Docket #330 Date Filed: 3/21/2023

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

In re:	)	Chapter 11
AVAYA INC., *et al.*,[1]	)	Case No. 23-90088 (DRJ)
Debtors.	)	(Jointly Administered)

MEMORANDUM OF LAW OF AVAYA INC. AND ITS DEBTOR AFFILIATES IN SUPPORT OF AN ORDER APPROVING THE DEBTORS' DISCLOSURE STATEMENT FOR, AND CONFIRMING, THE JOINT PREPACKAGED PLAN OF REORGANIZATION OF AVAYA INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/avaya. The location of Debtor Avaya Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 350 Mount Kemble Avenue, Morristown, New Jersey 07960.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this memorandum of law (this "Memorandum") in support of final approval of the *Disclosure Statement Relating to the Joint Prepackaged Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 51] (the "Disclosure Statement") and confirmation of the *Joint Prepackaged Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 50] (as modified, amended, or supplemented from time to time, the "Plan"),[2] pursuant to sections 1125, 1126, and 1129, respectively, of title 11 of the United States Code (the "Bankruptcy Code"). In support of confirmation of the Plan and final approval of the Disclosure Statement, the Debtors respectfully state as follows:

Preliminary Statement

1. The Plan should be confirmed. The Debtors' prepackaged Plan is the culmination of months of hard-fought negotiations and reflects complete consensus across the Debtors' capital structure, while leaving all vendors, suppliers, employees, and contract counterparties Unimpaired. The Plan deleverages the Debtors' balance sheet by approximately 75 percent and provides for $810 million in exit term loan financing and access to an approximately $128 million exit ABL facility, ensuring that the Reorganized Debtors will be well-capitalized upon emergence.

2. As contemplated by that certain Restructuring Support Agreement, entered into as of February 14, 2023, by and among the Debtors and the other parties thereto, including all exhibits

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[2] A detailed description of the facts and circumstances surrounding the Debtors' Chapter 11 Cases is set forth in greater detail in the Confirmation Declarations (as defined herein). Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Confirmation Declarations or the Plan, as applicable. On February 14, 2023 (the "Petition Date"), the United States Bankruptcy Court for the Southern District of Texas (the "Court") entered the *Order (I) Directing Joint Administration of the Chapter 11 Cases and (II) Granting Related Relief* [Docket No. 15]. The Debtors are operating their businesses as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases, and no committees have been appointed or designated.

thereto (including the Restructuring Term Sheet), as may be amended, modified, or supplemented from time to time, in accordance with its terms, attached to the Disclosure Statement as Exhibit B (the "RSA"), the Debtors began soliciting votes on the prepackaged Plan prior to filing these Chapter 11 Cases. The Plan has been accepted by substantially all voting creditors, who collectively hold over 90 percent in outstanding principal amount of the First Lien Claims.[3] In addition to the four formal objections to the Plan and the *Letters and Emails to the Court from Avaya Shareholders and Interested Parties* [Docket No. 284] (collectively, the "Shareholder Letters" and such objecting parties, the "Shareholders"),[4] the Debtors received a handful of informal requests for clarifying language from the U.S. Trustee and other parties in interest. All informal comments and all formal objections have been resolved, leaving only the unsubstantiated allegations set forth in the Shareholder Letters.

3. The Shareholder Letters should be overruled and the Plan should be confirmed. As discussed in detail below, the Plan satisfies each of the Bankruptcy Code's confirmation requirements. For these and other reasons set forth more fully in this Memorandum and based on the evidence to be presented at the Combined Hearing, the Court should approve the Disclosure Statement and enter the proposed confirmation order (the "Confirmation Order").

Procedural Background and Voting Results

4. On February 14, 2023, prior to commencing these Chapter 11 Cases, as more fully described in the Scheduling Motion,[5] the Debtors caused their claims and noticing agent,

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[3] *See Declaration of James Lee Regarding the Solicitation and Tabulation of Votes on the Joint Prepackaged Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 329] (the "Voting Report").

[4] For the avoidance of doubt, the Debtors are treating the Shareholder Letters as objections to confirmation of the Plan and as valid opt-outs to the Third-Party Release.

[5] "Scheduling Motion" means the *Debtors' Emergency Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure*

Kurtzman Carson Consultants LLC (the "Claims and Noticing Agent"), to distribute via electronic mail solicitation packages (the "Solicitation Packages") containing the Disclosure Statement (including all exhibits thereto), the Plan, and the appropriate ballot[6] to certain Holders of Class 4 First Lien Claims entitled to vote on the Plan as of February 9, 2023 (the "Voting Record Date"), in accordance with sections 1125 and 1126 of the Bankruptcy Code.[7] On or before February 17, 2023, the Claims and Noticing Agent completed transmitting the Solicitation Packages to all Holders of Class 4 First Lien Claims entitled to vote on the Plan (collectively, the "Voting Parties") via ground mail service.[8]

5. Each Voting Party to whom a Solicitation Package was transmitted was directed in the Disclosure Statement and applicable ballot to follow the instructions contained in the ballot (and described in the Disclosure Statement) to complete and submit its respective ballot to cast a vote to accept or reject the Plan. Each Voting Party was informed in the Disclosure Statement and applicable ballot that such Holder needed to submit its ballot such that it was actually received by the Claims and Noticing Agent by March 17, 2023 at 4:00 p.m. (prevailing Central Time) (the "Voting Deadline"), to be counted.

Statement, (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures, (IV) Approving the Solicitation Procedures, (V) Approving the Combined Notice, (VI) Extending the Time by Which the U.S. Trustee Convenes a Meeting of Creditors and the Debtors File (A) Schedules and SOFAs and (B) Rule 2015.3 Financial Reports, and (VII) Granting Related Relief [Docket No. 52].

6 The ballots used in the Debtors' Solicitation Package are substantially in the forms attached as Exhibits 4A, 4B, and 4C to the Scheduling Order.

7 *See Certificate of Service* [Docket No. 63].

8 *See Certificate of Service* [Docket No. 235]. Further, on March 17, 2023, the Claims and Noticing Agent filed the *Supplemental Certificate of Service* of the Combined Notice [Docket No. 312] (the "Supplemental Combined Notice Certificate"). Voting Report ¶ 16. The Debtors extended the Opt-Out Deadline to April 10, 2023 (which is 28 days after March 13, 2023, the date of such supplemental service), solely for those parties set forth on Exhibit A to the Supplemental Combined Notice Certificate.

6. On the Petition Date, each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. That same day, the Debtors filed with the Court, among other papers, the Plan, the Disclosure Statement, and the Scheduling Motion, pursuant to which the Debtors sought a Combined Hearing on approval of the Disclosure Statement and Confirmation of the Plan. On February 15, 2023, the Court entered the Scheduling Order[9] that, in relevant part, (a) established March 17, 2023, at 4:00 p.m. (prevailing Central Time), as the deadline to object to the adequacy of the Disclosure Statement and confirmation of the Plan (the "Objection Deadline") and (b) approved the form and manner of the Combined Notice and the Publication Notice (each as defined below).

7. On or before February 17, 2023, the Debtors mailed, or caused to be delivered, to all parties listed on the creditor matrix, including the Debtors' equityholders, a notice (the "Combined Notice"),[10] which informed recipients of (a) the Debtors' commencement of these Chapter 11 Cases on February 14, 2023, (b) the scheduling of the hearing to consider approval of the Disclosure Statement and Confirmation of the Plan on March 22, 2023, at 10:00 a.m. (prevailing Central Time) (the "Combined Hearing"), (c) the key terms of the Plan, including classification and treatment of Claims and Interests, (d) key dates and information regarding approval of the Disclosure Statement and Confirmation of the Plan and the Objection Deadline, (e) the multiple methods by which parties may request copies of the Plan and the Disclosure Statement, and (f) the full text of the release, exculpation, and injunction provisions set forth in

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9 "Scheduling Order" means the *Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures, (IV) Approving the Solicitation Procedures, (V) Approving the Combined Notice, (VI) Extending the Time by Which the U.S. Trustee Convenes a Meeting of Creditors and the Debtors File (A) Schedules and SOFAs and (B) Rule 2015.3 Financial Reports, and (VII) Granting Related Relief* [Docket No. 79].

10 The Combined Notice is substantially in the form attached as Exhibit 1 to the Scheduling Order.

the Plan.[11] The Combined Notice also informed all parties, including Holders or potential Holders of Claims or Interests in non-voting classes, that they could opt out of, or object to, the Third-Party Release contained in the Plan. The Debtors further caused a notice of, among other things, the Combined Hearing and the Objection Deadline to be published (the "Publication Notice") in the *New York Times* on February 17, 2023.[12]

8. Holders of Claims and Interests were not provided a Solicitation Package if such Holders are either (a) Unimpaired under the Plan and therefore conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code or (b) Impaired and entitled to receive no distribution under the Plan and therefore conclusively presumed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code, each as of the Voting Record Date.

9. On March 15, 2023, the Debtors filed with the Court and served notice of the Plan Supplement [Docket No. 300], which included the following exhibits: (a) forms of the Governance Documents; (b) disclosures regarding the New Board; (c) the Schedule of Retained Causes of Action; (d) forms of the Exit Facilities Documents; (e) the Description of Transaction Steps; and (f) the Rejected Executory Contract and Unexpired Lease List.

10. The Debtors completed solicitation of votes on the Plan on March 17, 2023. The Debtors completed their final tabulation of the ballots on March 18, 2023, following a complete review and audit of all ballots received.[13] Holders of over 90 percent of the outstanding principal amount of the First Lien Claims (the only Claims entitled to vote on the Plan) voted to accept the

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11 *See Certificate of Service* [Docket No. 235].

12 *See Proof of Publication* [Docket No. 145].

13 For additional discussion about, and certification of, the solicitation and vote tabulation processes, see the Voting Report.

Plan, exceeding what is required to constitute an accepting class for purposes of plan approval under the Bankruptcy Code.[14]

IMPAIRED CLASS AND DESCRIPTION	ACCEPT		REJECT	
	VOTES COUNTED	AMOUNT	VOTES COUNTED	AMOUNT
Class 4 First Lien Claims	99.81%	99.82%	0.19%	0.02%

11. The Debtors will file the proposed Confirmation Order in advance of the Combined Hearing.

Argument

12. This Memorandum is divided into four parts. ***First***, the Debtors request final approval of the Disclosure Statement and a finding that the Debtors complied with the Scheduling Order. ***Second***, the Debtors present how the Plan appropriately incorporates settlements of Claims and Causes of Action. ***Third***, the Debtors present their "case in chief" that the Plan satisfies section 1129 of the Bankruptcy Code and, accordingly, request that the Court confirm the Plan.[15] ***Fourth***, the Debtors present why the sole remaining objections—those contained in the Shareholder Letters—should be overruled. In support of the Plan, the Debtors have filed contemporaneously herewith: (a) the *Declaration of Eric Koza in Support of Confirmation of the Joint Prepackaged Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Koza Declaration"); (b) the *Declaration of David M. Barse in Support of Confirmation of the Joint Prepackaged Plan of Reorganization of Avaya Inc.*

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14 *See* Voting Report ¶¶ 18–19; 11 U.S.C. § 1126(c).

15 *See In re Star Ambulance Serv., LLC*, 540 B.R. 251, 259 (Bankr. S.D. Tex. 2015) ("As the proponent of the Plan, the Debtor must establish by a preponderance of the evidence that each of the confirmation requirements set forth in Bankruptcy Code [section] 1129 has been met.") (citing *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters.* (*In re Briscoe Enters.*), 994 F.2d 1160, 1165 (5th Cir. 1993)); *In re Lively*, 466 B.R. 897, 899 (Bankr. S.D. Tex. 2011), aff'd, 717 F.3d 406 (5th Cir. 2013) ("[T]he Court has a 'mandatory independent duty' to determine whether the standards set forth in [section]1129 of the Bankruptcy Code have been satisfied.") (citations omitted).

and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (the "Barse Declaration"); (c) the *Declaration of Roopesh Shah in Support of Confirmation of the Joint Prepackaged Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Shah Declaration"); and (d) the Voting Report (together with the Koza Declaration, the Barse Declaration, and the Shah Declaration, the "Confirmation Declarations").

I. Approval of the Disclosure Statement Is Warranted.

A. Impaired Creditors Received Sufficient Notice of the Combined Hearing and the Objection Deadline.

13. Under Bankruptcy Rule 3017(a), a hearing on the adequacy of the disclosure statement generally requires twenty-eight days' notice.[16] Similarly, Bankruptcy Rule 2002(b) provides that parties in interest should receive twenty-eight days' notice of the objection deadline and the hearing to consider approval of the disclosure statement.

14. ***First***, as described above, the Debtors commenced solicitation on February 14, 2023, in accordance with sections 1125(g) and 1126(b) of the Bankruptcy Code—thirty-six days prior to the date of the Combined Hearing. The Debtors completed hard-copy mailings of all Solicitation Packages to the remaining Holders of Claims entitled to vote on the Plan on or before February 17, 2023—thirty-three days prior to the requested date for the Combined Hearing and twenty-eight days prior to the Objection Deadline.

15. ***Second***, the Debtors caused the Claims and Noticing Agent to serve the Combined Notice to all parties on the Debtors' creditor matrix on or before February 17, 2023—

[16] Fed. R. Bankr. P. 3017(a) ("the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest . . . to consider the disclosure statement and any objections or modifications thereto.").

twenty-eight days prior to the Objection Deadline and thirty-three days prior to the date of the Combined Hearing.[17] On February 17, 2023, the Debtors published the Publication Notice in the *New York Times*.[18] Both the Combined Notice and the Publication Notice included the date of the Combined Hearing and the Objection Deadline, as well as instructions regarding how to obtain copies of the Plan and the Disclosure Statement through the Debtors' restructuring website, http://www.kccllc.net/avaya, or the Court's PACER website, https://pacer.gov.

16. Courts in the Fifth Circuit and elsewhere have adopted the general rule that due process requires notice to be "reasonably calculated, under all the circumstances, to inform interested parties of the pendency of a proceeding."[19] When evaluating the notice and the sufficiency thereof, courts will consider "[first, whether] the notice apprised the claimant of the pendency of an action affecting his rights, and [second, whether] the notice allowed sufficient time to permit the claimant to present his objections."[20] Whether a particular method of notice is reasonably calculated to inform interested parties is determined on a case-by-case basis.[21]

17. For the reasons set forth above, the Debtors have satisfied Bankruptcy Rules 2002(b) and 3017(a).

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17 *See Certificate of Service* [Docket No. 211].

18 *Proof of Publication* [Docket No. 145].

19 *In re Placid Oil Co.*, 753 F.3d 151, 154 (5th Cir. 2014) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

20 *See, e.g.*, *Kendavis Industries Int'l, Inc. v. Kendavis Holding Co. (In re Kendavis Holding Co.)*, 249 F.3d 383, 387 (5th Cir. 2001) (applying the two-part test); *In re Texas Tamale Co., Inc.*, 219 B.R. 732, 739–40 (Bankr. S.D. Tex. 1998) (same).

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

B. The Disclosure Statement Satisfies the Requirements of the Bankruptcy Code.

18. To determine whether a prepetition solicitation of votes to accept or reject a plan should be approved, the Court must determine whether the solicitation complied with sections 1125 and 1126(b) of the Bankruptcy Code, and Bankruptcy Rules 3017(d), 3017(e), 3018(b), and 3018(c).

19. Section 1125(g) of the Bankruptcy Code provides that:

> [A]n acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable non-bankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable non-bankruptcy law.

20. Section 1126(b) of the Bankruptcy Code provides that:

> [A] holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—(1) the solicitation of such acceptance or rejection was in compliance with any applicable non-bankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or (2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

21. Prepetition solicitations must therefore either comply with applicable federal or state securities laws and regulations (including the registration and disclosure requirements thereof) or, if such laws and regulations do not apply, the solicited holders must receive "adequate information" as defined in section 1125(a) of the Bankruptcy Code. As discussed below, the Debtors satisfied sections 1125(g) and 1126(b), as applicable, of the Bankruptcy Code.

1. The Disclosure Statement Demonstrates that the Debtors Complied with Applicable Non-Bankruptcy Law.

22. The Debtors' solicitation of Holders of Claims receiving Securities under the Plan prior to the Petition Date was subject to the United States Securities Act of 1933 (as amended,

the "Securities Act") and the regulatory authority of various states under state securities laws ("Blue Sky Laws"). The offering of New Equity Interests (including the RO Common Shares, the Backstop Shares, the RO Premium Shares, and the DIP Commitment Shares) before the Petition Date to Holders of First Lien Claims was exempt from the registration requirements of the Securities Act in reliance upon Section 4(a)(2) of the Securities Act, Regulation D promulgated thereunder, and/or in reliance on Regulation S under the Securities Act.

23. The Debtors believe that the New Equity Interests will be "securities," as defined in section 2(a)(1) of the Securities Act, section 101 of the Bankruptcy Code, and any applicable Blue Sky Law.

24. The Debtors further believe that the issuance of the New Equity Interests (other than the RO Backstop Shares, the RO Premium Shares, and the DIP Commitment Shares) pursuant to the Plan is and will be exempt from, among other things, the registration requirements of Section 5 of the Securities Act and any other applicable U.S., state, or local law requiring registration prior to the offering, issuance, distribution, or sale of securities in accordance with, and pursuant to, section 1145 of the Bankruptcy Code, as described further below.

25. The offering, issuance, and distribution of the New Equity Interests (other than the RO Backstop Shares, the RO Premium Shares, and the DIP Commitment Shares) after the Petition Date, as contemplated by the Plan, shall be exempt from, among other things, the registration requirements of section 5 of the Securities Act and any other applicable United States, state, or local law requiring registration prior to the offering, issuance, distribution, or sale of Securities in accordance with, and pursuant to, section 1145 of the Bankruptcy Code. Such New Equity Interests (a) will not be "restricted securities" as defined in Rule 144(a)(3) under the Securities Act, and (b) will be freely tradable and transferable in the United States by the recipients thereof

that are not, and have not been within ninety days of such transfer, an "affiliate" of the Debtors as defined in Rule 144(a)(1) under the Securities Act, subject to the provisions of section 1145(b)(1) of the Bankruptcy Code relating to the definition of an underwriter in section 1145(b) of the Bankruptcy Code, and compliance with applicable securities laws and any rules and regulations of the United States Securities and Exchange Commission, or state or local securities laws, if any, applicable at the time of any future transfer of such Securities or instruments.

26. The RO Backstop Shares, RO Premium Shares, and DIP Commitment Shares will be offered, issued, and distributed without registration under the Securities Act in reliance upon Section 4(a)(2) of the Securities Act, Regulation D promulgated thereunder, and/or Regulation S under the Securities Act, will be considered "restricted securities" as defined in Rule 144(a)(3) under the Securities Act, and may not be transferred except pursuant to an effective registration statement under the Securities Act or an available exemption therefrom.

27. The Debtors have advised Recipients of the New Equity Interests to consult with their own legal advisors as to the availability of any exemption from registration under the Securities Act and any applicable Blue Sky Laws for resales of New Equity Interests.

28. The New Equity Interests will be subject to any restrictions in the Governance Documents to the extent applicable.

29. No party in interest has objected to the Disclosure Statement on account of noncompliance with applicable nonbankruptcy law.

30. DTC shall be required to accept and conclusively rely upon the Plan and the Confirmation Order in lieu of a legal opinion regarding the exemption(s) from registration under the Securities Act pursuant to which the New Equity Interests will be issued under the Plan and/or eligible for DTC book-entry delivery, settlement, and depository services.

2. The Disclosure Statement Contains Adequate Information.

31. The primary purpose of a disclosure statement is to provide material information, or "adequate information," that allows parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[22] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[23] Courts within the Fifth Circuit and elsewhere acknowledge that determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code resides within the broad discretion of the court.[24]

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[22] *See, e.g.*, *In re J.D. Mfg., Inc.*, No. 07-36751 2008 WL 4533690, at *2 (Bankr. S.D. Tex. Oct. 2, 2008) ("Adequacy of information is a determination that is relative both to the entity (*e.g.*[,] assets/business being reorganized or liquidated) and to the sophistication of the creditors to whom the disclosure statement is addressed."); *In re U.S. Brass Corp.*, 194 B.R. 420, 423 (Bankr. E.D. Tex. 1996) ("The purpose of the disclosure statement is . . . to provide enough information to interested persons so they may make an informed choice[.]"); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991) ("A court's legitimate concern under Section 1125 is assuring that hypothetical reasonable investors receive such information as will enable them to evaluate for *themselves* what impact the information might have on their claims and on the outcome of the case[.]") (emphasis in original); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321–22 (3d Cir. 2003) ("Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing adequate information to enable a creditor to make an informed judgment about the Plan.") (internal quotations omitted); *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote.").

[23] 11 U.S.C. § 1125(a)(1) ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records."); *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 518 (5th Cir. 1998) ("The legislative history of [section]1125 indicates that, in determining what constitutes adequate information with respect to a particular disclosure statement, both the kind and form of information are left essentially to the judicial discretion of the court and that the information required will necessarily be governed by the circumstances of the case.") (internal citations omitted); *Floyd v. Hefner*, No. H-03-5693, 2006 WL 2844245, at *30 (S.D. Tex. Sept. 29, 2006), *on reconsideration in part*, 556 F. 2d 617 (S.D. Tex. 2008) (noting that what constitutes "adequate information" is a flexible standard); *In re Applegate Prop., Ltd.*, 133 B.R. at 829 ("The issue of adequate information is usually decided on a case by case basis and is left largely to the discretion of the bankruptcy court.").

[24] *See, e.g.*, *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The 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.").

32. Courts look for certain information when evaluating the adequacy of the disclosures in a proposed disclosure statement, including:

i. the events which led to the filing of a bankruptcy petition;

ii. the relationship of a debtor with the affiliates;

iii. a description of the available assets and their value;

iv. the anticipated future of the company;

v. the source of information stated in the disclosure statement;

vi. the present condition of a debtor while in chapter 11;

vii. the claims asserted against a debtor;

viii. the estimated return to creditors under a chapter 7 liquidation;

ix. the future management of a debtor;

x. the chapter 11 plan or a summary thereof;

xi. the financial information, valuations, and projections relevant to the claimants' decision to accept or reject the chapter 11 claim;

xii. the information relevant to the risks posed to claimants under the plan;

xiii. the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;

xiv. the litigation likely to arise in a non-bankruptcy context; and

xv. the tax attributes of a debtor.[25]

[25] *In re U.S. Brass Corp.*, 194 B.R. at 424–25; *Westland Oil Dev. Corp. v. MCorp Mgmt. Sols., Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993) (listing factors courts have considered in determining the adequacy of information provided in a disclosure statement); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (same); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same). Disclosure regarding all topics is not necessary in every case. *In re U.S. Brass Corp.*, 194 B.R. at 425; *In re Phx. Petroleum*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001).

33. The Disclosure Statement contains adequate information. For instance, the Disclosure Statement contains descriptions and summaries of, among other things: (a) the Debtors' prepetition reorganization efforts; (b) certain events and relevant negotiations preceding the commencement of these Chapter 11 Cases; (c) the key terms of the RSA and the Plan; (d) risk factors associated with the Plan and the consummation thereof; (e) a liquidation analysis setting forth the estimated stakeholder recoveries in a hypothetical chapter 7 case; (f) financial information that is relevant in determining whether to accept or reject the Plan; (g) a valuation analysis setting forth the Debtors' estimated implied going-concern equity value upon emergence from chapter 11; and (h) federal tax law consequences of the Plan. In addition, the Disclosure Statement and the Plan were subject to extensive review and comment by the Consenting Stakeholders, including a super majority of Holders of First Lien Claims.

34. Accordingly, the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code in satisfaction of section 1126(b)(2) of the Bankruptcy Code, and the Disclosure Statement should be approved on a final basis.

C. The Solicitation Procedures Complied with the Bankruptcy Code, the Bankruptcy Rules, and the Scheduling Order.

35. On February 15, 2023, the Court granted the relief requested in the Scheduling Motion, including approving the form and manner of the Combined Notice and Publication Notice, the Voting Record Date, the Voting Deadline, the Opt-Out Deadline, the Objection Deadline, the Solicitation Procedures, the forms of Ballots, and the RO Procedures. Prior to the Petition Date, the Debtors commenced distribution of the Solicitation Package to Holders of Claims entitled to vote on the Plan and solicited votes to accept or reject the Plan, in accordance with sections 1125

and 1126 of the Bankruptcy Code.[26] Bankruptcy Rule 3017(d) sets forth the materials that must be provided to Holders of Claims for the purpose of soliciting their votes to accept or reject a plan of reorganization. As set forth in more detail below, the Solicitation Procedures complied with the Bankruptcy Code, the Bankruptcy Rules, and the Scheduling Order.

1. The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Bankruptcy Rules and the Scheduling Order.

36. Bankruptcy Rule 3017(d) requires the Debtors to transmit a form of ballot, which substantially conforms to Official Form No. 314, only to "creditors and equity security holders entitled to vote on the plan." Bankruptcy Rule 3018(c) provides that "[a]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity holder or an authorized agent, and conform to the appropriate Official Form." As set forth in the Voting Report, only the Voting Parties entitled to vote on the Plan were transmitted ballots.[27] The form of ballots used for solicitation complied with the Bankruptcy Rules and are consistent with Official Form No. 314. Further, the form of ballots used were approved by the Court pursuant to the Scheduling Order[28] and no party has objected to the sufficiency of the ballots. Based on the foregoing, the Debtors have satisfied the requirements of Bankruptcy Rules 3017(d) and 3018(c).

2. The Voting Record Date Complied with the Bankruptcy Rules and the Scheduling Order.

37. In a prepetition solicitation, the holders of record of the applicable claims against and interests in a debtor entitled to receive ballots and related solicitation materials are to be

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26 *See* 11 U.S.C. § 1125(g) (debtors may commence solicitation prior to filing chapter 11 petitions); 11 U.S.C. § 1126(b)(2) (holders of claims or interests that accepted or rejected a plan before the commencement of a chapter 11 case are deemed to accept or reject the plan so long as the solicitation provided adequate information).

27 *See* Voting Report ¶ 9.

28 *See* Scheduling Order ¶ 12.

determined "on the date specified in the solicitation." Fed. R. Bankr. 3018(b). The Disclosure Statement and ballots clearly identified February 9, 2023, as the date for determining which Holders of Claims were entitled to vote to accept or reject the Plan. Further, the Court approved the Voting Record Date in the Scheduling Motion,[29] and no party in interest has objected to the Voting Record Date. Accordingly, the Debtors complied with the Scheduling Order and satisfied the applicable requirements of the Bankruptcy Code.

3. The Debtors' Solicitation Period Complied with Bankruptcy Rule 3018(b) and the Scheduling Order.

38. The Debtors' solicitation period complied with Bankruptcy Rule 3018(b). ***First***, as set forth above and in the Scheduling Motion, the Plan and the Disclosure Statement were transmitted to all Voting Parties on or before February 17, 2023, which was thirty-three days prior to the requested date of the Combined Hearing and with twenty-eight days' notice of the Objection Deadline.[30] Second, the solicitation period, which lasted from February 14, 2023, through March 17, 2023, complied with the statutory notice period and, therefore, was not "unreasonably short." Further, no party has objected to the length of the solicitation period. Accordingly, the Debtors complied with the Scheduling Order and satisfied the requirements of Bankruptcy Rule 3018(b).

4. The Debtors' Vote Tabulation Was Appropriate and Complied with the Scheduling Order.

39. As described in the Scheduling Motion, the Debtors used standard tabulation procedures in tabulating claim votes. Specifically, the Claims and Noticing Agent reviewed all ballots received through March 17, 2023 at 4:00 p.m. (prevailing Central Time), in accordance

[29] *See* Scheduling Order ¶¶ 9–12.

[30] *See* Voting Report ¶¶ 9–12.

with the procedures described in the Scheduling Motion and the Disclosure Statement.[31] The Debtors' tabulation of votes, set forth in the Voting Report, confirms that over 99 percent of voting Holders of Claims in Class 4 voted such Claims to accept the Plan, with the result that Class 4 voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code. The Debtors request that the Court approve the Debtors' tabulation of votes.

5. Waiver of Certain Solicitation Package Mailings Was Reasonable and Appropriate and Complied with the Scheduling Order.

40. Certain Holders of Claims and Interests were not provided a Solicitation Package because such Holders are: (a) Unimpaired under the Plan and therefore conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code or (b) Impaired and entitled to receive no distribution under the Plan and therefore conclusively presumed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code, each as of the Voting Record Date. Bankruptcy Rule 3017(d) requires transmission of a court-approved disclosure statement to, among other parties, classes of unimpaired creditors and equity security holders unless the court orders otherwise. Because Bankruptcy Rule 3017(d) depends, in relevant part, "[u]pon approval of a disclosure statement," such provision may not apply here given the facts and circumstances of the prepetition solicitation process employed. Distributing the Solicitation Package to stakeholders not entitled to vote on the Plan is an unnecessary imposition and expense that would only thwart these Chapter 11 Cases from proceeding as expeditiously as possible. Moreover, the Court approved the Notice of Non-Voting Status and Opt-Out Forms sent to stakeholders not

[31] *See* Voting Report ¶ 17.

entitled to vote on the Plan in the Scheduling Order.[32] Accordingly, the waiver of such mailing was reasonable and appropriate and complied with the Scheduling Order.

6. Solicitation of the Plan Complied with the Bankruptcy Code and Was in Good Faith.

41. Section 1125(e) of the Bankruptcy Code provides that "a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan.

42. The Plan was solicited in good faith and, as set forth in the Scheduling Order, the Solicitation Procedures utilized by the Debtors for distribution of the Solicitation Packages satisfy the applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, the Bankruptcy Local Rules, and any other applicable rules, laws, and regulations, including any applicable registration requirements under the Securities Act, and any exemptions from registration under Blue Sky requirements.[33] Therefore, as discussed in greater detail below, the Debtors request that the Court grant the parties the protections provided under section 1125(e) of the Bankruptcy Code.

II. The Plan Appropriately Incorporates Settlements of Claims and Causes of Actions

43. The Bankruptcy Code states that a plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[34] The court may approve a settlement under a plan only when it is "fair and equitable."[35] In particular, the Fifth

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32 *See* Scheduling Order ¶ 8.

33 Scheduling Order ¶ 7.

34 11 U.S.C. § 1123(b)(3)(A).

35 *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F. 3d 746, 754 n. 22 (5th Cir. 1995) (citing *In re AWECO, Inc.*, 725 F.2d 293, 297 (5th Cir. 1984)).

Circuit applies a five-factor test for considering motions to approve settlements under Bankruptcy Rule 9019, weighing: "(1) the probability of success in litigation with due consideration for uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any, to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the settlement is truly the product of arm's-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise."[36]

44. Although the debtor bears the burden of establishing that a settlement is fair and equitable based on the balance of the above factors, "the [debtor's] burden is not high."[37] Indeed, the court need only determine that the settlement does not "fall beneath the lowest point in the range of reasonableness."[38]

45. Here, among other settlements, including the settlements between the Debtors and the Consenting Stakeholders, the Plan, and Confirmation Order embody a general settlement of claims between the Debtors and the Settlement Group Releasing Parties. Pursuant to Article IV.B of the Plan, each Settlement Group Releasing Party, in consideration for granting the voluntary releases set forth in Article VIII.E of the Plan, as discussed further herein, will receive its pro rata share of the HoldCo Convertible Notes Settlement Consideration, subject to and in accordance with Article IV.B of the Plan.

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36 *See* Fed. R. Bankr. P. 9019; *In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010).

37 *See In re Roqumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008).

38 *See In re IDEARC Inc.*, 423 B.R. 138, 182 (Bankr. N.D. Tex. 2009); *In re Roqumore*, 393 B.R. at 480 ("The Trustee need only show that his decision falls within the 'range of reasonable litigation alternatives.'" (citations omitted)).

46. The HoldCo Convertible Notes Settlement Consideration consists of $24 million of total consideration, comprising (a) an aggregate of $10.4 million of Cash, plus (b) an aggregate of $10 million of Exit Term Loans; plus (c) the payment of certain reasonable and documented professional fees and expenses. [39] The HoldCo Convertible Notes Settlement is the result of good-faith, arm's-length negotiations, allows each Holder of a HoldCo Convertible Notes Claim to make an individual, informed, and economic decision between retaining certain, potential litigation claims on the one hand and receiving its pro rata share of the HoldCo Convertible Notes Settlement Consideration, on the other hand, and allows the Debtors to obtain the fresh start they need by minimizing the potential for distracting post-emergence litigation or other disputes, and is in the best interests of the Debtors' Estates and other parties in interest.

47. The settlements embodied in the Plan and Confirmation Order, including the HoldCo Convertible Notes Settlement, are fair and equitable and consistent with the Bankruptcy Rule 9019 factors as applied in this jurisdiction. The Plan and Confirmation Order resolve a host of alleged Claims and Causes of Action, which were thoroughly analyzed by the Debtors, the Consenting Stakeholders, and each of their advisors, all of which could have potentially caused extensive delay, cost, and uncertainty in these Chapter 11 Cases and otherwise, while adversely affecting the Debtors' businesses and operations. As reflected by the overwhelming support of creditors for the Plan (including the fact that no Holder of a HoldCo Convertible Notes Claim opted out of the HoldCo Convertible Notes Settlement),[40] the settlements embodied therein, which

[39] The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the foregoing summary and the operative Plan provisions, the Plan shall control.

[40] *See* Voting Report ¶ 20.

were the result of arm's-length negotiations, are in the best interests of creditors and all parties in interest.

III. The Plan Satisfies the Requirements of Section 1129 of the Bankruptcy Code.

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

48. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision also encompasses 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.[41] As explained below, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as other applicable provisions.

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

49. The classification requirement of section 1122(a) of the Bankruptcy Code provides, in pertinent part, as follows:

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

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41 *See* S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977); *In re S & W Enter.*, 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 most directly aimed at were [s]ections 1122 and 1123."); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008) (noting that the legislative history of section 1129(a)(1) confirms that a plan must comply with sections 1122 and 1123).

50. For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class.[42] Instead, claims or interests placed in a particular class need only be substantially similar to each other.[43] Courts in this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[44]

51. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Claims or Interests in each Class differ from the Claims or Interests in each other Class based on their legal or factual nature or other relevant criteria.[45] Specifically, the Plan provides for the separate classification of Claims and Interests into the following classes:

a. Class 1: Other Secured Claims;

b. Class 2: Other Priority Claims;

c. Class 3: Prepetition ABL Claims;

d. Class 4: First Lien Claims;

e. Class 5: B-3 Escrow Claims;

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42 *See, e.g.*, *Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (Bankr. D. Del. 2006).

43 *In re Vitro Asset Corp.*, No. 11-32600-HDH, 2013 WL 6044453, at * 5 (Bankr. N.D. Tex. Nov. 14, 2013) ("[A] plan may provide for multiple classes of claims or interests so long as each claim or interest within a class is substantially similar to other claims or interests in that class").

44 Courts have identified grounds justifying separate classification, including: (a) where members of a class possess different legal rights, and (b) where there are good business reasons for separate classification. *See In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1167 (5th Cir. 1993) (recognizing that "there may be good business reasons to support separate classification"); *In re Pisces Energy, LLC*, No. 09-36591-H5-11, 2009 WL 7227880, at *8 (Bankr. S.D. Tex. Dec. 21, 2009) ("[A] plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code provided there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar."); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan.").

45 Plan, Art. III.

f. Class 6: Non-HoldCo General Unsecured Claims;

g. Class 7: HoldCo Convertible Notes Claims;

h. Class 8: HoldCo General Unsecured Claims;

i. Class 9: Intercompany Interests;

j. Class 10: Section 510 Claims;

k. Class 11: Intercompany Interests; and

l. Class 12: Existing Avaya Interests.

52. Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of particular Claims or Interests into the Classes, and no unfair discrimination exists between or among Holders of Claims and Interests. In particular, Claims on account of the Debtors' prepetition secured credit facilities are separately classified from other Classes, including Non-HoldCo General Unsecured Claims, HoldCo Convertible Notes Claims, and HoldCo General Unsecured Claims, because the Debtors' obligations with respect to the former are secured by liens on substantially all assets of the applicable obligors. HoldCo General Unsecured Claims and HoldCo Convertible Notes Claims are structurally subordinated to Non-Holdco General Unsecured Claims and are therefore separately classified from non-HoldCo General Unsecured Claims.

53. In addition, Claims (rights to payment) are classified separately from Interests (representing ownership in the business). Accordingly, the Plan satisfies section 1122(a) of the Bankruptcy Code.

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

54. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. The Plan satisfies each of these requirements.

a. Designation of Classes of Claims and Equity Interests (§ 1123(a)(1)).

55. For the reasons set forth above, Article III of the Plan properly designates Classes of Claims and Interests and thus satisfies the requirement of section 1122 of the Bankruptcy Code. The Plan meets this requirement by classifying Claims and Interests such that each Class consists of substantially similar Claims or Interests, and no party has asserted otherwise.

b. Specification of Unimpaired Classes (§ 1123(a)(2)).

56. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan." The Plan meets this requirement by identifying each Unimpaired Class in Article III of the Plan, and no party has asserted otherwise.

c. Treatment of Impaired Classes (§ 1123(a)(3)).

57. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan meets this requirement by setting forth the treatment of each Impaired Class in Article III of the Plan, and no party has asserted otherwise.

d. Equal Treatment Within Classes (§ 1123(a)(4)).

58. 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." The Plan meets this requirement because the Allowed Claims or Interests in each Class will receive the same treatment as the other Allowed Claims or Interests within such Class, or the Holder of such Claim or Interest has agreed to a less favorable treatment thereof, and no party has asserted otherwise.

e. Means for Implementation (§ 1123(a)(5)).

59. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. The Plan satisfies this requirement because Article IV of the Plan, as well as other Plan provisions, provide the means by which the Plan will be implemented. Among other things, Article IV of the Plan:

a. constitutes a good faith compromise and settlement of all Claims and Interests and controversies resolved pursuant to the Plan;

b. authorizes the Debtors or Reorganized Debtors to take all actions necessary or appropriate to effectuate the Plan;

c. authorizes the Reorganized Debtors to adopt their Governance Documents;

d. authorizes the Reorganized Debtors to enter into the Exit Facilities;

e. authorizes the Debtors to distribute the Rights to the RO Eligible Offerees on behalf of the Reorganized Debtors and to issue the RO Common Shares, RO Backstop Shares, and RO Premium Shares;

f. authorizes Reorganized Avaya to issue the New Equity Interests;

g. preserves the Debtors' corporate existence following the Effective Date (except as otherwise provided in the Plan);

h. provides for the vesting of Estate assets in the Reorganized Debtors;

i. provides for the cancellation of existing securities and agreements (except as otherwise provided in the Plan);

j. authorizes and approves all corporate actions contemplated under the Plan;

k. provides for the appointment of the members of the New Board;

l. authorizes the Reorganized Debtors to issue and execute certain contracts and other agreements;

m. provides for the exemption of certain securities law matters;

n. provides for the exemption of section 1146(a) transfers; and

o. provides for the preservation and vesting of Claims and Causes of Action not released pursuant to the Plan in the Reorganized Debtors.

60. The precise terms governing the execution of many of these transactions are set forth in greater detail in the applicable definitive documents or forms of agreements included in the Plan Supplement. Accordingly, the Plan satisfies section 1123(a)(5), and no party has asserted otherwise.

f. Issuance of Non-Voting Securities (§ 1123(a)(6)).

61. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. To that end, Article IV.J of the Plan provides that the Reorganized Debtors' Governance Documents shall contain a provision prohibiting the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code. Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code, and no party has asserted otherwise.

g. Disclosure of New Directors and Officers (§ 1123(a)(7)).

62. Section 1123(a)(7) of the Bankruptcy Code requires that plan 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." Article IV.K of the Plan outlines the manner of selecting the members of the New Board, which accords with applicable state law, the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. In accordance with Article IV.K of the Plan and section 1129(a)(5) of the Bankruptcy Code, to the extent known, the Debtors will disclose in the

Plan Supplement the members of the New Board.[46] Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code, and no party has asserted otherwise.

3. The Plan Complies with the Discretionary Provisions of Section 1123(b) of the Bankruptcy Code.

63. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases; (c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[47]

64. The Plan is consistent with section 1123(b) of the Bankruptcy Code. Specifically, under Article III of the Plan, Classes 1, 2, 3, 5, and 6 are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of the Holders of Claims within such Classes.[48] On the other hand, Classes 4, 7, 8, 10, and 12 are Impaired because the Plan modifies the rights of the Holders of Claims and Interests within such Classes as contemplated in

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46 *See In re Am. Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) ("The debtor's inability to specifically identify future board members does not mean that the debtor has fallen short of the requirement imposed in subsection (a)(5)(A)r(i), because the debtor *at this point* has no particular individuals whom it proposes should serve, after confirmation, as a director, officer, or voting trustee, other than those whom it has already identified on the record . . . If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i)."); *see also In re Charter Commc'ns*, 419 B.R. 221, 260 n.30 (Bankr. D. Del. 2011) ("Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at [confirmation] the identities of the identities of the *known* directors.") (emphasis in original).

47 11 U.S.C. § 1123(b)(1)–(3), (6).

48 Plan, Art. III.

section 1123(b)(1) of the Bankruptcy Code.[49] Classes 9 and 11 may be Impaired or Unimpaired under the Plan at the option of the Debtors. In addition, and in accordance with section 1123(b)(2) of the Bankruptcy Code, Article V of the Plan provides for the assumption of all Executory Contracts and Unexpired Leases under section 365 of the Bankruptcy Code, unless such Executory Contract or Unexpired Lease: (a) was assumed or rejected previously by the Debtors; (b) previously expired or terminated pursuant to its own terms; (c) is the subject of a motion to reject Filed on or before the Effective Date; or (d) is identified on the Rejected Executory Contract and Unexpired Lease List. Finally, for the reasons set forth below, the Plan's release, exculpation, and injunction provisions are consistent with section 1123(b) of the Bankruptcy Code. No party has asserted that the Plan does not comply with section 1123(b).

4. The Plan Complies with Section 1123(d) of the Bankruptcy Code.

65. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and non-bankruptcy law."

66. The Plan complies with section 1123(d) of the Bankruptcy Code. The Plan provides for the satisfaction of cure costs under each Executory Contract and Unexpired Lease to be assumed under the Plan, if any, on the Effective Date, or as soon as reasonably practicable thereafter, subject to the limitations described in Article V of the Plan.[50] No party has asserted that the Plan does not comply with section 1123(d).

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[49] *Id.*

[50] Plan, Arts. V.A and V.D.

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

67. The Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any other appropriate provision not inconsistent with the applicable provisions of this title."[51] Among other discretionary provisions, the Plan includes certain Debtor and third-party releases, an exculpation provision, and an injunction provision. These provisions comply with the Bankruptcy Code and prevailing Fifth Circuit law because, among other things, they are the product of extensive good-faith, arm's-length negotiations, were necessary to generate consensus with certain of the Debtors' stakeholders to enter into the RSA, and are overwhelmingly supported by the Debtors' key stakeholders.

68. As set forth more fully below, the releases, exculpations, and injunction provisions are reasonable under the circumstances, appropriate, and in the best interest of the Debtors, their Estates, and all of the Debtors' stakeholder and should be approved.

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

69. Article VIII.C of the Plan includes releases of Estate claims and Causes of Action by the Debtors (the "Debtor Release"). The Debtor Release releases, among others, each Consenting Stakeholder, each Settlement Group Releasing Party, RingCentral, each Agent/Trustee, each DIP Commitment Party and each DIP Lender, each RO Backstop Party, and each Related Party or Debtor Related Party, as applicable, of the foregoing, except for acts or omissions that are found to have been the product of actual fraud, willful misconduct, or gross

[51] 11 U.S.C. §§ 1123(b)(1)-(6).

negligence.[52] Further, as set forth in the Plan, any Entity that opts out of the releases or that objects to the releases contained in Article VIII.D of the Plan (that is not resolved before Confirmation) shall not be a Released Party.[53] As discussed below, the Released Parties made significant concessions and contributions to the Chapter 11 Cases in exchange for the Debtor Release and are an integral component of the Debtors' "fresh start" upon emergence.

70. The Bankruptcy Code supports the inclusion of debtor releases in a chapter 11 plan. Section 1123(b)(3)(A) of the Bankruptcy Code states that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." This provision allows the Debtors to release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[54] In determining the appropriateness of such releases, courts in the Fifth Circuit generally consider whether the release is (a) "fair and equitable" and (b) "in the best interests of the estate."[55] The "fair and equitable" prong is generally interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule (discussed below).[56] Courts generally determine whether a debtor release is "in the best interest of the estate" by considering the following factors:

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52 The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the foregoing summary and the Plan, the Plan shall control.

53 *See* Plan, Arts. I.A.170, VIII.C. The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the foregoing summary and the Plan, the Plan shall control.

54 *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (finding that plan release provision "constitute[d] an acceptable settlement under [section] 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan"); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 259 (Bankr. N.D. Tex. 2007); *In re Mirant Corp.*, 348 B.R. 725, 737–39 (Bankr. N.D. Tex. 2006); *In re Gen. Homes Corp.*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991).

55 *In re Mirant Corp.*, 348 B.R. at 738; *see also In re Heritage Org.*, 375 B.R. at 259.

56 *In re Mirant Corp.*, 348 B.R. at 738.

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

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

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

d. the extent to which the settlement is truly the product of arm's-length negotiations.[57]

Courts afford debtors some discretion in determining the appropriateness of granting plan releases of estate causes of action.[58]

71. The Debtor Release easily meets the controlling standard. As an initial matter, the terms of the Debtor Release comply with the Bankruptcy Code's absolute priority rule. While certain Classes are deemed to have rejected the Plan, the Debtor Release and settlements embodied in the Plan do not result in any junior Classes improperly receiving or retaining any property on account of junior Claims or Interests. Thus, the Debtor Release is fair and equitable and in line with Fifth Circuit precedent.

72. In addition to being fair and equitable, the Debtor Release is in the best interest of the Debtors' estates. ***First***, the probability of success in litigation with respect to claims the Debtors may have against the Released Parties is uncertain, as are the benefits of pursuing litigation in light of the settlement embodied in the Plan and the impact of any litigation on the Reorganized Debtors' businesses and operations. As more fully described in the Koza Declaration and the Barse Declaration, in July 2022, Avaya engaged Kirkland & Ellis LLP ("Kirkland") to conduct an internal investigation at the direction, and under the supervision, of the audit committee

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

58 *See In re Gen. Homes*, 134 B.R. at 861 ("The court concludes that such a release is within the discretion of the Debtor.").

("Audit Committee") regarding, primarily, the circumstances giving rise to the preliminary Q3 2022 results and certain other matters (the "Investigation").[59] On February 1, 2023, David M. Barse and Carrie W. Teffner were appointed as directors to the boards of Avaya Inc. and Avaya Holdings Corp., respectively.[60] As a part of the Investigation, Kirkland interviewed 31 current and former employees regarding the Preliminary Q3 2022 Results (as defined in the Barse Declaration) and reviewed over 290,000 documents, including financial documents, Board minutes and related presentations and materials, communications between senior executives, and publicly-available materials.[61] Kirkland also reviewed communications between the Debtors' employees, officers, and the Board between May 18, 2022, and August 8, 2022, and facts relating to the Company's historical performance and revenue booking timeline with various employees and members of management.[62] The Audit Committee was kept apprised of the Investigation's progress through regular, formal meetings and informal updates. Additionally, each of Mr. Barse and Ms. Teffner attended various formal and informal meetings, both prior to and after the Petition Date, at which they were briefed on the Investigation process and progress. As a result of, among other things, the exhaustive process underlying the Investigation, the evaluation thereof by Mr. Barse and Ms. Teffner (both experienced directors with no prior relationship to the Avaya enterprise), and the support for the Debtor Releases from the Consenting Stakeholders (who will own the New Equity Interests in Reorganized Avaya), the Debtor Release constitutes a sound exercise of the Debtors' business judgment.

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59 Koza Decl. ¶ 6; Barse Decl. ¶ 4.

60 Barse Decl. ¶¶ 7–8.

61 Barse Decl. ¶ 5.

62 Barse Decl. ¶ 5.

73. ***Second***, the Debtor Releases are narrowly tailored to the circumstances of the Chapter 11 Cases. Specifically, the Debtor Release does not release any Released Party (a) other than a Released Party that is a Reorganized Debtor, Debtor, or a director, officer, or employee of any Debtor, in each case as of the Petition Date, from any Claim or Cause of Action with respect to (i) the repurchase, redemption, or other satisfaction by any Company Party of HoldCo Convertible Notes previously held by such Released Party prior to the Petition Date or (ii) the marketing, arrangement, syndication, issuance, or other action or inaction with respect to the incurrence of the B-3 Term Loans or the Secured Exchangeable Notes or (b) from any Claim or Cause of Action arising from an act or omission that is determined by a Final Order to have constituted actual fraud, willful misconduct, or gross negligence. These unreleased Claims were important considerations for both the Consenting Stakeholders and the Debtors in supporting the Debtor Release.

74. ***Third***, any potential claims against the Released Parties are complex, would cost time and money to litigate, and would require the Debtors to extend their stay in chapter 11 to the detriment of the business. ***Fourth***, as noted above, the overwhelming majority of voting creditors voted to accept the Plan, which includes the Debtor Release, and General Unsecured Claims will be paid in full or otherwise Unimpaired under the Plan.[63] ***Fifth***, the Plan, including the Debtor Release, was heavily negotiated by sophisticated entities that were represented by able counsel and financial advisors and that will own the New Equity Interests in Reorganized Avaya.[64] Critically, absent the settlement contemplated by the Debtor Release, the potential Claims and

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63 *See* Barse Decl. ¶ 15; Voting Report ¶ 18; *Matter of Foster Mortg. Corp.*, 68 F.3d 914, 917 (5th Cir. 1995) ("While the desires of the creditors are not binding, a court should carefully consider the wishes of the majority of the creditors.") (internal quotations omitted).

64 *See* Koza Decl. ¶ 40.

Causes of Action released via the Debtor Release would have vested in Reorganized Avaya. As a result, support for the Debtor Release from the Consenting Stakeholders—who will own the New Equity Interests in Reorganized Avaya—is a key indication of the reasonableness of the Debtor Release and the overall set of compromises in the Plan that reflect the give-and-take of a true arm's-length negotiation process.

75. To that end, the Debtor Release is a central component of the restructuring and is key to bringing the core parties to the deal. In return, under the terms of the RSA and the Plan, the Debtors will: (a) have substantial cash on hand at emergence, with approximately $810 million in exit term loan financing and approximately $128 million in exit ABL financing, (b) minimize administrative expenses associated with the chapter 11 process, and (c) unimpair all operational stakeholders, as a result of, among other things, the 2023 PBGC Settlement Agreement and the Renegotiated RingCentral Contracts. This result would be impossible without the concessions and efforts of the Released Parties embodied in the Plan. These contributions enabled the successful administration of these Chapter 11 Cases, will facilitate the Debtors' timely emergence from chapter 11, and avoid potentially costly and time-consuming litigation. Accordingly, the Debtor Release is fair, equitable, and in the best interest of the Debtors and their estates, are justified under the controlling Fifth Circuit standard, and should be approved.

b. The Third-Party Release Is Appropriate and Complies with the Bankruptcy Code.

76. Article VIII.D of the Plan contains a third-party release provision (the "Third-Party Release"). It provides that each Releasing Party—including all Holders of Claims that do not specifically opt out of or timely object to the Third-Party Release—shall release any and all Causes of Action (including a list of specifically enumerated claims) such parties could assert against the

Debtors, the Reorganized Debtors, and the Released Parties, except for acts or omissions that are found to have been the product of actual fraud, willful misconduct, or gross negligence.[65]

77. Ultimately, the value-maximizing restructuring contemplated by the Plan would not be possible without the support of the Released Parties. Certain of the Released Parties also will be the Debtors' largest post-emergence stakeholders. Thus, the Third-Party Release allows the Debtors to obtain the fresh start they need by minimizing the potential for distracting post-emergence litigation or other disputes. Moreover, as set forth below, the Third-Party Release is a permissible consensual release consistent with Fifth Circuit law.

78. While the Fifth Circuit has not directly addressed what constitutes a consensual third-party release, the *Republic Supply*[66] court found that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted and confirmed as an integral part of a plan of reorganization."[67] *Republic Supply* and its progeny[68] ultimately stand for the proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of settlement, and given for consideration do not violate" the Bankruptcy Code.[69] The *Republic Supply* court ultimately found that the third-party release provision at issue—to which no party timely objected in connection with plan confirmation—was binding and enforceable.[70]

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65 The foregoing description is a summary of the operative Plan provisions only. To the extent there is any conflict between the foregoing summary and the Plan, the Plan shall control.

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

67 *Id.*

68 *See, e.g.*, *Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App'x 281, 286–88 (5th Cir. 2016); *FOM Puerto Rico S.E. v. Dr. Barnes Eyecenter, Inc.*, 255 Fed. App'x 909, 911–12 (5th Cir. 2007); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914, 919 (5th Cir. 2000).

69 *See In re Wool Growers*, 371 B.R. 768, 776 (N.D. Tex. 2007) (citing *Republic Supply*, 815 F.2d at 1050); *see also Dr. Barnes Eyecenter*, 255 Fed. App'x at 911–12.

70 *In re Republic Supply Co.*, 815 F. 2d at 1053.

The Fifth Circuit has subsequently addressed the same issue from *Republic Supply* on three occasions, focusing on the specificity of the third-party release provision at issue to determine its *res judicata* effect.[71] At the core of the analysis is whether the third-party release is consensual.

79. Bankruptcy courts in Texas have applied this standard in recent chapter 11 bankruptcies when approving third-party releases. In doing so, these courts have focused on *process—i.e.*, whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look it over, [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[72] These courts acknowledge that parties in interest waive their rights with respect to a third-party release if they do not object.[73]

80. The Third-Party Release easily meets the standard set forth in *Republic Supply* and the cases following it. As a threshold matter, the Third-Party Release is ***consensual***. All parties in interest were provided notice of these Chapter 11 Cases, the Plan, and the deadline to object to

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[71] *See generally Hernandez*, 628 F. App'x 281 (comparing the specificity of the third-party release provisions at issue in *Republic Supply*, *Applewood*, and *Dr. Barnes Eyecenter*).

[72] Confirmation Hr'g Tr. at 47, *In re Energy & Exploration Partners, Inc.*, No. 15 44931 (Bankr. N.D. Tex. April 21, 2016) [Docket No. 730] (hereinafter "ENXP Tr."); *see also* Confirmation Hr'g Tr. at 32, *In re Ameriforge Group, Inc.*, No. 17-32660 (Bankr. S.D. Tex. May 24, 2017) [Docket No. 144]; Confirmation Hr'g Tr. at 7–8, *In re Hornbeck Offshore Servs., Inc.*, No. 20-32679 (Bankr. S.D. Tex. June 19, 2020) [Docket No. 227].

[73] *See In re Wool Growers*, 371 B.R. at 776 ("The Fifth Circuit has held that a non-debtor release violates section 524(e) when the affected creditor *timely objects* to the provision.") (emphasis added) (citations omitted); *see also* ENXP Tr. at 47 ("[T]he [*Republic Supply*] case being that the Debtor is authorized, I think, I don't think there's anything that's necessarily bad faith about the Debtor putting release provisions like this into a plan. And if we assume that the Debtor has otherwise satisfied procedural due process . . . and then they choose not to participate one way or the other, can they be bound by it? I would say that this is one of those situations where [*Republic Supply*] says those people can waive substantive rights by not affirmatively participating in the case."); Confirmation Hr'g Tr. at 29, *In re CJ Holding Co.*, No. 16-33590 (Bankr. S.D. Tex. December 16, 2017) [Docket No. 1076] (approving as consensual a third-party release provision that bound all holders of claims and interest that did not object); Confirmation Hr'g Tr. at 42, *In re Southcross Holdings, LP*, No. 16-20111 (Bankr. S.D. Tex. April 11, 2016) [Docket No. 191] (approving as consensual a third-party release provision in favor of the debtors' prepetition equity sponsors that bound all holders of claims and interest that did not object).

confirmation of the Plan. Both the Disclosure Statement (transmitted to all Voting Parties and otherwise publicly available), the Combined Notice (transmitted to ***all*** parties in interest), and the Notice of Non-Voting Status and Opt-Out Forms (transmitted to Holders of all non-voting Claims and Interests) expressly state in capitalized, bold-faced, underlined text that Holders of Claims and Interests that do not specifically opt out of or object to the Third-Party Release will be bound by it. Specifically, the Combined Notice contained the following information:

> **ARTICLE VIII OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS, ARTICLE VIII.D CONTAINS A THIRD-PARTY RELEASE, AND ARTICLE VIII.E CONTAINS A SETTLEMENT GROUP RELEASE. THUS, YOU ARE ADVISED TO REVIEW AND CONSIDER THE PLAN CAREFULLY BECAUSE YOUR RIGHTS MIGHT BE AFFECTED THEREUNDER.**
>
> **ALL HOLDERS OF CLAIMS OR INTERESTS THAT DO NOT (X) ELECT TO OPT OUT OF THE RELEASES CONTAINED IN ARTICLE VIII.D OR VIII.E OF THE PLAN; OR (Y) TIMELY FILE WITH THE BANKRUPTCY COURT ON THE DOCKET OF THE CHAPTER 11 CASES AN OBJECTION TO THE RELEASES CONTAINED IN ARTICLE VIII.D OR VIII.E OF THE PLAN THAT IS NOT RESOLVED BEFORE CONFIRMATION WILL BE DEEMED TO HAVE EXPRESSLY, UNCONDITIONALLY, GENERALLY, INDIVIDUALLY, AND COLLECTIVELY CONSENTED TO THE RELEASE AND DISCHARGE OF ALL CLAIMS AND CAUSES OF ACTION AGAINST THE DEBTORS AND THE RELEASED PARTIES OR THE SETTLEMENT GROUP RELEASED PARTIES.**

81. Each Ballot, the Combined Notice, the Notice of Non-Voting Status, and the Opt-Out Forms distributed also contained the full text of Article VIII.D of the Plan—the Third-Party Release itself. In addition to serving Solicitation Packages on all Voting Parties and the Notice of Non-Voting Status and Opt-Out Forms on non-voting parties, the Debtors served the Combined Notice on all known potential creditors, including approximately 17,000 parties on the Debtors' creditor matrix and over 20,000 equity holders of record.[74] Further, the Debtors published the Publication Notice in the *New York Times* on February 17, 2023. There is no

[74] *See* Voting Report ¶ 16 n.4.

question that the process worked—as set forth in the Voting Report, ***465 Holders of Existing Avaya Interests***, representing nearly ***4 million*** shares, including a significant number of individual Holders, determined to exercise their rights to opt out.[75]

82. Ultimately, chapter 11 is a collective proceeding meant to maximize the prospect for a debtor's "fresh start," so long as a debtor satisfies its obligations under the Bankruptcy Code in good faith and consistent with due process. Where, as here, a debtor satisfies its due process obligations, parties in interest may waive their rights by failing to participate. Thus, "[i]f a creditor wants to preserve his right to object to confirmation, on whatever ground, ***he must file an objection***. If he does not file an objection, he generally cannot complain about the results of the confirmation proceeding—even if he voted to reject the plan."[76] In addition to informing recipients of key elements in the Chapter 11 Cases, the Combined Notice detailed the Third-Party Release and the opportunity to opt out therein.

83. As contemplated by and specifically stated in the Debtors' solicitation materials and the Combined Notice, the Debtors have agreed to carve out all parties that specifically objected to their inclusion as a Releasing Party under the Third-Party Release, including each Shareholder who submitted a Shareholder Letter. Accordingly, the Third-Party Release is appropriate under Fifth Circuit law as a ***consensual*** third-party release.

84. In addition to being consensual, the Third-Party Release satisfies the other factors referenced in *Republic Supply* and the cases following it. ***First***, the Third-Party Release is

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75 *See* Voting Report, Ex. B.

76 *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 517 (Bankr. E.D. Mo. 2012) (emphasis added); *see also In re Camp Arrowhead*, 451 B.R. 678, 702 (Bankr. W.D. Tex. 2011) ("Without an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing[.]") (citing *Pacific Lumber*, 584 F.3d 229, 253 (5th Cir. 2009); *In re Pilgrim's Pride Corp.*, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010)); *Republic Supply*, 815 F.2d at 1050; *Wool Growers*, 371 B.R. at 775–76.

sufficiently specific, listing potential Causes of Action to be released, so as to put the Releasing Parties on notice of the released claims.[77] Moreover, all parties in interest have received notice of the Third-Party Release through the Disclosure Statement, the ballot, and/or the Combined Notice. ***Second***, the Third-Party Release is integral to the Plan and a condition of the comprehensive settlement embodied therein. The provisions of the Plan and RSA were heavily negotiated, including the scope of the Third-Party Release and the Claims that are expressly to be released and not to be released pursuant thereto. The Third-Party Release, together with the Debtor Releases, are key components of the Debtors' restructuring and a key inducement to bring all stakeholder groups to the bargaining table. ***Third***, the Third-Party Release was given for consideration. The contributions of all of the Released Parties will allow the Debtors to continue their businesses as a going concern and maximize value to all stakeholders.

85. The relevant factors weigh heavily in favor of approving the Third-Party Release. As set forth above, the Third-Party Release is fully consensual and otherwise complies with the controlling Fifth Circuit standards. Accordingly, the Third-Party Release is justified under the circumstances and should be approved.

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

86. Article VIII.F of the Plan provides that each Exculpated Party—*i.e.*, the Debtors—shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with these Chapter 11 Cases and certain related transactions, except for acts or

[77] *See, e.g.*, *Dr. Barnes Eyecenter*, 255 Fed. App'x. at 910, 912 (finding release language that provided for release of any and all claims "based in whole or in part on any act or omission, transaction, or occurrence from the beginning of time through the Effective Date in any way relating to [the debtor], its Bankruptcy Case, or the Plan" sufficiently specific to meet the *Republic Supply* standard).

omissions that are found to have been the product of actual fraud, willful misconduct, or gross negligence (the "Exculpation Provision").[78]

87. At the outset, it is important to underscore the difference between the Third-Party Release and the Exculpation Provision. Unlike a release, the Exculpation Provision does not affect the liability of Exculpated Parties *per se*, but rather sets a standard of care of gross negligence, willful misconduct, or actual fraud in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors' restructuring.[79] A bankruptcy court has the power to approve an exculpation provision in a chapter 11 plan because it cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good faith.[80] Thus, an exculpation provision represents a legal conclusion that flows inevitably from several different findings a bankruptcy court must reach in confirming a plan.[81] Once the court makes its good faith finding, it is appropriate to set the standard of care of the fiduciaries involved in the formulation of that chapter 11 plan.[82] Exculpation provisions, therefore, appropriately prevent future collateral attacks against the Debtors. Here, the Exculpation Provision is appropriate and vital because it provides protection to the Debtors, who served as fiduciaries during the restructuring process.

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

79 *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (holding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code[.]").

80 *See* 11 U.S.C. § 1129(a)(3).

81 *See* 11 U.S.C. § 157(b)(2)(L).

82 *In re PWS Holding Corp*, 228 F.3d at 246 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties").

88. The Exculpation Provision is consistent with Fifth Circuit law; namely, *Highland Capital*, where the court expressly adopted and applied Fifth Circuit precedent providing qualified immunity to "bankruptcy trustees," which extends to a debtor in possession under section 1107 of the Bankruptcy Code.[83] The Plan therefore appropriately includes the Debtors as Exculpated Parties, consistent with *Highland Capital* and this Court's precedent, for actions taken prior to the Effective Date.

89. Further, the Exculpation Provision in the Plan is an integral piece of the overall settlement embodied by the Plan.[84] It is limited to the Debtors themselves, and is the product of good-faith, arm's-length negotiations.[85] The Exculpation Provision is narrowly tailored to exclude acts of actual fraud, willful misconduct, or gross negligence.[86] Accordingly, the Exculpation Provision is in the best interests of the Debtors' Estates and other parties in interest, and is narrowly tailored to that end.

90. Rather than including non-Debtor Entities within the scope of the Exculpation Provision, the Debtors, the U.S. Trustee, and other parties in interest are supportive of the Covered Parties[87] being deemed to have acted in good faith and having the Covered Parties provided with the protections under section 1125(e) of the Bankruptcy Code, and for such treatment to be subject to a gatekeeping provision. In summary, for Covered Parties to have any liability for Covered

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83 *See NexPoint Advisors, L.P., et al. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 437–38 (5th Cir. 2022).

84 *See* Koza Decl. ¶ 41.

85 *See* Koza Decl. ¶¶ 41, 44–45.

86 Koza Decl. ¶ 40.

87 "Covered Party" means with respect to the Debtors, each Debtor Related Party of each Debtor, including, for the avoidance of doubt, each such Entity's financial advisors, partners, attorneys, accountants, investment bankers, consultants, and other professionals, each in their capacity as such.

Claims (*i.e.*, acts or omissions in connection with, relating to, or arising out of, the Chapter 11 Cases and certain related transactions), the Court must (a) first determine, after notice and a hearing, that such Covered Claim represents a colorable Claim of any kind, and (b) specifically authorize a Person or Entity to bring such Covered Claim against any such Covered Party (the "Gatekeeping Provision").[88] The Gatekeeping Provision is consistent both with *Highland* and recent confirmations in this district.[89]

91. The Debtors' Exculpation Provision and Gatekeeping Provision are the product of good-faith, arm's-length negotiations. These provisions are strictly limited to parties (*i.e.*, the Exculpated Parties and the Covered Parties) who have performed valuable services in connection with the Debtors' restructuring. The Exculpated Parties and the Covered Parties contributed significant value to the Debtors' Chapter 11 Cases by, among other things, negotiating and supporting the RSA, the Plan, the DIP Facilities, the Rights Offering, and the Exit Facilities. These extensive contributions cannot be understated. The efforts of the Exculpated Parties and the Covered Parties have culminated in a value-maximizing restructuring that (a) leaves all vendors, suppliers, employees, and contract counterparties Unimpaired, (b) deleverages the Debtors' balance sheet by approximately 75 percent, and (c) positions the Debtors for long-term success

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88 The foregoing description is a summary of the operative Plan provisions only. To the extent there is any conflict between the foregoing summary and the Plan, the Plan shall control.

89 *See In re Highland Capital*, 48 F.4th at 437–39; *Order Approving the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization of Pipeline Health System, LLC and Its Debtor Affiliates (Technical Modifications)* [Docket No. 1041], ¶¶ 44–45, *In re Pipeline Health Sys., LLC*, No. 22-90291 (MI) (Bankr. S.D. Tex. Jan. 13, 2023); *Findings of Fact, Conclusions of Law, and Order Confirming Joint Chapter 11 Plan of Talen Energy Supply, LLC and its Affiliated Debtors* [Docket No. 1760], ¶ 37, *In re Talen Energy Supply, LLC, et al.*, Case No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 15, 2022); *Order Approving the Debtors' Disclosure Statement and Confirming the Joint Chapter 11 Plan of Reorganization of Altera Infrastructure L.P. and its Debtor Affiliates* [Docket No. 533], ¶ 43, *In re Altera Infrastructure L.P., et al.*, Case No. 22-90130 (MI) (Bankr. S.D. Tex. Nov. 4, 2022).

upon emergence. The Exculpation Provision and Gatekeeping Provision are narrow in scope and appropriate under the circumstances and should be approved.

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

92. The injunction provision set forth in Article VIII.G of the Plan (the "Injunction Provision") is a necessary part of the Plan because it enforces the discharge, Release, and Exculpation Provisions that are critically important to the Plan. The Injunction Provision affords the Debtors and their stakeholders (including, among others, the Released Parties and the Exculpated Parties) a greater degree of certainty with respect to the Chapter 11 Cases and the Restructuring Transactions by requiring the Court's authorization for parties to commence or pursue Claims or Causes of Action that relate to or are reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action subject to the Debtor Releases, the Third-Party Release, or the Exculpation. Further, as described above, the injunction provided for in the Plan is consensual as to any party that did not specifically object thereto. Accordingly, to the extent the Court finds that the Plan's Debtor Releases, Third-Party Releases, Gatekeeping Provision, and Exculpation Provision are appropriate, the Court should approve the Injunction Provision.[90]

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

93. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The legislative history to section 1129(a)(2) of the Bankruptcy Code reflects

[90] *See, e.g.*, *In re Camp Arrowhead*, 451 B.R. at 701–02 ("the Fifth Circuit does allow permanent injunctions *so long as there is consent* . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing") (citations omitted).

that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[91] As discussed below, the Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code regarding disclosure and solicitation of the Plan.

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

94. As discussed in Part I of this Memorandum, the Debtors complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code.

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

95. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Specifically, under section 1126 of the Bankruptcy Code, only holders of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.[92]

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91 *In re Lapworth*, No. 97-34529 (DWS), 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of [section] 1129(a)(2) specifically identifies compliance with the disclosure requirements of [section] 1125 as a requirement of [section] 1129(a)(2)."); *In re WorldCom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including disclosure and solicitation requirements under sections 1125 and 1126).

92 11 U.S.C. § 1126(a), (f).

96. As set forth in Part I of this Memorandum, in accordance with section 1125 of the Bankruptcy Code, the Debtors solicited votes from the Holders of Allowed Claims in Class 4—the only Class entitled to vote on the Plan. The Debtors did not solicit votes from Holders of Claims and Interests in Classes 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, or 12 because Holders of such Claims and Interests are either Unimpaired and conclusively presumed to have accepted the Plan under section 1126(f) or Impaired and conclusively presumed to have rejected the Plan under section 1126(g). Thus, pursuant to section 1126(a) of the Bankruptcy Code, only Holders of Claims in Class 4 were entitled to vote to accept or reject the Plan.

97. Sections 1126(c) and 1126(d) of the Bankruptcy Code specify the requirements for acceptance of a plan by classes of claims and interests:

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

98. As described above, over 99 percent of Voting Parties who returned ballots voted to accept the Plan in sufficient number and in sufficient amount to constitute an accepting class under the Bankruptcy Code.[93] Based upon the foregoing, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code, and no party has asserted otherwise.

[93] *See* Voting Report ¶ 18.

C. The Plan Was Proposed in Good Faith (§ 1129(a)(3)).

99. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[94] To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[95]

100. The Plan satisfies section 1129(a)(3) of the Bankruptcy Code. The fundamental purpose of chapter 11 is to enable a distressed business to reorganize its affairs to prevent job losses and the adverse economic effects associated with disposing of assets at liquidation value.[96] Here, the Plan will enable the Debtors to significantly deleverage their balance sheet, leave operational obligations unimpaired, and position the Debtors for long-term success. Moreover, the Plan is the product of extensive arm's-length negotiations among the Debtors, their lenders, and other key stakeholders. The Plan's overwhelming support by the Voting Parties is strong evidence that the Plan is likely to succeed. Finally, as set forth herein, the Plan complies with bankruptcy and applicable non-bankruptcy law.

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94 *See e.g.*, *In re Sun Country Dev., Inc.*, 764 F. 2d 406, 408 (5th Cir. 1985) ("Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied."); *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 692 (Bankr. S.D. Tex. 2022) (noting the same); *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997) (quoting *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985)).

95 *See, e.g.*, *In re T-H New Orleans*, 116 F.3d at 802 (quoting *In re Sun Country Dev., Inc.*, 764 F.2d at 408); *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012) (same); *In re Century Glove*, No. 90-00400 (SLR), 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) (same).

96 *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."); *B.D. Int'l Disc. Corp. v. Chase Manhattan Bank, N.A. (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) ("[T]he two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start.").

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

101. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable. Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the Court as to their reasonableness.[97]

102. All Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code.[98] Article II.C of the Plan, moreover, provides that Professionals shall file all final requests for payment of Professional Fee Claims no later than 45 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Fee Claims.

103. Further, DIP Professional Fees will be paid in accordance with the terms of the DIP Orders.[99] The Court approved, on a final basis, the Debtors' authority to pay all fees required under the DIP Documents, including the payment of all fees to the DIP Agents, the DIP Lenders, and the fees and expenses of the professionals retained by the DIP Agents, the DIP Lenders, and the Commitment Parties, subject to certain notice requirements.[100] No party has asserted that the Plan does not comply with section 1129(a)(4) of the Bankruptcy Code.

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97 *See Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 518 (5th Cir. 1998) ("Section 1129(a)(4) by its terms requires court approval of any payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case.") (internal citations omitted); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

98 11 U.S.C. §§ 328(a), 330(a)(1)(A).

99 Plan, Art. II.B.

100 *See Final Order (I) Authorizing the Debtors (A) to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 262, 262(b), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e), and (B) to Utilize Cash Collateral*

E. The Debtors Disclosed All Necessary Information Regarding Directors, Officers, and Insiders (§ 1129(a)(5)).

104. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the identity of an "insider" (as defined by section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider. Additionally, the Bankruptcy Code provides that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[101] Section 1129(a)(5)(A)(ii) directs the Court to ensure that the post-confirmation governance of the Reorganized Debtors is in "good hands," which courts have interpreted to mean: (a) experience in the reorganized debtors' business and industry;[102] (b) experience in financial and management matters;[103] (c) that the debtors and creditors believe control of the entity by the proposed individuals will be beneficial;[104] and (d) does not "perpetuate[] incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor."[105]

Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 352, 363, 364, 503, 506(c) and 507(b) and (III) Granting Related Relief [Docket No. 278], ¶ 6(b)(iii); Koza Decl. ¶ 28.

101 11 U.S.C. § 1129(a)(5)(A)(ii).

102 *See In re Landing Assocs.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) ("In order to lodge a valid objection under [section] 1129(a)(5), a creditor must show that a debtor's management is unfit or that the continuance of this management post-confirmation will prejudice the creditors."); *In re Rusty Jones, Inc.*, 110 B.R. 362, 372, 375 (Bankr. N.D. Ill. 1990) (holding that 1129(a)(5) was not satisfied where management had no experience in the debtor's line of business).

103 *See, e.g.*, *In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); *In re Sherwood Square Assocs.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989).

104 *See, e.g.*, *In re Apex Oil Co.*, 118 B.R. 683, 704–05 (Bankr. E.D. Mo. 1990).

105 *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).

The "public policy requirement would enable [a court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[106]

105. The Debtors have satisfied section 1129(a)(5) of the Bankruptcy Code. As set forth in Article IV.K of the Plan, as of the Effective Date, the terms of the current members of the board of directors of Avaya Inc. and Avaya Holdings Corp. shall expire, and the members for the initial term of the New Board shall be appointed in accordance with the selection process disclosed and set forth in the Governance Term Sheet. Accordingly, the appointment of directors of the Reorganized Debtors is consistent with the interests of creditors.[107] The Debtors believe control of the Reorganized Debtors by individuals to be appointed in accordance with the Plan and Governance Documents will be consistent with public policy, and no party in interest has objected to the Plan on these grounds. Therefore, the requirements under section 1129(a)(5)(A)(ii) of the Bankruptcy Code have or will be satisfied. Finally, the Debtors will satisfy section 1129(a)(5)(B) of the Bankruptcy Code because the Debtors will publicly disclose the identity of all insiders that the Reorganized Debtors will employ or retain and the nature of any compensation for such insiders in compliance with the Bankruptcy Code on or immediately prior to the Effective Date. No party has asserted that the Plan does not comply with section 1129(a)(5) of the Bankruptcy Code.

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[106] 7 Collier on Bankruptcy ¶ 1129.02[5][b] (16th ed. 2012).

[107] *In re Landing Assocs.*, 157 B.R. at 817 ("Under § 1129(a)(5) the plan proponent must disclose the identity of the individuals that will manage the business post-confirmation, and the participation of these individuals in the debtor's business must be consistent with the interests of creditors."); s*ee also In re Armstrong World Indus.*, 348 B.R. at 165 (finding disclosure of identities and nature of compensation of persons to serve as directors and officers on the effective date sufficient for section 1129(a)(5) of the Bankruptcy Code).

F. The Plan Does Not Require Governmental Regulatory Approval For Any Rate Changes (§ 1129(a)(6)).

106. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change provided for in the plan. Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these chapter 11 cases.

G. The Plan Is in the Best Interests of All the Debtors' Creditors (§ 1129(a)(7)).

107. Section 1129(a)(7) of the Bankruptcy Code, commonly known as the "best interests test," provides, in relevant part:

> With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .

108. The best interests test applies to individual dissenting holders of impaired claims and interests rather than classes, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[108] As section 1129(a)(7) of the Bankruptcy Code makes clear, the best interests test applies only to

[108] *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Century Glove*, 1993 WL 239489, at *7; *In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (stating that section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

holders of non-accepting impaired claims or interests. Here, an overwhelming majority of voting creditors have voted to accept the Plan, and all Holders of Claims and Interests in all Impaired Classes will recover at least as much under the Plan as they would in a hypothetical chapter 7 liquidation.[109] Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

109. As set forth in Exhibit G to the Disclosure Statement and in the Koza Declaration, the Debtors, with the assistance of their advisors, prepared a liquidation analysis that estimates recoveries for Holders of Claims under the Plan (the "Liquidation Analysis").[110] The projected recoveries under the Plan as set forth in the Disclosure Statement are equal to or in excess of the recoveries estimated in a hypothetical chapter 7 liquidation of the Debtors, as reflected in the Liquidation Analysis and the Koza Declaration. Accordingly, the Plan complies with section 1129(a)(7), and no party has asserted otherwise.

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

110. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan.

111. Of the Impaired Classes of Claims and Interests under the Plan, Class 4 voted overwhelmingly to accept the Plan. Holders of Claims and Interests in Classes 7, 8, 10, and 12 are deemed to have rejected the Plan and thus were not entitled to vote. While the Plan does not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to the Impaired Classes that were deemed

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

[110] Disclosure Statement, Ex. G; *see also* Koza Decl. ¶¶ 46–53.

to reject, the Plan is confirmable nonetheless because it satisfies sections 1129(a)(10) and 1129(b) of the Bankruptcy Code, as discussed below.

I. The Plan Provides for Payment in Full of All Allowed Priority Claims (§ 1129(a)(9)).

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

113. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. ***First***, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each Holder of an Allowed Administrative Claim will receive Cash equal to the amount of such Allowed Administrative Claim on the Effective Date, or as soon as reasonably practicable thereafter, or at such other time defined in Article II.A of the Plan. ***Second***, the Plan satisfies section 1129(a)(9)(B)

of the Bankruptcy Code because no Holders of the types of Claims specified by 1129(a)(9)(B) are Impaired under the Plan. ***Finally***, Article II.D of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each Holder of Allowed Priority Tax Claims shall be paid in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code. Thus, the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code, and no party has asserted otherwise.

J. At Least One Class of Impaired, Non-Insider Claims Accepted the Plan (§ 1129(a)(10)).

114. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan.

115. As set forth above, over 99 percent of voting Holders of Claims in Class 4—which is an Impaired Class—voted to accept the Plan independent of any insiders' votes. The Plan thus satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

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

116. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that a plan is feasible as a condition precedent to confirmation. Specifically, the Court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.[111]

[111] 11 U.S.C. § 1129(a)(11).

To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[112] Rather, a debtor must provide only a reasonable assurance of success.[113] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[114] As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

117. In determining standards of feasibility, courts have identified the following probative factors:

a. the adequacy of the capital structure;

b. the earning power of the business;

c. the economic conditions;

d. the ability of management;

e. the probability of the continuation of the same management; and

f. any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[115]

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[112] *In re T–H New Orleans Ltd P'ship*, 116 F.3d at 801 ("[T]he [bankruptcy] court need not require a guarantee of success . . . , [o]nly a reasonable assurance of commercial viability is required.") (citations omitted); *In re Lakeside Global II Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (noting that the feasibility standard "has been slightly broadened and contemplates whether the debtor can realistically carry out its plan.").

[113] *See, e.g.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.*, 475 B.R. at 115; *see also Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted) ("[T]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.").

[114] *E.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy [section] 1129(a)(11) so long as adequate evidence supports a finding of feasibility") (internal citations omitted); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *on reconsideration in part*, 464 B.R. 208 (Bankr. D. Del. 2011).

[115] *In re M & S Assocs., Ltd.*, 138 B.R. 845, 849 (Bankr. W.D. Tex. 1992).

118. The Plan is feasible. ***First***, as set forth in Section XI.C of the Disclosure Statement, the Debtors thoroughly analyzed and are satisfied as to their ability post-confirmation to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring.[116] Accordingly, the Debtors submit that confirmation of the Plan is not likely to be followed by liquidation.[117] ***Second***, as set forth in the Disclosure Statement, the Debtors prepared projections of the Debtors' financial performance through fiscal year 2027 (the "Financial Projections").[118] The Financial Projections demonstrate the Debtors' ability to meet their obligations under the Plan.[119] In summary, the Financial Projections show that the Debtors will emerge with a refinanced balance sheet, with debt service payments reduced to a manageable level.[120] Based on anticipated revenues earned over the following several years, the Debtors anticipate that they will be able to pay down their post-emergence debt over time, enabling the Debtors' operations to thrive in a right-sized capital structure.[121] And ***third***, the Plan reduces the Debtors' funded debt by approximately 75 percent, from approximately $3.4 billion to approximately $810 million.[122] Thus, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code, and no party has asserted otherwise.

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116 Koza Decl. ¶ 35.

117 Koza Decl. ¶ 35.

118 *See* Disclosure Statement, Ex. E; Koza Decl. ¶¶ 33–34.

119 *See* Koza Decl. ¶¶ 34–35.

120 *See* Koza Decl. ¶ 35.

121 Disclosure Statement, Ex. E; *see* Koza Decl. ¶ 35.

122 Koza Decl. ¶ 35.

L. All Statutory Fees Have Been or Will Be Paid (§ 1129(a)(12)).

119. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority status.

120. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because Article XII.C of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid for each quarter (including any fraction thereof) until these Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first, and no party has asserted otherwise.

M. The Plan Provides for Post-Effective Date Payment of Retiree Benefits (§ 1129(a)(13)).

121. Section 1129(a)(13) requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. Subject to Article V of the Plan, Article IV.O of the Plan provides that as of the Effective Date, all retiree benefits, if any, shall continue to be paid in accordance with applicable law. The Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code, and no party has asserted otherwise.

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

122. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. Since the Debtors are not subject to any domestic support obligations, the requirements of section 1129(a)(14) of the Bankruptcy Code do not apply. Likewise, section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code. Because no Debtor is an "individual," the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply. Finally, each Debtor

is a moneyed, business, or commercial corporation, and therefore, section 1129(a)(16) of the Bankruptcy Code, which provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust be made in accordance with any applicable provisions of non-bankruptcy law, is not applicable to these Chapter 11 Cases.

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

123. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied. 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.[123]

124. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects the plan (or is deemed to reject the plan) if it follows the "absolute priority rule."[124] The absolute priority rule provides that a junior stakeholder (*e.g.*, an equity holder) may not receive or retain property under a plan of reorganization "on account of" its junior interests unless all senior classes either (a) are paid in full or (b) vote in favor of the plan.[125] The Debtors submit that

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[123] *In re Ambanc La Mesa L.P.*, 115 F.3d 650, 653 (9th Cir. 1997) ("the [p]lan satisfies the 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b), which requires that the [p]lan 'does not discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the [p]lan.").

[124] *Bank of Am. Nat'l Tr. & Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42 (1999); *In re Mirant Corp.*, 348 B.R. 725, 738 (Bankr. N.D. Tex. 2006).

[125] *See* 11 U.S.C. § 1129(b)(2)(B)(ii); *see also DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 88 (2d Cir. 2011) (the absolute priority rule "provides that a reorganization plan may not give 'property' to the holders of any junior claims or interests 'on account of' those claims or interests, unless all classes of senior claims either receive the full value of their claims or give their consent") (citations omitted); *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005) ("Under the statute, a plan is fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class's claims in full,

the Plan satisfies the "fair and equitable" requirement notwithstanding that Class 7 (HoldCo Convertible Notes Claims), Class 8 (HoldCo General Unsecured Claims), Class 10 (Section 510 Claims), and Class 12 (Existing Avaya Interests) are deemed to reject the Plan and Class 9 (Intercompany Claims) and Class 11 (Intercompany Interests) may be deemed to reject the Plan, because, as to such Classes, there is no Class of equal priority receiving more favorable treatment and no Class that is junior to such Classes will receive or retain any property on account of the Claims or Interests in such Class.

125. The Bankruptcy Code does not provide a standard for determining "unfair discrimination."[126] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[127] At a minimum, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[128] The unfair discrimination requirement, which involves a comparison of classes, is distinct from the equal treatment requirement of section 1123(a)(4), which involves a comparison of the treatment of claims within a particular class. A plan does not unfairly discriminate where it provides

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or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan 'on account of' such claims or interests.") (citations omitted).

126 *See In re IDEARC Inc.*, 423 B.R. 138, 171 (Bankr. N.D. Tex. 2009).

127 *See In re Kolton*, No. 89-53425-C, 1990 WL 87007 at *5 (Bankr. W.D. Tex. Apr. 4, 1990) (quoting *In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does [unfairly] discriminate is to be determined on a case-by-case basis[.]")); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

128 *See IDEARC Inc.*, 423 B.R. at 171 ("[T]he unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so."); *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 654 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589–91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

different treatment to two or more classes that are comprised of dissimilar claims or interests.[129] Likewise, there is no unfair discrimination if, taking into account the particular facts and circumstances of the case, there is a reasonable basis for the disparate treatment.[130]

126. Here, certain Classes are deemed to have rejected the Plan. The Plan's treatment of such Classes is nonetheless proper because all similarly situated Holders of Claims and Interests will receive substantially similar treatment. Additionally, the Plan's classification scheme rests on a legally acceptable rationale because it separates substantively dissimilar Claims into separate Classes. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code, and the Plan therefore satisfies section 1129(b)(1) and can be confirmed. No party has asserted otherwise.

127. For the reasons described above, the Plan satisfies section 1129(b) of the Bankruptcy Code. As noted above, Class 4, the only Impaired Class of Claims entitled to vote on the Plan, voted to accept the Plan. Notwithstanding the fact that certain Impaired Classes are deemed to have rejected the Plan, the Plan is confirmable.

P. The Debtors Complied with Section 1129(d) of the Bankruptcy Code.

128. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code, and no party has asserted otherwise.

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[129] *See In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 655 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589–91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

[130] *Aztec Co.*, 107 B.R. at 590.

Q. Modifications to the Plan.

129. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[131]

130. The Debtors made certain technical modifications to the Plan (collectively, the "Modifications") in response to informal comments from certain parties in interest. The Modifications are either immaterial or do not adversely impact the way creditors or other stakeholders are treated, and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. Accordingly, the Debtors submit that no additional solicitation or disclosure is required on account of the Modifications, and that such Modifications should be deemed accepted by all creditors that previously accepted the Plan.

[131] *See, e.g.*, *In re Am. Solar King Corp.*, 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988) (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not require additional disclosure or resolicitation); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 857 (Bankr. S.D. Tex. 2001) (same); *see also In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation).

IV. The Shareholder Letters Should Be Overruled.

131. As set forth in greater detail in **Exhibit A** attached hereto, the Debtors received four formal objections to Confirmation of the Plan and/or final approval of the Disclosure Statement and the Shareholder Letters (collectively, the "Objections"). The Debtors have worked with objecting parties to resolve as many Objections as possible, and as of the date hereof, the Debtors have resolved all but the Shareholder Letters. The Court should overrule any objections contained in the Shareholder Letters for the reasons described below.[132]

132. The Shareholder Letters are primarily premised on arguments that (a) the Debtors filed these Chapter 11 Cases in bad faith and/or in violation of their fiduciary duties and (b) the valuation of the Debtors' businesses is incorrect or inappropriate.

133. Many of the Shareholder Letters generally allege that the Debtors' board(s) of directors and management filed these Chapter 11 Cases in bad faith and that their motivations were to enrich themselves at the expense of the shareholders. All of these unsubstantiated allegations should be overruled. The Debtors' directors have fiduciary duties to maximize the value of the Debtors' estates for ***all*** stakeholders. Throughout the restructuring process (both before and after the Petition Date), the Debtors' directors, and management, have upheld this duty. Understanding the stark reality of the Debtors' liquidity crisis, the Debtors' highly-levered capital structure and the pressure that created on the Debtors' business plan, and the impending events of default under the Debtors' prepetition secured credit facilities, the Debtors determined that the only actionable path forward was to commence these Chapter 11 Cases and pursue confirmation of a chapter 11 plan reflecting the terms set forth in the RSA.

[132] To the extent the Debtors inadvertently omitted any objection that raises issues discussed herein, the Debtors' reply in this section shall apply to such objection.

134. Certain Shareholder Letters allege that Shareholders are entitled to a distribution and that the Plan is an attempt to divert the Company's value away from them, a proposition that is contrary to the evidence provided by the Debtors in these Chapter 11 Cases. These Shareholders allege that the value of the Debtors' business is sufficient to support recovery for equity holders but have failed to present any evidence showing that any path forward could lead to an outcome in which the Debtors' equity would not be significantly out of the money. Indeed, the Shareholder Letters do not present any evidence of their valuation methodology or provide an estimated enterprise value.

135. As the Debtors' noted on the very first day of these Chapter 11 Cases, the Debtors do not take the cancellation of Existing Avaya Interests lightly. Nevertheless, the threshold issue remains: there is simply no acceptable or credible valuation method that would support a distribution to Existing Avaya Interests. While there certainly is value in the Debtors' business, that value does not eclipse the Debtors' prepetition funded debt obligations.

136. The valuation conducted by the Debtors' investment banking firm, Evercore Group L.L.C. ("Evercore"), serves as an appropriate foundation for the Plan and related analysis. Specifically, the Debtors' valuation analysis sets forth adequate information regarding the Plan's valuation, including all assumptions and related information with respect thereto, and provides a clear picture of the Debtors' estimated value.

137. As set forth in the Disclosure Statement, the Reorganized Debtors project having approximately $179 million of tax-effected U.S. pension and other postemployment benefits ("OPEB") liabilities, $313 million of international pension liability (tax-effected where

applicable), $31 million of capital lease liability, $800 million of funded debt, and $436 million of excess cash (net of minimum cash of $175 million) at emergence.[133]

138. As discussed more fully in the Shah Declaration, the implied estimated total enterprise value (the "Enterprise Value") for the Reorganized Debtors upon emergence is approximately $1,426 million, and the implied equity value (the "Equity Value") of the Reorganized Debtors upon emergence is approximately $538.8125 million.[134] Additionally, Evercore estimated the total enterprise value for the Reorganized Debtors using a discounted cash flow methodology (such methodology, a "DCF Analysis" and such value, the "DCF Enterprise Value").[135] Based on Evercore's DCF Analysis, and consistent with the Enterprise Value set forth in the valuation analysis included in the Disclosure Statement, the DCF Enterprise Value of the Reorganized Debtors is less than the aggregate First Lien Claims of $3.0 billion and HoldCo Convertible Notes Claims of $221 million. Given that First Lien Claims and HoldCo Convertible Notes Claims are senior to equity, the DCF Enterprise Value and the Enterprise Value set forth in the valuation analysis included in the Disclosure Statement imply that there is no value in the Debtors for equity holders.[136]

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[133] Shah Decl. ¶ 8. As of the date of this Declaration, the Debtors estimate $810 million of funded debt and $419 million of excess cash (net of minimum cash of $175 million) at emergence, driven by the HoldCo Convertible Notes Settlement Consideration and the regular-course operations of the business.

[134] Shah Decl. ¶¶ 7, 9.

[135] Shah Decl. ¶ 10.

[136] In preparing the estimated DCF Enterprise Value and DCF Equity Value ranges for the Reorganized Debtors, Evercore, among other things: (a) reviewed certain historical financial and operating information of the Debtors for recent years and interim periods; (b) met with certain members of the Debtors' senior management to discuss the Debtors' finances, operations and future prospects; (c) reviewed publicly available financial data and considered certain economic and industry information relevant to the Debtors' operating businesses; (d) reviewed the Debtors' Financial Projections filed with the Disclosure Statement of their go-forward consolidated balance sheet, income statements, and statement of cash flows for the fiscal period Q3 2023 through FY 2027; (e) prepared a DCF Analysis based on the Financial Projections, utilizing a range of discount rates, derived using the capital asset pricing model, above and below the Debtors' weighted average cost of capital (the "Discount Rate"); (f)

139. Accordingly, the Shareholder Letters should be overruled.

Waiver Of Bankruptcy Rule 3020(e)

140. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

141. The Debtors submit that good cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the Confirmation Order will be effective immediately upon its entry.[137] The restructuring contemplated in the Plan was vigorously negotiated among sophisticated parties and is premised on preserving the value of the Debtors as a going concern. Additionally, to the extent necessary to facilitate closing of the Restructuring Transactions, the Debtors require the ability to immediately begin making any payments required under the Plan.

142. Finally, as set forth above, given the Debtors' extensive efforts to provide each of the Voting Parties, as well as their other stakeholders, with due process, staying the Confirmation Order will not serve any due process-related ends. Accordingly, the Debtors request

conducted such other analyses as Evercore deemed appropriate; and (g) considered a range of potential risk factors. Shah Decl. ¶ 11.

[137] *See, e.g.*, *In re Energy Partners, Ltd.*, No. 09-32957, 2009 WL 2898876, at *19 (Bankr. S.D. Tex. Aug. 3, 2009) (waiving stay of confirmation order); *In re IDEARC Inc.*, 423 B.R. at 158 (waiving stay of confirmation order waived because debtors needed to consummate their chapter 11 plan prior to December 31, 2009, and absent a stay the debtors may have been unable to do so).

a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

Conclusion

143. For all of the reasons set forth herein and in the Confirmation Declarations, and as will be further shown at the Combined Hearing, the Debtors respectfully request that the Court approve the Disclosure Statement and confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the Confirmation Order and granting such other and further relief as is just and proper.

Houston, Texas
Dated: March 21, 2023

/s/ *Matthew D. Cavenaugh*

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Certificate of Service

I certify that on March 21, 2023, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Matthew D. Cavenaugh
Matthew D. Cavenaugh

Exhibit A

Plan Objection Summary Chart

***In re Avaya Inc.*, Case No. 23-90088 (DRJ)**

Plan Objection Summary Chart[1]

	Objection	Summary of Objection	Status
1.	*Letters and Emails to the Court from Avaya Shareholders and Interested Parties* [Docket No. 284]	Shareholders object to the Plan, arguing that the Debtors breached their fiduciary duties by filing for chapter 11 relief. Shareholders argue that they should receive a recovery because they were mislead by management. Shareholders object to the valuation of the Debtors' businesses and argue that equity holders should receive a recovery.	Unresolved.
2.	*Objection of the Texas Taxing Entities to the Debtors' Joint Plan of Reorganization (Related Docket Entry No. 50)* [Docket No. 303]	The Plan should expressly provide that the Texas Taxing Entities retain their liens against the collateral until all Tax Claims, along with applicable interest, are paid in full. ¶ 6. The Texas Taxing Entities object to confirmation of the Plan to the extent it provides for the vesting of all property in each Estate of the applicable Reorganized Debtor free and clear of liens, claims or other encumbrances, unless otherwise provided in the Plan. ¶ 6. The Texas Taxing Entities object to confirmation of the Plan because it does not provide for payment of the applicable statutory interest for delinquent taxes. ¶ 7. The Texas Taxing Entities object to confirmation of the Plan because it provides that collateral securing status of an Allowed Other Secured Claim may be received by each Holder of an Other Secured Claim but fails to provide that the Texas Taxing Entities will keep their claims senior to any Other Secured Claim Holders that may have a security interest or lien against the same collateral. ¶ 8. The Texas Taxing Entities object to the confirmation of the plan to the extent it fails to provide for the payment of post-petition taxes in the ordinary course of business prior to delinquency, making the failure to pay such taxes an event of default under the Plan. ¶ 9.	Resolved via language in paragraph 119 of the Confirmation Order.

[1] Capitalized terms used herein but not defined have the same meaning given to such terms in the Plan, the Disclosure Statement, the relevant Objection, or the Memorandum (each as defined in the Memorandum), as applicable.

		The Texas Taxing Entities object to the confirmation of the Plan to the extent it provides for exit financing that would purport to prime the Tax Liens. ¶ 10. The Texas Taxing Entities object to the confirmation of the Plan to the extent the Plan or any supplements to the Plan intends to retain causes of action against the Taxing Entities beyond what is permitted under the Texas Tax Code. ¶ 11.	
3.	*Objection of Securities Plaintiff City of Pittsburgh Comprehensive Municipal Pension Trust Fund to Approval of the Disclosure Statement for, and Confirmation of, the Joint Prepackaged Plan of Reorganization of Avaya Inc and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 308]	**Objection to Plan Confirmation** Pittsburgh objects to confirmation of the Plan, alleged that the Debtors' violated the due process rights of the class of certain securities purchases (the "Class") in the certain securities litigation filed by Oliver Jiang on behalf of himself and the Class against Avaya Holdings Corp. (the "Securities Litigation") by not providing them with notice and an opportunity to opt-out of the third-party releases provided under Article VIII.D of the Plan (the "Third-Party Releases"). ¶¶ 24–31. • **Requested Resolution**: Either: (a) including language carving out Pittsburgh's and the Class's claims against certain non-Debtor defendants from the Third-Party Releases, or (b) allowing Pittsburgh to opt out of the Third-Party Releases and Injunction on behalf of the Class. Pittsburgh objects to confirmation of the Plan, arguing that the Third-Party Releases are impermissible under Federal Rule of Civil Procedure 23(e) and *de facto* nonconsensual third-party releases violative of Fifth Circuit jurisprudence based on the burden imposed on the Class (an impaired, non-voting class deemed to reject under the Plan). ¶¶ 35–40. • **Requested Resolution**: Adoption of the language set forth in paragraph 41 of Pittsburgh's objection in the Third-Party Releases, expressly excluding the claims of Pittsburgh and the Class against certain named and any subsequent non-debtor defendants in the Securities Litigation. • "*provided*, *further*, that neither any plaintiffs nor the proposed class (including to any extent modified in the future) or any member thereof in the securities class action captioned as Jiang v. Avaya Holding Corp., et al., Case No. 1:23-cv-1258 (S.D.N.Y.) shall constitute Releasing Parties." Pittsburgh objects to confirmation of the Plan, contending that Article VIII.J of the Plan does not require the Debtors and Reorganized Debtors to comply with their evidence	Resolved via language in paragraphs 123–27 of the Confirmation Order.

		preservation obligations under the Private Securities Litigation Reform Act of 1995 and other applicable law. ¶¶ 43–45. • **Requested Resolution**: Adopt of the language set forth in ¶ 46 of Pittsburgh's objection in the Plan, expressly requiring preservation of documents and other evidence potentially relevant to the Securities Litigation and the allegations contained therein: "Until the entry of a final and non-appealable order of judgment or settlement with respect to all defendants now or hereafter named in the litigation captioned as Jiang v. Avaya Holding Corp., et al., Case No. 1:23-cv-1258 (S.D.N.Y.) (the "Securities Litigation"), the Debtors, the Reorganized Debtors, and any transferee or custodian of the Debtors' books, records, documents, files, electronic data (in whatever format, including native format), or any tangible object or other item of evidence relevant or potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records"), shall preserve and maintain the Potentially Relevant Books and Records as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records." ¶ 46. **Objection to Final Approval of the Disclosure Statement** Pittsburgh objects to the approval of the Disclosure Statement on a final basis, arguing that the Disclosure Statement lacks adequate information to advise the Class of the Plan's impact on their claims against certain non-debtor debtors and on the prosecution of the Securities Litigation. ¶ 47. Pittsburgh alleges that the Disclosure Statement does not mention, or at least describe, the Securities Litigation to advise and inform parties deciding on how to vote on the Plan. ¶¶ 49–48. Pittsburgh alleges that the Disclosure Statement violates Bankruptcy Rule 3016(c) by failing to disclose the scope of the Third-Party Releases, despite facially complying with Bankruptcy Rule 3016(c), because of the copied language from the Plan is convoluted and requires extensive cross-referencing without any specificity as to the universe of claims and parties impacted by the Third-Party Releases or the acts enjoined by the associated injunction, in particular as they relate to Pittsburgh, the Class, and the Securities Litigation. ¶¶ 50–52.	

		Pittsburgh alleges that the Disclosure Statement does not disclose whether or how the Debtors intend to preserve evidence potentially relevant to the Securities Litigation after the Plan's Effective Date to advise and inform parties deciding on how to vote on the Plan. ¶ 52 (cross-referencing ¶¶ 43–45). **Requested Resolution**: Modify the Disclosure Statement, with corresponding modifications to the Plan, to address the above allegations.	
4.	*Theodore Walker Cheng-de King's Objection to Confirmation of Debtors' Joint Prepackaged Plan of Reorganization of Avaya Inc. and It's Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (Docket Entry No. [50])* [Docket No. 310]	Objects to the Plan because the releases and exculpations provided therein purport to release directors and officers from liability to Mr. King, exceeding the scope permitted by the Bankruptcy Code and controlling Fifth Circuit precedent. ¶¶21–25. Notes that by filing the objection and filing an Opt-Out Form, Mr. King opts out of and objects to any and all provisions of the plan applicable to him, including (without limitation) the third-party release and exculpation in Articles VIII.D and VII.F of the Plan. ¶ 2. Claims that prior to the Petition Date, he held and even expanded his equity position as a result of false and/or misleading statements made directly to him by one or more of the Debtors' directors and officers. He believes that this fact differentiates his objection from those of other shareholders. ¶ 14.	Resolved via language in paragraph 128 of the Confirmation Order.
5.	*Collin County Tax Assessor's Joinder to the Objection of the Texas Taxing Entities (Docket No. 303) to the Debtors' Joint Plan of Reorganization (Docket No. 50)* [Docket No. 311]	Collin County Tax Assessor joins the Texas Taxing Entities' objection and request that any CO language for the benefit of the Taxing Entities should also be applied equally to Collin County, Collin College, and City of Plano. ¶¶ 6–7.	Resolved via language in paragraph 119 of the Confirmation Order.