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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: EIGER BIOPHARMACEUTICALS, INC., *et al.*[1] Debtors.	Chapter 11 Case No. 24-80040 (SGJ) (Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE THIRD AMENDED JOINT PLAN OF LIQUIDATION OF EIGER BIOPHARMACEUTICALS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are: Eiger BioPharmaceuticals, Inc. (1591); EBPI Merger Inc. (9986); EB Pharma LLC (8352); Eiger BioPharmaceuticals Europe Limited (N/A); and EigerBio Europe Limited (N/A). The Debtors' service address is 2100 Ross Avenue, Dallas, Texas 75201.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") in these chapter 11 cases (the "Chapter 11 Cases") submit this memorandum of law (this "Memorandum") in support of the approval of the *Amended Disclosure Statement for Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 476-1] (as modified, amended, or supplemented from time to time hereafter, the "Disclosure Statement") and confirmation of the *Third Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 571] (as modified, amended, or supplemented from time to time hereafter, the "Plan").[1] As demonstrated below, the Plan satisfies the requirements of sections 1125 and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code")[2] and should be confirmed. In support of confirmation of the Plan, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. The Debtors' Plan comes at the culmination of an orderly and efficient chapter 11 process that saw the Debtors sell substantially all of the Debtors' assets and effectuate a value-maximizing process that has maximized recoveries for all the Debtors' major constituents beyond any reasonable expectations.[3]

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[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or the Proposed Confirmation Order (as defined below), as applicable.

[2] A detailed description of the Debtors, their business, and the facts and circumstances surrounding these Chapter 11 Cases, is set forth in greater detail in the *Declaration of David Apelian in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 19] (the "First Day Declaration"). On April 1, 2024 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner in these Chapter 11 Cases. On July 10, 2024, the United States Trustee for the Northern District of Texas (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "UCC") [Docket No. 322]. On July 25, 2024, the U.S. Trustee appointed an official committee of equity security holders pursuant to section 1101 of the Bankruptcy Code (the "Equity Committee").

[3] As of the time of filing this Memorandum, the only filed objections or reservations of rights have been resolved pursuant to the Proposed Confirmation Order (as defined below). Note that additional objections may be filed prior to the Plan Objection Deadline (as defined below), in which case the Debtors will address such objections in a supplemental pleading.

2. The Plan provides for the best possible outcome for creditors and equity holders and is the result the extraordinary efforts of the Debtors' directors, officers and professionals to create value for the benefit of the Estates. For the reasons stated herein and in the Declarations (as defined below), the Debtors respectfully request the Court approve the Disclosure Statement on a final basis, confirm the Plan, and enter the Proposed Confirmation Order.

ARGUMENT

3. This Memorandum is divided into two parts. Part I sets forth the procedural history of these Chapter 11 Cases, including the Plan, the Disclosure Statement, and the Debtors' solicitation efforts and voting results. Part II establishes the Plan's compliance with the applicable confirmation requirements, including with respect to certain of the discretionary contents of the Plan such as the release provisions, supporting the proposition that the Plan is appropriate and should be approved.

4. In further support of confirmation, the Debtors submit the following declarations (collectively, the "Declarations"):

a. the *Declaration of Adam Gorman in Support of Confirmation of the Third Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Voting Report"), to be filed after the Voting Deadline (as defined below); and

b. the *Declaration of Douglas Staut, Chief Restructuring Officer, in Support of Confirmation of the Third Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Staut Declaration"), to be filed substantially contemporaneously herewith.

5. For the reasons stated herein and in light of the evidentiary support offered in the Declarations, the Debtors respectfully request that the Court find that the Debtors have satisfied their burden under the Bankruptcy Code and confirm the Plan.

CASE BACKGROUND

I. Procedural History.

6. On July 15, 2024, the Debtors filed the *Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 424] and the *Disclosure Statement for Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 425], along with the Disclosure Statement Motion,[4] pursuant to which the Debtors sought conditional approval of the Disclosure Statement and the scheduling of a combined hearing for Disclosure Statement approval and confirmation of the Plan (the "Combined Hearing").

7. On July 28, 2024, the Debtors filed the *Notice of Filing of Amended Plan* [Docket No. 455] and the *Notice of Filing of Amended Disclosure Statement* [Docket No. 456], each attaching the Plan and Disclosure Statement, respectively, as amended.

8. On July 29, 2024, the Debtors filed the *Notice of Filing of Further Amended Disclosure Statement* [Docket No. 463], which attached the Debtors' further amended Disclosure Statement as Exhibit A.

9. Also on July 29, 2024, the Court held a hearing on the Disclosure Statement Motion (the "Conditional Disclosure Statement Hearing"), at which the Court approved the Disclosure Statement on a conditional basis and granted certain other relief requested in the Disclosure Statement Motion and the amended proposed order related thereto [Docket No. 457-1] (the "Proposed Disclosure Statement Order").

10. On July 30, 2024, the Court entered the Disclosure Statement Order[5] which, in the relevant parts: (a) scheduled the Combined Hearing for September 5, 2024 at 9:30 a.m. (prevailing

[4] *See Debtors' Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (II) Conditionally Approving the Disclosure Statement; (III) Establishing Objection Deadlines and Related Procedures; (IV) Approving the Notice Materials; and (V) Granting Related Relief* [Docket No. 426] (the "Disclosure Statement Motion").

[5] *Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (II) Conditionally Approving the Disclosure Statement; (III) Establishing Objection Deadlines and Related Procedures; (IV) Approving the Notice Materials; and (V) Granting Related Relief* [Docket No. 473] (the "Disclosure Statement Order").

Central Time); (b) conditionally approved the adequacy of the Disclosure Statement; (c) established August 30, 2024 at 4:00 p.m. (prevailing Central Time) as the deadline to object to the Plan (the "Plan Objection Deadline"); (d) approved the solicitation procedures set forth in the Disclosure Statement and the Proposed Disclosure Statement Order; and (d) approved the form and manner of the Combined Notice (as defined in the Disclosure Statement Order). Following entry of the Disclosure Statement Order, the Debtors filed solicitation versions of the Plan [Docket No. 475-1] and the Disclosure Statement [Docket No. 476-1].

11. The Debtors caused Kurtzman Carson Consultants, LLC dba Verita Global (the "Notice and Claims Agent") to serve the Combined Notice, the Non-Voting Packages, and the Solicitation Packages (each as defined in the Disclosure Statement Order), on or about August 2, 2024 (the "Solicitation Date"), all in accordance with the terms of the Disclosure Statement Order.[6] The Debtors caused the Combined Hearing Publication Notice (as defined in the Disclosure Statement Order) to be published in *The New York Times* (national edition) and the *San Francisco Chronicle* on August 2, 2024.[7]

12. On August 15, 2024, the Debtors filed the *Notice of Filing of Second Amended Plan* [Docket No. 517], which attached the Debtors' further amended Plan as Exhibit A (the "Second Amended Plan"). While Class 4 (General Unsecured Claims) was classified as Impaired under the version of the Plan used for solicitation, the Second Amended Plan, inter alia, amended the treatment of Class 4 to provide for post-petition interest through the date on which a distribution is made on account of such Claim, resulting in the unimpairment of Class 4.

13. On August 16, 2024, the Debtors filed the *Notice of Filing of Plan Supplement* [Docket No. 525] (the "Initial Plan Supplement"), which included: (a) the Liquidation Analysis, (b) the Schedule of Assumed Executory Contracts and Unexpired Leases, (c) the Schedule of Retained Causes of Action, (d) the Amended Certificate of Incorporation of Eiger

[6] *See Certificate of Service* [Docket No. 508].

[7] *See Affidavit of Publication of Notice of (I) Combined Hearing on the Amended Disclosure Statement and Confirmation of the Amended Joint Plan, and (II) Notice of Objection and Opt Out Rights in the New York Times and San Francisco Chronicle* [Docket No. 494].

BioPharmaceuticals, Inc., (e) the Liquidating Trust Agreement, (f) the Plan Administrator Agreement; and (g) the identity of any insider that will be employed or retained by the Plan Administrator, and caused such notice of filing of the Initial Plan Supplement to be delivered by first-class mail and electronic mail upon the parties receiving notice of the Disclosure Statement.[8]

14. On August 28, 2024, the Debtors filed the *Notice of Filing of Third Amended Plan* [Docket No. 571], which attached the Debtors' further amended Plan as Exhibit A.

15. On or after the Plan Objection Deadline (as defined in the Disclosure Statement Order), the Debtors will file the proposed *Order Approving the Third Amended Joint Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (as such may be amended or modified from time to time thereafter, the "Proposed Confirmation Order").

16. The deadline for all Holders of Claims and Interests entitled to vote on the Plan to cast their ballots is August 30, 2024 at 4:00 p.m. (prevailing Central Time), subject to certain extensions (the "Voting Deadline"). The Combined Hearing is scheduled for September 5, 2024 at 9:30 a.m. (prevailing Central Time).

II. Plan Solicitation and Notification Process.

17. In compliance with the Bankruptcy Code, only Holders of Claims or Interests in Impaired Classes receiving or retaining property on account of such Claims or Interests as of the Solicitation Date were entitled to vote on the Plan.[9] Holders of Claims or Interests were not entitled to vote if their rights were Unimpaired or if their rights were Impaired and they were deemed to reject the Plan. The following Classes of Claims or Interests were not entitled to vote on the Plan at the time of solicitation, and the Debtors did not solicit votes from Holders of such Claims or Interests:

[8] *See Certificate of Service* [Docket No. 508].

[9] *See* 11 U.S.C. § 1126.

Class	Claims and Interests	Status	Voting Rights
Class 1	Other Secured Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 2	Other Priority Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 3	Prepetition Term Loan Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 5	Intercompany Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)

18. The Debtors solicited votes on the Plan only from Holders of Claims or Interests in Impaired Classes receiving or retaining property on account of such Claims or Interests as of the Solicitation Date. As such, at the time of solicitation on August 2, 2024, Holders of Claims and Interests in Classes 4 (General Unsecured Claims) and 6 (Existing Equity Interests) were entitled to vote to accept or reject the Plan (collectively, the "Original Voting Classes").

19. As previously discussed herein, subsequent improvements to the treatment of Claims in Class 4 following the Solicitation Date resulted in the unimpairment of such Claims. Accordingly, the Debtors await the results of the Voting Report, which will reflect the results of the voting process with respect to the only Class that remains Impaired—Class 6.

20. Holders of Claims and Interests in Classes 1 through 6 were entitled to opt-out of the definition of "Releasing Parties" as set forth in the Plan. If a Holder of a Claim or Interest opted to execute and timely return a Release Opt-Out, delivered with the Non-Voting Packages or Solicitation Packages, as applicable, the Notice and Claims Agent will reflect this decision in the Voting Report.

APPROVAL OF THE DISCLOSURE STATEMENT IS WARRANTED

I. The Disclosure Statement Contains Adequate Information.

21. 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.[10] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[11] 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.[12]

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

a. the events leading to the filing of a bankruptcy petition;

b. the relationship of a debtor with its affiliates;

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

d. the anticipated future of the company;

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

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

g. the claims asserted against a debtor;

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

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[10] *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 . . . .").

[11] 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 § 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. CIV.A. H-03-5693, 2006 WL 2844245, at *30 (S.D. Tex. Sept. 29, 2006) (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.").

[12] *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."); *Kirk v. Texaco, Inc.*, 82 B.R. 678, 682 (S.D.N.Y. 1988) ("The legislative history could hardly be more clear in granting broad discretion to bankruptcy judges under § 1125(a).").

i. the future management of a debtor;

j. the chapter plan or a summary thereof;

k. the financial information, valuations, and projections relevant to the claimant's decision to accept or reject the chapter 11 plan;

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

m. the actual or projected realizable value from recovery of any causes of action or avoidance actions;

n. the litigation likely to arise in a nonbankruptcy context; and

o. the tax attributes of a debtor.[13]

23. The Disclosure Statement contains adequate information and was previously approved on a conditional basis on July 30, 2024.[14] The Disclosure Statement contains descriptions and summaries of, among other things: (a) the chapter 11 process; (b) a summary of the treatment of Claims and Interests, including projected recoveries at the time of solicitation; (c) the solicitation and voting procedures; (d) the history, operations, and capital structure of the Debtors; (e) the events leading to the filing of these Chapter 11 Cases; (f) material events during the Chapter 11 Cases; (g) key terms of the Plan; (h) risk factors affecting the Plan; and (i) federal tax law consequences of the Plan.

24. In light of the foregoing, the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code and should be approved on a final basis.

II. The Solicitation Procedures Complied with the Bankruptcy Code and Bankruptcy Rules.

25. In addition to conditionally approving the adequacy of the Disclosure Statement, the Disclosure Statement Order granted relief regarding solicitation and noticing procedures including, among other things: (a) scheduling a combined Disclosure Statement approval and Plan confirmation hearing; (b) establishing a Plan and Disclosure Statement Objection Deadline and

[13] *See 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).

[14] *See* Disclosure Statement Order [Docket No. 473].

related procedures; (c) approving the form and manner of the Combined Notice and Combined Hearing Publication Notice; (d) approving the forms of Non-Voting Packages; and (e) approving the forms of Solicitation Packages. The Debtors have complied with the procedures and timeline approved by the Disclosure Statement Order in these Chapter 11 Cases.

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

26. 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 . . . ."[15] The Debtors at all times took appropriate actions in connection with the solicitation of the Plan and in compliance with section 1125 of the Bankruptcy Code.[16] Accordingly, the Court should grant the parties the protections provided under section 1125(e) of the Bankruptcy Code.

THE PLAN SATISFIES SECTION 1129 OF THE BANKRUPTCY CODE

27. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[17] As set forth herein, the Plan fully complies with all relevant sections of the Bankruptcy Code—including sections 1122, 1123, 1125, 1126, and 1129—as well as the Bankruptcy Rules and applicable non-bankruptcy law.

[15] 11 U.S.C. § 1125(e).

[16] *See* Staut Decl. ¶ 19.

[17] *See Financial Sec. Assur. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 801 (5th Cir. 1997) ("The standard of proof required by the debtor to prove a Chapter 11 plan's [section 1129(a)(11)] feasibility is by a preponderance of the evidence . . .") (citation omitted); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir. 1993), *cert. denied*, 510 U.S. 92 (1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard for proof both under § 1129(a) and in a cramdown.") (footnote omitted); *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.") (citation omitted).

I. The Plan Complies with Section 1129(a)(1) of the Bankruptcy Code.

28. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]."[18] 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, respectively.[19] As explained below, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as other applicable provisions.

A. The Plan Properly Classifies Creditors' Claims Under Section 1122 of the Bankruptcy Code.

29. 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 other claims or interests of such class.[20]

30. 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.[21] Courts in this jurisdiction, as well as others, frequently recognize the significant flexibility that plan proponents have to place similar claims in different classes, provided there is a rational basis to do so.[22]

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[18] 11 U.S.C. § 1129(a)(1).

[19] 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."); *see also In re Nutritional Sourcing Corp*., 398 B.R. 816, 824 (Bankr. D. Del. 2008).

[20] 11 U.S.C. § 1122(a).

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

[22] *See In re Briscoe Enters., Ltd., II*, 994 F.2d at 1167 (recognizing that "there may be good business reasons to support separate classification"); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (holding that a classification scheme is proper as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed"); *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

Grounds justifying separate classification, including separate classification of unsecured claims, include: (a) where members of a class possess different legal rights; and (b) where there is a good business reason for separate classification.[23]

31. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places the Claims and Interests into six (6) separate Classes, with Claims and Interests in each Class differing from the Claims and Interests in each other Class in a legal or factual manner, or based on other relevant criteria.[24] 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 Term Loan Claims;

d. Class 4: General Unsecured Claims;

e. Class 5: Intercompany Claims; and

f. Class 6: Existing Equity Interests.

32. Claims or Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests in such Class.[25] In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes set forth in the Plan, and the classification scheme was not implemented for any improper purpose and is necessary to implement the Plan.[26] Specifically, the Plan separately classifies the Claims because each Holder of such Claim may hold (or may have held at the time

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.").

[23] *See, e.g.*, *In re Briscoe Enters. Ltd., II*, 994 F.2d at 1167; *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993).

[24] *See* Plan, Art. III.

[25] *See* Staut Decl. ¶ 21.

[26] *Id.*

the Plan was filed) rights in the Estates that were legally dissimilar to the Claims in other Classes.[27] For example, debt and equity are separately classified and secured debt is separately classified from unsecured debt. Other aspects of the classification scheme reasonably recognize the different legal or factual nature of the Claims and Interests. Finally, each Claim or Interest in each particular Class is substantially similar to every other Claim or Interest in that Class.

33. Accordingly, the Plan satisfies section 1122 of the Bankruptcy Code.

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

34. 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, and no party has asserted otherwise.

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

35. For the reasons set forth above, Article III of the Plan properly designates classes of Claim and Interests and thus satisfies the requirements of section 1122 of the Bankruptcy Code.[28] No party has asserted otherwise.

2. Specification of Unimpaired Classes (Section 1123(a)(2)).

36. 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."[29] The Plan meets this requirement by setting forth the treatment of each Class in Article III that is Impaired.

37. In addition, on August 2, 2024, the Debtors filed the *Debtors' Motion for Entry of Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* [Docket No. 488] (the "Estimation Motion"), seeking entry of an order estimating Innovatus's claim for purposes of calculating the Prepetition Term Loan Claims Escrow Amount and rendering Innovatus unimpaired.

[27] *Id.*

[28] *Id.* ¶ 23.

[29] 11 U.S.C. § 1123(a)(2).

38. On August 16, 2024, the Prepetition Term Loan Secured Parties filed an objection to the Estimation Motion asserting, among other arguments, that the Prepetition Term Loan Claims Account, as contemplated in the Plan, impaired the Prepetition Term Loan Secured Parties regardless of the size of the Prepetition Term Loan Claims Escrow Amount.[30]

39. On August 23, 2024, following a hearing on the Estimation Motion and Estimation Objection, the Court entered the *Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* [Docket No. 561] (the "Estimation Order"), setting the Prepetition Term Loan Secured Parties' claim amount for funding the Prepetition Term Loan Claims Account at $15,738,961.47, thereby rendering Innovatus unimpaired.

40. Accordingly, the Plan meets the requirement of section 1123(a)(2) of the Bankruptcy Code.[31]

3. Treatment of Impaired Classes (Section 1123(a)(3)).

41. 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."[32] The Plan meets this requirement by setting forth the treatment of each Class in Article III that is Impaired.[33] No party has asserted otherwise.

4. Equal Treatment Within Classes (Section 1123(a)(4)).

42. 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."[34] The Plan meets

[30] *See Innovatus Life Sciences Lending Fund I, LP's Objection to Debtors' Motion for Entry of an Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves To Unimpair Claim* [Docket No. 526] (the "Estimation Objection").

[31] *See* Plan, Art. III.A; Staut Decl. ¶ 24.

[32] 11 U.S.C. § 1123(a)(3).

[33] *See* Plan, Art. III.B; Staut Decl. ¶ 24.

[34] 11 U.S.C. § 1123(a)(4).

this requirement because Holders of Allowed Claims or Interests will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such holders' respective Class.[35] No party has asserted otherwise.

5. Means for Implementation (Section 1123(a)(5)).

43. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation.[36] The Plan satisfies this requirement because Article IV of the Plan, as well as other provisions thereof, provide for the means by which the Plan will be implemented.[37]

44. Among other things, Article IV of the Plan provides for: (i) the general settlement of Claims and Interests; (ii) creation of the Liquidating Trust and appointment of the Liquidating Trustee and Liquidating Trust Oversight Committee; (iii) the authorization for the Debtors, the Wind-Down Debtors, the Plan Administrator, and the Liquidating Trustee, as applicable, to take all actions (including corporate actions), necessary or appropriate to implement or effectuate the Plan; (iv) the consummation of the Plan, including the Wind-Down and dissolution of the Debtors; (v) the sources of consideration for Plan Distributions, including the Sale Transactions, Use of Cash, and Retained Causes of Action; (vi) the preservation and vesting of the Retained Causes of Action in the Liquidating Trustee or the Plan Administrator, as applicable, as set forth on the Schedule of Retained Causes of Action; (vii) the authorization, approval, and entry of corporate actions under the Plan; (viii) the cancellation of existing securities and agreements; (ix) the effectuation and implementation of documents and further transactions; and (x) the continuity of the Sale Orders and Sale Transaction Documents. Accordingly, the Plan complies with section 1123(a)(5) of the Bankruptcy Code, and no party has asserted otherwise.

[35] *See* Plan, Art. III.B; Staut Decl. ¶ 24.

[36] 11 U.S.C. § 1123(a)(5).

[37] *See* Staut Decl. ¶ 25.

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

45. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of nonvoting equity securities.[38] The Plan is a liquidating plan pursuant to which the Debtors' assets will be liquidated and distributed by the Debtors, the Plan Administrator, or the Liquidating Trustee, as applicable. As such, the Plan does not provide for the issuance of non-voting equity securities and section 1123(a)(6) of the Bankruptcy Code is inapplicable.[39] No party has asserted otherwise.

7. Directors and Officers (Section 1123(a)(7)).

46. 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."[40] In accordance with Article IV.H of the Plan, as of the Effective Date, the existing board of directors of the Debtors shall be deemed to have resigned and the remaining employees or officers of the Debtors terminated without any further action required. From and after the Effective Date, the Plan Administrator and the Liquidating Trustee, as applicable, shall be authorized to act on behalf of the Estates, provided that neither of them shall have duties other than as expressly set forth in the Plan, Proposed Confirmation Order, Plan Administrator Agreement, and Liquidating Trustee Agreement, as applicable. The identities of the Plan Administrator and the Liquidating Trustee, as applicable, along with the nature of any compensation for such persons, will be disclosed in the Plan Supplement. The appointments of the Plan Administrator and Liquidating Trustee are consistent with the interests of creditors and with public policy.[41] Accordingly, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code, and no party has asserted otherwise.

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[38] 11 U.S.C. § 1123(a)(6).

[39] Staut Decl. ¶ 26.

[40] 11 U.S.C. § 1123(a)(7).

[41] *See* Staut Decl. ¶ 27.

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

47. 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) modify or leave unaffected the rights of holders of secured or unsecured claims; (c) provide for the settlement or adjustment of claims against or interests in a debtor or its estate or the retention and enforcement by a debtor, trustee, or other representative of claims or interests; (d) provide for the assumption or rejection of executory contracts and unexpired leases; (e) provide for the sale of all or substantially all of the property of a debtor's estate, and the distribution of the proceeds of such sale among holders of claims or interests; or (f) "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[42]

1. Impairment and Unimpairment of Classes (Section 1123(b)(1)).

48. The Plan satisfies the requirements of section 1123(b)(1), and no party has asserted otherwise. Article III leaves each Class of Claims and Interests Impaired or Unimpaired, respectively.[43]

2. Treatment of Executory Contracts and Unexpired Leases (Section 1123(b)(2)).

49. The Plan is consistent with section 1123(b)(2) of the Bankruptcy Code. Article V of the Plan provides for the automatic rejection of the Debtors' Executory Contracts and Unexpired Leases (other than the Indemnification Obligations and the D&O Liability Insurance Policies) not previously rejected, assumed, or assumed and assigned during these Chapter 11 Cases under section 365 of the Bankruptcy Code, nor scheduled to be assumed under the Plan, the Plan Supplement, or the Sale Orders.[44] The Debtors determined, in their sound business judgment, that all of the Executory Contracts and Unexpired Leases other than the Indemnification Obligations,

[42] *See* U.S.C. § 1123(b)(1)–(6).

[43] *See* Plan, Art. III.A.; Staut Decl. ¶ 29.

[44] *See* Plan, Art. V.

the D&O Liability Insurance Policies, and those contracts listed on the Schedule of Assumed Executory Contracts and Unexpired Leases should be automatically rejected upon the Effective Date because the Debtors will wind down after the Effective Date and only those Executory Contracts necessary for the wind down are being assumed.[45] Accordingly, the Plan satisfies the requirements of Bankruptcy Code section 1123(b)(2), and no party has asserted otherwise.[46]

3. Release, Exculpation, and Injunction Provisions (Section 1123(b)(3), (6)).

50. The Plan also includes certain releases, an exculpation provision, and an injunction provision. These discretionary provisions are proper because, among other things, they comply with the Bankruptcy Code and are in the best interests of the Debtors' Estates.

i. The Debtor Releases Are Appropriate and Comply with the Bankruptcy Code.

51. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[47] For a debtor to release claims under section 1123(b)(3)(A) of the Bankruptcy Code, this Court has previously held that "the only analysis required is to determine whether the release…is an exercise of reasonable business judgment on that part of the debtor, is it fair and equitable, [and] is it in the best interest of the estate, given all the relevant facts and circumstances."[48]

52. Because a debtor is extinguishing its own claims, debtor releases are generally the "least-controversial type of release,"[49] and as such, courts afford the Debtors reasonable discretion

[45] *See* Staut Decl. ¶ 30.

[46] *Id.*

[47] 11 U.S.C. § 1123(b)(3)(A).

[48] *In re Highland Capital Management, L.P.*, Case No. 19-34054 (SGJ) (Bankr. N.D. Tex., Feb. 9, 2021) [Docket No. 1917]; *see also In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (finding that plan release provision "constitutes an acceptable settlement under § 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan"); *In re Heritage Org., LLC*, 375 B.R. at 259; *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).

[49] *In re Highland Capital*, No. 19-34054, at 24:16-17.

in determining for themselves the appropriateness of granting plan releases of estate causes of action.[50]

53. Further, courts in this Circuit generally interpret the "fair and equitable" prong, 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.[51] Courts generally determine whether a release is "in the best interest of the estate" by reference to the following factors:

a. the probability of success of litigation;
b. the complexity and likely duration of the litigation, any attendant expense, inconvenience, or delay, and possible problems collecting 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 arms'-length negotiations.[52]

54. Article IX.A of the Plan contains a Debtor release provision (the "Debtor Releases"), which releases certain Claims or Causes of Action that the Debtors or their Estates may have or hold against a Released Party.[53] The Debtor Releases meet the applicable standard because they balance the likelihood of success on any released claim as against the complexity and likely duration of the litigation, and represent the best interests of the creditors, who overwhelmingly support their inclusion in the Plan.[54] As described in the Staut Declaration, the

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

[51] *In re Mirant Corp.*, 348 B.R. at 738.

[52] *Id.* at 739–40.

[53] *See* Plan, Art. IX.A. Under the Plan, "**Released Party**" is defined as: (1) each Debtor and its Estate; (2) each Wind-Down Debtor and its Estate; (3) each Related Party of each Entity in clause (1) and (2); *provided* that in each case, an Entity shall not be a Released Party if it: (x) elects to opt out of the releases contained in Article IX.A or Article IX.B of the Plan or (y) timely objects to the releases contained in Article IX.A or Article IX.B of the Plan and such objection is not resolved before Confirmation. *See id.*, Art. I.A. A "**Related Party**" means each of, and in each case in its capacity as such, current and former directors, managers, officers, committee members, members of any governing body, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors and any such Person's or Entity's respective heirs, executors, estates, and nominees. *Id.*

[54] *See* Staut Decl. ¶ 32.

Released Parties made significant contributions to a highly complex and contentious restructuring.[55] In the face of numerous obstacles and challenges, the Debtors' directors and officers navigated the Debtors through a chapter 11 process that has been successful beyond any reasonable expectation. Consider, for example, the Debtors' highly successful Sale Transactions as evidence of the Released Parties' contributions. Recognizing the concern for patient health and the ability to maintain production of its life-saving products, the Released Parties consummated the Zokinvy sale within 32 days of the Petition Date and obtained a base purchase price that was approximately $20 million over the original Stalking Horse bid. This effort was followed up by another highly successful sale process for Avexitide, which yielded approximately $25 million over the original Stalking Horse bid, far exceeding stakeholders' expectations by generating enough cash to fund meaningful recovery to equity.[56]

55. Importantly, the Debtors do not believe they have any viable causes of action against any of the Released Parties that would justify the risk, expense, and delay of pursuing any such cause of action. The probability of success with respect to any possible causes of action the Debtors may have against the Released Parties is extraordinarily low, and prosecution of any potential causes of action released under the Debtor Releases would be complex, expensive, and time consuming. Further, parties related to the Debtors have indemnification rights against the Debtors with respect to claims subject to the Debtor Releases.[57] As such, the indemnification claims asserted by Released Parties would directly affect the Debtors' estates and undermine attempts to collect on a released cause of action.

56. Finally, each of the Released Parties participated in the negotiation, formulation, and ultimately, the effectuation of the transactions contemplated in the Plan. The Plan provides these parties with the global closure they deserve.[58]

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[55] *Id.*

[56] *Id.*

[57] *Id.* at ¶ 33.

[58] *Id.* at ¶ 33

57. In light of these substantial benefits and the lack of any value in the potential Claims and Causes of Action being released, the Debtors are justified in agreeing to the Debtor Releases, which are a key component to the Plan. Accordingly, the Debtor Releases are fair and equitable, in the best interests of the Estates, and should be approved.

ii. The Third Party Release is Appropriate and Complies with the Bankruptcy Code.

58. Article IX.B of the Plan contains a third party release provision (the "Third Party Release").[59] It provides that each Releasing Party—including all Holders of Claims and Interests who do not specifically object to or opt out of their inclusion as a Releasing Party—shall release all Claims or Causes of Action set forth in the Third Party Release that could be asserted against the Released Parties.[60] The Third Party Release was important for bringing key stakeholders groups to the bargaining table to effectuate the value maximizing transactions contemplated by the Plan.[61] Moreover, the Third Party Release is a permissible consensual release consistent with Fifth Circuit law.

59. While a number of Fifth Circuit decisions limit the availability of third party releases,[62] those limitations only apply to certain *non-consensual* third party releases—*i.e.* releases

[59] *See* Plan, Art. IX.B.

[60] *Id.* Under the Plan, "**Releasing Party**" is defined as each of, and in each case in its capacity as such: (1) each Debtor and its Estate; (2) each Wind-Down Debtor and its Estate; (3) any Statutory Committee and each of its members; (4) the Holders of all Claims or Interests who vote to accept the Plan; (5) the Holders of all Claims or Interests whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan and do not opt out of granting the releases set forth in Article IX.A or Article IX.B of the Plan; (6) the Holders of all Claims or Interests who vote to reject the Plan but do not opt out of granting the releases set forth in Article IX.A or Article IX.B of the Plan; (7) each current and former Affiliate of each Entity in clauses (1) through (6) and the following clause (8); and (8) each Related Party of each Entity in clause (1) through this clause (8), solely to the extent such Related Party may assert Claims or Causes of Action on behalf of or in a derivative capacity by or through an Entity in clause (1) through clause (7); *provided* that in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt out of the releases contained in Article IX.A or Article IX.B of the Plan or (y) timely objects to the releases contained in Article IX.A or Article IX.B of the Plan and such objection is not resolved before Confirmation. *See id.*, Art. I.A.

[61] *Id.*

[62] *See Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031, 1059 (5th Cir. 2012); *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760–61 (5th Cir. 1995).

that occur despite the affected party's effort to object or opt out.[63] "Most courts allow *consensual* nondebtor releases to be included in a plan."[64] This practice is consistent with the notion that "[t]he validity of a consensual release is primarily a question of contract law because releases are no different from any other settlement or contract."[65]

60. The Fifth Circuit has not directly addressed what constitutes a consensual third-party release, but it has touched on the issue in a series of decisions addressing the *res judicata* effect of a confirmed chapter 11 plan that contains a third-party release.[66] The *Republic Supply* 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] The *Republic Supply* court found that the third party release at issue—to which no party timely objected—was binding and enforceable.[68] The Fifth Circuit has subsequently addressed the same issue from *Republic Supply* on several occasions, focusing on the specificity of the third-party release provision at issue to determine its *res judicata* effect.[69]

61. Ultimately, *Republic Supply* and its progeny stand for the proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of

[63] *See, e.g.*, *In re Pilgrim's Pride Corp.*, No. 08-45664-DML-11, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) (ruling that under Pacific Lumber "the court may not, *over objection*, approve through confirmation of the Plan third party protections. . . .") (emphasis added); *see also In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701–02 (Bankr. W.D. Tex. 2011) ("[T]he Fifth Circuit does allow permanent injunctions *so long as there is consent*.") (emphasis in original).

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

[65] *Id.* (citations omitted).

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

[67] *Republic Supply*, 815 F.2d at 1050.

[68] *Id.* at 1053.

[69] *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*).

settlement, and given for consideration do not violate" the Bankruptcy Code.[70] At the core of the analysis is whether the third-party release is consensual.

62. In determining whether a release is consensual, courts focus on the process—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."[71] Ultimately, these courts acknowledge that parties in interest waive their rights with respect to a third-party release if they vote to accept the Plan or do not opt out of the releases.[72] Such waiver and consent is generally rooted in contract law.[73] Although such parties are consenting by silence, contract law in the state of Texas, the governing law of the Plan,[74] recognizes certain instances where silence is deemed consent.[75]

63. Under contract law of the state of Texas, "silence and inaction may nevertheless operate as an acceptance that creates a binding agreement . . . [w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation."[76] To provide an offeree with notice of an expectation of compensation, the offeror must "notif[y] the [offeree] prior to the delivery of the [goods or services] that [the offeror] anticipate[s] payment" from the offeree.[77]

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[70] *In re Wool Growers*, 371 B.R. at 776 (citing *Republic Supply*, 815 F.2d at 1050); *Dr. Barnes Eyecenter*, 255 Fed. App'x at 911–12).

[71] 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.").

[72] *See* ENXP Tr. at 47 (reasoning that, so long as due process is satisfied, a party can waive its substantive rights by not affirmatively participating in the bankruptcy case); 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).

[73] *See In re Wool Growers*, 371 B.R. at 775 ("The validity of a consensual release is primarily a question of contract law because such releases are no different from any other settlement or contract.") (internal quotations omitted).

[74] *See* Art. XII.M of the Plan.

[75] *See Thompson v. Chase Bank USA, N.A.*, No. H-07-1642, 2009 U.S. Dist. LEXIS 8343, at *5 (S.D. Tex. Feb. 5, 2009) (noting that under Texas state law silence can sometimes be deemed consent).

[76] *Kroesche v. Wassar Logistics Holdings, LLC*, No. 01-20-00047-CV, 2023 Tex. App. LEXIS 618, at *106 (Tex. App. Jan. 31, 2023).

[77] *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 n.4 (Tex. 1992) (discussing notice of expectation of compensation in the quantum meruit context); *see also Emerald Aero., LLC v. Boeing Co*., No. 3:22-CV-0717-B, 2022 U.S. Dist. LEXIS 200311, at *16 (N.D. Tex. Nov. 3, 2022) ("The 'notice' element focuses on what the recipient of

64. The Third Party Release meets the standard set forth in *Republic Supply* and its progeny. As a threshold matter, the Third Party Release is *consensual*.[78] All parties in interest were provided extensive notice of these Chapter 11 Cases, the Disclosure Statement and Plan, the deadline to object to confirmation of the Plan, and the ability to opt out of the Third Party Release.[79] The Ballots, which were transmitted to all Holders of Claims or Interests in the Original Voting Classes, and the Release Opt-Out Form, which was transferred to all Holders of Claims not entitled to vote, both expressly state in conspicuous, bold text that Holders of Claims and Interests who do not opt out of the release contained in the Plan will be bound by the Third Party Release.[80] Each Ballot and Release Opt-Out Form distributed also contained the full text of Article IX.B of the Plan—the Third Party Release—along with relevant definitions therein.[81]

65. In addition to serving the full Solicitation Packages or Notice of Non-Voting Status Packages (as applicable) on all known Holders of Claims or Interests, the Debtors served the Combined Hearing Notice on all known potential creditors, including vendors, current and former employees, customers, and contract counterparties.[82] In addition, the Debtors published the notice of the Combined Hearing in *The New York Times* (national edition) and the *San Francisco Chronicle*. Critically, the notice of Combined Hearing contained the full text of the Third Party Release and informed parties, in conspicuous text, that they would be bound by the terms of the Third Party Release if they did not otherwise opt out.[83]

66. In addition to being consensual, the Third Party Release satisfies the other factors referenced in *Republic Supply* and its progeny. ***First,*** the Third Party Release is specific, listing

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the services knew or should have known at the time the services were accepted.") (citing *Myrex Indus., Inc. v. Ortolon*, 126 S.W.3d 548, 551 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[78] *See* Staut Decl. ¶ 37.

[79] *See generally* Disclosure Statement Order, Exs 2–5.

[80] *Id.*

[81] *Id.*

[82] *See Certificate of Service* [Docket No. 508].

[83] *See* Disclosure Statement Order, Exs. 1-2.

potential Claims and Causes of Action to be released in sufficient detail so as to put the Releasing Parties on notice of the released claims.[84] ***Second,*** the Third Party Release is integral to the Plan and an important part of the comprehensive settlement embodied therein.[85] ***Finally,*** the significant contributions of the Released Parties inured not only to the benefit of the Debtors but also to the benefit of all stakeholders by allowing these Chapter 11 Cases to proceed in an efficient and expedient manner thus maximizing the proceeds from the Sale Transactions available for recovery.[86]

67. Based on the extensive notice provided to all Holders of Claims or Interests of the Third Party Release and the opportunity to opt out of the Third Party Release, the Third Party Release satisfies the standard for a consensual release. For all of the foregoing reasons, the Third Party Release is justified, appropriate, and should be approved.

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

68. Article IX.C. of the Plan provides for the exculpation of the Exculpated Parties.[87] The Plan's exculpation provision is fair and appropriate, an integral piece of the overall settlement embodied by the Plan, and the product of good faith, arms'-length negotiations. Put simply, the Debtors could not have developed the Plan without the support and contributions of the exculpated parties. Moreover, the exculpation provision is narrowly tailored to exclude acts of actual fraud, willful misconduct, or gross negligence, relates only to acts or omissions in connection with, or arising out of the Debtors' restructuring transactions, and is limited to parties who have performed valuable services as fiduciaries of the Debtors' estates in connection with these Chapter 11 Cases.

[84] *See* Plan, Art. IX.B.

[85] *See* Staut Decl. ¶ 36.

[86] *Id.*

[87] *See* Plan, Art. IX.C. Under the Plan, "Exculpated Parties" means, collectively, (1) the Debtors and the Wind-Down Debtors, (2) any Statutory Committee and each of its members, (3) the Debtors' Professionals, including Sidley Austin LLP, SSG Advisors, LLC, Alvarez & Marsal North America, LLC, Neligan LLP, and Verita Global f/k/a Kurtzman Carson Consultants, LLC, (4) the Professionals of any Statutory Committee, and (5) any directors and officers of the Debtors as of the Petition Date.

Accordingly, the exculpation provision is appropriate, justified, and necessary under the facts and circumstances of these Chapter 11 Cases and should be approved.

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

69. The injunction provision set forth in Article IX.D. of the Plan implements the Plan's release and exculpation provisions, in part, by permanently enjoining all entities from commencing or maintaining any action against the Debtors, the Plan Administrator, the Liquidating Trustee, the Released Parties, or the Exculpated Parties (as applicable), on account of, in connection with, or with respect to any such claims or interests released or subject to exculpation.[88] Thus, the injunction provision is a key provision of the Plan because it enforces and implements those release and exculpation provisions that are centrally important to the Plan.[89] As such, to the extent the Court finds that the exculpation and release provisions are appropriate, the injunction provision must also be appropriate. As such, the injunction provisions are necessary, appropriate, and should be approved.

4. The Plan Complies with the Additional Provision of Section 1123(b).

70. The Plan complies with section 1123(b)(4) of the Bankruptcy Code as substantially all of the Debtors' assets have been sold or will be sold pursuant to the Sale Transactions, the proceeds of which shall be for the benefit of stakeholders.[90] It complies with section 1123(b)(5) of the Bankruptcy Code as Article III of the Plan modifies or leaves unaffected, as is applicable, the rights of certain Holders of Claims.[91] Finally, any other discretionary provisions in the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1123(b)(6) of the Bankruptcy Code.[92] Accordingly, the Plan satisfies the requirements of Bankruptcy Code sections 1123(b)(4)–(6), and no party has asserted otherwise.

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[88] *See* Plan, Art. IX.D.

[89] *See* Staut Decl. ¶ 40.

[90] *Id.* ¶ 41.

[91] *Id.* ¶ 42.

[92] *Id.* ¶ 43.

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

71. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires the plan proponent to comply with the applicable provisions of the Bankruptcy Code.[93] The legislative history to section 1129(a)(2) provides that section 1129(a)(2) is intended to encompass the disclosure and solicitation requirements set forth in section 1125 and the plan acceptance requirements set forth in section 1126 of the Bankruptcy Code.[94] As set forth herein, the Debtors have complied with these provisions, including sections 1125 and 1126 of the Bankruptcy Code, as well as Bankruptcy Rules 3017 and 3018, by distributing the Disclosure Statement and soliciting acceptances of the Plan through their Notice and Claims Agent in accordance with the Disclosure Statement Order.[95]

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

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

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

73. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject a plan.[96] The Debtors did not solicit votes on the Plan from the Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), Class 3 (Prepetition Term Loan Claims), and Class 5 (Intercompany Claims) as such Classes are

[93] *See* 11 U.S.C. § 1129(a)(2).

[94] *See In re Lapworth*, 1998 WL 767456, at *3 (DWS) (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); *In re Aleris Int'l, Inc*., 2010 WL 3492664, at *20 (Bankr. D. Del. May 13, 2010) ("[S]ection 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the solicitation and disclosure requirements under sections 1125 and 1126 of the Bankruptcy Code."); S. Rep. No. 989, 95th Cong., 2d Sess., at 126 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 412 (1977).

[95] *See* Staut Decl. ¶ 44.

[96] *See* 11 U.S.C. § 1126.

Unimpaired under the Plan and thus presumed to accept under section 1126(f) of the Bankruptcy Code.[97]

74. Accordingly, the Debtors solicited votes only from the Original Voting Classes, constituting Holders of Allowed Claims and Interests in Classes 4 and 6 because, as of the Solicitation Date, each of these Classes were Impaired and entitled to receive a distribution under the Plan.[98]

75. With respect to Class 6, the only Impaired Class as of the date of this Memorandum, section 1126(c) of the Bankruptcy Code provides that:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of [section 1126], that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of [section 1126], that have accepted or rejected such plan.[99]

76. The Voting Report will reflect the results of the voting process in accordance with section 1126 of the Bankruptcy Code. Based on the foregoing, the Debtors submit that they have satisfied the requirements of section 1129(a)(2), and no party has asserted otherwise.

III. The Plan Was Proposed in Good Faith and Therefore Complies with Section 1129(a)(3) of the Bankruptcy Code.

77. 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.[100] To determine whether a plan seeks

[97] *See* Plan, § III.A.

[98] *Id.*

[99] 11 U.S.C. § 1126(c).

[100] *See, e.g.*, *In re Block Shim Dev. Company-Irving*, 939 F.2d 289, 292 (5th Cir. 1991) (noting the fundamental purpose of the Bankruptcy Code); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985) (determining whether plan met good faith standard).

relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[101]

78. The Plan was proposed with honesty, good intentions, and with the goal of maximizing stakeholder recoveries.[102] Throughout these Chapter 11 Cases, the Debtors, their directors, and their management team have upheld their fiduciary duties to stakeholders and protected the interests of all constituents, including the general unsecured creditors. The Plan facilitates transactions that will provide significant value to the Debtors' stakeholders compared to the alternative of a chapter 7 liquidation.[103] Accordingly, the Plan and the Debtors' conduct satisfy section 1129(a)(3) of the Bankruptcy Code, and no party has asserted otherwise.

IV. The Plan Provides that the Payment of Debtors' Professional Fees and Expenses Are Subject to Court Order in Compliance with Section 1129(a)(4).

79. 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.[104]

80. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code.[105] All payments made, or to be made, by the Debtors for services or for costs or expenses in connection with these Chapter 11 Cases prior to the Confirmation Date, including all Professional Compensation Claims, have been approved by, or are subject to approval of, the Court.[106] Article II.B.1. of the Plan

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[101] *E.g., 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).

[102] *See* Staut Decl. ¶ 45.

[103] *See id*. ¶ 51.

[104] *See In re Cajun Elec. Power Coop.*, 150 F.3d at 518 ("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").

[105] *See* Staut Decl. ¶ 48.

[106] *See* Plan, Art. II.

provides that all final requests for payment of Professional Compensation Claims shall be filed no later than 45 days after the Effective Date for determination by the Court, after notice and a hearing, in accordance with the procedures established by the Court except as such procedures have been otherwise modified by the Plan.[107] Accordingly, the Plan fully complies with the requirements of section 1129(a)(4) of the Bankruptcy Code, and no party has asserted otherwise.

V. The Plan Does Not Require Additional Disclosures Regarding Directors, Officers, or Insiders and Therefore Complies with Section 1129(a)(5).

81. The Bankruptcy Code requires the plan proponent to disclose the affiliation of any individual proposed to serve as a director or officer of the debtor or a successor to the debtor under the plan.[108] Section 1129(a)(5)(A)(ii) further requires 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.[109]

82. Here, Article IV.H of the Plan provides for the dissolution of the existing board of directors of the Debtors and the removal of any remaining directors or officers of the Debtors as of the Effective Date.[110] As such, section 1129(a)(5) of the Bankruptcy Code is inapplicable to the Plan. To the extent section 1129(a)(5) applies to the Plan Administrator or the Liquidating Trustee, the Plan Administrator and the Liquidating Trustee, as applicable, will satisfy the requirements of this provision by, among other things, disclosing the identities and affiliations of the persons proposed to serve as Plan Administrator or the Liquidating Trustee, as applicable, in the Plan Supplement.[111] Moreover, the Plan Supplement will identify any insider to be employed by the Plan Administrator in compliance with section 1129(a)(5)(B).[112] Accordingly, the

[107] *Id.*

[108] 11 U.S.C. § 1129(a)(5)(A)(i).

[109] *Id.* § 1129(a)(5)(A)(ii).

[110] *See* Plan, Art. IV.G.

[111] *See* Staut Decl. ¶ 49.

[112] 11 U.S.C. § 1129(a)(5)(B).

requirements of section 1129(a)(5) of the Bankruptcy Code are satisfied, and no party has asserted otherwise.

VI. The Plan Does Not Require Governmental Regulatory Approval and Therefore Complies with Section 1129(a)(6).

83. 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, and no party has asserted otherwise.

VII. The Plan Is in the Best Interest of Creditors and Therefore Complies with Section 1129(a)(7).

84. 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 . . . .[113]

85. 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.[114] As section 1129(a)(7) of the Bankruptcy Code makes clear, the best interests test applies only to holders of non-accepting impaired claims or interests.

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[113] *Id.* § 1129(a)(7).

[114] *Bank of Am. Nat. 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 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").

86. As set forth in the Plan Supplement, the Debtors, with the assistance of their advisors, prepared a liquidation analysis that estimates recoveries for members of each Class under the Plan. The projected recoveries under the Plan are in excess of the recoveries estimated in a hypothetical chapter 7 liquidation.[115] Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the best interests test.

VIII. The Plan is Expected to Satisfy the Requirements of Section 1129(a)(8) of the Bankruptcy Code.

87. 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. Holders of Claims and Interests in Classes 1, 2, 3, and 5 are Unimpaired under the Plan and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively deemed to have voted to accept the Plan.[116] So long as Class 6 votes to accept the Plan, each Class of Claims or Interests will be either Unimpaired or will have accepted the Plan and, as such, the Plan complies with Section 1129(a)(8) of the Bankruptcy Code.[117]

IX. The Plan Provides for Payment in Full of All Allowed Priority Claims in Compliance with Section 1129(a)(9) of the Bankruptcy Code.

88. 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—generally wage, employee benefit, and deposit claims

[115] *See* Staut Decl. ¶ 51.

[116] *See id.* ¶ 54.

[117] As of the time of filing this Memorandum, it appears likely that Class 6 will accept the Plan. To the extent Class 6 does not accept the Plan, the Debtors will file a supplement to this Memorandum to address the impact such development on Confirmation.

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).[118] Finally, section 1129(a)(9)(C) of the Bankruptcy Code 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.[119]

89. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code.[120] *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 shall receive cash or such other treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code.[121] *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 and such Claims have been, or will be, paid in the ordinary course. Finally, Article II.C. of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it provides that holders of Allowed Priority Tax Claims will receive cash or such other treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code.[122] The Plan thus satisfies each of the requirements of section 1129(a)(9) of the Bankruptcy Code, and no party has asserted otherwise.

X. At Least One Class of Impaired, Non-Insider Claims is Expected to Accept the Plan in Compliance with Section 1129(a)(10) of the Bankruptcy Code.

90. 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

[118] 11 U.S.C. § 1129(a)(9)

[119] 11 U.S.C. §§ 507(a)(1)–(7), 1129(a)(9).

[120] *See* Staut Decl. ¶ 56.

[121] *See* Plan, Art. II.A.

[122] *See id.*, Art. II.D.

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.[123]

91. So long Class 6 votes to accept the Plan, independent of any insider's vote, the Plan will satisfy the requirements of section 1129(a)(10) of the Bankruptcy Code,[124] and no party has asserted otherwise.[125]

XI. The Plan Is Feasible in Compliance with Section 1129(a)(11) of the Bankruptcy Code.

92. 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.[126]

93. To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[127] Rather, a debtor must provide only a reasonable assurance of success.[128] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[129] The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds.[130] Bankruptcy

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[123] 11 U.S.C. § 1129(a)(10).

[124] *See* Staut Decl. ¶ 57.

[125] As of the time of filing this Memorandum, it appears likely that Class 6 will accept the Plan. To the extent Class 6 does not accept the Plan, the Debtors will file a supplement to this Memorandum to address the impact such development on Confirmation.

[126] 11 U.S.C. § 1129(a)(11).

[127] *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.").

[128] *Kane*, 843 F.2d at 649; *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) (holding that "[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"); *accord In re Capmark Fin. Grp. Inc*., No. 09-13684 (CSS), 2011 WL 6013718, at *61 (Bankr. D. Del. Oct. 5, 2011) (same).

[129] *See, 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 § 1129(a)(11) so long as adequate evidence supports a finding of feasibility") (internal citations omitted); *In re Sea Garden Motel & Apartments*, 195 B.R. 294, 305 (D. N.J. 1996); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *overruled in part on other grounds*, 464 B.R. 208 (Bankr. D. Del. 2011).

[130] *See In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985).

courts have found that feasibility is established where a debtor has "sufficient resources" to meet its obligations under a liquidating plan, including its "obligations to pay for the costs of administering and fully consummating the Plan and closing the Chapter 11 Cases."[131] Other courts have said that, to demonstrate that a liquidating plan is feasible, a plan proponent need only show that "the successful performance of [the plan's] terms is not dependent or contingent upon any future, uncertain event."[132]

94. Here, the Plan satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code by providing reasonable procedures, by which, the Debtors and the Liquidating Trustee may make the necessary distributions under the Plan.[133] The Debtors project that all Allowed Priority and Allowed Administrative Claims under the Plan will be satisfied as outlined in the Plan and Confirmation Order. Moreover, and as explained in the Staut Declaration, the Debtors have the funds, in cash, necessary to implement the Plan, fund the wind down process, and offer reasonable assurance that the Plan is workable and has a reasonable likelihood of success.[134] The Debtors will continue this process following the Effective Date under the guidance of the Plan Administrator. Accordingly, the Plan satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code, and no party has asserted otherwise.

XII. All Statutory Fees Have or Will Be Paid in Compliance with Section 1129(a)(12).

95. 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."[135] Section 507(a)(2) of the Bankruptcy Code provides

[131] *In re Finlay Enters., Inc.*, No. 09-14873 JMP, 2010 WL 6580628, at *7 (Bankr. S.D.N.Y. June 29, 2010).

[132] *In re Heritage Org., L.L.C.*, 375 B.R. 230, 311 (Bankr. N.D. Tex. Aug. 31, 2007) (holding that the creation of a creditor trust with res consisting of estate cash and the proceeds of any future successful litigation in addition to a fixed trust governance mechanism qualified as feasible).

[133] *See* Staut Decl. ¶ 59.

[134] *See id.*

[135] 11 U.S.C. § 1129(a)(12).

that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses.[136]

96. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because Article II.D of the Plan provides that all fees due and payable pursuant to section 1930 of title 28 of the United States Code, shall be paid by the Debtors on the Effective Date.[137] After the Effective Date, any and all Statutory Fees shall be paid to the U.S. Trustee when due and payable, and the Debtors or Plan Administrator, as applicable, shall remain obligated to pay the U.S. Trustee Statutory Fees until the earliest of the Debtors' cases being closed, dismissed, or converted to case under chapter 7 of the Bankruptcy Code. Accordingly the Plan satisfies section 1129(a)(12), and no party has asserted otherwise.

XIII. The Debtors Have No Retiree Benefit Obligations (Section 1129(a)(13)).

97. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. The Debtors do not have any obligation to pay retiree benefits (as defined in section 1114 of the Bankruptcy Code).[138] Therefore, section 1129(a)(13) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases or the Plan, and no party has asserted otherwise.

XIV. Sections 1129(a)(14), (a)(15) and (a)(16) Do Not Apply to the Plan.

98. 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.[139] 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 the Debtors are not an "individual," the requirements

[136] *Id.* § 507(a)(2).

[137] *See* Staut Decl. ¶ 60; Plan, Art. II.D.

[138] *See* Staut Decl. ¶ 61.

[139] *See id.*

of section 1129(a)(15) of the Bankruptcy Code do not apply.[140] Finally, the Debtors are 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 nonbankruptcy law, is not applicable to these Chapter 11 Cases.[141]

XV. Section 1129(b) of the Bankruptcy Code Is Inapplicable Because All Holders of Claims or Interests Are Unimpaired or Expected to Vote to Accept the Plan.

99. 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. So long as Class 6 votes to accept the Plan, all Holders of Claims or Interests under the Plan are either Unimpaired or they have accepted the Plan,[142] thus satisfying the requirements of section 1129(a)(8) of the Bankruptcy Code and rendering section 1129(b) of the Bankruptcy Code inapplicable.[143]

XVI. The Plan Complies with Sections 1129(d) and (e) of the Bankruptcy Code.

100. Section 1129(d) of the Bankruptcy Code provides that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[144] The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933.[145] Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' Chapter 11 Cases is a "small

[140] *See id*.

[141] *See id*.

[142] As of the time of filing this Memorandum, it appears likely that Class 6 will accept the Plan. To the extent Class 6 does not accept the Plan, the Debtors will file a supplement to this Memorandum to address the impact such development on Confirmation.

[143] *See* Staut Decl. ¶ 62.

[144] *See* 11 U.S.C. § 1129(d).

[145] *See* Staut Decl. ¶ 65.

business case."[146] Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements, and no party has asserted otherwise.

XVII. Modifications to the Plan.

101. 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.[147]

102. Since the commencement of solicitation on August 2, 2024, the Debtors modified the Plan to, among other things, reflect permitted adjustments to the treatment of Classes 3 and 4, reserve parties' rights relating to the Prepetition Term Loan Claims pending the Bankruptcy Court's determination of the Aggregate Allowed Prepetition Term Loan Claims Amount, and correct general, non-substantive errors. None of the modifications to the Plan adversely affect the treatment of any party in interest without their consent; rather, the modifications improve the treatment of certain creditors who were previously expected to receive no recovery on account of

[146] *See* 11 U.S.C. § 1129(e); *see* Staut Decl. ¶ 66.

[147] *See, e.g., In re Federal–Mogul Global Inc.*, 2007 Bankr. LEXIS 3940, *113 (Bankr. D. Del. 2007) (additional disclosure under section 1125 is not required where plan "modifications do not materially and adversely affect or change the treatment of any Claim against or Equity Interest in any Debtor"); *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).

their Claims under the Plan and thus deemed to reject.[148] Accordingly, the Plan, as modified, is properly before this Court and all votes cast with respect to the Plan prior to such modification shall be binding and shall apply with respect to the Plan. No party has asserted otherwise.

XVIII. Good Cause Exists to Waive the Stay of the Proposed Confirmation Order.

103. 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."[149] 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.

104. Good cause exists for waiving and eliminating any stay of the Proposed Confirmation Order so that the Proposed Confirmation Order will be effective immediately upon its entry. As noted above, this Plan is the product of extensive, good-faith negotiations among the Debtors and their key stakeholders.[150] Additionally, each day the Debtors remain in chapter 11, they incur significant administrative and professional costs that directly reduce the amount of distributable value for creditors.[151] Based on the foregoing, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the Proposed Confirmation Order may be effective immediately upon its entry.

CONCLUSION

For all of the reasons set forth herein and in the Declarations, including the uncontested nature of the Plan, the Debtors respectfully request that the Court confirm the Plan grant such other and further relief as is just and proper.

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[148] *See* Staut Decl. ¶ 67.

[149] Bankruptcy Rule 3020(e).

[150] *See* Staut Decl. ¶ 68.

[151] *Id.*

Dated: August 28, 2024
Dallas, Texas

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Certificate of Service

I certify that on August 28, 2024, 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 Northern District of Texas.

/s/ Thomas R. Califano
Thomas R. Califano