IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: Eletson Holdings Inc., *et al.*, [1] Debtors.	Chapter 11 Case No. 23-10322 (JPM) (Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF ENTRY OF AN ORDER CONFIRMING THE SECOND AMENDED JOINT PLAN OF REORGANIZATION OF DEBTORS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND RESPONSE TO THE CONFIRMATION OBJECTIONS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND THE PETITIONING CREDITORS

[1] The Debtors in these chapter 11 cases are: Eletson Holdings Inc., Eletson Finance (US) LLC, and Agathonissos Finance LLC.

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The above captioned debtors and debtors in possession (collectively, the "Debtors") in these chapter 11 cases (the "Chapter 11 Cases") hereby submit this memorandum of law (the "Brief") in support of the *Debtors' Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code* [Dkt. No. 840] (and as may be modified or amended, the "Plan")[2] pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code"), and in response to *The Official Committee of Unsecured Creditors' Objection to the Debtors' Second Amended Joint Plan of Reorganization and the Petitioning Creditors' Alternative Chapter 11 Plan and Statement in Support of the Petitioning Creditors' Plan* [Dkt. No. 1030] (the "Committee Objection") and the *Petitioning Creditors' Objection to Confirmation of the Debtors' Chapter 11 Plan* [Dkt. No. 1027] (the "PS Objection" and together with the Committee Objection the "Objections"). In support of the confirmation of the Plan the Debtors incorporate the *Declaration of Vasilis Hadjieleftheriadis in Support of the Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code* [Dkt. No. 985] (the "Hadjieleftheriadis Declaration") and *the Declaration of Vassilis Kertsikoff in Support of the Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code* [Dkt. No. 986] (the "Kertsikoff Declaration") each of which are incorporated herein by reference and respectfully represent the following:

I. PRELIMINARY STATEMENT

1. The Debtors present the Plan for confirmation as the culmination of a year's long struggle to fend off predatory actors disguised as creditors, satisfy the Debtors' outstanding

[2] Capitalized terms used herein have the meaning provided in the Plan or the *First Amended Disclosure Statement in Support Debtors' Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code* [Dkt. No. 839] (the "Disclosure Statement") as applicable.

obligations to their legitimate creditors, and emerge from these Chapter 11 Cases as a reorganized entity capable of reclaiming its title as a world leader at the forefront of the global shipping industry.

2. The confirmation proceedings in these Chapter 11 Cases have been extraordinary to say the least. In addition to the Plan, that group known as the Petitioning Creditors led by purported creditor Pach Shemen LLC ("Pach Shemen") have filed not one, but two competing plans of reorganization. The first of these plans [Dkt. No. 846] (the "PS Plan") is an attempt to seize the Debtors' equity through a rights offering backstopped by Pach Shemen that would leave Pach Shemen in control of the Reorganized Debtors' equity interests with little to no material value for the non-Pach Shemen creditors. The second plan filed by Pach Shemen [Dkt. No. 848] (the "PS Alternative Plan" and together with the PS Plan the "Competing Plans") brazenly copies the structure of the Plan in all material respects. Notwithstanding the crowded confirmation process, as set forth in this Brief and the Debtors' objections to the Competing Plans,[3] the Plan provides the Debtors' creditors with the best and greatest economic recovery of all the plans of reorganization filed in these Chapter 11 Cases and is the best path forward for the Reorganized Debtor.

3. One hundred percent of holders of claims of Class 1, Class 2, and Class 3 and Interests in Class 7 have voted to accept the Plan. Despite Classes 4 through 6 lack of acceptance, confirmation of the Plan is still in the best interest of all parties in interest in these Chapter 11 Cases. Confirmation of the Plan will provide creditors with significantly greater recoveries than

[3] *See Debtors' Omnibus Objection to (I) Confirmation of the Petitioning Creditors' PS Plan and (II) Confirmation of the Petitioning Creditor PS Alternative Plan* [Dkt. No. 1029].

the paltry returns under the PS Plan and the speculative financing called for under the PS Alternative Plan.

4. The Bankruptcy Code requires that a plan of reorganization satisfy the requirements of the Bankruptcy Code by a preponderance of evidence for confirmation. The Plan satisfies all applicable requirements for confirmation for the reasons set forth herein. The Objections were filed by an opposing plan proponent, Pach Shemen and their proxy - the Official Committee of Unsecured Creditors (the "Committee") who has made it clear from the day of its appointment that it is not acting as a fiduciary for unsecured creditors, but rather as a tool for Murchinson aiming to interfere with the Debtor's legitimate reorganization. The Objections go to great length to mischaracterize the terms of the Debtor's Plan, malign the Debtors and their principals, misapply case law, and attempt to disenfranchise the votes of creditors that are not Noteholders. The Objections, as addressed herein, are predicated on faulty financial analyses, artificially developed and unsupportable equity values, and ultimately leave creditors other than Pach Shemen significantly worse off in the long run.

5. As set forth in the *Debtors' Omnibus Objection to (I) Confirmation of the Petitioning Creditors' PS Plan and (II) Confirmation of the Petitioning Creditor PS Alternative Plan* [Dkt. No. 1029] the Competing Plans may not be confirmed under section 1129 of the Bankruptcy Code. However, should this Court find that either of the Competing Plans are also confirmable, this Court must decide which confirmable plan of reorganization should be confirmed. Accordingly, the Debtors submit this Brief to demonstrate not only that the Plan is confirmable, but also that confirmation of the Plan over the Competing Plans is in the best interest of the Debtors estates and represents the best path forward for the success of the Reorganized Debtor. The Debtors' Plan is materially better than either of the Competing Plans and directs

millions more dollars to creditor recoveries. Creditors also agree that the Debtors' Plan is superior. When controlling for Pach Shemen and its affiliates, nearly all creditors voted overwhelmingly in favor of the Debtors' Plan, including the unanimous votes of those parties that will have a continued business relationship with the Reorganized Debtor and a significant percentage of the value of the Debtors' Notes.

II. BACKGROUND AND OVERVIEW OF THE PLAN

6. On March 7, 2023, the Debtors' bankruptcy cases were initiated through the filing of involuntary bankruptcy petitions by alleged creditors Pach Shemen, VR Global Partners, L.P. ("VR Global") and Alpine Partners (BVI) L.P ("Alpine Partners" and together with Pach Shemen and VR Global, the "Original Petitioning Creditors"). As stated by counsel to Pach Shemen,[4] the purpose of the bankruptcy was to hedge against a loss in the Arbitration against Levona over purported ownership of the Preferred Shares of Eletson Gas. To make this hedge, Pach Shemen, an entity created and/or controlled by Levona through Nomis Bay Ltd. and BPY Ltd. (two entities affiliated with Murchinson)–and with the direction of now counsel to the Committee–purported to purchase approximately $183.8 million of the outstanding Exchange Notes (purporting to represent more than half of the aggregate balance of the outstanding Exchange Notes) for $2 million. If Levona lost in the Arbitration and did not receive the Preferred Shares, Pach Shemen intended to initiate an involuntary bankruptcy against the Debtors and attempt to collect the Preferred Shares or the value thereof through the bankruptcy proceedings. As detailed at length in the Disclosure Statement, the *Debtors' Omnibus Objection to (I) Motion of the Official Committee of Unsecured Creditors for an Order Appointing a Chapter 11 Trustee and Joinder of*

[4] *See* Hr'g Transcript 4/09/24 87:21-24 ("Even if they were right, and Pach Shemen bought the notes as a hedge as opposed to a separate investment, that Judge Liman noted, neither the arbitrator nor the debtors identified anything wrong with that, Your Honor.").

Petitioning Creditors and (II) Petitioning Creditors' Emergency Motion to Appoint a Trustee [Dkt. No. 513] Levona, Pach Shemen and the remaining Murchinson Entities were entirely incorrect about the Preferred Shares redounding to Holdings and the Debtors. The involuntary proceedings caused significant harm to the Debtors' estates and are in line with the heinous and inequitable conduct Pach Shemen and its affiliates have committed against the Eletson enterprise. Nonetheless the Debtors used the bankruptcy proceedings as an avenue to address their outstanding debt obligations and provide value to their legitimate creditors, while ridding themselves of Murchinson and its proxies once and for all.

7. The Debtors voluntarily converted their chapter 7 cases to these Chapter 11 Cases on September 25, 2023 (the "Conversion Date"). Since the Conversion Date, the Debtors have attempted to effectuate a swift emergence from these Chapter 11 Cases to ensure the greatest return to their legitimate creditors and lower the administrative burden on their estates. Despite the Debtors' good faith intentions, they have been besieged on all sides by Murchinson affiliated entities, including (i) Wilmington Savings Fund Society FSB ("WSFS") who serves at the direction of Pach Shemen; (ii) the Committee appointed in these Chapter 11 Cases who is represented by Dechert LLP, former counsel to Murchinson, Pach Shemen and WSFS;[5] (iii) Levona and (iv) the Petitioning Creditors led by Pach Shemen. These affiliated parties have acted in concert at the behest of Murchinson throughout these Chapter 11 Cases. The result has been the value destroying and elongated Chapter 11 Cases the Debtors now seek to conclude.

[5] See *Supplemental Declaration of Stephen D. Zide in Support of the Application of the Official Committee of Unsecured Creditors of Eletson Holdings, Inc., et al. for Order Authorizing the Employment and Retention of Dechert LLP as Counsel, Effective as of October 25, 202*3 [Dkt. No. 304]. Pursuant to this Supplemental Declaration, Dechert LLP's ("Dechert") representation of Murchinson and Pach Shemen ended the day before Dechert's retention by the Committee.

8. Other than the Debtors, the parties in interest in these Chapter 11 Cases have not acted as rational actors intent on increasing the distributable value of the Debtors' estates. Rather they have attempted to bleed the Debtors as part of a pyrrhic litigation strategy. For example, these actors forced the Debtors to incur millions of dollars defending against the Committee's frivolous *Motion of the Official Committee of Unsecured Creditors for an Order Appointing a Chapter 11 Trustee* [Dkt. No. 394] (the "Trustee Motion"), which was joined by Pach Shemen (who also filed their own independent motion for a trustee) and WSFS. The Trustee Motion was predicated on an alleged "fraud" which was asserted by the Committee at the outset of these Chapter 11 Cases, yet nearly a year later still has not been articulated by the Committee or any other party. The Trustee Motion was rightfully denied by this Court. Instead of accepting their loss and moving on to take meaningful actions designed to benefit the creditors the Committee represents, the Committee continues to pursue meaningless and value destructive causes of action such as appealing this Court's denial of the Trustee Motion even though such appeal will be mooted by confirmation of any plan of reorganization filed in these Chapter 11 Cases.[6]

9. These same parties have also significantly impeded the Debtors' reorganization efforts time and time again. The Debtors were forced to endure a months' long process for approval of their Disclosure Statement and overcome repeated objections from the Committee and Petitioning Creditors seeking to prevent the Debtors from presenting their Plan to creditors. These parties, represented by sophisticated counsel were aware of futility and inappropriateness of their actions but nonetheless continued to push on in a hail Mary effort to prevent the Debtors' Plan from being solicited and robbing creditors of the opportunity for a meaningful recovery. The Committee has extensively abused the discovery process to distract and harass the Debtors in

[6] *Notice of Appeal* [Dkt. No. 768].

support of their endless investigation that has cost the Debtors' estates of almost $3 million dollars that provided no benefit to the Debtors' estates, has identified absolutely no improper conduct and was only meant to benefit Murchinson.[7]

10. Despite these headwinds, the Debtors have presented the Plan which will provide materially greater recoveries to the Debtors' legitimate creditors than the Competing Plans. First the Plan provides for the creation of a Litigation Trust. The Litigation Trust will be provided with the Litigation Trust Causes of Action–which includes any of the unarticulated and unarticulatable causes of action the Petitioning Creditors and the Committee allege exist, which can be pursued by the Litigation Trust Trustee and Litigation Trust Oversight Committee in accordance with the Litigation Trust Agreement (each as defined in the Plan) for the benefit of Litigation Trust Beneficiaries. The Litigation Trust will be funded by several different sources and will be operated by the Litigation Trust Trustee who has been selected by the Committee. The purpose of the Litigation Trust is to aggregate the various sources of Plan Consideration and make distribution to the holders of Allowed Noteholder Claims.[8]

11. Second, the Plan provides for a significant cash infusion through the "Shareholder New Value Contribution" which is comprised of (i) a $30 million cash contribution by the Debtors' equity holders (the "Eletson Members") and (ii) the "Collections Contribution" which is a one-time payment that will be contributed by the Eletson Members via the "Gas Ownership

[7] The Committee through Dechert and their financial advisor FTI Consulting Inc., have respectively spent at least 1,213,996 and $1,616,000 over their retention solely "investigating" potential avoidance claims against the Debtors' insiders. Notwithstanding the fact that for over ten months no action was brought, the Debtors believe the Committee will file a complaint as a litigation tactic either on the date hereof, or immediately before the Confirmation Hearing.

[8] The Debtors' Plan obligates the Litigation Trust Trustee to make a distribution on behalf of creditors within forty-five days of the Effective Date and at least every six months after that in any amount in excess of $1 million over the then budgeted needs of the Litigation Trust. Notwithstanding the foregoing, other than the initial budget established by the Plan, the Litigation Trust Trustee may amend the Litigation Trust Budget as it sees fit. Ultimately the timing and amount of distributions from the Litigation Trust is therefore at the discretion of the Litigation Trust Trustee who was selected by the Committee, and this process cannot be controlled or influenced by the Debtors.

Defendants" of significant portions of the Arbitration Award issued and confirmed against Levona for its actions against Eletson Gas and the Eletson enterprise. The $30 million portion of the Shareholder New Value Contribution will be used to satisfy the Debtors' administrative claims, priority claims, and fund recoveries to the Debtors' non-Exchange Noteholder creditors, and certain of the Exchange Noteholder creditors who elect for immediate cash payments in lieu of interests in the Litigation Trust. The remainder of this $30 million cash contribution will be transferred to the Litigation Trust along with the other sources of Plan Consideration as Distributable Cash for distribution to the Debtors' Noteholders. The Collections Contribution will ultimately provide additional millions of dollars to the Litigation Trust based on the Debtors' conservative estimates, dwarfing the nominal payments provided to Class 3 General Unsecured Creditors and Class 4 Convenience Claims under the PS Plan.

12. Third, the Plan provides for the direction of cash on hand of certain non-Debtor affiliates (the "SMEs") to the Litigation Trust in the form of the "SME Revenue." The SME Revenue will provide the Litigation Trust with any excess cash on hand of each of the SMEs on the Effective Date less the SMEs projected operating expenses and a $250,000 holdback as set forth in the Plan. The Debtors conservatively estimate the SME Revenue will provide the Litigation Trust with an additional $1 million to $1.5 million on the Effective Date.

13. Fourth, the Plan provides for the direction of future SME cash flows through the "Excess SME Proceeds." The Excess SME Proceeds will provide the Litigation Trust with additional funding through the direction of (i) future cash contributions equal to 20% of the consolidated excess cash flow (calculated on a semi-annual basis) of the consolidated operating revenues of the SMEs less the consolidated operating expenses for the previous six month period, up to a maximum of $5 million in the aggregate; and (ii) 20% of the gross proceeds from the sale

of any SME and/or SME Vessel less said SME's existing debt (including any unpaid obligations under the terms of the applicable bareboat charter and any trade obligations applicable to the operation of such SME Vessel which were incurred but not paid prior to the sale closing date) up to a maximum of $5 million in the aggregate for four years from the Effective Date.

14. Fifth, the Plan provides for the direction of the Retained Causes of Action Contribution to the Litigation Trust. The Retained Causes of Action Contribution will direct 75% of the net cash recoveries of the Retained Causes of Action prosecuted by the Reorganized Debtor to the Litigation Trust for the benefit of the Litigation Trust Beneficiaries.

15. Sixth, the Plan provides that Debtors Eletson Finance (US) LLC and Agathonissos Finance LLC will be consolidated into Eletson Holdings and reorganized Eletson Holdings will become the sole Reorganized Debtor. The Consolidating Debtors are holding companies formed for the express purpose of issuing the Exchange Notes. Pursuant to the Exchange Notes Indenture, the Consolidating Debtors are prohibited from holding or maintaining any assets. As the Exchange Notes and the Claims related thereto will be discharged after the confirmation of these Chapter 11 Cases, there is no reason for the continued existence of these entities. As such, they will be consolidated into the Reorganized Debtor for the convenience of all parties, and with no impact to any operations, distributions, assets, or rights of any party in interest or the Reorganized Debtor.

16. Finally, the Plan provides that the equity of the Reorganized Debtor will be distributed to the Eletson Members on account of the Shareholder New Value Contribution. The Eletson Members have provided the Debtors with substantial new value, equal to, if not exceeding the value of the Reorganized Debtor in the form of as much as $80 million Shareholder New Value Contribution. This significant investment in the Reorganized Debtor was provided in accordance with requirements of the "new value exception" to the absolute priority rule. Further, as required

by Supreme Court precedent, in addition to independently satisfying the requirements of the new value exception, the Debtors have adequately marketed the Plan through a competing plan process that has subjected the Plan to competition against not one, but two, competing plans. The marketing process, which has already resulted in a significantly improved Plan Consideration (as acknowledged by this Court) and ensured that the Eletson Members were not provided with an exclusive opportunity to purchase the Reorganized Debtors' equity.

III. SOLICITATION OF THE PLAN

17. The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") require, among other things, that a debtor distribute its plan and disclosure statement to substantially all affected creditors and equity security holders, that it adopt effective procedures for the transmission of its plan and disclosure statement to beneficial owners of securities, and that creditors and equity security holders be permitted a reasonable period of time in which to accept or reject the proposed plan. *See* 11 U.S.C. §§ 1125, 1126; Fed. R. Bankr. P. 3017, 3018.

18. On January 23, 2024, the Debtors filed the initial iteration of the Plan [Dkt. No. 370]. On April 8, 2024, the Debtors filed an amended version of the Plan [Dkt. No. 570]. The Debtors filed subsequent iterations of the Plan on May 31, 2024 [Dkt. No. 725], June 6, 2024 [Dkt. No. 744], June 14, 2024 [Dkt. No. 786], and finally the current iteration of the Plan on July 5, 2024 [Dkt. No. 840].

19. On May 15, 2024, June 7, 2024, and June 18, 2024, this Court held hearings regarding the adequacy of the various iterations of the Disclosure Statement as well as the disclosure statements of the Competing Plans. On July 10, 2024, this Court entered the *Order (I) Approving Disclosure Statements, (II) Approving Solicitation and Notice Procedures with Respect*

to Confirmation of Competing Plans, (III) Approving Forms of Various Ballots and Notices in Connection Therewith, (IV) Approving Scheduling of Certain Key Dates in Connection with Confirmation, and (V) Granting Related Relief [Dkt. No. 856] (the "Joint Solicitation Order"). On August 2, 2024, in accordance with the terms of the Plan and the Joint Solicitation Order, the Debtors filed the *Notice of Filing of Plan Supplement* [Dkt. No. 910] (the "Plan Supplement") which provided supplemental information in support of the Plan including the Litigation Trust Agreement, identity of the Litigation Trust Trustee and the proposed officers and directors of the Reorganized Debtor.[9]

20. Bankruptcy Rule 3017(d) requires that, unless otherwise ordered, a debtor shall transmit to all creditors, equity holders, and the United States Trustee for Region 2 (the "United States Trustee")

> (1) the plan or a court-approved summary of the plan;
> (2) the disclosure statement approved by the court;
> (3) notice of the time within which acceptances and rejections of the plan may be filed; and
> (4) any other information as the court may direct…
> Fed. R. Bankr. 3017(d).

21. Rule 3017(d) also requires that creditors and equity holders be given notice of the time fixed for filing objections to the proposed disclosure statement and the hearing on

[9] On the same day the Committee filed *Notice of Filing of Plan Supplement to the Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code and the Petitioning Creditors' Alternative Chapter 11 Pan of Eletson Holdings Inc. and its Affiliated Debtors* [Dkt. No. 911] (the "Committee Supplement"). The Plan provides that the Committee would draft the Litigation Trust Agreement in accordance with the terms of the Plan. Notwithstanding the terms of the Plan, the Committee improperly and unilaterally attempted modify substantive provisions of the Plan by increasing the Administrative Fund of the Litigation Trust from $200,000 to $3,000,000. This change was presented to the Debtors the night before the Joint Solicitation Order provided plan supplements were to be filed and was not consented to by the Debtors. Notwithstanding the fact that the Debtors informed the Committee that they did not consent to the substantive alterations to the Plan in the Committee Supplement, the Committee Supplement was filed anyway. The Debtors reject the validity of the Litigation Trust Agreement contained in the Committee Supplement and do not incorporate or otherwise associate the Plan with the Litigation Trust Agreement contained in the Committee Supplement.

confirmation, and that a ballot be mailed to each creditor and equity security holder entitled to vote on the plan. *Id.*

22. Pursuant to the Joint Solicitation Order, the Debtors and Pach Shemen jointly solicited the Plan and Competing Plans through their joint solicitation agent Kurtzman Carson Consultants, LLC dba Verita Global ("Joint Solicitation Agent"). The Joint Solicitation Agent commenced the solicitation of the Plan and the Competing Plans and caused the ballots approved in the Joint Solicitation Order to be distributed to the applicable creditors and equity holders of the Debtors. See *Certification of James Lee with Respect to the Tabulation of Votes on the Competing Chapter 11 Plans of Reorganization for Eletson Holdings Inc. and its Affiliated Debtors* [Dkt. No. 941] (the "Voting Certification"). Further, included in the solicitation materials sent to all creditors and equity holders, regardless of their voting status, was the notice of the Confirmation Hearing including the time, date and location of the Confirmation Hearing, the deadline for serving objections to confirmation of the Plan or Competing Plans and the necessary form and service requirements for any such objection. *See* Voting Certification at ¶7. For these reasons and as articulated in the Voting Certification the Debtors submit that they have given proper, adequate, and sufficient notice of the Confirmation Hearing and that no other or further form of notice is or shall be required.

IV. THE PLAN SHOULD BE CONFIRMED

23. For the Plan to be confirmed, this Court must find that the Plan and the Debtors are and have remained in compliance with the terms of the applicable provisions of section 1129 of the Bankruptcy Code. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648 (2d Cir. 1988) (plan must comply with section 1129(a) requirements). As set forth below the Plan presented by the

Debtors satisfies all the necessary requirements of section 1129(a) of the Bankruptcy Code. Accordingly, the Plan should be confirmed.

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

24. Section 1129(a)(1) of the Bankruptcy Code states that a plan may only be confirmed if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Compliance with section 1129(a)(1) has routinely been held to require compliance with the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and interests and the contents of the plan, respectively. *See In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986) (noting that confirmation objections under section 1129(a)(1) usually involve failure of plan to conform to either section 1122(a) or 1123 of Bankruptcy Code), aff'd 78 B.R. 407 (S.D.N.Y. 1987), aff'd sub nom; *see also In re Dana Corp.*, No. 06-10354 (BRL), 2007 WL 4589331, at *2-*3 (Bankr. S.D.N.Y. Dec. 26, 2007) (analyzing compliance of chapter 11 plan under sections 1122 and 1123 for purposes of determining compliance with 1129(a)(1)).

i. Classification of the Debtors Claims and Interests

25. Section 1122 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience. 11 U.S.C. § 1122.

26. Debtors in bankruptcy are provided with significant discretion to classify claims and interests in their plan. *See In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757

(Bankr. S.D.N.Y. 1992) ("A plan proponent is afforded significant flexibility in classifying claims under § 1122(a) if there is a reasonable basis for the classification scheme and if all claims within a particular class are substantially similar"). Section 1122 also permits separate classification of different groups of unsecured claims where a reasonable basis existed for the classification. *Id.* Further, courts have held that a lack of similarity can be demonstrated by differences in "legal rights or bankruptcy priorities," as well as "business reasons relevant to the success of the reorganized debtor." *In re Bloomingdale Partners*, 170 B.R. 984, 997 (Bankr. N.D. Ill. 1994).

27. The Plan satisfies the requirements of section 1122 of the Bankruptcy Code. In addition to Administrative Claims, Priority Tax Claims, and DIP Claims which are not required to be classified, the Plan designates six Classes of Claims and one Class of Interests based on the legal and factual differences for each Class. Further, all the Claims and Interests within the Classes established in the Plan are substantially similar to other Claims included in the same Class.

28. The Classes of Claims and Interests are Class 1 (OCM Guaranty Claims); Class 2 (Corp Guaranty Claims); Class 3 (Azure Guaranty Claims); Class 4 (Trade Creditor Claims); Class 5 (Noteholder Election Recovery Claims); Class 6A (Non-Petitioning Creditor Exchange Note Claims); Class 6B (Petitioning Creditor Exchange Note Claims); and Class 7 (Interests). *See* Plan at Art. II.A.

29. Class 1 (OCM Guaranty Claims), Class 2 (Corp Guaranty Claims) and Class 3 (Azure Guaranty Claims) are all separately classified as the underlying guaranty obligations supporting each of these claims are based on different contractual relationships with separate and distinct entities and differing rights.

30. The Class 1 OCM Guaranty Claims are distinct from the Debtors' other general unsecured claims as they are guaranty obligations. They are likewise distinct from the Debtors'

other classes of guaranty obligations as they arise from four separate guaranties (collectively the "OCM Guaranties") executed by Eletson Holdings with four separate but affiliated financiers (collectively the "OCM Entities") of the Debtors' primary operating subsidiaries and value drivers, the SMEs. Each SME is an operating entity that manages a specific vessel subject to a bareboat charter between the applicable SME and OCM Entity. The applicable OCM Guaranty obligates Eletson Holdings to guaranty the obligations of the applicable SME to the specific OCM Entities under said bareboat charter. Given the distinct nature of the SMEs to the Debtors' capital structure the OCM Guaranty Claims represent substantially similar claims that were properly grouped together, and distinct claims that justify their separate classification from the Debtors' other guaranty obligations.

31. Class 2 Corp Guaranty Claims are distinct from the Debtors' other general unsecured claims as they are guaranty obligations. These guaranty obligations are distinct from the Debtors' other separately classified guaranty obligations as they do not arise from the same guaranty obligations as those obligations in Class 1 and Class 3. Non-Debtor Eletson Corp is the operational and technical management entity for various Eletson subsidiaries. Eletson Holdings has guaranteed several Eletson Corp's guaranty obligations to various banking entities in Greece. These guaranty obligations are substantially similar as they are guaranty obligations owed by a single entity, are unrelated to chartering entities, and do not stem from, or connect to any arbitration or litigation actions. Given the foregoing, the Debtors reasonably assert that the Class 2 Corp Guaranty Claims are substantially similar claims that are properly classified together, and distinct legal obligations that justify a separate classification from the Debtors' other guaranty obligations.

32. The Class 3 Azure Guaranty Claims are distinct from the Debtors' other general unsecured claims as they are guaranty obligations. They are distinct from the Debtors' other

guaranty related obligations as they arise from four separate guaranties (collectively the "Azure Guaranties") executed by Eletson Holdings with four separate but affiliated financiers (collectively "Azure") of certain of the Debtors' affiliates. Each of those charterer entities is subject to a bareboat charter between such entity and Azure. The applicable Azure Guaranty purports to obligate Eletson Holdings to guaranty the obligations of the applicable entity under said bareboat charter. In addition to being distinct contractual relationships with distinct contractual counterparties, the Azure Guaranty Claims also differ significantly from the Debtors' other guaranty obligations as the defaults asserted under the predicate agreements–and by extension each the Azure Guarantees–are the subject to a pending arbitration with the separate Azure entities creating an even greater factual distinction for the Class 3 Azure Guaranty Claims from the Debtors' other guaranty obligations justifying the separate classification of the Azure Guaranty Claims.

33. The remaining Classes of Claims, Class 4 (Trade Creditor Claims), Class 5 (Noteholder Election Recovery Claims), Class 6A (Non-Petitioning Creditor Exchange Note Claims), and Class 6B (Petitioning Creditor Exchange Note Claims) are all Classes of general unsecured creditors. Class 4 Trade Creditor Claims are distinct from the Debtors' other unsecured creditor Classes as they are claims of general unsecured creditors that do not arise from the Exchange Notes or Old Notes. Rather, they are claims of entities that have provided business services to the Debtors in some capacity or another and arose in the ordinary course of the Debtors' business. Given that Trade Claims do not arise from the Exchange Notes Indenture or Old Notes Indenture, they are not subject to the same terms and restrictions as the Exchange Notes or Old Notes under the applicable Indentures. The distinct legal and factual differences from the Note Claims justify the separate classification of the Trade Creditor Claims from the Note Claims, and

the general ordinary course nature of the Trade Creditor Claims indicates that the claims are substantially similar and properly classified together.

34. Class 5 Noteholder Election Recovery Claims are Claims of Exchange Noteholders and Old Noteholders that have affirmatively elected to separate treatment on the Effective Date of the Plan. The Noteholder Election Recovery Class does not have any specifically designated members. Rather, the Class consists of only those Noteholders who would prefer an immediate cash payout rather than wait for liquidation of the Litigation Trust Assets. As the Class 5 Noteholder Election Recovery Claims are claims of Exchange Noteholders who were all provided the same affirmative election to receive immediate payout and have no further connection to these Chapter 11 Cases and the Reorganized Debtor, the Debtors maintain that the Claims in this Class are substantially similar to the other claims in Class 5, and wholly distinct from the Claims classified in Class 6A and Class 6B.

35. Class 6 consists of the Debtors' Noteholder Claims. The Noteholder Claims consist of the Old Notes and the Exchange Notes which are separate and distinct from each of the Debtors other Classes of Claims as they are governed by the applicable Note Indentures unlike the Debtors' other general unsecured claims. Class 6 is divided into Class 6A Non-Petitioning Creditor Exchange Note Claims and Class 6B Petitioning Creditor Exchange Note Claims. The Petitioning Creditors (as defined in the Plan) have wreaked havoc on the Debtors and their subsidiaries through bribery, fraud, intimidation, and illegal transfer and purchase of Exchange Notes for the sole purpose of obtaining the equity of the Debtors at the expense of the Debtors and their legitimate creditors. Given these knowingly illegal and inequitable actions the Debtors seek the equitable subordination of the Petitioning Creditor Exchange Noteholders. Class 6B is therefore distinct from Class 6A given the subordinate nature of Class 6B.

36. Finally, Class 7 Interest include the claims of equity in the Debtors. Class 7 is separately classified from the remaining classes as it a class for equity ownership unlike Classes 1 though 6B which are comprised of Claims against the Debtors.

37. The disparate nature of the Debtors' direct and indirect obligations mandated the separation of these Claims into these Classes. The classification system set out in the Plan allowed each impaired class of creditors to cast a meaningful vote and indicate their desires and intentions to the Court and other creditors.

38. The Debtors classification of Claims and Interest are sufficiently distinct, and the Debtors have presented valid business, factual and legal reasons for separately classifying the Debtors' classifications. *See* Kertsikoff Declaration at ¶¶24-26; *see also JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 264 (Bankr. S.D.N.Y. 2009) (finding that the plan's separate classification was "appropriate given the disparate legal rights and payment expectations" of noteholders and general unsecured creditors); *Calpine Corp.*, 2007 WL 4565223, at *7 (finding that "[v]alid business, factual, and legal reasons" justified separate classification of various claims and interests); *In re Bally Total Fitness*, No. 07-12395 (BRL), 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) (same). For the foregoing reasons, the Debtors provide that the Plan satisfies section 1122 of the Bankruptcy Code.

ii. Mandatory contents of the Plan

39. Section 1123(a) of the Bankruptcy Code contains seven requirements that must be included in a plan of reorganization. The plan fully complies with each of the requirements of section 1123(a).

a. The Plan Designates Classes of Claims and Interests

40. Section 1123(a)(1) requires that a plan designate classes of claims and interests other than those specified in sections 507(a)(2) (administrative expenses claims), 507(a)(3) (claims arising during the gap period in an involuntary bankruptcy), and 507(a)(8) (priority tax claims). 11 U.S.C. § 1123(a)(1). Article II of the Plan complies with this requirement by expressly classifying all Claims and Interests other than Administrative Claims, priority tax claims and DIP Claims.

b. The Plan Identifies Unimpaired Classes of Claims and Interests

41. Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Article III of the Plan satisfies this requirement by specifying that there are no unimpaired Classes of Claims or Interests under the Plan.

c. The Plan Specifies the Treatment of Impaired Classes

42. Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article III of the Plan satisfies this requirement by specifying that Classes 1, 2, 3, 4, 5, 6A, 6B, and 7 are Impaired. Article II of the Plan further specifies the treatment of the Claims and Interests in those Classes.

d. The Plan Provides the Same Treatment within Each Class

43. Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class" 11 U.S.C. § 1123(a)(4). Article II of the Plan satisfies this requirement by providing the same treatment to each Claim or Interest in each

respective Class, unless the Holder of a Claim or Interest agrees to less favorable treatment on account of its Claim or Interest.

44. Pach Shemen asserts that the treatment of Class 5 Noteholder Election Recovery Claims violates section 1123(a)(4) because creditors receive different outcomes based on the value of their claim. However, the objection misses the mark. First, section 1123(a)(4) provides that a plan must "provide the same treatment for each claim or interest of a particular class, **unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.**" 11 USC § 1123(a)(4) (emphasis added). "The key inquiry under § 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same opportunity." *Ad Hoc Committee of Personal Injury Asbestos Claimants v. Dana Corp., (In re Dana Corp.)*, 412 B.R. 53, 61-62 (S.D.N.Y. 2008) (holding that "'the same' does not mean 'identical'", and noting that the Second Circuit has held section 1123(a)(4) was not violated where "class members received different percentages of recovery to take into account different factors" so long as such distinctions are "rationally based on legitimate considerations."); *see also In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F.2d 721, 749 (2d Cir. 1992). ("the 'same treatment' standard of section 1123(a)(4) does not require that all claimants within a class receive the same amount of money.").

45. The Plan provides the same treatment to all creditors in Class 5. As a pure election class, creditors were able to determine their approximate return based on the size of their claim and then make an election. This cannot be characterized as anything but affirmative consent to both the election, and possibly different treatment from a class member with different claims.

46. Notwithstanding the foregoing, the Plan provides that should the Noteholder Election Recovery Claims be found to be in violation of section 1123(a)(4), that the Class shall

terminate, and electing Noteholders will revert to Class 6 and have their claims treated in accordance with the distributions provided for Class 6. For these reasons the Debtors submit that the Plan satisfies the requirements of section 1123(a)(4).

e. The Plan Provides Adequate Means for Implementation

47. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for implementation 11 U.S.C. § 1123(a)(5). Adequate means for implementation of a plan may include retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; curing or waiving of any default; extension of a maturity date or change in an interest rate or other term of outstanding securities; amendment of the debtor's charter; or the issuance of securities in exchange for cash, property, or existing securities, all in exchange for claims or interests or for any other appropriate purpose. *See, generally*, *In re Spiegel, Inc.*, No. 03-11540 (BRL), 2005 WL 1278094 (Bankr. S.D.N.Y. May 25, 2005).

48. Article IV of the Plan provides for the means of implementation of the Plan. In conjunction with the Plan Supplement, these provisions relate to, among other things, the (a) Shareholder New Value Contribution, (b) Distributable Cash, (c) Excess SME Proceeds, (d) Litigation Trust Causes of Action, (e) order granting Plan consolidation, (f) Plan consolidation, (g) the corporate existence of the Reorganized Debtor, (h) the vesting of assets of the Reorganized Debtor, (i) Reorganized Debtor Organizational Documents, (j) appointment of the directors and officers of the Reorganized Debtor, (k) creation of the Litigation Trust, (l) transfer of assets and Litigation Trust Causes of Action to the Litigation Trust, (m) liabilities of the Litigation Trust, (n) appointment of the Litigation Trust Trustee and Members of the Litigation Trust Oversight Committee, (o) cooperation and privilege between the Debtors and the Litigation Trustee, (p) duties of the Litigation Trust Trustee, (q) post-confirmation expenses; (r) exemption from certain

taxes and fees, (s) issuance of documents necessary to consummate the Plan; and (t) issuance of a final decree.

49. In addition to the information provided in Article IV of the Plan based on the anticipated liquidity feasibility analysis prepared by Riveron RTS, LLC ("RTS") (the "Feasibility Analysis") the Debtors have sufficient cash to make all payments required to be made on the Effective Date or shortly after pursuant to the Plan. For the foregoing reasons, the Debtors are in compliance with the provisions of 1123(a)(5) of the Bankruptcy Code.

f. The Plan Prohibits the Issuance of Non-Voting Securities

50. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's organizational documents prohibit the issuance of non-voting equity securities. 11 U.S.C. § 1123(a)(6). Article IV of the Plan provides that the Reorganized Debtor Organizational Documents will prohibit the issuance of non-voting equity securities.

g. The Selection of Officers, Directors, and Managers of the Reorganized Debtor is consistent with the Interests of Creditors, Interest Holders and Public Policy

51. Section 1123(a)(7) of the Bankruptcy Code requires that a plan of reorganization "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan." 11 U.S.C. § 1123(a)(7). Section 1123(a)(7) is augmented by section 1129(a)(5) of the Bankruptcy Code which requires the Court to evaluate the method by which management of the Reorganized Debtor is selected. *See* 7 Collier on Bankruptcy ¶ 1123.01[7] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2010).

52. As set forth in the Plan Supplement, the directors and officers of the Reorganized Debtor will be the same directors and officers of Eletson Holdings. The directors and officers of

the Debtors are the best equipped parties to direct the Reorganized Debtor to a value maximizing future and operational efficiency. The Debtors' officers and directors possess invaluable knowledge regarding the Debtors' operations and needs, industry contacts, and reputational value that will allow the Reorganized Debtor to maximize its opportunities in the complex and unforgiving shipping industry. For the foregoing reasons, the Debtors are in compliance with the provisions of 1123(a)(7) of the Bankruptcy Code.

iii. Discretionary Contents of the Plan

a. Section 1123(b)(1): Impaired Classes

53. Section 1123(b)(1) of the Bankruptcy Code permits the Debtors to impair or leave unimpaired any class of claims, secured or unsecured, or interests. The Plan leaves all classes of the Debtors' creditors (which are all unsecured) as well as the Debtors' interest holders, impaired.

b. Section 1123(b)(2): Rejection of Executory Contracts

54. Section 1123(b)(2) of the Bankruptcy Coder permits the assumption, rejection or assignment of any executory contract or unexpired lease of the Debtors not previously rejected. Article IV of the Plan provides that all executory contracts and unexpired leases of the Debtors not previously assumed will be rejected effective of the Confirmation Date and that the Confirmation Order shall constitute an order of the Bankruptcy Court approving such rejection.

c. Section 1123(b)(3)(A): The Exculpation Provision Is Appropriate

55. Under section 1123(b)(3)(A) of the Bankruptcy Code, a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). The rules governing the approval of a settlement under Bankruptcy Rule 9019 are useful in evaluating plan injunctions and exculpation provisions.

56. The Plan provides for the exculpation of the "Exculpated Parties," which include the Debtors and their officers and directors and the Debtors' professionals retained under the Bankruptcy Code that served in such capacities between the Petition Date and the Effective Date. Courts evaluate exculpation provisions based upon several factors, including whether the provision is integral to the plan and whether protection from liability was necessary for plan negotiations. *See In re Bally Total Fitness*, No. 07-12395 (BRL), 2007 WL 2779438, at *8 (Bankr. S.D.N.Y. Sept. 17, 2007) (finding exculpation, release, and injunction provisions appropriate because they were negotiated in good faith and at arm's length, necessary to successful reorganization, and integral to plan); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 501 (S.D.N.Y. 2005) (approving exculpation provision where it was necessary to effectuate plan and excluded gross negligence and willful misconduct). Generally speaking, the effect of an appropriate exculpation provision is to set a standard of care. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (reasoning that exculpation provision did not affect third party liability but rather "set[] forth the appropriate standard of liability" for the exculpated parties). Additionally, where a Court confirms a plan proposed in good faith, it is appropriate to set the standard for liability for those involved in the negotiation and formulation of that plan. *See id*. at 246 (observing that creditors providing services to debtors are entitled to a "limited grant of immunity" for "actions within the scope of their duties"); *In re WorldCom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *28 (Bankr. S.D.N.Y. Oct. 31, 2003).

57. Courts in this District generally have specified three categories of parties that are appropriate candidates for exculpation: (a) parties indemnified by the estate for their services; (b) parties to "[u]nique [t]ransactions" that "contribute[] substantial consideration to the

reorganization"; and (c) any party when the exculpation provision is consensual and those voting had full notice. *In re Adelphia Commc'ns Corp*., 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007).

58. The Exculpation provisions provided in Article IX of the Plan states that "none of the Exculpated Parties shall have or incur, and each Exculpated Party is released and exculpated from any claim, obligation, Cause of Action, or liability for (a) any act or omission occurring between the Petition Date and the Effective Date in connection with, the representation of the Debtors, or (b) any act or omission occurring between the Petition Date and the Effective Date in connection with, or related to formulating, negotiating, soliciting, preparing, disseminating, confirming, administering, or implementing the Plan, or consummating the Plan, the Disclosure Statement, the Reorganized Holdings Organizational Documents, the Reorganized Debtor Organizational Documents, the Restructuring Transactions, the Litigation Trust Interests, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Plan (including, for the avoidance of doubt, providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion), in each case except for fraud, willful misconduct, gross negligence or claims for legal malpractice, release of which is prohibited by Rule 1.8(h) of the New York Rules of Professional Conduct (22 N.Y.C.R.R. § 1200), each solely to the extent as determined by a Final Order of a court of competent jurisdiction; provided, however, that, for the avoidance of doubt, such exculpation shall not act or be construed to exculpate, channel, release, enjoin, or otherwise affect any civil or criminal enforcement action by a Governmental Unit." *See* Plan at Art.IX.C.

59. The Exculpation Provision is vital to the success of the Chapter 11 Cases and appropriate under applicable law because the Exculpated Parties satisfy the relevant standard. As

explained in the Kertsikoff Declaration, the Debtors formulated the Plan after extensive good faith negotiations with numerous parties and relied on the good faith actions and representations of their retained professionals. *See Kertsikoff Declaration* at ¶¶ 49-51. These retained professionals were each instrumental in formulating, negotiating, and defending the Plan which could not have been made and confirmed without their support.

60. The Exculpation Provision, including the carveout for fraud and willful misconduct is warranted under the circumstances of these Chapter 11 Cases and consistent with similar provisions approved in this district. Further the Exculpation Provision has been reviewed and approved by the United States Trustee.

61. The injunction provision of the Plan (the "Injunction") is equally meritorious and should be approved. The Injunction provides that after the Effective Date, all holders of Claims subject to discharge under the Plan are enjoined from commencing any enforcement action related to such Claims. The Injunction does not waive or release any prepetition causes of action or any other rights other than enforcement of pre-Effective Date Claims. The Injunction is necessary to enforce the discharge under the Bankruptcy Code and Exculpation Provision and is narrowly tailored to achieve that result. Further the Injunction provisions is a key component of the Debtors' ultimate reorganization. Given the limited scope of the Injunction, the Court should approve the Injunction as provided for in the Plan.

d. Section 1123(b)(5): Modification of Rights of Claimholders

62. Section 1123(b)(5) of the Bankruptcy Code permits the modification of rights of claimholders. The Plan permissibly modifies the rights of Holders of Claims or Interests in the Plan's impaired classes through confirmation.

B. The Debtors Have Complied with the Applicable Provisions of Title 11 (Section 1129(a)(2))

63. Section 1129(a)(2) of the Bankruptcy Code requires the Debtors to "compl[y] with the applicable provisions of [title 11 of the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The principal purpose of section 1129(a)(2) is to ensure that a plan proponent has complied with the requirements of sections 1125 and 1126 of the Bankruptcy Code. *See WorldCom, Inc.*, 2003 WL 23861928, at *49 ("The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code."); *see also In re Texaco Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988). The Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code in soliciting the Plan. Further the Debtors have remained in compliance with all other provisions of the Bankruptcy Code through the pendency of these Chapter 11 Cases.

64. The Committee baselessly asserts that the Plan fails to satisfy section 1129(a)(2) of the Bankruptcy Code because the Debtors made misrepresentations in their Disclosure Statement. As has been their modus operandi throughout these Chapter 11 Cases, the Committee has presented another regurgitated broad and unsupported accusation in an attempt to stymie the Debtors' reorganization. The Court already approved the Disclosure Statement which, in and of itself, already overruled the Committee's accusation. Given that the Committee has presented no evidence of any "new" misrepresentation, their statements should be afforded no weight. Regarding interactions with the Eletson Members, the Debtors have, and continue to be represented by separate counsel from the Eletson Members, who have appeared separately in these cases, and supported the assertion of arm's length negotiations regarding the Shareholder New Value Contribution. For these reasons the Debtors' disclosures and Disclosure Statement are

accurate and the Plan complies with the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. The Plan was Proposed in Good Faith (Section 1129(a)(3))

65. Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Second Circuit has held that the standard of good faith requires "a showing that the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984); *see also In re Johns-Manville Corp.*, 68 B.R. 618, 631-32 (Bankr. S.D.N.Y. 1986), aff'd, 78 B.R. 407 (S.D.N.Y. 1987), aff'd sub nom. In the context of a chapter 11 plan, courts have held that "a plan is proposed in good faith 'if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code.'" *In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997).

66. When determining whether the good faith requirement of section 1129(a)(3) has been satisfied, courts within this district focus on "the plan itself and whether such plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Granite Broad. Corp.*, 369 B.R. 120, 137 (Bankr. S.D.N.Y. 2007) (citation omitted). Accordingly, bankruptcy courts have asserted that the good faith requirement is satisfied if the plan has been proposed for the purpose of reorganizing the debtor, preserving the value of the bankruptcy estate, and distributing that value to creditors.

67. The Plan has been proposed in good faith and with a legitimate and honest business purpose of reorganizing the Debtors, providing payments to legitimate creditors, and emerging from these Chapter 11 Cases as a leaner entity better situated to compete in a complex shipping

market. *See Kertsikoff Declaration* at ¶¶ 59-61. The value provided to creditors pursuant to the Plan is greater than the value said creditors would receive upon a liquidation. *See Kertsikoff Declaration* at ¶¶ 68-73. The Plan and its predicate components, including the Shareholder New Value Contribution, were negotiated in good faith and at arm's length between the Debtors and the Eletson Members who were at all times represented by separate counsel. The Plan is supported by a significant number of the of Debtors' creditor constituencies who have accepted Plan thereby evidencing its overall fairness. Given the foregoing, the Debtors submit that the Plan satisfies the provisions of section 1129(a)(3) of the Bankruptcy Code.

68. The assertions that that the Plan was not filed in good faith are laughable coming from the Committee and Pach Shemen, two parties that have been intent on, and intimately involved with, harming the Debtors and their estates. The Committee asserts that the Debtors are operating in bad faith by continuing to push their Plan. "The PC Plan has significantly more funding and both the PC Plan and PC Alternative Plan provide greater day-one cash recoveries to all creditor classes." Committee Objection at ¶71. The specification of "day-one" cash is telling. It is clear that the various sources of Plan Consideration significantly outweigh the consideration being provided by Pach Shemen under the Competing Plans. Further any argument of delayed payments to Noteholders from the Litigation Trust being parroted by the Committee must be ignored as the Committee, through selection of the Litigation Trust Trustee, will be the party responsible for when payments should be made.

69. Pach Shemen's objections are equally without merit. Pach Shemen's primary objection to the Debtors' good faith is that the Debtors developed their Plan without Pach Shemen's input. This does not amount to bad faith. The assertions of self-dealing and a conflict of interest ignore the realities of these Chapter 11 Cases. The Eletson Members are represented

by separate counsel. The Debtors established an independent committee to evaluate claims of a potential conflict that neither Pach Shemen nor the Committee ever bothered to reach out to. The Debtors and the Eletson Members have more than demonstrated the feasibility of the Plan through the provision of the Feasibility Analysis, and an enforceable Commitment Letter. The continued assertions of fraudulent transfers are still baseless and unsupported.

70. The Debtors have operated in good faith throughout these Chapter 11 Cases to ensure a meaningful recovery to the Debtors' legitimate creditors who have also been harmed by Pach Shemen and the Committee through their unfettered allegiance to Murchinson. For these reasons the Court should ignore these Objections and find that the Plan was filed in good faith in accordance with section 1129(a)(3) of the Bankruptcy Code.

D. All Payments to be Made in Connection with these Chapter 11 Cases are Subject to Approval of the Bankruptcy Court (Section 1129(a)(4))

71. Section 1129(a)(4) of the Bankruptcy Code provides that

> "Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."
> 11 U.S.C. § 1129(a)(4).

72. Section 1129(a)(4) effectively requires that all fees and payments made from the Debtors' estates pursuant to a plan of reorganization must be disclosed and reviewed by the court. Article II of the Plan provides that all payments to estate professionals, including the Debtors' Professionals and Committee Professionals shall only be made upon final order of the Bankruptcy Court. Final application for allowance of Professional Fee Claims and Committee Professional Fee Claims must be submitted within forty-five (45) days of the Effective Date. Additionally, Article X of the Plan provides that the Bankruptcy Court will retain jurisdiction over all

applications for the allowance of compensation and reimbursement of Professional Fee Claims and Committee Professional Fee Claims. The Debtors do not maintain any ordinary course professionals, and all professionals retained in these Chapter 11 Cases are required to submit interim and final applications for payment of fees. Given the foregoing, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

E. The Plan Discloses the Required Information Regarding the Directors and Officers of the Reorganized Debtor and their Insider Status (Section 1129(a)(5))

73. Section 1129(a)(5) of the Bankruptcy Code requires a plan of reorganization to "disclos[e] the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan" and "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy". 11 U.S.C. § 1129(a)(5)(A). Section 1129(a)(5)(B) further requires that a plan of reorganization disclose the identity of any insider that will be employed or retained by the reorganized debtor and the nature of such insiders' compensation. 11 U.S.C. § 1129(a)(5)(B).

74. The Plan Supplement provides that the Debtors' officers and directors will resume their current role in the Reorganized Debtor upon confirmation of the Plan. Further, the Plan Supplement states that no insider officer and/or director will be compensated by the Reorganized Debtor.

75. When determining whether the management of a reorganized debtor is consistent with the interests of creditors, equity holders and public policy, courts must evaluate the proposed management's competence, discretion, experience and affiliation with adverse entities. *See In re*

Sherwood Square Assocs., 107 B.R. 872, 878-79 (Bankr. D. Md. 1989). The Debtors' current officers and directors are the parties best suited to lead the Reorganized Debtor given their familiarity with the Debtors and the shipping industry. Management of the Reorganized Debtor must have immense levels of knowledge regarding nautical sciences, shipping routes, and geopolitical climates, among other technical know-how. The Debtors' current directors and officers possess this highly specialized and technical knowledge and have proven themselves to be capable leaders both prepetition and throughout these Chapter 11 Cases. Further case law is clear that a plan may contemplate the reappointmnet of the debtor's existing directors and officers. See*, e.g., Texaco Inc.*, 84 B.R. at 908 (determining that section 1129(a)(5) was satisfied where plan disclosed debtor's existing directors and officers who would continue to serve in office after plan confirmation). Given the foregoing, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. The Plan Does Not Provide for Any Rate Change Subject to Regulatory Approval (Section 1129(a)(6))

76. Section 1129(a)(6) of the Bankruptcy Code requires debtors with rates subject to governmental regulation following confirmation receive the appropriate governmental approval for any rate change provided in a plan of reorganization or that the proposed rate be expressly conditioned on government approval. 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) of the Bankruptcy Code does not apply to the Plan because there is no governmental regulatory commission that has jurisdiction over the Debtors' or the Reorganized Debtor's rates. *See Kertsikoff Declaration* at ¶ 67.

G. The Plan Satisfies the "Best Interests" Test (Section 1129(a)(7))

77. Section 1129(a)(7) of the Bankruptcy Code contains the best interest test, which requires each claimholder or interest holder has accepted the proposed plan of reorganization or

will receive property of a value greater than what such claim or interest holder would have received if the debtor had been liquidated under chapter 7 of the Bankruptcy Code. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988). Also, the best interest test focuses on individual dissenting creditors or interest holders, rather than classes of claims or interests. *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992).

78. When determining the best interest of creditors pursuant to section 1129(a)(7), the court is not required to consider any alternatives to the plan of reorganization other than the dividend projected in the liquidation of all of the debtor's assets pursuant to the hypothetical chapter 7 reorganization. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 298 (Bankr. S.D.N.Y. 1990). Further, the liquidation analysis applies only to non-accepting impaired claims. If a class of claims or equity interests unanimously accepts the plan the best interest test is deemed satisfied for all members of that accepting class. See 11 U.S.C. § 1129(a)(7)(A)(i)(ii).

79. A Liquidation Analysis was attached to the Disclosure Statement as Exhibit 7. Pursuant to the Liquidation Analysis, the Debtors presented ranges of potential recoveries for creditors ranging from a "Low End Recovery Range" to a "High End Recovery Range." This range was predicated on various factors, including the forced sale value of the SME Vessels, the Debtors' equity interests in other subsidiaries and the potential allowable claims against the Debtors' estates.

80. The SME Vessels are each subject to certain bareboat charters which provide the charterer with the right to foreclose on the applicable SME Vessel. *See Kertsikoff Declaration* at ¶70. Therefore, it is possible that upon a chapter 7 liquidation, the Debtors' estates would realize no value from the SMEs. On the high end the Liquidation Analysis provides that based on broker

vessel valuations as of May 13, 2024, and the charterers allow the charters to continue and the Debtors to exercise the purchase options, the SME Vessels may account for $22.8 million. *Id.*

81. Finally, the Liquidation Analysis takes into account the asserted value of claims against the Debtors. In the High-End Recovery scenario, the Debtors presume the disallowance of a significant swath of illegitimate and improper claims asserted against the Debtors' estates, such as the claim asserted by Levona for approximately $262 million, and the reduction of the claims of WSFS as Exchange Noteholder Trustee to about $167 million. In the Low-End Recovery scenario the Debtors assume all claims asserted against the Debtors will be allowed in their full amount, which will reduce the recoveries of all creditors. As set forth in the Liquidation Analysis, low-end recovery estimates provide no recovery to any class of creditors, and only an 11% recovery to holders of administrative claims. The high-end recovery provides only for a 1.4% recovery for the Debtors' creditors. The Debtors' Plan on the other hand provides for 15% recoveries for Class 4 Trade Creditors, approximately 10% recovery for most Noteholder Election Recovery Claims and 4.6% recoveries for Class 6A Non-Petitioning Creditor Exchange Note Claims.[10] *See Kertsikoff Declaration* at ¶70.

82. As the Creditors who voted to reject the Plan would receive more under the Plan than they would in a hypothetical liquidation, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

H. The Plan has been Accepted by the Requisite Class of Creditors and Interest Holders (Section 1129(a)(8))

83. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or

[10] The estimate of 4.6% recovery represents the low-end recovery for Class 6A Non-Petitioning Creditor Exchange Note Claims assumes the inclusion of Class 6B Petitioning Creditor Exchange Note Claims. If the Class 6B Petitioning Creditor Exchange Note Claims are subordinated, they will be entitled to a recovery only upon payment in full of all senior claimants and will likely receive no recovery, but the recovery for Class 6A will increase significantly.

interests under a plan either accept the plan or be left unimpaired under the plan. 11 U.S.C. § 1129(a)(8). With respect to an impaired class, section 1126 of the Bankruptcy Code provides that a plan is accepted by an impaired class of claims if the class members accepting hold at least two-thirds in amount and more than one-half in number of the claims held by the class members that have cast votes on the plan. 11 U.S.C. § 1126(c). As set forth in the Voting Certification, Class 1 (OCM Guaranty Claims), Class 2 (Corp Guaranty Claims), Class 3 (Azure Guaranty Claims) and Class 7 (Interests) all unanimously voted to accept the Plan pursuant to section 1126 of the Bankruptcy Code. Class 4 (Trade Creditor Claims), Class 5 (Noteholder Election Recovery Claims), Class 6A (Non-Petitioning Creditor Exchange Note Claims) and Class 6B (Petitioning Creditor Exchange Note Claims) (collectively, the "Rejecting Classes") did not vote to accept the Plan. Notwithstanding rejection of the Plan by certain voting classes, as discussed below the Debtors have met the "cramdown" requirements of section 1129(b) necessary to confirm the Plan.

I. The Plan Provides for the Payment of Priority Claims (Section 1129(a)(9))

84. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date. Pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(1) of the Bankruptcy Code – administrative claims allowed under section 503(b) of the Bankruptcy Code – must receive cash equal to the allowed amount of such claims on the effective date of the plan. 11 U.S.C. § 1129(a)(9)(A). Section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code, priority tax claims, must receive deferred cash payments over a period not to exceed five years after the petition date in an amount equal to the present value of such claim. 11 U.S.C. § 1129(a)(9)(C)(i)(ii).

85. The Plan satisfies these requirements. The Debtors have no operations and no administrative costs other than Professional Fees and Committee Professional Fees. Nonetheless as set forth herein, these will be paid on the Effective Date subject to final order from the Bankruptcy Court. Further the Plan provides that the Debtors' singular priority tax claim will be paid in full on the Effective Date. *See Plan* Art.II.B.a. For these reasons the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. The Plan has been Accepted by at Least One Impaired, Non-Insider Class (Section 1129(a)(10))

86. Section 1129(a)(10) of the Bankruptcy Code provides:

> If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.
> 11 U.S.C. § 1129(a)(10).

87. As set forth in the Voting Certification, the Debtors have satisfied this requirement. The Plan has been accepted by Class 1 (OCM Guaranty Claims), Class 2 (Corp Guaranty Claims) and Class 3 (Azure Guaranty Claims). To the best of the Debtors' knowledge, no entities in Classes 1 through 3 are an "insider" of the Debtors within the meaning of such term under the Bankruptcy Code. *See Kertsikoff Declaration* at ¶78. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(10) of the Bankruptcy Code by having at least one impaired accepting class.

K. The Debtors' Plan is Feasible (Section 1129(a)(11))

88. Pursuant to section 1129(a)(11) of the Bankruptcy Code, a plan of reorganization can only be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C.

§ 1129(a)(11). One commentator has stated that this section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." 7 Collier on Bankruptcy ¶ 1129.02[11] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2010).

89. Section 1129(a)(11) does not require that a plan be absolutely guaranteed to succeed. Instead, the appropriate standard for satisfaction of section 1129(a)(11) is that the plan has a reasonable likelihood for success. *See Drexel Burnham*, 138 B.R. at 762 ("'It is not necessary that success be guaranteed, but only that the plan present a workable scheme of organization and operation from which there may be a reasonable expectation of success' . . . The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since guarantee of the future is not required." (emphasis omitted) (citations omitted)); *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11).").

90. As evidence of their commitment to the Debtors' reorganization the Eletson Members through their independent counsel have shared a commitment letter (the "Commitment Letter") evidencing the Eletson Members' ability to fund the $30 million portion of the Shareholder New Value Contribution and providing the Debtors with the right to enforce that obligation against the Eletson Members. This commitment supports a finding of feasibility. *In re Aspen Vill. at Lost Mountain Assisted Living, LLC,* 609 B.R. 555, 568 (Bankr. N.D. Ga. 2019) ("A letter of intent, even a non-binding one that is subject to some contingency, can be supportive of a finding of feasibility."); *see also In re Reading Broad., Inc.*, 2009 Bankr. LEXIS 2593, at *32 (Bankr. E.D. Pa. Jan. 17, 2009) ("refinancing is feasible under section 1129(a)(11) where lenders 'have issued a commitment letter and/or agreed to term sheets which are detailed and contingent only upon final documentation, confirmation of the Modified Plan, and no materially adverse

changes occurring.'") (quoting *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 46 (Bankr. D. Del. 2000)).

91. As stated in the Feasibility Analysis the $30 million provides the Debtors' Plan with sufficient liquidity to make all distributions to creditors of Classes 2 through 5 on the Effective Date, as well as satisfy all outstanding Administrative Claims including Professional Fees and Committee Professional Fees. The Feasibility Analysis prepared by the Debtors' domestic financial advisors RTS and presented at the Confirmation Hearing confirms there are sufficient funds to satisfy the to fund distributions to Class 6 Noteholders on or immediately following the Effective Date of the Plan.

92. In reaching this feasibility determination, RTS evaluated, among other things, the outstanding Professional Fees and Committee Professional Fees, estimates of Professional Fees and Committee Professional Fees as of an estimated Effective Date of September 30, 2024, the Debtors' outstanding claim objections, the Administrative Fund for the Litigation Trust, the Effective Date payments to be made to Creditors in Classes 2 through 5, and United States Trustee Quarterly Fees.

93. As set forth in the Kertsikoff Declaration the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code, and this opinion is shared by RTS. *Kertsikoff Declaration* at ¶¶ 79-82. After the Effective Date the Reorganized Debtor will be discharged of its burdensome debt and will be better positioned to operate in the complex global shipping market. The Debtors have set up the Plan in such a way that they will be able reasonably ensure the Reorganized Debtor can meet its post-Effective Date obligations. The Debtors will have sufficient cash on hand at the appropriate subsidiaries to reasonably operate the Reorganized Debtor upon emergence and will be at little to no risk of default given the limited obligations the Reorganized Debtor will have

upon emergence. For these reasons the Debtors submit that the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

94. Pach Shemen and the Committee's challenges to the feasibility of the Debtors' Plan are inconsequential. First, the assertions that the Debtors have not demonstrated the existence of the $30 million is meritless. The Commitment Letter is the proof of those funds. The Commitment Letter is an enforceable agreement, coupled with evidence of the $30 million to be provided to the Debtors' estates. The assertion that the Commitment Letter is not a firm commitment because it is enforceable by the Debtors is also meritless and should be afforded no credence. The Debtors and their shareholders are separate entities represented by separate counsel. The case law cited by Pach Shemen and the Committee for this proposition do not support their assertion that a commitment letter from a shareholder to a debtor's estate is somehow not a firm commitment.[11]

95. The $30 million as stated in the Feasibility Analysis is more than sufficient to ensure that all required Effective Date distributions are made. Pach Shemen and the Committee's reliance on FTI's significantly flawed analyses and projections do not render the Plan unfeasible. Rather the FTI analysis contains significant deviations from the actual facts of these cases, and misstates the actual distributions to be made to creditors under the Plan. No weight should be afforded to FTI's flawed analysis.

96. Further, the Committee's insistence that the Debtors' have failed to account for fixed plan costs is incorrect. The Committee's unilateral and unsupportable position that the

[11] *See ,e.g*., *In re Tyler*, 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993) ("The Plan references that some of its funding will be from preference actions. The DIP, however, has completed a preference analysis and finds that no preferences exist. Thus, this particular funding source is untenable and must be deleted. The Plan also provides for financing from outside sources. The Plan, however, does not indicate that there is firm financing in place and **no evidence of any commitment to such financing has been provided to the Court**) (emphasis added); *In re Wiston XXIV, Ltd. P'ship*, 153 B.R. 322, 327 (Bankr. D. Kan. 1993) ("In addition, the debtor's plan also calls for the debtor's general partner to contribute $ 100,000 during the first two years of the plan. **The general partner testified that he does not currently have $ 100,000 in cash to contribute**, and did not indicate how he would get the money.") (emphasis added).

Litigation Trust requires $3 million in startup costs is of no value and of no consequence to these Confirmation Proceedings. The Committee has provided no basis for its assertions and the budget indicating this "need" states that only $1 million would be needed for the first year. *See Declaration and Expert Report of Michael Cordasco* [Dkt. No. 1032] (the "Cordasco Declaration") at pg. 21. The Committee does not dictate the distributions under the Plan, and this certainly does not make the Plan unfeasible.

L. The Plan Provides for the Payment of Certain Fees (Section 1129(a)(12))

97. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees set forth in 28 U.S.C. § 1930, determined by the court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. 11 U.S.C. § 1129(a)(12). Article II of the Plan provides that all fees pursuant to 28 U.S.C. § 1930 payable to the United States Trustee will be paid on the Effective Date. All other fees arising under 28 U.S.C. § 1930 along with any interest that accrues thereon will be paid when the Chapter 11 Cases are closed, dismissed, or converted, whichever occurs first. Given the foregoing, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. No Retiree Benefits (Section 1129(a)(13))

98. Section 1129(a)(13) of the Bankruptcy Code requires that a plan of reorganization ensure that retiree benefits continue after the effective date of a plan at the level determined by agreement or court order for the duration of such benefit obligations. 11 U.S.C. § 1129(a)(13). The Debtors have no retiree benefit obligations. Therefore, section 1129(a)(13) of the Bankruptcy Code does not apply to the Debtors.

99. Given the foregoing, the Plan satisfies all the applicable requirements of section 1129(a) of the Bankruptcy Code. As set forth below, the Plan also satisfies the requirements of section 1129(b) of the Bankruptcy Code and should be confirmed.

V. THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1129(B)

100. Section 1129(b) of the Bankruptcy Code provides that a plan of reorganization may be confirmed over the rejection of an impaired class of creditors. Section 1129(b)(1) of the Bankruptcy Code provides that, if certain requirements are met, a plan shall be confirmed notwithstanding that section 1129(a)(8) is not satisfied with respect to one or more classes:

> [I]f all of the applicable requirements of [ ] section [1129(a) of the Bankruptcy Code] other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
> 11 U.S.C. § 1129(b)(1).

101. To confirm a plan that has not been accepted by all impaired classes pursuant to section 1129(b), the plan proponent must show that the plan "does not discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes. *In re Calpine Corp*., No. 05-60200 (BRL), 2007 WL 4565223, at *12 (Bankr. S.D.N.Y. Dec. 19, 2007); *see also In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of reorganization, the court shall nonetheless confirm the plan if it 'does not discriminate unfairly and is fair and equitable'"). As set forth below, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code.

A. The Plan Does not Discriminate Unfairly with Respect to the Rejecting Classes

102. The Plan does not discriminate unfairly against claim holders in the Rejecting Classes. What constitutes "unfair discrimination" is not set out in the Bankruptcy Code. *See In*

re 203 N. LaSalle St. Ltd. P'ship, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), aff'd, 195 B.R. 692 (N.D. Ill. 1996), aff'd, 126 F.3d 955 (7th Cir. 1997), rev'd on other grounds, 526 U.S. 434 (1999). Instead, whether a plan unfairly discriminates is evaluated on a case-by-case basis based on the totality of the circumstances present in the chapter 11 case. Ultimately, the unfair discrimination determination is meant to prevent creditors and interest holders with similar rights and priority from receiving materially different treatment and risk of payment.

103. No unfair discrimination exists here. The Debtors have explained at length the justifications for the separate Classes established in the Plan. Classes 1 through 3 are classes with contingent claims who are significantly impaired. Each of the Rejecting Classes will receive a greater pro rata cash distribution on account of their claim than holders of Class 2 Claims (3.6%) and Class 3 Claims (.2%), and both of these classes voted to accept the Plan despite these returns. The assertions that this treatment is unfair discrimination because the PS Plan exists (PS Objection at ¶ 41) or that the PS Plan does not gerrymander claims (Committee Objection at ¶ 66) are equally meritless when you consider that the PS Plan classification system was designed to drown out and drag along dissenting voters with Pach Shemen in an attempt to avoid a cramdown.[12]

104. Class 4 (Trade Creditors) include creditors whose claims do not arise from the Exchange Notes or Old Notes. Class 5 (Noteholder Election Recovery Claims) is a purely elective class that was open to all members of Class 6 Noteholder Claims. Further Class 6A (Non-Petitioning Creditor Exchange Noteholder Claims) are bifurcated from Class 6B (Petitioning Creditor Exchange Noteholder Claims) because the inequitable conduct of the Petitioning Creditors that was taken with the express intent of harming the Debtors and their estates.

[12] Both Objections allude to an improper payment by Eletson Corp to a holder of a Class 2 Corp Guaranty Claim. These assertions are meritless and should be afforded no weight in these confirmation proceedings.

105. In addition to a justifiable classification scheme, there is no disparate treatment amongst the Rejecting Classes. Class 5 and Class 6B, if found to be improper will be treated the same as Class 6A, thereby precluding any issues regarding unfair treatment. Further, Class 4 Trade Creditor Claims are being paid out in cash in an amount that is commensurate with the range of payment that holder of Old Note Claims and Exchange Note Claims can expect. Given the foregoing, the Plan clearly does not discriminate unfairly, and is in accordance with section 1129(b)(1) of the Bankruptcy Code.

106. Pach Shemen's assertion that seeking equitable subordination amounts to discrimination is meritless. The Debtors may properly seek equitable subordination through a plan process and are not required to initiate a separate adversary proceeding. Rather the Confirmation Order may provide for the equitable subordination of the claims of Pach Shemen and the Petitioning Creditors. *See In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 271 (Bankr. D. Del. 2017). Further, Pach Shemen has been aware of the Debtors' intent to subordinate their claim for nearly seven months as subordination has been included in each iteration of the Plan, including the first iteration which was filed on January 23, 2024. Nonetheless if subordination fails Pach Shemen will be treated at a Class 6A Creditor.

B. The Plan is Fair and Equitable with Respect to the Rejecting Classes and Complies with the Requirements for a New Value Plan

107. Fair and equitable treatment with respect to holders of general unsecured claims, subordinated claims and equity interests are found in sections 1129(b)(2)(B) and 1129(b)(2)(C) of the Bankruptcy Code. Each section specifies two alternative requirements, only one of which must be satisfied for a plan to be fair and equitable with respect to a dissenting class of equity interests. See 11 U.S.C. § 1129(b)(2)(B)(i)–(ii), (b)(2)(C)(i)–(ii).

108. A plan will be found fair and equitable to general unsecured claims through satisfaction of one the following:

i. the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

ii. the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

11 U.S.C. § 1129(b)(2)(B)(i)–(ii).

109. A plan will be found to be fair and equitable with respect to a class of subordinated claims if it complies with either of the following:

i. the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

ii. the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

11 U.S.C. § 1129(b)(2)(C)(i), (ii).

110. Notwithstanding the foregoing, Courts have recognized situations where an equity holder may be permitted to a distribution of equity in the reorganized debtor despite senior creditors not being paid in full. This exception, known as the "new value corollary" or "new value exception," contemplates the receipt of equity in the reorganized debtor by equity holders before full payment of creditors in a debtor's reorganization, provided that those equity holders make a "fresh contribution" to the insolvent enterprise. *See Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106,

121 (1939); *In re Save Our Springs (S.O.S.) All., Inc.*, 388 B.R. 202, 245 (Bankr. W.D. Tex. 2008). Such is the case here.

111. The Plan is a "new value plan" whereby the Debtors' shareholders, the Eletson Members, are contributing $30 million, as well as additional cash contributions from the Collections Contribution funded by the enforcement of the Arbitration Award against Levona. The Arbitration Award is a confirmed award worth approximately $99 million dollars which the Debtors and Eletson Members estimate will result in an additional $50 million or more being provided to the Debtors' estates. Therefore, pursuant to the Plan, the Eletson Members are contributing approximately $80 million dollars to the Debtors' estates for the benefit of creditors.

112. To satisfy the requirements of section 1129(b)(2)(B)(ii), the Debtors must show that they are in adherence with the "new value exception." The Debtors must show that the Shareholder New Value Contribution is "(1) new, (2) substantial, (3) money or money's worth, (4) necessary for a successful reorganization and (5) reasonably equivalent to the property that old equity is retaining or receiving." *In re RAMZ Real Estate Co., LLC*, 510 B.R. 712, 718 (Bankr. S.D.N.Y. 2014). The Shareholder New Value Contribution unquestionably satisfies these requirements.

i. The Shareholder New Value Contribution is New

113. The first prong of the new value exception to the absolute priority rule requires that the value provided by the debtor's equity holder is new. A contribution is "new" when the contribution arises from somewhere outside of the debtor's business. *See In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 802 n.105 (Bankr. S.D.N.Y. 2020) ("'New' contributions are supposed to be from outside a debtor's business."); *see also See In re S.A.B.T.C. Townhouse Ass'n Inc.*, 152 B.R. 1005, 1010 (Bankr. M.D. Fla. 1993) (stating existing equity holders "must contribute

something to the debtor that does not already belong to the debtor or to which the debtor is not already entitled").

114. Here the Shareholder New Value Contribution is unquestionably new. The Eletson Members, which are the holders of the equity interests of Eletson Holdings and its subsidiaries are Glafkos Trust Co., Family Unity Trust Co., Lassia Investment Co, Elafonissios Shipping Corp., and Keros Shipping Corp. *Hadjieleftheriadis Declaration* at ¶ 18. These entities are completely removed from the Debtors' corporate structure and are wholly independent from the Debtors' enterprises.

115. Notwithstanding the Objections' assertions to the contrary the Commitment Letter is more than sufficient evidence of the existence and availability of the $30 million and that it was not sourced from the Debtors or their subsidiaries. *In re Aspen Vill. at Lost Mountain Assisted Living, LLC,* 609 B.R. at 568. These funds originate from outside of the Debtors' capital structure and are not from any of the Debtors' subsidiaries. In fact, the Committee has been provided with the general ledgers for the Debtors and all of their subsidiaries from 2021 onward and have presented **no evidence** of **any transfer** of value to the Eletson Members for the Shareholder New Value Commitment has been provided by the Debtors or their estates.

116. The Collections Contribution is being provided by the Gas Ownership Defendants,[13] at the direction of the Eletson Members. The Preferred Owners, collectively Desimuso Trading Company, Apargo Limited, and Fentalon Limited, are entities controlled by the Eletson Members and outside of the Debtors' corporate structure. *Hadjieleftheriadis Declaration* at ¶ 28.

[13] The Gas Ownership Defendants are Eletson Gas, the Preferred Owners and their officers and directors.

117. The Collection Contributions consists of a one-time cash payment to be made by the Gas Ownership Defendants to the Litigation Trust. The right to enforce the Arbitration Award against Levona unquestionably belongs to the Preferred Owners, and the validity of such transfer has been briefed extensively in these Chapter 11 Cases. The Preferred Owners were validly nominated to receive the Preferred Shares of Eletson Gas and the Arbitration Award as early as 2022. *See* Final Award at pg. 46. Given that the right to enforce the Arbitration Award and the proceeds of such enforcement belong to the Preferred Owners, thee proceeds are not property of the Debtors' estates or attributable to their subsidiaries. Therefore, the Shareholder New Value Contribution exists outside of the Debtors' business and is "new" within the meaning of the new value exception.

ii. The Shareholder New Value Contribution is Substantial

118. The second prong of the new value exception requires that the new value provided by the equity holders be "substantial." *RAMZ Real Estate Co., LLC*, 510 B.R. at 718. The Shareholder New Value Contribution is estimated at approximately $80 million. *Kertsikoff Declaration* at ¶90. This is significantly more than has been committed under the PS Plan and more than has been evidenced can be committed under the PS Alternative Plan. In this district the new value must be weighed against the claims being disposed by the plan of reorganization. See e.g., *In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 762 (Bankr. S.D.N.Y. 1995) (explaining that new value contribution must be "substantial in relation to the claims being disposed of under the Plan[,]"). In comparison to the claims to be disposed pursuant to the Plan, the Shareholder New Value Contribution is clearly substantial.

119. Various claims against the Debtors are subject to objections and the Debtors believe that once certain illegitimate claims are adjudicated the claims pool will be significantly reduced.

The Debtors estimate that the claims pool ranges from $197 million to $768 million depending on the ultimate allowance of claims. *Kertsikoff Declaration* at ¶78.[14] Given the foregoing, the Shareholder New Value Contribution will range from approximately 10.4% of the claims being addressed under the Debtors' Plan to potentially **40.6%** of claims being addressed under the Debtors' Plan. Clearly the Shareholder New Value Contribution is substantial in light of the contribution and the overall claims pool. *See e.g.*, *In re Abeinsa Holding, Inc.,* 562 B.R. 265 (Bankr. D. Del. 2008) (finding that 8% contribution was substantial for new value plan).

120. Pach Shemen's assertion that the Shareholder New Value Contribution is insubstantial is meaningless. Pach Shemen inflates the Debtors' claim pool to $505 million dollars in their effort to minimize the value being provided to the Debtors' estates. Their estimation ignores the fact that a substantial portion of these claims are subject to objection. It is the burden of the claimant to now prove their claims are allowed. Further, the case law that Pach Shemen cites to regarding the permissible percentage of new value to the overall claim pool are small dollar cases wholly inapplicable to these cases. *See e.g., Fur Creations*, 188 B.R. at 762-63 (proposed contribution $25,000 and approximately $1,086,000 of general unsecured claims); *In re Snyder*, 967 F.2d 1126, 1131 (7th Cir. 1992) (contribution of $30,000 in relation to approximately $2.2 million in unsecured debt); *In re Sovereign Grp.*, 142 B.R. 702, 710 (E.D. Pa. 1992) (contribution of $135,000 in relation to $3,750,000 worth of claims). The actual value provided and distributed in these Chapter 11 Cases is several magnitudes greater and even smaller distributions dwarf the contributions in the cases cited by Pach Shemen.

[14] Despite being included in this calculation, the Debtors strongly believe that Levona, which asserted a claim against the Debtors' estates of approximately $262 million, does not have an Allowed Claim. This view is shared by the Committee. *See Cordasco Declaration* at pg. 16 n.6.

121. Finally, Pach Shemen improperly attempts to diminish the Shareholder New Value Contribution by asserting that the substantialness of the contribution must be compared to the actual funds provided to creditors, instead of funds used to assist in the reorganization effort. Pach Shemen also asserts that Noteholders in Class 6A will receive no distributions on the Effective Date. Both of these assertions are wrong.

iii. The Shareholder New Value Contribution is Money or Money's Worth

122. The third prong of the new value exception requires that the contribution provided by money or money's worth *RAMZ Real Estate Co., LLC*, 510 B.R. at 718. $30 million is being provided on the Effective Date, which alone is sufficient to make the Debtors' Plan feasible. The Collection Contribution is also predicated on an Arbitration Award that has been confirmed by the United States District Court for the Southern District of New York. Rather than speculative and uncertain litigation, or an unsupported or unsecured promise to pay in the future like a promissory note, the Collections Contribution is a directed form of payment through the foreclosure of fixed assets that have been valued in an amount of at least $60 million and may not be disposed of due to a binding global injunction of a court of competent jurisdiction. Given the foregoing, the Shareholder New Value Contribution reasonably constitutes money or money's worth.

iv. The Shareholder New Value Contribution is Necessary for a Successful Reorganization

123. The fourth prong of the new value exception requires the new value provided by the debtor's equity holder to be necessary. To be necessary "old equity must be willing to **contribute more money than any other source** or it must be the lender of 'last resort.'" *BT/SAP Pool C Assocs., L.P. v. Coltex Loop Cent. Three Partners, L.P.*, 203 B.R. 527, 535 (S.D.N.Y. 1996)(emphasis added). Here the Shareholder New Value Contribution is necessary not only

because the Eletson Members were the lenders of last resort, but also because the Eletson Members are contributing more money than any other source.

124. As stated herein, the Eletson Members are contributing approximately $80 million dollars to the Debtors' reorganization. Pach Shemen submitted two plans of reorganization, neither of which can feasibly match this amount. The PS Plan is predicated on a purported $43.5 million equity rights offering and back stop. Pach Shemen and/or its plan sponsor are not providing any additional sources of funding. *See* PS Plan at Art.V. The PS Alternative Plan asserts to commit a $41 million "Equity Investment" as well as the CVR, in an amount equal to the Gas Ownership Defendant's ultimate collections from Levona. Notwithstanding the CVR, and the commitments called for under the PS Alternative Plan, Pach Shemen has not provided any financial wherewithal to satisfy the CVR which is likely upwards of $70 million, especially when considering that payment of the CVR means Pach Shemen and its affiliate Levona must pay this $70 million twice, first to the Gas Ownership Defendants, and then again to the creditors under the PS Alternative Plan. Given neither Pach Shemen nor any other third party has committed funding exceeding that of the Eletson Members, or in the case of the PS Alternative Plan has shown the wherewithal to match or exceed the funding contribution of the Eletson Members, it is clear that the Eletson Members are willing to contribute more than any other lender or party in interest, satisfying the necessary prong of the new value exception. For these the Eletson Members are clearly providing more money that Pach Shemen the Objections' assertions regarding the necessity of the Shareholder New Value Contribution fail.

125. Further, the Objections misstate the Debtors' position regarding necessity and marketing of the Plan. Contrary to Pach Shemen's assertions, the Debtors do not assert that *Coltex* is no longer good law following *LaSalle*. Rather Pach Shemen's argument that the shareholder

funded plans are impossible where creditors are willing to provide new money is unsupported by the very cases Pach Shemen cites for this proposition.[15]

126. Pach Shemen asserts "[u]nder Coltex (and others), the existence of a creditor plan dooms a debtor's new value plan. It is that simple." Pach Shemen Objection at ¶ 31. Pach Shemen's interpretation that a competing plan precludes shareholder new money, would create the anomalous situation where a shareholder is willing to provide more money than a creditor in exchange for of the equity of the reorganized debtor (as is the case here) but said shareholder would be precluded simply by virtue of a creditor filing of a competing plan. This flaw in Pach Shemen's interpretation is exemplified by the existence of new value plans that are confirmed over competing plans. *See e.g., In re Walden Palms Condo. Ass'n,* 625 B.R. 543, 552 (Bankr. M.D. Fla. 2020) (approving debtors' new value plan over competing creditor plan.), and even the language of Coltex. See *Coltex Loop Cent. Three Partners, L.P.*, 203 B.R. at 535.

127. Pach Shemen cites to *Coltex*, *In re Trikeenan Tileworks, Inc.*, No. 10-13725-JMD, 2011 WL 2898955, at *7-9 (Bankr. D.N.H. July 14, 2011), and *In re Dwellco I Ltd. P'Ship*, 219 B.R. 5, 7 (Bankr. D. Conn. 1998). Yet none of these cases stands for Pach Shemen's assertion because none of the courts denied confirmation of a shareholder new value plan because a competing plan existed.

128. Pach Shemen and the Committee also misstate the Debtors' position regarding the marketing of the Shareholder New Value Contribution. As stated in *LaSalle*, an equity holder will retain equity on account of its previous equity ownership if they are provided an exclusive opportunity to purchase the equity of the reorganized debtor. *LaSalle* at 456. *LaSalle* then goes

[15] *LaSalle*'s limited holding on marketing would be eviscerated by Pach Shemen's argument. In fact, the portion of LaSalle that Pach Shemen cites (which in turn cites to Coltex) states that a shareholder must be willing to fund more, indicating that a competing plan does not per say "doom" a new value plan.

on to state that the right to purchase equity of the reorganized debtor must be subject to some form of market testing, leaving the door open as to whether that market test may be conducted via competing plans or some other form of marketing. *Id.* at 458.

129. The Debtors' position, as acknowledged by this Court,[16] is that the requirement that the Shareholder New Value Contribution be exposed to competition has been satisfied by the Debtors' intentionally allowing the Plan to be tested by the Competing Plans. The Debtors have not asserted that the Shareholder New Value Contribution was permissible solely because of this competition, rather the Debtors' position has been that the equity was not being provided on account of previous interests in part because it was not offered in a vacuum. *See, e.g.*, Dkt. No. 670 at ¶¶ 6-15 (discussing Shareholder New Value Contribution compliance with five factor test for the new value exception).

130. For the foregoing reasons, the Shareholder New Value Contribution is necessary to the Debtors' reorganization as no other party, including the Pach Shemen is willing or able to provide as much capital as the Eletson Members.

v. The Shareholder New Value Contribution is Reasonably Equivalent to the Property Being Retained

131. The final prong of the new value exception requires that the property being retained by the equity investors in the debtor be reasonably equivalent in value to the contribution being provided.

132. Here the Eletson Members propose to provide $80 million towards the Debtors' reorganization. The Debtors' valuation of the enterprise value of the Reorganized Debtor is approximately $84.3 million dollars. See *Expert Report of Nikolaos Veraros* (the "Veraros

[16] *See Memorandum Opinion and Order Denying: (I) Motion in Limine; (II) Motion to Exclude; and (III) Motions to Appoint a Chapter 11 Trustee* [Dkt. No. 721] at p. 48.

Report"). Given the foregoing, the Debtors seek to purchase the equity of the Debtors at an approximately 5% discount, half of the discount offered by Pach Shemen under the PS Plan. While the Court has discretion in determining what constitutes reasonably equivalent value, certainly 95% of the equity value constitutes reasonably equivalent value.

133. Pach Shemen's asserts that the enterprise value of Reorganized Holdings is "between $103.9 million and $116.4 million with a midpoint range of $110.2 million." See Pach Shemen Objection at ¶ 39. However, this enterprise valuation is predicated on speculative market conditions, and the continued operation of the shipping industry at unprecedentedly high value. The Batuta report relied upon by Pach Shemen ignores the cyclical nature of the industry and is predicated on lofty and unrealistic expectations for the future performance of the shipping industry. For the foregoing reasons, the Debtors believe that the Shareholder New Value Contribution is more than reasonably equivalent to the value of the Reorganized Debtor.

vi. The Shareholder New Value Contribution has been Adequately Marketed

134. Finally, the Supreme Court has held that a new value plan must be adequately marketed or subject to some form of competition. *In Bank of Am. Nat. Trust & Savings Ass'n v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434 (1999), the Supreme Court specifically noted that a competing plan may be a sufficient form of market testing. *Id.* at 458. This form of marketing has subsequently been supported by numerous courts around the country. *See e.g., In re Walden Palms Condo. Ass'n*, 625 B.R. 543, 552 (Bankr. M.D. Fla. 2020) (approving debtors' new value plan over objection of committee stating "By allowing competing plans, the market test did occur as to the sufficiency of the equity holders proposed contribution. All interested parties had an opportunity to file a plan which could address the equity class and any proposed contribution. An open exposure to the market occurred."); *H.G. Roebuck & Son, Inc. v. Alter Commc'ns, Inc.*, 2011

U.S. Dist. LEXIS 59781, 2011 WL 2261483, at *7 (D. Md. June 3, 2011) ("LaSalle mandates market valuation of the new equity in the reorganized debtor and provides two potential solutions: competitive bidding or termination of exclusivity and the opportunity to file competing bids. The latter solution ensures compliance with the principles of the LaSalle case."); *In re SW Bos. Hotel Venture LLC*, 449 B.R. 156, 181-82 (Bankr. D. Mass. 2011) ("If the plan provides that the Debtor's equity holders pay new and reasonably equivalent value for their equity interests, and the market price for new value is tested through a bidding or third-party plan procedure, there would be no impediment to confirmation of a plan of reorganization."). Further, this Court has noted the propriety of allowing exclusivity to lapse to market a new value plan. *See Memorandum Opinion and Order Denying: (I) Motion in Limine; (II) Motion to Exclude; and (III) Motions to Appoint a Chapter 11 Trustee* [Dkt. No. 721] at p. 48 ("'new value plans' can potentially be an acceptable means of reorganization so long as, for instance, they are market tested, as the Debtors propose here through the competing plan process."). The marketing process in these Chapter 11 Cases has been extremely beneficial to the Debtors' creditors and resulted in substantial new value being provided to the Debtors' estates.

135. Given the foregoing, the Debtors submit that the new value exception to the absolute priority rule has been satisfied. The Eletson Members are not retaining their equity interests on account of their previous interests, but rather are gaining equity in the Reorganized Debtor in exchange for their substantial contribution to the Debtors' reorganization. As such the Plan is fair and equitable to those creditors in impaired classes that have voted against the Plan. Since the Plan does not unfairly discriminate between the claimholders who voted to reject the Plan as well, the requirements of section 1129(b) have been satisfied, and confirmation of the Plan over the rejection of the Rejecting Classes is warranted and appropriate as the Plan is fair and

equitable, does not unfairly discriminate and will still provide the Rejecting Classes with the greatest recovery possible in these Chapter 11 Cases.

VI. The Petitioning Creditors Should be Equitably Subordinated

136. The Plan seeks the equitable subordination of the Petitioning Creditors pursuant to section 510(c) of the Bankruptcy Code. Equitable subordination may properly be sought through a plan of liquidation or reorganization. *See In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 271 (Bankr. D. Del. 2017) ("In addition to classifying claims and specifying treatment for those claims, plans may seek approval of sales, assumption or rejection of contracts, substantive consolidation, equitable subordination and, as it did here, approval of settlements and releases.").

137. As discussed at length in the Debtor's Disclosure Statement and throughout these Chapter 11 Cases, the Petitioning Creditors and their affiliates have engaged in a years' long campaign to harm the Debtors and depress the Debtors' value for the Petitioning Creditors' benefit. The Petitioning Creditors have resorted to bribery, fraud, intentional interference with contracts, threats, and a host of other inequitable actions intentionally taken to harm the Debtors and for the Petitioning Creditors' own gain.

138. When determining whether a claim should be equitably subordinated, courts regularly use the three-part test in *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692 (5th Cir. 1988). Under that test: (i) the creditor must have engaged in some type of inequitable conduct; (ii) the misconduct must have resulted in injury to other creditors or conferred an unfair advantage on the creditor to be subordinated; and (iii) equitable subordination of the claim must not be inconsistent with the other provisions of the bankruptcy laws. *Nisselson v. Softbank AM Corp. (In re MarketXT Holdings Corp.)*, 361 B.R. 369, 385 (Bankr. S.D.N.Y. 2007) (citing *In re Mobile Steel Co.*, 563 F.2d at 700, cited with approval in *United States v. Noland*, 517 U.S. 535,

538, 116 S. Ct. 1524, 134 L. Ed. 2d 748 (1996)). The third prong of the *Mobile Steel* test has since become moot as equitable subordination has been specifically provided for in the Bankruptcy Code. *Id.*

139. Under the Mobile Steel test, a subordinated creditor must have engaged in a form of inequitable conduct that resulted in injury to other creditors or conferred an unfair advantage on the creditor. The phrase "inequitable conduct" encompasses conduct that may be lawful but is nevertheless contrary to equity and good conscience. It includes a misrepresentation or fraud, lack of good faith by a fiduciary, unjust enrichment, or enrichment brought about by unconscionable, unjust, or unfair conduct or double-dealing. In re Adler, Coleman Clearing Corp., 277 B.R. 520, 563 (Bankr. S.D.N.Y. 2002).

140. Other courts have described the type of conduct that warrants equitable subordination as including: (i) fraud, illegality, or breach of fiduciary duty; (ii) undercapitalization of the debtor; and (iii) control or use of the debtor as a vehicle to benefit the creditor or a third party in preference to the general creditor body. *In re MarketXT Holdings Corp.*, 361 B.R. at 385; In re Granite Partners, L.P., 210 B.R. 508, 514 (Bankr. S.D.N.Y. 1997).

141. The shocking and appalling conduct of the Petitioning Creditors and their affiliates has satisfied each one of these prongs under *Mobile Steel*.

142. For all intents and purposes, Pach Shemen is nothing more than a puppet through which Levona and Murchinson operate. All actions attributable to Levona prepetition should be attributed to Pach Shemen as an alter ego of Levona. In the Second Circuit, courts consider ten factors for determining alter ego claims. *MAG Portfolio Consult, GmbH v. Merlin Biomed Grp., LLC*, 268 F.3d 58, 63 (2d Cir. 2001) ("(1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and

personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities"). "This list is not exhaustive, nor is there a minimum number of factors that must be satisfied. Rather, the guiding principle is whether piercing the corporate veil 'would achieve an equitable result.'" *Budisukma Permai SDN BHD v. N.M.K. Prods.*, 606 F. Supp. 2d 391, 399 (S.D.N.Y. 2009) (quoting Williamson v. Recovery Ltd. P'ship, 542 F.3d 43, 53 (2d Cir. 2008)).

143. Courts frequently find alter ego based on shared officers, directors, and personnel, and intermingling of funds under this test. *See Wm. Passalacqua Builders v. Resnick Developers S.*, 933 F.2d 131 (2d Cir. 1991) (finding that common office space and staff, shared officers and directors, and comingling of funds demonstrated that these were alter ego corporations); *Trs. of the Mosaic & Terrazzo Welfare, Pension, Annuity & Vacation Funds v. High Performance Floors, Inc.*, 233 F. Supp. 3d 329 (E.D.N.Y. 2017) (finding that two entities were alter egos, as the two entities shared a common business purpose, had the same management and employees, shared assets, finances, and offices); *Rea Navigation, Inc. v. World Wide Shipping LTD*, 2009 U.S. Dist. LEXIS 96113, (S.D.N.Y. Oct. 14, 2009) (finding that the alter ego defendant made payments on behalf of the other defendant, shares a common director, and shares the address).

144. Here, the ownership and management of Pach Shemen and Levona is identical; both are controlled by the same principals – Marc Bistricer, Mark Lichtenstein, and Adam Spears. Further, Pach Shemen and Levona do not hold themselves out as separate entities with separate funds. As an example, in connection with purchasing bonds from a selling bondholder, Spears

"promis[ed] potential monetary benefits received in connection with [the] arbitration, and any value relating to the preferred shares of [Eletson Gas], as compensation in connection with the purchase of the notes by [Pach Shemen]." Final Award at p. 21-22. Pach Shemen and Levona are therefore the same entity for alter ego purposes.

145. "Pach Shemen and Levona are not distinct for any meaningful purposes relevant to these proceedings. They are alter egos of one another, with identical corporate ownership and management." Final Award at p. 22. In fact, Pach Shemen was originally contemplated to be named "Levona II." *See* PS00005721. Pach Shemen has "the identical ownership as Levona, [is] directed by the same Murchinson representatives, including Spears and Lichtenstein, and [was] seemingly created for the sole purpose of purchasing a controlling interest in the outstanding bond debt of Holdings so that three weeks later, it could direct the involuntary bankruptcy filing against Holdings." *See* Final Award at p. 21.

146. Justice Belen's findings in the Arbitration evidence Levona and therefore Pach Shemen's concerted campaign to destroy the Eletson enterprise, including by bribing Eletson Corp's CFO to disclose sensitive, non-public and confidential information relating to the Debtors and their affiliates, by wrongfully conspiring with and using Eletson's own legal counsel to turn against Eletson's interests, intentionally interfering with Eletson's business relationships, and violating clear contractual obligations. The involuntary proceedings—which were a continuation of a clear two-party dispute—were just the latest move in Levona's playbook.

147. The magnitude of Levona, and Pach Shemen's inequitable conduct is breathtaking. This inequitable conduct was done with the express purpose of harming the Debtors and their affiliates and creditors for Levona and Pach Shemen's benefit. The inequitable conduct includes:

- Levona "[b]rib[ed] an Eletson Corporation employee, and [Eletson Gas] representative, Peter Kanelos, and causing him to disclose [Eletson Gas']

confidential information." Final Award at p. 97.

- Levona "[v]iolat[ed] confidentiality obligations by disclosing [Eletson Gas'] confidential information to third parties, failing to take steps to recover such information, and then deceiving Claimants and [Eletson Gas] concerning said breaches after it became a member of [Eletson Gas]." Final Award at p. 97.
- Levona "actively engag[ed] in unlawful behavior by wrongfully influencing [Eletson Gas] financiers to turn against [Eletson Gas] and Claimants, including without limitation by causing the arrest of five of the [Eletson Gas] vessels and not disclosing this misconduct to Eletson or [Eletson Gas] after it became a member of [Eletson Gas]." Final Award at p. 97.
- Levona "[f]ail[ed] to acknowledge that Eletson fully complied with the terms of the BOL Purchase Option, and fail[ed] to act in good faith by remaining silent about its purported belief that [Eletson Gas] would or might fail to meet its BOL terms." Final Award at p. 97.
- Levona "[i]mproperly purport[ed] to act on behalf of [Eletson Gas] in its business dealings with third parties, including by attempting to sell [Eletson Gas'] assets to its primary competitor, Unigas, and concealing such misconduct from Claimants. Final Award at p. 97.
- Levona "[i]mproperly threaten[ed] Eletson and affiliated officers and directors, including by pursuing litigation against them." Final Award at p. 97.
- Levona "[i]mproperly purport[ed] to seize control of [Eletson Gas'] board of directors… to direct the day-to-day operations… to assert control over the assets of [[Eletson Gas, and].. to call and hold meetings of the Board of [Eletson Gas] without following proper procedures and for unlawful and improper purposes of approving unlawful and improper conduct post-March 11, 2022." Final Award at p. 97-98.
- Levona further "purport[ed] to terminate management agreements that Eletson Corporation has with [Eletson Gas'] subsidiaries, purporting to change management of the [Eletson Gas'] subsidiaries, precluding Eletson Corporation from communicating with the [Eletson Gas'] financiers, all of which Levona knew was unlawful and in breach of the LLCA." Final Award at p. 98.

148. Each of Levona and Pach Shemen's bad faith pre-acquisition actions were aimed at seizing on an immediate financial gain at the expense of harming the Debtors' estate and their creditors.

149. Further to this pre-acquisition bad faith, the acquisition of the Notes was never about prospective monetary returns on investment, as has been represented by Petitioning Creditors to this Court. *See* Dkt. No. 3 at ¶ 1. Instead, for the Murchinson entities, including Pach

Shemen it was always about manipulating the Debtors and their operations in a way that would work to their advantage in the Arbitration, including ousting the Debtors current management through the appointment of a bankruptcy trustee.

150. Justice Belen—after almost a year of supervising discovery and conducting a two-week Arbitration trial—agreed. Justice Belen found in the Arbitration that acquisition of the Notes, the filing of the bondholder litigation, and the filing this involuntary bankruptcy were directed by Murchinson and orchestrated by its alter ego Pach Shemen, with the goal of financially leveraging Eletson Holdings while avoiding the prospect of an adverse Arbitration award (Final Award, at 31).

151. [redacted], even *before* Murchinson's affiliate Levona (a shell company created solely to acquire shares in Gas), acquired the Preferred Shares. *See* ELETSONBK113131, ELETSONBK113151, ELETSONBK113209. When that plan did not work out, Murchinson looked to the Debtors as its next pawns, creating another shell company, Pach Shemen, in an attempt to acquire a majority of the notes issued by the Debtors for pennies on the dollar, with the clear intent to immediately put the Debtors into bankruptcy and the added benefit of upending the then-pending Arbitration.

152. As part of this "bankruptcy strategy," Murchinson employed another agent, Maeir Tarlow [redacted] VOLUNTARY -00004272)—to coordinate Alpine's purported acquisition of the Notes (Deposition Transcript of A. Tarlowe, at 23:8-16; BP LIMITED VOLUNTARY-00003237). Significant here, [redacted]

[redacted] *See e.g.,* EletsonBK041154; EletsonBK041313.

153. Further, the commencement of the involuntary proceedings was in bad faith because of a failure to adequately diligence whether the "creditors" were qualified to be petitioning creditors under the Bankruptcy Code. There is no dispute that, by the time the involuntary petitions were filed, Alpine and Pach Shemen were aware of the existence of the Second RSA, its forbearance provisions and its transfer restrictions. *See* Dkt. No. 3 ¶¶ 31-34. They were similarly aware that the alleged termination of the Second RSA–undertaken at Murchinson's direction–was disputed by the Debtors. *Id.,* at ¶ 33. In addition, as a signatory to the OCM Stipulation, VR Global was aware of additional restrictions that prohibited the transfer of any interests to parties that had not executed joinders to the same. See EletsonBK000901*,* § 4 (detailing restrictions on transfer of notes); *id.* at EletsonBK000919*,* (execution page of VR Global). The failure to investigate and diligence the legitimacy of the Petitioning Creditors' claims or to verify the statements made on behalf of the petitioning creditors in the Petitioning Creditors Statement ISO of the Petitions is, itself, an indicium of bad faith. Indeed, "[f]ailure to conduct a reasonable inquiry before filing an involuntary petition that has no basis in law or fact constitutes bad faith." *In re Anmuth Holdings LLC*, 600 B.R. 168, 197 (Bankr. E.D.N.Y. 2019).

154. Unlike Pach Shemen and its affiliates, many of the Noteholders are original Noteholders, meaning that there is no doubt that they have standing as proper creditors. HFR Report, at p. 36. Relatedly, Pach Shemen and its affiliates have benefitted from causing the value of the Notes to decrease and the poor performance of Eletson Gas, which has directly harmed the other Noteholders. *Id.* at p. 36-37. The other Noteholders have been further harmed because of Pach Shemen and its affiliates' multi-year plot to take over Holdings and Gas and sell off their respective assets. *Id.* at p. 36. In sum, the magnitude of the bad faith actions undertaken by Pach

Shemen and its affiliates over the past three and a half years have resulted in significant harm to the other creditors, at the Debtors and other creditors' expense. Their actions were found to have constituted fraud, bribery, and deceit. The nature of these actions caused harm to the Debtors and their estates, and the actions were taken willingly. Given the foregoing, the Petitioning Creditors (as defined in the Plan) must have their claim must be subordinated pursuant to *Mobile Steel*.

VII. The Plan is in the Best Interest of All Creditors and Should be Confirmed Pursuant to 1129(c)

155. The Plan is the only confirmable plan of reorganization filed in these Chapter 11 Cases. *See* Dkt. No. 1029. Nonetheless this Court may find that the Competing Plans are confirmable. Upon finding multiple plans confirmable this Court must determine which of the confirmable plans will be confirmed. In doing so this Court must consider the preference of creditors and may consider such other factors like the type of plan, the feasibility of the competing plans and the proposed treatment of creditors thereunder. *See, e.g.*, *In re Holley Garden Apartments, Ltd.,* 238 B.R. 488, 493 (Bankr. M.D. Fla. 1999). Given these consideration criteria, the Plan is the one that should be confirmed by this Court.

A. The Plan has the Most Creditor Support When Controlling for Pach Shemen

156. The Voting Certification provides that the Debtors' Plan has the greatest amount of creditor support in terms of electing creditors that have indicated a preference towards one plan. While there is a dispute with Pach Shemen articulating different tabulation results, one thing is clear, creditors that articulated a preference overwhelmingly preferred the Debtors' Plan. *See* Voting Certification Exhibit A. Under the Debtors tabulation methodology, 13 creditors and interest holders articulated a preference for the Debtors' Plan as opposed to just 3 creditors who articulated a preference for the PS Plan. Even under Pach Shemen's tabulation methodology, 19 creditors and interest holders articulated a preference for the Debtors' Plan compared to only 17

creditors articulating an interest for the PS Plan, and 10 creditors articulating a preference for the PS Alternative Plan. The Court is not bound solely by the preference of creditors in making its determination. *See e.g. In re Holley Garden Apartments, Ltd.*, 238 B.R. 488 (Bankr. M.D. Fla. 1999). Nonetheless, to the extent creditor preference plays a part in the Court's decision, this factor should weigh in favor of confirmation of the Debtors' Plan. This difference in support becomes even more shocking when controlling for Pach Shemen and the Petitioning Creditors' claims, even under the Competing Plans. If Pach Shemen's votes are removed, a shocking **6%** of claims value voted in favor of the PS Plan and an abysmal 1.1% of claims value voted in favor of the PC Alternative Plan. However, when controlling for Pach Shemen 49.7% of claim value voted in favor of the Debtors' Plan compared to the approximately 40% of claims that did not vote. Clearly, creditors other than Pach Shemen strongly favor the Debtor's Plan over either of the Competing Plans.

B. The Plan is Unanimously Supported by the Parties that will have a Continued Relationship with the Reorganized Debtor

157. Certain of the Debtors' creditors will have a continued relationship with the Reorganized Debtor after the Effective Date. These include the holders of guaranty claims such as the OCM Guaranty Claims and the Corp Guaranty Claims; the other creditors have no continued relationship with the Reorganized Debtor other than the continued distributions from the Litigation Trust. It should be noted that the parties that will maintain an active business relationship with the Reorganized Debtor, and who are active participants in this market, **unanimously** voted in favor of the Debtors' Plan, preferred the Debtors' Plan, and rejected the Competing Plans. This is a clear indication that, in addition to greater recoveries, to market participants under the Debtors' Plan, the Eletson Members and officers and directors of Eletson Holdings remaining at the helm of the Reorganized Debtor is preferable to untested leadership under a plan which would

contemplate Pach Shemen equity ownership. To the extent that any weight is afforded to the nature of the claims of creditors that have articulated a preference towards a plan of reorganization and the viability of the Reorganized Debtor, this factor should weigh heavily in favor of the Debtors' Plan.

C. The Plan Provides the Greatest Recovery for Creditors

158. Finally, simply put, the Debtors' Plan provides the greatest recovery to creditors. The Plan is funded by the Shareholder New Value Contribution (approximately $80 million), Excess SME Proceeds (approximately $10 million), the SME Revenue (approximately $1 million) and the Retained Causes of Action Contribution. The Debtors' Plan therefore provides for over $90 million in anticipated funding. The administrative costs of these Chapter 11 Cases will be the same regardless of which Plan is accepted. The excess value of the Debtors' Plan all flows to the Litigation Trust for the benefit of the Debtors' Noteholders.

159. The PS Plan provides for $13.5 million to be split amongst all General Unsecured Claims resulting in a paltry recovery for all creditors. Likewise, an additional $2.5 million is split between Convenience Class Claims. This amount is a third of the value provided by the Collections Contribution. Clearly the PS Plan does not provide more for creditors than the Debtors' Plan.

160. Compared to the consideration being provided under the PS Plan, and the speculative double payment of the CVR under the PS Alternative Plan, the Debtor's Plan has committed the greatest amount of funding, thereby guaranteeing a larger recovery for creditors entitled to such recovery under the Plan.

161. Given the foregoing, in the event the Court finds that multiple plans are confirmable, the Debtors' Plan should ultimately be the plan of reorganization that is confirmed, as it is the plan with the greatest support, provides the greatest recovery to creditors, and is most

likely to allow the Reorganized Debtor to succeed upon emergence from bankruptcy and move forward as a viable enterprise.

VIII. PROPOSED ORDER

162. Filed simultaneously herewith are proposed findings of fact, conclusions of law and order confirming the Plan (the "Confirmation Order"). The findings of fact and conclusions of law in the Confirmation Order are supported by the Kertsikoff Declaration and the Hadjieleftheriadis Declaration.

IX. IMMEDIATE EFFECTIVENESS

163. The Debtors request that the terms of the Confirmation Order be effective immediately upon entry thereof, notwithstanding any stay that might be imposed by Bankruptcy Rules 3020(e), 6004(h), 7062, 8001, 8002 or otherwise. The Debtors have spent nearly a year in these Chapter 11 Cases and expended significant efforts to facilitate the restructuring called for in the Plan and emerge from these Chapter 11 Cases as soon as practicable. Moving forward with the actions to be authorized under the Confirmation Order is necessary to ensure a speedy exit from these Chapter 11 Cases. Each day that the Debtors remains in these Chapter 11 Cases they incur additional administrative and professional costs, and delays to the timing and value of distributions to creditors. Under the circumstances, the Debtors submit that allowing the terms of the Confirmation Order to be effective immediately is appropriate.

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X. CONCLUSION

The Plan complies with and satisfies all the requirements of sections 1127 and 1129 of the Bankruptcy Code. Accordingly, the Debtors request that the Court (i) confirm the Plan, (ii) deny confirmation of the Competing Plans (iii) overrule any objections, if necessary, and (iv) grant the Debtors such other and further relief as is just and proper.

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New York, New York

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