee "shall have sole and exclusive standing to object to Claims in order to have the Bankruptcy

Court determine the amount and treatment of any Claim." The U.S. Trustee argues that the Bankruptcy Code permits any party in interest to object to claims and that the Plan cannot rewrite the Bankruptcy Code. The U.S. Trustee's objection should be overruled because the Plan is not rewriting the Bankruptcy Code.

72. After confirmation and effectiveness of a chapter 11 plan, the claims and settlement process is governed by the terms of the confirmed plan and any ancillary documents (like a plan administrator agreement or a liquidating trust agreement). In a plan accepted by creditors and approved by a court, these documents can and do incorporate as much or as little of the Bankruptcy Code and Bankruptcy Rules as necessary because, following the Effective Date, the bankruptcy estate(s) technically cease to exist. The governing principals are those of fiduciary duties created by the law of trusts—with a bankruptcy overlay as incorporated by the confirmed plan and related documents.

73. The Debtors believe that imbuing only the Liquidating Trustee with the authority to object to and settle claims (overseen by an oversight committee made up of unsecured creditors) is the most efficient way to handle claims reconciliation—especially in cases such as these, where every penny spent administering the Liquidating Trust is one less penny available for distribution to unsecured creditors. Given the cost and time efficiencies of granting a liquidating trustee the sole authority to object to and settle claims, it is common practice in this District to include such language in a plan of liquidation.[38]

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[38] *See, e.g.*, *In re Renovate America, Inc.*, *et al.*, Case No. 20-13172 (LSS), Plan § 12.1(b) [D.I. 722] (stating that "after the Effective Date, the Liquidating Trustee or its designee, as applicable, shall have the authority to File objections to Claims or Interests, and the exclusive authority to settle, compromise, withdraw, or litigate to judgment objections on behalf of the Debtors' Estates to any and all Claims or Interests . . . .").

74. Additionally, allowing any creditor to object to claims would interfere with another common attribute of liquidating trusts—the ability of the liquidating trustee to settle claims without court approval. This power, also contained within Section 12.6 of the Plan, would be unworkable if a creditor had an independent ability to object to claims—what happens if such claim has already been settled by the Liquidating Trustee? This potential confusion is another reason that permitting the Liquidating Trustee to be sole party objecting to and settling claims under the Plan is practical and makes good sense.

75. Similarly, the Debtors believe that the U.S. Trustee's second remaining objection should also be overruled. The U.S. Trustee argues that if the Liquidating Trustee seeks to extend the Claims Objection Deadline beyond the initial 180-day deadline set by the Plan, notice of such motion must be sent to any claimant who holds a claim that may still be the subject of an as-yet filed objection. The added burden of serving such a motion on all creditors would be excessively expensive and would necessarily reduce the ultimate recoveries to Holders of Allowed Unsecured Claims. The Plan provides that parties who have requested notice in these Chapter 11 Cases will receive notice of any motion to extend the Claims Objection Deadline—and the general unsecured creditors have received notice of this fact because they have received copies of the Combined Disclosure Statement and Plan.

76. Such language is commonly included in plans of liquidation for the reasons noted above—namely, in a liquidation case, there are finite assets available for distribution to creditors and any unnecessary expense will reduce already limited creditor recoveries.[39] While the Debtors could have proposed a much longer initial deadline to object to Claims, the Debtors

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[39] *See, e.g., Renovate America*, Plan Art. I(A)(1.21) [D.I. 722] (stating that the initial 180 day Claims Objection Bar Date may be extended "upon a motion Filed by the Liquidating Trustee served only on the Bankruptcy Rule 2002 service list . . . ."

proposed a 180-day deadline in order to ensure that the Liquidating Trustee promptly begins the claims reconciliation process. Limiting the notice of any extension of such deadline to those creditors who have requested notice in the Chapter 11 Cases will ensure that the creditors who have been actively monitoring the Chapter 11 Cases can continue to do so.

V. CONCLUSION

For the reasons set forth in this Memorandum, the Debtors respectfully request that the Court enter an order, in a form substantially similar to the proposed Confirmation Order filed simultaneously herewith, confirming the Plan and overruling the objection thereto, and granting such other and further relief as it deems appropriate.

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Wilmington, Delaware

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