IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER INC., *et al.*,	Case No. 24-11390 (TMH)
Debtors.[1]	(Jointly Administered)

DEBTORS' (I) MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION OF FISKER INC. AND ITS DEBTOR AFFILIATES AND (II) REPLY TO OBJECTIONS THERETO

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Wilmington, Delaware

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Dr, La Palma, CA 90623.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The debtors and debtors in possession in the above-captioned cases (collectively, the "**Debtors**") submit this (a) memorandum of law in support of confirmation of the *First Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation for Fisker Inc. and Its Debtor Affiliates* filed concurrently herewith (as may be amended, modified and/or supplemented from time to time, the "**Plan**, the "**Disclosure Statement**" or the "**Combined Disclosure Statement and Plan**" as applicable);[2] and (b) reply to objections thereto. In support hereof, the Debtors rely upon (a) the declaration of John C. DiDonato (the "**DiDonato Declaration**"), (b) a proposed form of order approving the Disclosure Statement on a final basis and confirming the Plan (as the same may be amended, modified and/or supplemented from time to time, the "**Confirmation Order**"), (c) the balloting tabulation and declaration of James Lee prepared by Kurtzman Carson Consultants, LLC dba Verita Global LLC ("**Verita**"), the Debtors' solicitation and balloting agent (the "**Voting Declaration**"), each filed concurrently herewith, and (d) the applicable certificate of service filed by Verita in connection with Plan solicitation [D.I. 601] (the "**Solicitation Affidavit**").

PRELIMINARY STATEMENT

1. The Debtors commenced these Chapter 11 Cases nearly four months ago with the goal of facilitating an orderly wind down of their assets and maximizing distributions to creditors and other stakeholders. Prior to the Petition Date, negative industry trends, production and delivery delays, and sale model transitions contributed to the Debtors' decreasing resources. In attempt to stabilize its liquidity position, the Debtors implemented several cost-cutting measures and evaluated various strategic transactions.

[2] Capitalized terms used but not defined herein have the meanings given to them in the Combined Disclosure Statement and Plan.

2. The Debtors ultimately determined that it was in their best interest to file these Chapter 11 Cases to seek an orderly liquidation of their assets. On June 30, 2024, the Debtors executed the Fleet Sales Agreement (the "**Fleet Sales Agreement**"), which was approved by the Court on July 27, 2024 [D.I. 293] (as amended on July 26, 2024 [D.I. 294] and September 13, 2024 [D.I. 555]). The Fleet Sales Agreement provided for the purchase and sale of substantially all of the Debtors' existing fleet of vehicles configured for the U.S. and Canada.

3. On July 16, 2024, the Secured Noteholder filed the Conversion Motion, requesting conversion of the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code. The Debtors resolved the Conversion Motion and agreed upon the Global Settlement, as memorialized in the Global Settlement Term Sheet attached as Exhibit 2 to the Sixth Interim Cash Collateral Order.

4. With the Fleet Sales Agreement consummated and the Global Settlement in hand, the Debtors turned their attention to exiting these cases in an orderly fashion. The Plan before the Court is the culmination of these efforts. The Plan is the result of extensive negotiations and enjoys broad support from the Debtors' board of directors and management team, the Creditors' Committee, the Secured Noteholder, and other key constituents.

5. The Plan is the best available option for maximizing recoveries for the Debtors' stakeholders, while also seeking to maintain the safety and drivability of the Debtors' vehicles. If confirmed, the Plan will (a) provide funding to pay all amounts required under the Plan, including payment in full of all administrative expense and priority claims, and (b) provide for funding of up to $1.8 million to the Liquidating Trust, and establish the IP/Austria Assets Trust, which, collectively will facilitate an orderly wind down of the Debtors' estates and distribute the proceeds of the trust assets in accordance with the Plan.

6. The Debtors received five objections to Plan confirmation:

- The first objection—filed by the U.S. Securities and Exchange Commission—at D.I. 630 (the "**SEC Objection**");
- The second objection—filed by the U.S. Trustee—at D.I. 636 (the "**UST Objection**");
- The third objection—filed by the United States of America, on behalf of the National Highway Traffic Safety Administration ("**NHTSA**"), an operating administration of the U.S. Department of Transportation—at D.I. 650 (the "**NHTSA Objection**"); and
- The fourth objection—filed by American Lease LLC ("**AL**")—at D.I. 655 (the "**AL Objection**").[3]

7. As set forth herein and on the chart annexed hereto as **Exhibit A**, the Debtors respectfully submit that the SEC Objection, the UST Objection, and the NHTSA Objection should be overruled. The Debtors believe that all other Plan objections have been or will be resolved prior to the confirmation hearing.

8. As set forth in further detail below, the Plan satisfies the requirements of the Bankruptcy Code, the Bankruptcy Rules, and all other applicable law, and thus, the Plan should be confirmed. Accordingly, the Debtors will seek entry of the Confirmation Order at the hearing on October 9, 2024, and move to consummate the Plan immediately.

BACKGROUND

I. GENERAL BACKGROUND.

9. On June 17 and 19, 2024 (collectively, the "**Petition Date**"), the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code (these "**Chapter 11**

[3] The Debtors will file a separate reply to the AL Objection, which will follow the Confirmation Brief.

Cases"). The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

10. On July 2, 2024, the U.S. Trustee appointed the Committee in these Chapter 11 Cases [D.I. 106]. No trustee or examiner has been appointed in any of the Debtors' cases.

11. Additional information regarding the Debtors' business, their capital structure, and the circumstances leading to the filing of these Chapter 11 Cases is set forth in the *Declaration of John C. DiDonato as Chief Restructuring Officer of the Debtors in Support of Debtors' Chapter 11 Proceedings and First Day Pleadings* [D.I. 37], which was filed with the Court on June 21, 2024 and amended on July 25, 2024 [D.I. 289].

II. COMBINED DISCLOSURE STATEMENT AND PLAN.

12. On August 30, 2024, the Debtors filed the Combined Disclosure Statement and Plan [D.I. 498]. On September 10, 2024, the Court entered an order [D.I. 545] (the "**Interim Approval Order**") (a) approving the Disclosure Statement on an interim basis, (b) scheduling a combined hearing to approve the Disclosure Statement on a final basis and to confirm the Plan, and (c) establishing procedures for solicitation of the Plan and tabulation of votes to accept or reject the Plan. The Debtors commenced solicitation of the Plan on September 12, 2024 as set forth in the Solicitation Affidavit [D.I. 601].

13. On September 23, 2024, the Debtors filed their plan supplement [D.I. 587] (including all exhibits thereto and as amended, modified and/or supplemented from time to time, the "**Plan Supplement**"), which provides information regarding a variety of topics relating to the Plan and the transactions contemplated thereby, including (a) the Committee Statement in Support, (b) the Liquidation Trust Agreement, (c) the IP/Austria Trust Agreement, and (d) the Fee Schedule.

14. The overall purpose of the Plan is to provide for the liquidation of the Debtors in a manner designed to maximize recovery to stakeholders by, among other things,

paying all Claims necessary to confirm the Plan, establishing a Liquidation Trust and IP/Austria Assets Trust, and providing for the orderly wind down of the Debtors.

15. Specifically, the Plan provides:[4]

- each holder of an Allowed Other Priority Claim shall be paid in full and in Cash or provided such other treatment rendering such holder's Allowed Other Priority Claim Unimpaired in accordance with section 1124 of the Bankruptcy Code;[5]

- each holder of an Allowed Other Secured Claim shall, at the option of the Liquidating Trust, (i) be paid in full and in Cash, (ii) receive its collateral in full satisfaction of its Claim, or (iii) such other treatment rendering such holder's Allowed Other Secured Claim Unimpaired in accordance with section 1124 of the Bankruptcy Code;[6]

- each holder of an Allowed Secured Notes Claim (or its designee) shall receive its Pro Rata Share of the IP/Austria Assets Trust Units and all proceeds thereof;[7]

- except to the extent that a holder of an Allowed General Unsecured Claim and the Debtors (prior to the Effective Date, with the consent of the Secured Noteholder and the Committee) or the Liquidating Trust (after the Effective Date) agrees to less favorable treatment, each holder of an Allowed General Unsecured Claim shall receive its Pro Rata Share of the Liquidating Trust Units[8]

- all Intercompany Claims shall be deemed automatically cancelled, released, and extinguished and shall be of no further force or effect, and no holder of an Intercompany Claim will receive any Plan Distribution on account thereof;[9]

[4] The summary of the Plan contained herein is qualified in its entirety by the terms of the Plan and in the event of any inconsistency, the Plan shall control in all respects.

[5] *See* Plan Art. VI.B.1.

[6] *See id.* Art. VI.B.2.

[7] *See id.* Art. VI.B.3.

[8] *See id.* Art. VI.B.4.

[9] *See id.* Art. VI.B.5.

- all Equity Interests in the Debtors shall be deemed automatically canceled, released, and extinguished and shall be of no further force or effect, and no holder of an Equity Interest will receive any Plan Distribution on account thereof;[10]

- all Intercompany Interests shall be deemed automatically cancelled, released, and extinguished and shall be of no further force or effect, and no holder of an Intercompany Interest will receive any Plan Distribution on account thereof;[11]

- funding of a Liquidating Trust with the Wind Down Amount (in the amount of approximately $750,000), the Liquidating Trust Additional Amount (in the amount of approximately $750,000), and the First Tier Claims Reserve to govern the liquidation of the Debtors' estates and remaining assets following the Effective Date;[12] and

- distributions under the Plan shall be funded from Cash on hand and, to the extent applicable, from other proceeds of Non-IP Assets.

III. PLAN SOLICITATION AND VOTING RESULTS.

16. On September 12, 2024, the Debtors began soliciting votes on the Plan by distributing the Combined Disclosure Statement and Plan and related materials to holders of Claims in impaired Classes that were entitled to vote under the Plan, as required by the Interim Disclosure Statement order. Specifically, as set forth in the Solicitation Affidavit, Verita, on behalf of the Debtors, transmitted: (a) the *Notice of Joint Hearing for Final Approval of the Disclosure Statement and Confirmation of the Plan* [D.I. 547] (the "**Combined Hearing Notice**"); (b)

[10] *See id.* Art. VI.B.6.

[11] *See id.* Art. VI.B.7.

[12] *See id.* Art. VII.C.1. To the extent that Cash on hand on the Effective Date is insufficient to fund the Liquidating Trust Additional Amount in full, the unfunded portion of the Liquidating Trust Additional Amount shall be funded first by the Liquidating Trust from Cash and other proceeds of Non-IP Assets and, thereafter, from Proceeds of Estate Claims and, solely to the extent the Liquidating Trust does not have funds to fund the Wind Down Amount, then by the IP/Austria Assets Trust from proceeds of IP/Austria Assets, in each case, subject to the Reimbursement Mechanics. *See id.* Art. VIII.D. The First Tier Claims Reserve is a reserve, established on the Effective Date from the Debtors' Cash and other proceeds of Non-IP Assets, sufficient to fund all Allowed Administrative Claims, Other Priority Claims, Tax Claims, and Effective Date Statutory Fees that are not paid on the Effective Date. *See id.* Art. I.A.72.

instructions for accessing copies of the Combined Disclosure Statement and Plan; (c) a copy of the Interim Approval Order (without the exhibits); and (d) an appropriate Ballot to all known holders of Claims in Class 3 (Secured Notes Claims) and Class 4 (General Unsecured Claims), which were the only Classes entitled to vote to accept or reject the Plan.[13]

17. The Interim Approval Order and related notices scheduled a combined hearing on final approval of the Disclosure Statement and confirmation of the Plan and established deadlines and procedures for voting on, and objecting to, the Plan.[14]

18. In addition, as required by the Interim Approval Order, the Debtors transmitted to each member of Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 5 (Intercompany Claims), Class 6 (Equity Interests), and Class 7 (Intercompany Interests) the Non-Voting Combined Notice indicating that such person was not entitled to vote on the Plan.

19. As set forth in the Voting Declaration, the Debtors received acceptance of the Plan from the Voting Classes for all Debtors.[15]

20. Under the Plan, Class 1 (Other Priority Claims) and Class 2 (Other Secured Claims) are unimpaired and deemed to have accepted the Plan, and thus were not entitled to vote to accept or reject the Plan.[16] Moreover, Class 5 (Intercompany Claims), Class 6 (Equity Interests),

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[13] *See* Interim Approval Order Exhibit 1.

[14] The Combined Disclosure Statement and Plan Objection Deadline occurred on October 4, 2024 at 4:00 p.m. (Eastern Time) and the Voting Deadline occurred on October 7, 2024 at 12:00 p.m. (Eastern Time). The Combined Hearing is scheduled for October 9, 2024 at 10:00 a.m. (Eastern Time).

[15] The Plan does not substantively consolidate the Debtors. *See* Plan Art. I.J ("For purposes of administrative convenience and efficiency, the Plan has been filed as a joint plan for each of the Debtors and presents together Classes of Claims against and Interests in the Debtors. The Plan does not provide for the substantive consolidation of any of the Debtors."). In addition, all votes on the Plan were tabulated on a non-consolidated basis by Class and by Debtor for the purpose of determining whether the Plan satisfies sections 1129(a)(8) and/or 1129(a)(10) of the Bankruptcy Code. *See* Plan Art. VI.C. Each Class entitled to vote on the Plan voted to accept with respect to each Debtor. *See* Voting Declaration ¶ 14, Ex. A.

[16] *See* 11 U.S.C. § 1126(f).

and Class 7 (Intercompany Interests) will not receive any distribution under the Plan, are deemed to have rejected the Plan, and were not entitled to vote to accept or reject the Plan.[17]

ARGUMENT

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

A. Jurisdiction and Venue.

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

B. Adequate Notice of Combined Hearing.

22. In accordance with Bankruptcy Rules 2002, 6006, 9007, and 9014, the Interim Approval Order, the Combined Hearing Notice and the solicitation procedures set forth therein, adequate notice of (a) the time for filing objections to confirmation of the Plan and final approval of the Disclosure Statement, and (b) the transactions, settlements and compromises contemplated thereby, and the Combined Hearing was provided to all holders of Claims and Interests and other parties in interest entitled to receive such notice under the Bankruptcy Code and the Bankruptcy Rules. No other or further notice of the Combined Hearing is necessary or required.

[17] *See* 11 U.S.C. § 1126(g).

II. THE DISCLOSURE STATEMENT SHOULD BE APPROVED ON A FINAL BASIS.

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

> information of the kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.[18]

24. The amount and type of information required to satisfy section 1125(a) must be determined case by case. The legislative history of section 1125 indicates that the threshold of what constitutes "adequate information" is flexible and based on the circumstances of each case.[19] Courts also have broad discretion to determine what constitutes adequate information necessary to satisfy the requirements of section 1125(a).[20] This grant of discretion was intended to facilitate a debtor's effective emergence from chapter 11 in the broad range of businesses in which chapter

[18] 11 U.S.C. § 1125(a)(1).

[19] H.R. Rep. No. 95-595, at 409 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6364.

[20] *See In re Phoenix Petroleum Co*., 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) ("The general language of the statute and its surrounding legislative history make clear that the determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.") (internal quotations omitted).

11 debtors engage.[21] A disclosure statement must provide creditors entitled to vote on the plan with information that is "reasonably practicable" to permit an "informed judgment."[22] The general purpose of the disclosure statement is to set forth sufficient facts to permit a creditor to make an informed evaluation of the merits of the plan.[23]

25. To determine whether a disclosure statement contains adequate information, courts typically expect the following elements to be included in a disclosure statement, where applicable to the circumstances of the case: (a) the events leading to the filing of a bankruptcy petition; (b) a description of the available assets and their values; (c) the anticipated future of the company; (d) the source of information stated in the disclosure statement; (e) a disclaimer; (f) the present condition of the debtor while in chapter 11; (g) the scheduled claims; (h) the estimated return to creditors under a chapter 7 liquidation; (i) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (j) the future management of the debtor; (k) the chapter 11 plan or a summary of it; (l) the estimated administrative expenses, including attorneys' and accountants' fees; (m) the collectability of accounts receivable; (n) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the plan; (o) information relevant to the risks posed to creditors under the plan; (p) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (q) litigation likely to arise in a non-bankruptcy context; (r) tax attributes of the debtor; and (s) the relationship of the debtor with affiliates.[24]

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[21] *See* H.R. Rep. No. 95-595, at 408–409 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6364-65.

[22] *Cohen v. Tic Fin. Sys. (In re Ampace Corp.)*, 279 B.R. 145, 158 n.26 (Bankr. D. Del. 2002).

[23] *See Century Glove, Inc. v. First Am. Bank of New York*, 860 F.2d 94, 100 (3d Cir. 1988); *Phoenix Petroleum*, 278 B.R. at 392.

[24] *See Phoenix Petroleum*, 278 B.R. at 393 n.6.

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

27. Moreover, pursuant to the Interim Approval Order, the Disclosure Statement was approved as having adequate information under 11 U.S.C. § 1125(a)(1). For the reasons stated above and set forth in the Debtors' motion to approve the Disclosure Statement on a final basis [D.I. 499], the Debtors further submit that the proposed Disclosure Statement contained more than sufficient detail to permit holders of Claims entitled to vote on the Plan to make an informed judgment on whether to accept or reject the Plan.

28. Accordingly, the Debtors request that the Court approve the Disclosure Statement on a final basis.

III. THE PLAN SHOULD BE CONFIRMED.

A. The Plan Meets All Applicable Requirements of the Bankruptcy Code.

29. To confirm the Plan, the Court must find by a preponderance of the evidence that the provisions of section 1129 of the Bankruptcy Code have been satisfied.[25] The Debtors submit that based on the record of these Chapter 11 Cases, the DiDonato Declaration, the Voting Declaration and the Debtors' arguments set forth herein, the applicable burden is clearly satisfied and the Plan complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code. Each requirement is addressed below.

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

30. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code. The principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan.[26] Consequently, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the

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

[26] The legislative history of section 1129(a)(1) explains that this provision is intended to draw in the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan, respectively. S. Rep. No. 95-989, at 126 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re S & W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was more directly aimed at were Sections 1122 and 1123.").

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

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

31. Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[27]

32. The Third Circuit "permits the grouping of similar claims in different classes[]" as long as those classifications are reasonable.[28] The classifications, however, cannot be "arbitrarily designed" to secure the approval of an impaired class when "the overwhelming sentiment of the impaired creditors [is] that the proposed reorganization of the debtor would not serve any legitimate purpose."[29] Accordingly, the Third Circuit has held that the only requirement for classification is that it be "reasonable."[30] Separate classes of similar claims are reasonable when each class represents "a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed."[31] Courts have recognized that this gives both the debtor and the bankruptcy court considerable discretion in determining whether similar claims may be separately classified.[32] Furthermore, if it is evident

[27] 11 U.S.C. § 1122(a).

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

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

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

[31] *John Hancock Mut. Life Ins. Co.*, 987 F.2d. at 159.

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

based on the voting results that the debtor would have an impaired accepting class regardless of the chosen classification scheme, then any challenge to the classification scheme is moot because the plan would have been accepted even if the classes were constituted differently.[33]

33. Here, the Plan's classification of Claims and Interests satisfies section 1122(a) of the Bankruptcy Code. The Plan designates a total of seven Classes of Claims and Interests of the Debtors. This classification satisfies section 1122(a) of the Bankruptcy Code because each Class contains only Claims or Interests that are substantially similar to each other. Furthermore, the classification scheme used by the Plan is based on the similar nature of Claims or Interests contained in each Class and not on any impermissible classification factor.[34] Finally, no party has objected to the Debtors' classification scheme and the Debtors submit that similar Claims and Interests have not been placed into different Classes in order to affect the outcome of the vote on the Plan.[35] Therefore, the Court should approve the classification scheme as set forth in the Plan as consistent with section 1122(a) of the Bankruptcy Code.

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[33] *See, e.g.*, *In re Heritage Org., L.L.C.*, 375 B.R. 230, 302 (Bankr. N.D. Tex. 2007) (rejecting challenge to classification scheme where voting results would be the same regardless of whether classes were combined or separate); *In re New Midland Plaza Assocs.*, 247 B.R. 877, 892 (Bankr. S.D. Fla. 2000) ("The Court holds that because the City, like the general trade creditors, voted in favor of the Plan, the issue of gerrymandering is moot, i.e., if the classes were combined, the Debtor would still have an impaired accepting class, and only one such class is necessary under § 1129(a)(10)."); *In re Dow Corning Corp.*, 244 B.R. 634, 645 n.5 (Bankr. E.D. Mich. 1999) (noting that a conclusion of gerrymandering would be counterintuitive where 24 of 33 classes had voted to accept a plan, most by overwhelming margins); *Beal Bank, S.S.B. v. Way Apts., D.T. (In re Way Apts., D.T.)*, 201 B.R. 444, 451, 451 n.6 (N.D. Tex. 1996) (finding that separation of claims of large trade creditors and small trade creditors into two separate classes did not constitute gerrymandering because the "votes of the combined class would have resulted in acceptance"); s*ee also In re Abeinsa Holding, Inc*., 562 B.R. 265, 274–75 (Bankr. D. Del. 2016) (rejecting challenge to separate classification in part on the basis that, even without the challenged classification, the voting results would not change); *In re Nuverra Envtl. Solutions, Inc.* 590 B.R. 75, 98–99 (D. Del. 2018) (district court dismissing claimants' appeal, determining the overwhelming acceptance within the claimant's class rendered argument moot).

[34] *See* DiDonato Declaration ¶ 11.

[35] The U.S. Trustee, however, has objected that the Plan's provisions relating to Owner Reimbursement Claims and the Liquidating Trust's funding thereof (*see* Plan Art. VIII.D) contradict the Bankruptcy Code's "equal treatment" principle under section 1123(a)(4). *See* UST Obj. ¶ 101–03. For the reasons stated below, the UST Objection should be overruled.

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

34. The Plan satisfies the seven mandatory requirements of sections 1123(a)(1) through (7).

35. Sections 1123(a)(1)-(4). Specifically, Article VI of the Plan satisfies the first four requirements of section 1123(a) by: (a) designating seven Classes of Claims and Interests, not including Claims of the kinds specified in sections 507(a)(2), (a)(3) and (a)(8) of the Bankruptcy Code, as required by section 1123(a)(1); (b) specifying the Classes of Claims and Interests that are unimpaired under the Plan, as required by section 1123(a)(2); (c) specifying the treatment of each Class of Claims and Interests that is impaired, as required by section 1123(a)(3); and (d) providing for the same treatment for each Claim or Interest within a particular Class, unless otherwise agreed by the holder of a particular Claim, as required under section 1123(a)(4).

36. Section 1123(a)(5). Furthermore, Article VII of the Plan sets forth the means for implementation of the Plan in accordance with section 1123(a)(5), which the Debtors submit are adequate. Section 1123(a)(5) of the Bankruptcy Code requires that a plan "provide adequate means for the plan's implementation," and gives several examples of what may constitute "adequate means" for implementation. 11 U.S.C. § 1123(a)(5). The implementation mechanisms in the Plan and Plan Supplement include, among other things:

- distributions under the Plan will be funded from Cash on hand as of the Effective Date and, to the extent applicable, from other proceeds of Non-IP Assets;
- appointment of the Liquidating Trustee and IP/Austria Assets Trustee to coordinate the liquidation and dissolution of the Debtors and distribution of recoveries to creditors; and
- the establishment of a Liquidating Trust and IP/Austria Assets Trust consistent with the Liquidating Trust Agreement and IP/Austria Assets

Trust Agreement to govern the liquidation of the Debtors' estates and remaining assets following the Effective Date.

37. Accordingly, the Plan satisfies the requirements of section 1123(a)(5) of the Bankruptcy Code.

38. Section 1123(a)(6). Section 1123(a)(6) of the Bankruptcy Code requires that the charter of the debtor, or the surviving corporation if the debtor is transferring all of its property or merging or consolidating with another entity, contain a provision prohibiting the issuance of nonvoting equity securities.[36] Section 1123(a)(6) is not applicable under the Plan because no new equity securities are being issued. The Debtors' corporate entities will be wound down (and ultimately dissolved) and will not be issuing securities. Thus, the requirement that the Debtors' new organizational documents prohibit the issuance of nonvoting equity securities does not apply in these Chapter 11 Cases.

39. Section 1123(a)(7). Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any director, officer or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy."[37] Pursuant to Article VII.F of the Plan, on the Effective Date, each of the Debtors' directors and officers shall be discharged from their duties and terminated automatically without the need for any corporate action or approval and without the need for any corporate filings, and, unless subject to a separate agreement with the Liquidating Trustee, shall have no continuing obligations to the Debtors following the occurrence of the Effective Date. Moreover, pursuant to Article XIII.B of the Plan and Article II of each of the IP/Austria Assets

[36] 11 U.S.C. § 1123(a)(6).

[37] 11 U.S.C. § 1123(a)(7).

Trust Agreement and Liquidating Trust Agreement, on the Effective Date, the Liquidating Trustee and IP/Austria Assets Trustee shall be appointed. The Debtors disclosed the identities of the Liquidating Trustee and IP/Austria Assets Trustee as part of the Plan Supplement, which is consistent with the interest of creditors and with public policy. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

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

40. Section 1123(b) of the Bankruptcy Code sets forth permissive components that may be incorporated into a chapter 11 plan. Specifically:

a. in accordance with section 1123(b)(1) of the Bankruptcy Code, Article VI of the Plan provides that each particular Class is impaired or left unimpaired, as the case may be;

b. in accordance with section 1123(b)(2) of the Bankruptcy Code, Article XI of the Plan provides for the assumption, assumption and assignment, or rejection of the Debtors' executory contracts and unexpired leases that have not been previously assumed, assumed and assigned, or rejected pursuant to section 365 of the Bankruptcy Code and prior orders of the Court;

c. in accordance with section 1123(b)(3)(A) of the Bankruptcy Code, the Plan incorporates the settlement and adjustment of claims or interests belonging to the Debtors and their estates;

d. in accordance with section 1123(b)(3)(B) of the Bankruptcy Code, Article VII.B.1 of the Plan provides that, among other things, except with respect to the Released Parties or any other beneficiary of the releases, injunctions, and exculpations contained in Article XII of the Plan, the Liquidating Trustee shall have, retain, reserve and be entitled to assert all Causes of Action that the Debtors had immediately prior to the Effective Date;

e. in accordance with section 1123(b)(5) of the Bankruptcy Code, Article VI of the Plan modifies or leaves unaffected, as the case may be, the rights of holders of Claims in each Class; and

f. in accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with applicable provisions of the Bankruptcy Code. In addition, Articles VIII.A.9 and VIII.B.9 of the Plan provides that to the extent the Liquidating Trust Units

> or any beneficial interests in the IP/Austria Assets Trust issued pursuant to the Plan are deemed "securities", such units will be exempt from registration under applicable securities law in reliance on the exemption provided by section 1145 of the Bankruptcy Code.

41. Under section 1123(b)(2) of the Bankruptcy Code, "a plan may, subject to section 365, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected."[38] Section 365(a) of the Bankruptcy Code provides that a debtor, subject to the court's approval, may assume or reject any executory contract or unexpired lease. Bankruptcy courts generally approve a debtor's decision to assume, assume and assign, or reject executory contracts or unexpired leases where such decision is made in the exercise of such debtor's sound business judgment and benefits its estate.[39] The business judgment standard requires that the court approve the debtor's business decision unless that judgment is the product of bad faith, whim, or caprice.[40]

42. Article XI of the Plan provides that each Executory Contract and Unexpired Lease not previously rejected, assumed, or assumed and assigned (including any Executory Contract or Unexpired Lease assumed and assigned in connection with an asset sale) shall be deemed automatically rejected pursuant to sections 365 and 1123 of the Bankruptcy Code, except: (a) any Executory Contracts and Unexpired Leases that are the subject of separate motions to reject, assume, or assign filed pursuant to section 365 of the Bankruptcy Code by the Debtors before entry of the Confirmation Order; (b) all Executory Contracts and Unexpired Leases (if any) assumed or assumed and assigned by order of the Bankruptcy Court entered before the Effective

[38] 11 U.S.C. § 1123(b)(2).

[39] *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *N.L.R.B. v. Bildisco & Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

[40] *See In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001).

Date and not subsequently rejected pursuant to an order of the Bankruptcy Court; (c) any Executory Contract or Unexpired Lease that is the subject of a dispute over the amount or manner of cure pursuant to the next section hereof and for which the Debtors make a motion to reject such contract or lease based upon the existence of such dispute filed at any time; (d) any guaranty or similar agreement executed by a third party which guarantees repayment or performance of an obligation owed to the Debtors or to indemnify the Debtors; (e) agreements with third parties regarding preservation of the confidentiality of documents produced by the Debtors; and (f) the Insurance Contracts.

43. The Debtors believe that such relief is appropriate as the Debtors are in the process of winding down their estates and will have no need for the vast majority of their remaining contracts and leases after the Effective Date, which will continue to be an unnecessary expense of the Estates if not rejected.[41] The Plan provides that parties with Claims arising from the rejection of executory contracts or unexpired leases pursuant to the Plan will have thirty (30) days after the later of: (a) the date of entry of an order of the Bankruptcy Court (including the Confirmation Order) approving such rejection, and (b) the effective date of the rejection of such Executory Contract or Unexpired Lease. The Debtors believe that confirmation of the Plan is a sufficient forum to address the rejection of the Debtors' executory contracts and unexpired leases, and that the notice of the Effective Date will provide sufficient notice to all counterparties of the deadline to file claims against the Debtors for rejection damages.

44. The Debtors also submit that they have satisfied the applicable requirements with respect to the handful of executory contracts that they will assume on the Effective Date (the "**Assumed Contracts**"). Here, all counterparties to the Assumed Contracts were provided with a

[41] *See* DiDonato Declaration ¶¶ 12-13.

notice listing their agreement in the Schedule of Assumed Contracts in the Plan Supplement. No such contract counterparties objected to the proposed assumption and cure amounts. The Debtors are authorized to assume such agreements provided that, to the extent necessary, the Debtors have: (a) cured, or provided adequate assurance that they will promptly cure, any default in accordance with section 365(b)(1)(A) of the Bankruptcy Code; (b) compensated or provided adequate assurance that they will promptly compensate the counterparties for any actual pecuniary loss resulting from such default; and (c) provided adequate assurance of future performance under the agreements.[42] With respect to cure costs, the proposed cure amounts set forth for each Assumed Contract are based on the Debtors' review of their books and records. Regarding adequate assurance of future performance, the Debtors and/or the Debtors' Estates have sufficient liquidity from, among other sources, the Wind Down Amount provided under the Plan, to address the obligations under the agreements in the ordinary course of business.[43]

45. Accordingly, assumption and rejection of the Executory Contracts and Unexpired Leases under the Plan and Confirmation Order, as applicable, should be approved as a sound exercise of the Debtors' business judgment.

d. The Plan's Release, Injunction and Exculpation Provisions Are Appropriate and Should be Approved.

46. Article XII of the Plan provides for: (a) releases by the Debtors of the Released Parties;[44] (b) releases of any Released Parties by and among the other Released Parties;

[42] *See* 11 U.S.C. § 365(b).

[43] *See* DiDonato Declaration ¶ 14.

[44] "**Released Parties**," as defined in Article I.A.141 of the Plan, means each of the following, each solely in their capacity as such: (a) each Debtor; (b) [reserved]; (c) the Liquidating Trustee; (d) the IP/Austria Assets Trustee; (e) Davis Polk, as counsel to the Debtors; (f) Morris Nichols, as counsel to the Debtors, (g) Huron Consulting Services, LLC, as financial advisor and consultant to the Debtors; (h) Kurtzman Carson Consultants, LLC dba Verita Global, as administrative advisor to the Debtors; (i) the Transaction Committee Chairman; (j) the CRO; (k) the Committee and each of its members; (l) the Secured Noteholder; (m) Heights Capital Management, Inc.; (n) the 2025 Notes

(c) releases of any Released Parties by the Releasing Parties (together with clause (b), the "**Third-Party Releases**");[45] (d) an injunction precluding holders of Claims against or Interests in any of the Debtors or their Estates from bringing any action against the Debtors or their Estates or otherwise taking any action inconsistent with the Plan; and (e) exculpation for the Exculpated Parties related to Court-approved transactions in these Chapter 11 Cases. As discussed in more detail below, these provisions are proper because, among other things, they are reasonable, in the best interests of the Debtors and their Estates, the product of good faith, arm's-length negotiations, in exchange for substantial consideration from various parties, including the Released Parties, and critical to obtaining the support of various constituencies for the Plan.[46]

Trustee and the 2026 Notes Indenture Trustee; (o) Magna; (p) each Related Party of each Entity in clauses (c) through (o) above; provided, that, for the avoidance of doubt and notwithstanding anything to the contrary herein, (i) the D&Os, including the Other Directors and Officers (for the avoidance of doubt, notwithstanding that the Other Directors and Officers are not and shall not be deemed hereunder to be a Released Party, the Other Directors and Officers shall be released in accordance with Article XII.B of this Plan); (ii) all other professionals, advisors, and attorneys advising the Debtors prior to the Petition Date other than those specifically identified in clauses (e) through (h) of this definition of "Released Party", (iii) any entity that directly or indirectly owned, held, or controlled any equity in the Debtors prior to the Petition Date (other than those specifically identified in clauses (c) through (p) this definition of "Released Party"), (iv) the Fisker Parties, (v) the Debtors' current or former direct or indirect non-Debtor subsidiaries, and (vi) the Debtors' current or former non-Debtor Affiliates (other than the Transaction Committee Chairman, the CRO, and the Other Directors and Officers), in each case, are not and shall not be deemed hereunder to be a Released Party.

[45] "**Releasing Parties**," as defined in Article I.A.142 of the Plan, means (a) all holders of Claims or Equity Interests who are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures; (b) each Related Party of each Entity in clause (a) above; and (c) each Released Party (other than the Debtors); provided that, for the avoidance of doubt and notwithstanding anything to the contrary herein, (i) the D&Os (other than the Other Directors and Officers); (ii) all other professionals, advisors, and attorneys advising the Debtors prior to the Petition Date other than those specifically identified in clauses (e) through (h) of the definition of "Released Party" in Article I.A.141 of this Plan, (iii) the Fisker Parties, (iv) the Debtors' current or former direct or indirect non-Debtor subsidiaries, and (v) the Debtors' current or former non-Debtor Affiliates (other than the Transaction Committee Chairman, the CRO, and the Other Directors and Officers), in each case, are not and shall not be deemed hereunder to be a Releasing Party.

[46] *See* DiDonato Declaration ¶¶ 15-18.

47. The U.S. Trustee objected to the Debtors' proposed Third-Party Releases, exculpation provisions, discharge, and solicitation procedures.[47] For the reasons discussed below, those objections should be overruled.

(i) Debtor Releases

48. Article XII of the Plan provides for the release and waiver of all claims, any and all actions, causes of action, Avoidance Actions, controversies, liabilities, obligations, rights, suits, damages, judgments, any right of setoff, counterclaim, or recoupment that could have been asserted by or on behalf of the Debtors or their Estates against any Released Party (the "**Debtor Releases**"). The Debtors have proposed the Debtor Releases based on their business judgment and submit that the Debtor Releases are reasonable and satisfy the standard that courts generally apply when reviewing these types of releases.

49. Section 1123(b) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[48] Furthermore, a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[49]

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[47] *See* UST Objection ¶¶ 42–91; 104–06.

[48] *See In re Coram Healthcare Corp.*, 315 B.R. 321, 334–35 (Bankr. D. Del. 2004) (holding that standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019). Generally, courts in the Third Circuit approve a settlement by the debtors if the settlement "exceed[s] the lowest point in the range of reasonableness." *See, e.g.*, *In re Exaeris, Inc.*, 380 B.R. 741, 746–47 (Bankr. D. Del. 2008) (internal citation omitted); *see In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (examining whether settlement "fall[s] below the lowest point in the range of reasonableness") (alteration in original) (internal citation omitted); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (settlement must be within reasonable range of litigation possibilities).

[49] *See U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'") (internal citation omitted).

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

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

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

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

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

e. whether a plan provides for payment of all or substantially all of the classes of claims in the class or classes affected by the release.[50]

51. No one factor is dispositive, nor is a plan proponent required to establish each factor for the release to be approved.[51]

52. Here, the Debtors submit that the Debtor Releases are appropriate. First, each of the categories of the Released Parties has contributed significantly to the Debtors' chapter 11 efforts, including negotiating and formulating the Global Settlement and the Plan, and facilitating the progress made during these Chapter 11 Cases.[52] Such efforts include the following, among others:

Released Party	Consideration Provided
CVI Investments, Inc. ("CVI")	• Negotiating and agreeing to permit the Debtors' consensual use of cash collateral to fund these Chapter 11 Cases and the Fleet Sale.

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

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

[52] *See* DiDonato Declaration ¶¶ 15-18.

Released Party	Consideration Provided
	• Contributing the Austria Claims to the IP/Austria Assets Trust. • Supporting a consensual liquidation of the Debtors' Estates and funding the Wind Down Amount, including the Liquidating Trust Assets. • Devoting significant time and resources to negotiating the terms of the Plan and related documents and agreeing to vote for and otherwise support the Plan. • Extending the chapter 11 case milestones under the Cash Collateral Orders to ensure an efficient plan confirmation process and wind down of the Estates. • Negotiating in good faith the terms of the Global Settlement and Plan. • Resolving CVI's request for conversion of the Chapter 11 Cases to chapter 7. • Reducing substantially the amount of CVI's asserted Claims.
The Creditors' Committee	• Expending time and effort to represent the interests of the general unsecured creditors. • Actively supporting a consensual liquidation of the Debtors through the implementation of the Global Settlement and Plan. • Negotiating in good faith the terms of the Liquidating Trust Agreement on behalf of the Liquidating Trust Beneficiaries.
Current and Former Directors, Officers, Agents, Members of Management and Other Employees of the Debtors[53]	• Significant efforts on behalf of the Debtors prior to, and continuing throughout, these Chapter 11 Cases to effectuate the transactions set forth in the Plan. These efforts included, among other things, overseeing a robust marketing process (both prior to and during the bankruptcy proceeding) — all while working with a skeletal staff and significantly fewer resources given employee turnover and limited liquidity.

[53] For the avoidance of doubt and notwithstanding anything to the contrary in the Plan, the Confirmation Order, or any prior order of the Bankruptcy Court, the Debtor Releases set forth in Article XII.A of the Plan do not release Claims or Causes of Actions of the Debtors against (a) Roderick K. Randall, (b) Mark E. Hickson, (c) Nadine I. Watt, (d) Wendy J. Greuel, (e) William R. McDermott, (f) Mitchell S. Zuklie, (g) Jose Angel Salinas, (h) John C. Finnucan IV, (i) Burkhard Huhnke, (j) David King, (k) Corey MacGillivray, or (l) Henrik Fisker, (m) Dr. Geeta Gupta-Fisker, and each of their respective family members, related trusts, investment vehicles, Affiliates (other than the

Released Party	Consideration Provided
	• Significant efforts in connection with the Fleet Sale and Plan processes to maximize value for the Debtors' Estates. In particular, the Debtors' directors, officers, and employees were critical to maintaining and preserving the value of the Fleet Sale Assets. • Maintaining the safety of Fisker Oceans and responding to all recall and stop-hold notices. • Ensuring the uninterrupted operation of the Debtors' business during these Chapter 11 Cases and preserving the value of the Debtors' estates in a challenging operating environment. • Attending Court hearings and numerous board meetings, including meetings on short notice, overnight and on weekends, related to these Chapter 11 Cases and sale process.
Magna International, Inc.	• Actively supporting a consensual liquidation of the Debtors through implementation of the Global Settlement and Plan. • Significant efforts to achieve a settlement of claims in the Austrian Insolvency, which was critical to the success of the Chapter 11 cases.
Professionals of the Debtors, Committee, CVI, and Magna	• Active participation, negotiation and documentations of the transactions during the prepetition and postpetition periods.

53. The Debtor Releases are also critical to the Plan as a whole and represent valid and appropriate settlements of claims the Debtors may have against the Released Parties. First, the Plan was reached after extensive arm's-length negotiations among the Debtors, CVI, Magna, the Committee, and numerous other stakeholders. The Debtor Releases constitute an integral aspect of these negotiations and without such protections, the Plan may not have garnered the necessary support of the requisite parties, making it impossible for the Debtors to have moved

Debtors), and successors and assigns; *provided*, that any recovery against the individuals in clauses (a) through (k) above shall be limited to the applicable D&O Policy Cap.

through these Chapter 11 Cases. Third, the Debtor Releases are limited in scope. As is customary, the releases do not extend to claims arising out of or relating to any act or omission of a Released Party that constitute willful misconduct, actual fraud or gross negligence. Additionally, the Debtor Releases do not release direct claims held by third parties against any Released Party—such claims are preserved to the extent stakeholders object to, or opt out of, the Plan. Fourth, in consideration for the Debtor Releases, the Debtors and their Estates will receive mutual releases from potential Claims and Causes of Action of each of the Released Parties.

54. Finally, the Debtor Releases are supported by all constituencies in these cases. Importantly, the Committee—the party with both an economic incentive and legal mandate to investigate potential claims—conducted an exhaustive investigation into the Debtors' affairs to determine whether there were potential claims against Released Parties that could result in value for the Estates. The Committee concluded that the value to creditors of the Global Settlement and terms of the Plan outweigh the value of any potential causes of action.

55. For the foregoing reasons, the Debtors submit that the Debtor Releases are fair and reasonable and should be approved as a valid exercise of the Debtors' business judgment.[54]

[54] *See* June 15, 2022 Hr'g Tr. 95:7-10, *In re Corp Grp. Banking, S.A.*, No. 21-10969 (JKS) (Bankr. D. Del.) [D.I. 829] ("The Court finds that the debtor releases are a sound exercise of the debtors' business judgment, are fair and reasonable, fall within the range of customarily approved releases, and are approved."); Dec. 14, 2022 Hr'g Tr. 14:14–24, *In re Legacy Ejy, Inc.*, No. 22-10580 (JKS) (Bankr. D. Del.) [D.I. 695] (holding the inclusion of the debtor releases proposed in the plan is a valid exercise of the debtors' judgment and are approved); *see also Spansion*, 426 B.R. at 142 (approving as a valid exercise of business judgment the debtor's releases of, among others, the debtor's current directors, officers and employees, the debtor's current and former professionals, secured creditors and their advisors, the debtor and their affiliates, and their officers, directors, employees, and advisors and senior noteholders and their advisors).

(ii) Third-Party Releases Are Permissible and Should Be Approved.

56. As demonstrated in Debtors' Moving Brief[55] and Reply Brief,[56] nothing in the Supreme Court's recent decision in *Purdue* changed the landscape with respect to consensual third-party releases, including the longstanding precedent permitting consensual third-party opt-out releases.[57] The arguments advanced by the U.S. Trustee and the SEC to the contrary are directly at odds with the clear language of the very decision they cite. The Supreme Court expressly stated: "Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan . . . [n]or do we have occasion today to express a view on what qualifies as a consensual release."[58] Given the Supreme Court's guidance on this point, there is no basis for this Court to depart from the vast number of cases that have determined that opt-out releases are both permissible and consensual.[59]

57. Moreover, it is clear that the notice and vote/opt-out solicitation process here has been effective. The Plan has received overwhelming support from voting parties. Over

[55] "**Moving Brief**" shall refer to Debtors' *Motion for Entry of an Order (I) Approving (A) the Disclosure Statement on an Interim Basis, (B) The Solicitation and Tabulation Procedures, and (C) the Forms of Ballots, Solicitation Package, and Notices, (II) Establishing Certain Dates and Deadlines in Connection with the Solicitation and Confirmation of the Plan, (III) Scheduling a Joint Hearing for Final Approval of the Disclosure Statement and Confirmation of the Plan, and (IV) Granting Related Relief* [D.I. 499].

[56] "**Reply Brief**" shall refer to Debtors' *Reply to U.S. Trustee's Objection to Motion of Debtor for Entry of an Order (I) Approving (A) the Disclosure Statement on an Interim Basis, (B) The Solicitation and Tabulation Procedures, and (C) the Forms of Ballots, Solicitation Package, and Notices, (II) Establishing Certain Dates and Deadlines in Connection with the Solicitation and Confirmation of the Plan, (III) Scheduling a Joint Hearing for Final Approval of the Disclosure Statement and Confirmation of the Plan, and (IV) Granting Related Relief* [D.I. 527].

[57] Moving Brief at ¶¶ 29–33; Reply Brief at ¶ 3–8.

[58] *Harrington v. Purdue Pharma L.P.*, 603 U.S. ___, 144 S. Ct. 2071, 2087-88 (2024) (emphasis in original).

[59] *See* Moving Brief at ¶ 27.

90% of voting parties with general unsecured claims have voted to approve the Plan.[60] Nearly 80% of the 2026 Noteholders voted to approve the plan.[61] Moreover, the Third-Party Releases presented voting parties with a genuine choice—more than 70% of voting holders of General Unsecured Claims (totaling 682), roughly one-third of responding holders of 2026 Notes Claims, and more than 9,000 holders of Equity Interests, have elected to opt out.[62]

58. With respect to the creditors who have voted on the Plan, there can be no question that their releases are consensual—these creditors consented to their release by voting. This conclusion finds support even in the cases cited by the U.S. Trustee in the UST Objection.[63] At the very least, for all parties that voted after receiving notice, their choice not to opt out should be found to establish consent. For the additional reasons set out in the Moving and Reply Briefs and below, these parties, together with those creditors that did not vote and all equityholders should be found to have consented to the Third-Party Releases at issue here.

59. As more fully addressed in the Moving and Reply Briefs, the Third-Party Releases are proper, consensual releases of the kind approved by courts within the Third Circuit.[64] This was true prior to *Purdue* and this remains true after *Purdue*, with numerous courts having held that *Purdue*'s holding does not extend to consensual third-party releases and opt-out

[60] *See* Voting Declaration ¶ 14, Ex. A.

[61] *See* Voting Declaration ¶ 14, Ex. A.

[62] *See* Voting Declaration ¶ 14, Ex. B.

[63] *See, e.g., In re Smallhold, Inc.*, 2024 WL 4296938, at *14 (Bankr. D. Del Sept. 25, 2024) (finding, as conceded by the U.S. Trustee, that voting on a plan without opting out constitutes an affirmative step from which consent can be inferred).

[64] Reply Brief at ¶¶ 3–8.

mechanisms like those included in the Plan.[65] The opt-out releases in *Robertshaw*, *Rite Aid*, *Invitae*, and *Gigamonster* were all similar to the releases included in the Plan.[66]

60. The Debtors respectfully disagree with the U.S. Trustee's assertion that the appropriateness of the Third-Party Releases is a matter governed by state law.[67] At least one judge of this Bankruptcy Court recently concluded that Third-Party Releases such as the one in the Plan are subjects of federal Bankruptcy law rather than state contract law.[68] Third-party releases and

[65] *See, e.g., In re Indianapolis Downs, LLC*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party opt-out release that applied to unimpaired holders of claims presumed to accept the plan as consensual), Moving Brief at ¶ 26. *See also In re Tritek Int'l Inc.*, No. 23-10520 (TMH) (Bankr. D. Del. Oct. 6, 2023) [D.I. 506-1 § 1.129] (confirming third party releases where "Releasing Parties" include (a) all holders of claims or interest who are unimpaired and do not opt out of the releases, (b) holders of claims or interests who are entitled to vote and do not vote against the plan or opt out of the releases, and (c) their respective related parties, among others); *In re Amyris, Inc.*, No. 23-11131 (TMH) (Bankr. D. Del. Feb. 7, 2024) [D.I. 1251 ¶ 79] (confirming third party releases where "Releasing Parties" either "(a) voted to accept the Plan; (b) abstained from voting on the Plan or voted to reject the Plan, but in either case have been afforded the opportunity to opt out of the Third-Party Release and did not opt out of granting the Third-Party Release; (c) are Unimpaired by the Plan and therefore presumed to accept the Plan, have been afforded the opportunity to opt out of the Third-Party Release, and did not opt out; or (d) are Holders of Impaired non-voting Claims or Interests and therefore deemed to reject the Plan, have been afforded the opportunity to opt out of the Third-Party Release, and did not opt out").

[66] *See, e.g.,* Hr'g Tr., Aug. 19, 2024, 65:17–21, *In re Bowflex Inc.*, No. 24-12364 (ABA) (Bankr. D. N.J.) (confirming over the U.S. Trustee's objection a plan which contained third-party releases and an opt out mechanism similar to that at issue here); *see In re Robertshaw U.S. Holdings Corp.*, 2024 WL 3897812, at *17 (Bankr. S.D. Tex. Aug. 16, 2024) ("**Robertshaw**") ("Nothing is construed to question consensual third-party releases offered in connection with a chapter 11 plan. There was also no occasion for the Supreme Court to express a view on what constitutes a consensual release. The Supreme Court confined its decision to the question presented. This Court will not narrow or expand the scope of the Supreme Court's holding. These words must be read literally."); *see also* Hr'g Tr. at 93:7-14, *In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. June 28, 2024) (ECF No. 4145) ("**Rite Aid**") ("The Court sees no reason to deviate from its position as to the appropriateness of these tools and mechanisms, even taking into account the Supreme Court's recent pronouncement in Purdue."); Hr'g Tr. at 14:10- 16, *In re Invitae Corp.*, No. 24-11362 (MBK) (Bankr. D.N.J. July 23, 2024) (approving a similar opt-out release mechanism post-Purdue); Hr'g Tr. at 64:8–67:1, *In re GigaMonster Networks, LLC*, No. 23-10051 (JKS) (Bankr. D. Del. Aug. 27, 2024) ("**Gigamonster**") (same).

[67] UST Obj. ¶ 51.

[68] Hr'g Tr. 80:21-25; 81: 1-7, *Extraction Oil & Gas, Inc.*, No. 20-11548 (Bankr. D. Del. Dec. 22, 2020) [D.I. 1534] ("I have repeatedly ruled that you can imply consent by failing to opt out or respond to a plan, either through a ballot or on the docket, that calls for a release. I don't believe this is necessarily a contractual point ...as much as it is a point of notice under the Bankruptcy Code and the Bankruptcy Rules, because it's the plan that serves as the mechanism to have the release take effect and, thus, it's really the rules, the Federal Rules of Bankruptcy Procedure that figure out whether someone has achieved proper notice and has, by not responding, given their implied consent.").

opt-out mechanisms being proper subjects of federal Bankruptcy rather than state law is further supported by other decisions issued by judges of this and other Bankruptcy Courts.[69]

61. Indeed, courts in this district have long taken the position that consent to third party releases is not an issue of contract law, but rather one of notice.[70] This specific issue was discussed at length in *In re Mallinckrodt*.[71] In *Mallinckrodt*, like here, the U.S. Trustee objected to the plan where shareholders (a) received no recovery, (b) were not entitled to vote, and (c) were deemed to give a third-party release unless they opted out[72]. There, Judge Dorsey agreed that releasing parties' consent could be manifested from their silence when proper notice was given.[73] The Court explained that the judicial system utilizes this "failure to act" standard often, for example, in the context of default judgments, bar dates and consent to the entry of final orders by a bankruptcy court, and specifically noted that the result may have "been quite different if the notice regarding the ability to opt out was insufficient."[74]

62. Judge Dorsey's opinion in *Mallinckrodt* and Judge Silverstein's opinion in *Boy Scouts of America* follow Judge Sontchi in *Extraction Oil &* Gas—discussed above—and

[69] *See, e.g.,* Hr'g Tr. at 78:12–25; 79:1-2, *In re Avadim Health, Inc.*, No. 21-10883 (Bankr. D. Del. Oct. 27, 2021) [D.I. 394] (framing the failure to opt out of a release as "the forfeiture of [a] potential objection" under § 1141(a) of the Bankruptcy Code); Hr'g Tr. at 36:10–11, *In re Tops Holding II Corp*., No. 18-22279 (RDD) (Bankr. S.D.N.Y. Nov. 8, 2018) [D.I. 783] (identifying § 1141(a) as the "source of the duty to speak" with respect to a release and opt-out mechanism).

[70] *See, e.g.*, *In re Boy Scouts of Am.*, 642 B.R. 504, 675 (Bankr. D. Del. 2022) ("I agree that the issue, as raised, is one of notice."); Confirmation Hr'g Tr. 116:11-22, *In re FTX Trading Ltd.*, Case No. 22-11068 (JTD) (Bankr. D. Del. Oct. 7, 2024) (analogizing the opt-out process to notice provided to parties in the class action context).

[71] 639 B.R. 837, 880–81 (Bankr. D. Del. 2022).

[72] *Id*. at 880.

[73] *Id.* at 879.

[74] *Id.* at 880.

Judge Gross in *Insys*. In *Insys*, Judge Gross approved third party releases under an opt-out mechanism based on the notice given, stating:

> Insys is a case of great notoriety. People knew about the existence of the bankruptcy case and they knew they would have to act because there was a bankruptcy case. There was clear notice of the opt-out requirement in both, mailed and published notices, and, here, the released parties helped to resolve problems and issues and guided debtors through bankruptcy and were very instrumental in the settlement that we have here today. And as a consequence, the releases are essential to the plan[.][75]

63. Moreover, the Third-Party Releases here satisfy the numerous factors courts consider in evaluating the appropriateness of release and opt out mechanisms. To begin with, these Chapter 11 Cases were highly publicized and creditors had ample opportunity to discover the need for them to act with respect to the Third Party Release.[76] Interested parties were provided with clear and prominent notice of the release and of their opportunity to opt out, as evidenced by nearly 50% opt out rate among voting creditors.[77] The Committee in these Chapter 11 Cases provided robust representation of creditor interests.[78] All of the traditional factors typically considered by virtually all courts in approving opt-out provisions remain relevant post-Purdue and are met here.[79]

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[75] Confirmation Hr'g Tr. at 110:10–111:22, *In re Insys Therapeutics, Inc.*, Case No. 19-11292 (KG) (Bankr. D. Del. Jan. 16, 2020) [D.I. 1121].

[76] *See* Hr'g Tr. at 110:10-17, *In re Insys Therapeutics Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 17, 2020) [D.I. 1121].

[77] *See In re LATAM Airlines Grp. SA*, No. 20-11254 (JLG), 2022 Bankr. LEXIS 1725, at 144 & n. 88 (Bankr. S.D.N.Y. June 18, 2022).

[78] Hr'g Tr. at 13:21-25; 14:1-7, *In re Clovis Oncology Inc.*, No. 22-11292 (JKS) (Bankr. D. Del. June 9, 2023) [D.I. 875]. The U.S. Trustee and SEC assert in their objection that the Third-Party Release is improper because the release is not supported by consideration. SEC Obj. 17; U.S. Trustee Obj. at 77 n. 7. This argument ignores that the Third-Party Release is a provision of a Plan negotiated at arm's length, and that absent confirmation of the Plan the Debtors face a Chapter 7 liquidation which would leave creditors with far smaller recoveries. *See Reply* ¶ 11; *see also In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022) (crediting debtor's witness testimony that release provided greater consideration to creditors than those creditors "would receive in the other alternative scenarios" should the plan in that case not be confirmed).

[79] Moving Brief ¶¶ 33–36; Reply Brief ¶ 8.

64. Approval of such releases in a bankruptcy proceeding is entirely consistent with the wide range of federal court practices allowing for similar opt-outs in other contexts.[80] In light of the foregoing, the Third-Party Releases are necessary for confirmation of the Plan, warranted under the circumstances, clearly permitted by the applicable law, and should be approved as proposed.

(iii) The Plan's Exculpation Provisions are Permissible and Should be Approved.

65. In addition to the Releases discussed above, the customary exculpation provisions found in Article XII of the Plan should be approved. The exculpation provisions exculpate the Exculpated Parties[81] from claims arising out of or related to, among other things, the administration of these Chapter 11 Cases, entry into the Cash Collateral Orders, the entry into the Liquidating Trust Agreement, the entry into IP/Austria Assets Trust Agreement, the negotiation and pursuit of this Combined Disclosure Statement and Plan, or the solicitation of votes for, or confirmation of, this Combined Disclosure Statement and Plan, the funding of this Combined Disclosure Statement and Plan, the consummation of this Combined Disclosure Statement and

[80] *See, e.g., Kem v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004) (reasoning that, in the context of FRCP 23(b)(3) class actions, "it seems fair for the silent to be considered as part of the class") (citation omitted); *In re Mallinckrodt PLC*, 639 B.R. at 879 (approving a third-party release and opt out similar to that at issue here, and favorably comparing it to how "in bankruptcy . . . [d]ebtors send out bar date notices, and if claimant fail to file a proof of claim by a certain time, they lose the right to assert a claim").

[81] "**Exculpated Parties**" as defined in Section 1.A.66 of the Plan, means each of the following, to the extent permitted by applicable law, in their capacity as such: (a) each Debtor; (b) each Other Director and Officer; (c) the Liquidating Trustee; (d) the IP/Austria Assets Trustee; (e) Davis Polk, as counsel to the Debtors; (f) Morris Nichols, as counsel to the Debtors; (g) Huron Consulting Services, LLC, as financial advisor and consultant to the Debtors; (h) Kurtzman Carson Consultants, LLC dba Verita Global, as administrative advisor to the Debtors; (i) the Transaction Committee Chairman; (j) the CRO; (k) the Committee and each of its members; (l) solely to the extent provided by section 1125(e) of the Bankruptcy Code, each Section 1125(e) Party; and (m) each Related Party of each Entity in clauses (c) through (k) above; provided, that, for the avoidance of doubt and notwithstanding anything to the contrary herein, D&Os (other than the Other Directors and Officers), the Fisker Parties, the Debtors' current or former direct or indirect non-Debtor subsidiaries, and the Debtors' current or former non-Debtor Affiliates are not and shall not be deemed hereunder to be an Exculpated Party.

Plan, or the administration of this Combined Disclosure Statement and Plan or the property to be distributed under this Combined Disclosure Statement and Plan, and the issuance of securities or beneficial interests under or in connection with this Combined Disclosure Statement and Plan or the transactions contemplated by the foregoing. Gross negligence, willful misconduct, fraud and criminal acts are excluded from the exculpation provision.

66. The exculpation provisions are appropriate under both applicable law and the facts of these Chapter 11 Cases. This Court regularly approves exculpation provisions for estate and non-estate professionals for acts taken in connection with the Debtors' restructuring efforts, except where based on fraud, gross negligence and willful misconduct.[82]

67. Further, the Plan provides that Section 1125(e) Parties are subject to the exculpation provisions of the Plan only to the extend provided by section 1125(e) of the Bankruptcy Code. The "Section 1125(e) Parties" are (a) the Secured Noteholder; (b) Heights Capital Management, Inc.; (c) the 2025 Notes Trustee and the 2026 Notes Indenture Trustee; (d) Magna; and (e) each Related Party of each Entity in clauses (a) through (d) above. The proposed exculpation of the Section 1125(e) Parties is consistent with, and subject to, and the Bankruptcy Code, and has been approved by this Court.[83]

[82] *In re Washington Mut., Inc.*, 442 B.R. 314 at 350–51 (Bankr. D. Del. 2011) (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate). *See*, *e.g.*, *In re Amyris, Inc.*, Case No. 23-11131 (TMH) (Bankr. D. Del. Feb. 7, 2024) [D.I. 1251] (confirming a bankruptcy plan in which the debtors, the unsecured creditors' committee and their professionals are exculpated parties); *In re Clovis Oncology, Inc.*, Case No. 22-11292 (JKS) (Bankr. D. Del. June 16, 2023) [D.I. 904] (same) *In re Legacy FSRD, Inc.*, No. 22-11051 (JKS) (Bankr. D. Del. Feb. 23, 2023) [D.I. 322] (same); *In re Legacy Ejy, Inc.* No. 22-10580 (JKS) (Bankr. D. Del. Dec. 14, 2022) [D.I. 689] (same).

[83] *See, e.g.*, *In re Quiksilver, Inc.*, Case No. 15-11880 (BLS) (Bankr. D. Del. Jan. 29, 2016) [D.I. 740 at 7, 10, 20, 60]; Confirmation Hr'g Tr. at 42:16–19, *In re AFA Inv. Inc.*, Case No. 12-11127 (MFW) (Bankr. D. Del. Mar. 5, 2024) [D.I. 1508] ("I will exculpate these lenders for their actions taken in connection with negotiation and solicitation of the plan because I think that is governed by 1125(e)").

68. Here, the scope of the exculpation provision is appropriately limited to the Debtors, the Committee, and the other Exculpated Parties that participated in the Debtors' Chapter 11 Cases and in the negotiation and implementation of the Plan, and has no effect on liability that results from fraud, gross negligence, or willful misconduct. Moreover, the scope of the exculpation provision and the Exculpated Parties are consistent with the Bankruptcy Code and exculpation provisions granted by courts in this Circuit.[84] Therefore, the Debtors respectfully request that the Court approve the exculpation set forth in Article XII of the Plan.

ii. The Plan Complies with Applicable Provisions of Section 1129(a)(2) of the Bankruptcy Code.

69. The Debtors have complied with the applicable provisions of the Bankruptcy Code in accordance with section 1129(a)(2) of the Bankruptcy Code. A principal purpose of section 1129(a)(2) is to ensure that plan proponents have complied with the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[85] As discussed above, the Debtors have complied with all notice, solicitation and disclosure requirements set forth in the Bankruptcy Code and the Bankruptcy Rules in connection with the Combined Disclosure Statement and Plan.

[84] *See*, *e.g.*, *In re Legacy FSRD, Inc.*, No. 22-11051 (JKS) (Bankr. D. Del. Feb. 23, 2023) [D.I. 322]; *In re Carestream Health, Inc.*, No. 22-11778 (JKS) (Bankr. D. Del. Sep. 28, 2022) [D.I. 185]; *In re Am. Eagle Delaware Holding Co.*, No. 22-10028 (JKS) (Bankr. D. Del. April 27, 2022) [D.I. 328]; *In re Alpha Latam Mgmt., LLC*, No. 21-11109 (JKS) (Bankr. D. Del. Mar. 16, 2022) [D.I. 652].

[85] S. Rep. No. 95-989, at 126 (1978); H.R. Rep. No. 95-595, at 412 (1977) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.").

iii. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law (Section 1129(a)(3)).

70. Section 1129(a)(3) of the Bankruptcy Code requires that "[t]he plan has been proposed in good faith and not by any means forbidden by law."[86] In the Third Circuit, "good faith" requires that a "plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and the purposes of the Bankruptcy Code.'"[87]

71. Here, the Plan is designed to maximize stakeholder recoveries and complies with the objectives and the mechanisms of the Bankruptcy Code.[88] Moreover, the Plan is the product of arm's-length negotiations among the Debtors and their key constituencies, including CVI, the Committee, Magna, NHTSA, the Fisker Owners Association, and other parties in interest.[89]

72. For these reasons, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

iv. The Plan Provides for Court Approval of Payments for Services or Costs and Expenses (Section 1129(a)(4)).

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

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has

[86] 11 U.S.C. § 1129(a)(3).

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

[88] *See* DiDonato Declaration ¶ 19.

[89] *See id.*

> been approved by, or is subject to the approval of, the court as reasonable.[90]

This section of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the bankruptcy court as reasonable.[91] Article V of the Plan contains procedures for filing applications for final allowance of Fee Claims and procedures for the payment of such Fee Claims upon approval by the Bankruptcy Court.[92] Further, the Debtors' ordinary course professionals will be paid in the ordinary course as holders of Administrative Expense Claims consistent with the *Order Approving Procedures for the Retention and Compensation of Ordinary Course Professionals* [D.I. 343]. Therefore, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

v. The Plan and Plan Supplement Disclose the Liquidating Trustee (Section 1129(a)(5)).

74. Section 1129(a)(5)(A) of the Bankruptcy Code requires that the plan proponent disclose 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 . . . or a successor to the debtor under the plan," and requires a finding that "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."[93] Section 1129(a)(5)(B) of the Bankruptcy Code further requires a plan

[90] 11 U.S.C. § 1129(a)(4).

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

[92] *See* DiDonato Declaration ¶ 20.

[93] 11 U.S.C. § 1129(a)(5)(A)(i)–(ii).

proponent to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider."[94]

75. The Debtor has satisfied the foregoing requirements. Article VII of the Plan provides for the winding down of the Debtors' corporate entities. On the Effective Date, each of the Debtors' directors and officers shall be discharged from their duties and terminated automatically without the need for any corporate action or approval and without the need for any corporate filings, and, unless subject to a separate agreement with the Liquidation Trustee, shall have no continuing obligations to the Debtors following the occurrence of the Effective Date. Further, as part of the Plan Supplement, the Debtors have disclosed the identities of the Liquidation Trustee and the IP/Austria Assets Trustee.[95] Such appointments will allow the Debtors to wind down under applicable law in an orderly fashion and make distributions to creditors and are consistent with the interests of creditors and interest holders and with public policy.[96] Accordingly, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

vi. The Plan Does Not Require Governmental Regulatory Approval of Rate Changes (Section 1129(a)(6)).

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

[94] 11 U.S.C. § 1129(a)(5)(B).

[95] *See* Plan Supplement; *Notice of Filing of Second Plan Supplement to Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and its Debtor Affiliates* [D.I. 623].

[96] *See* DiDonato Declaration ¶ 21.

vii. The Plan Is in the Best Interests of Creditors and Interest Holders (Section 1129(a)(7)).

77. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity security holders of the debtor. This "best interests" test, focusing on potential individual dissenting creditors, requires that each holder of a claim or equity interest either accept the plan or receive or retain property under the plan that is not less than the amount such holder would receive or retain in a chapter 7 liquidation.[97]

78. Under the best interest analysis, "the court must measure what is to be received by rejecting creditors . . . under the plan against what would be received by them in the event of liquidation under chapter 7."[98] Accordingly, the Court is required to "take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation."[99] In evaluating the liquidation analysis, the Court must remain cognizant of the fact that "[t]he hypothetical liquidation entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to chapter 7."[100] Under section 1129(a)(7), the liquidation analysis applies only to non-accepting holders of impaired claims or equity interests.[101]

79. The Liquidation Analysis provided in the Disclosure Statement demonstrates that the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code

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

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

[99] *See id.*

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

[101] *See Drexel Burnham Lambert Grp.*, 138 B.R. at 761.

and that under a chapter 7 liquidation holders of Claims and Interests would receive less than is projected under the Plan.[102]

80. The uncontroverted assumptions and estimates in the Liquidation Analysis are appropriate in the context of these Chapter 11 Cases and are based upon the knowledge and expertise of the Debtors' professionals and personnel who have extensive knowledge of the Debtors' business and financial affairs as well as relevant industry and financial experience.[103] In light of the foregoing, the Plan satisfies the requirements of section 1129(a)(7).

81. The "best interests" test is not implicated with respect to the following Classes: holders of Claims in Class 3 (Secured Notes Claims) and Class 4 (General Unsecured Note Claims) which voted in favor of the Plan; and holders of Class 1 (Other Priority Claims) and Class 2 (Other Secured Claims) which were not impaired and thus were conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. In contrast, the "best interests" test must be applied with respect to the following Classes: holders of Claims and Interests in Class 5 (Intercompany Claims), Class 6 (Equity Interests), and Class 7 (Intercompany Interests), pursuant to which holders will not receive any distribution under the Plan and thus are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code.

82. The Liquidation Analysis is sound and reasonable and incorporates justified assumptions and estimates regarding the Debtors' assets and claims, such as (i) the additional costs and expenses that would be incurred by the Debtors as a result of a chapter 7 trustee's fees and retention of new professionals, (ii) the delay and erosion of value that would be caused to the Debtors' assets, (iii) the reduced recoveries caused by an accelerated sale or disposition of the

[102] *See* DiDonato Declaration ¶ 22.

[103] *See id*. at ¶¶ 23-25.

Debtors' assets by the chapter 7 trustee, and (iv) other potential claims that may arise in a chapter 7 liquidation. The estimates regarding the Debtors' assets and liabilities that are incorporated into the Liquidation Analysis are based upon the knowledge and familiarity of the Debtors' advisors with the Debtors' business and their relevant experience in chapter 11 proceedings. As such, the Debtors' Liquidation Analysis should be afforded deference.[104]

83. Here, as set forth in the Liquidation Analysis and the DiDonato Declaration, all rejecting holders of Impaired Claims or Interests will receive or retain property value, as of the Effective Date, in an amount that is at least equal to the value of what they would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.[105]

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

84. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either (a) has accepted the plan or (b) is not impaired by the plan. A class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half in the number of claims in the class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan.[106] Moreover, a class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan.[107] Conversely, a class is deemed to have rejected a plan if such plan provides

[104] *See id.*

[105] *See id.* at ¶¶ 22-25.

[106] *See* 11 U.S.C. § 1126(c).

[107] *See* 11 U.S.C. § 1126(f).

that the claims or interests in a class do not receive or retain any property under the plan on account of such claims or interests.[108]

85. Here, Class 1 (Other Priority Claims) and Class 2 (Other Secured Claims) are unimpaired under the Plan and therefore are deemed to have accepted the Plan. In addition, as set forth in the Voting Declaration, in accordance with the tabulation procedures in the Interim Approval Order, Class 3 (Secured Notes Claims) and Class 4 (General Unsecured Claims) have voted to accept the Plan within the meaning of section 1126 of the Bankruptcy Code. Accordingly, the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to all of the foregoing Classes.

86. However, Class 5 (Intercompany Claims), Class 6 (Equity Interests), and Class 7 (Intercompany Interests), are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code because they will not receive any distributions or retain any property under the Plan. Nevertheless, the Debtors meet the requirements of section 1129(b) of the Bankruptcy Code to "cram down" such rejecting classes, as discussed more fully below.[109]

ix. The Plan Provides for Payment in Full of All Allowed Administrative and Priority Claims (Section 1129(a)(9)).

87. As required by section 1129(a)(9) of the Bankruptcy Code, except to the extent that a holder of a particular Claim has agreed to a different treatment of such Claim, Article V of the Plan provides for payment in full of Allowed Administrative Claims, Allowed Tax Claims, and Other Priority Claims. Therefore, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

[108] *See* 11 U.S.C. § 1126(g).

[109] *See* DiDonato Declaration ¶¶ 26.

x. At Least One Impaired Class of Claims That Was Entitled to Vote Has Accepted the Plan (Section 1129(a)(10)).

88. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims under a plan, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider."[110] As evidenced by the Voting Declaration, Class 3 (Secured Notes Claims) is impaired and voted to accept the Plan, for all three Debtor entities, not counting the votes of any insider. In addition, Class 4 (General Unsecured Claims) is impaired and voted to accept the Plan, for all three Debtor entities, not counting the votes of any insider.[111] Therefore, section 1129(a)(10) of the Bankruptcy Code is satisfied as to each Debtor.

xi. The Plan Is Feasible (Section 1129(a)(11)).

89. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[112] Finding "feasibility" of a chapter 11 plan does not require a guarantee of success by the debtor.[113] Rather, a debtor must demonstrate only a reasonable assurance of success.[114] There is a relatively low threshold of proof necessary to satisfy

[110] 11 U.S.C. § 1129(a)(10).

[111] *See* DiDonato Declaration ¶ 27.

[112] 11 U.S.C. § 1129(a)(11).

[113] *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *In re Kaplan*, 104 F.3d 589, 597 (3d Cir. 1997).

[114] *Tribune I,* 464 B.R. at 185 (citing *In re Wash Mut., Inc.*, 461 B.R. 200, 252 (Bankr. D. Del. 2011) (quoting *In re Orlando Investors LP,* 103 B.R. 593, 600 (Bankr. E.D. Pa. 1989); *see also Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988).

the feasibility requirement.[115] Bankruptcy courts in this District have approved plans that were subject to uncertain and contingent future events.[116]

90. As set forth in the DiDonato Declaration, while the Plan provides for the liquidation of the Debtors, the Debtors estimate that they will have sufficient available cash to ensure that holders of Allowed Claims under the Plan receive the distributions required under the Plan and the Debtors otherwise satisfy their financial obligations under the Plan.[117] In addition, the Debtors estimate that the Liquidating Trust and IP/Austria Assets Trust will have sufficient funding pursuant to the Wind Down Amount to meet their obligations under the Plan to administer post-Effective Date responsibilities of the Debtors and wind down the Debtors' Estates.

91. Therefore, the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

xii. The Plan Provides for Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12)).

92. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the court at the hearing on confirmation of a plan, be paid or that provisions be made for their payment.[118] Articles V.E and XVIII.C of the Plan provide that the Debtors shall pay all fees arising under 28 U.S.C. § 1930 (and, to the extent applicable, interest thereon) on the date such U.S. Trustee fees become due, until such time as a final decree is entered

[115] *Tribune I,* 464 B.R. at185 (quoting *In re Briscoe Enters, Ltd.*, 994 F.2d 1160, 1166 (5th Cir. 1993)).

[116] *See, e.g.*, *In re Indianapolis Downs, LLC.*, 486 B.R. at 298–99 (finding plan feasible despite being conditioned on regulatory approval to operate a casino); *In re Wash. Mut. Inc.*, 461 B.R. at 252 (finding plan feasible despite lack of regulatory approval for securities exemption); Jan. 15, 2015 Hr'g Tr. 88-89, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del.) (finding, due to the confidence of the debtor's witnesses, that a startup company's Plan was feasible despite no evidence on balance sheet of ability to repay unsecured debt).

[117] *See* DiDonato Declaration ¶¶ 28-30, 33.

[118] 11 U.S.C. § 1129(a)(12).

closing these Chapter 11 Cases, these Chapter 11 Cases are converted or dismissed.[119] Thus, the Plan satisfies the requirements of section 1129(a)(12).

xiii. Sections 1129(a)(13)–(16) of the Bankruptcy Code Are Not Applicable to the Plan.

93. The Debtors (i) do not have any retiree benefits as that term is defined in section 1114(a) of the Bankruptcy Code; (ii) are not required to pay any domestic support obligations; (iii) are not individuals; and (iv) are not nonprofit corporations or trusts. Accordingly, sections 1129(13)–(16) of the Bankruptcy Code are inapplicable to the Plan.[120]

xiv. The Plan Meets the Requirements for Cramdown (Section 1129(b)).

94. Section 1129(b) of the Bankruptcy Code provides that when the requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8), a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied.[121] To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[122]

a. <u>The Plan Does Not Discriminate Unfairly With Respect to the Impaired Rejecting Classes.</u>

95. The unfair discrimination standard of section 1129(b)(1) of the Bankruptcy Code ensures that a plan does not unfairly discriminate against a dissenting class with respect to

[119] *See* DiDonato Declaration ¶ 34.

[120] *See id.* ¶ 35.

[121] *See* 11 U.S.C. § 1129(b).

[122] *See* 11 U.S.C. § 1129(b)(1); *Zenith*, 241 B.R. at 105; *Johns-Manville Corp.*, 843 F.2d at 650.

the value it will receive under a plan when compared to the value given to all other similarly situated classes.[123] Accordingly, as between two classes of claims or two classes of interests, there is no unfair discrimination if (a) the classes are comprised of dissimilar claims or interests,[124] or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[125]

96. The Plan does not discriminate unfairly against the impaired Classes that are deemed to have rejected the Plan (i.e., Classes 5, 6, and 7). Section 1129(b) of the Bankruptcy Code does not prohibit differences in treatment between the classes. To the contrary, the very premise of any chapter 11 plan with multiple impaired classes is to differentiate among classes. Section 1129(b) of the Bankruptcy Code thus permits a debtor's chapter 11 plan to provide for unequal treatment of separately classified creditors with similar legal rights, so long as the discriminatory treatment of the impaired dissenting class is not "unfair."[126]

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[123] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (noting that the "hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination.") (citing *In re Lernout & Hauspie Speech Prod., N.V.*, 301 B.R. 651, 660 (Bankr. D. Del. 2003) *aff'd*, 308 B.R. 672 (D. Del. 2004)); *In re WorldCom, Inc*., No. 02-13533 (AJG), 2003 WL 23861928, at *59 (Bankr. S.D.N.Y. Oct. 31, 2003) (citing *In re Buttonwood Partners, Ltd.*, 111 B.R 57, 63 (Bankr. S.D.N.Y. 1990)); *In re Johns-Manville Corp.,* 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, *In re Johns-Manville Corp*., 78 B.R. 407 (S.D.N.Y. 1986), *aff'd sub nom. Kane v. Johns-Manville Corp.,* 843 F.2d 636 (2d Cir. 1988).

[124] *See, e.g., In re Johns-Manville Corp.*, 68 B.R. at 636.

[125] *See, e.g., In re Drexel Burnham Lambert Grp.,*138 B.R. at 715 (separate classification and treatment was rational where members of each class "possesse[d] different legal rights"), *aff'd sub nom. Lambert Brussels Asocs, L.P. v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 140 B.R. 347 (S.D.N.Y. 1992); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (approving classification of general unsecured creditors into different classes with different legal bases: doctors' indemnification claims, medical malpractice claims, employee benefit claims and trade claims); s*ee also In re Abeinsa Holding, Inc*., 562 B.R. 265, 274–75 (Bankr. D. Del. 2016) (rejecting challenge to separate classification in part on the basis that, even without the challenged classification, the voting results would not change); *In re Nuverra Envtl. Solutions, Inc.* 590 B.R. 75, 98–99 (D. Del. 2018) (district court dismissing claimants' appeal, determining the overwhelming acceptance within the claimant's class rendered argument moot).

[126] *See Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 10 (D. Conn. 2006); *see also* DiDonato Declaration ¶ 37.

97. With respect to the rejecting Classes, there is no unfair discrimination because there are no other Classes containing creditors with Claims or Interests similar to those in such Classes and each Class contains Claims and Interests that are similarly situated. Accordingly, the Plan does not discriminate unfairly against such Classes.

b. The Plan Is Fair and Equitable With Respect to the Rejecting Classes.

98. For a plan to be "fair and equitable" with respect to an impaired class of unsecured claims or interests that rejects a plan (or is deemed to reject a plan), the plan must follow the "absolute priority rule" and satisfy the requirements of section 1129(b)(2) of the Bankruptcy Code.[127] Generally, this requires that the impaired rejecting class of claims or interests either be paid in full or that any class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[128] In addition, for a plan to be "fair and equitable," no class of claims or interests senior to the impaired dissenting class is permitted to receive more than the full value of its senior claims or interests under the plan.[129]

99. Here, the Plan satisfies the absolute priority rule with respect to the rejecting Classes. First, no Class of Claims or Interests junior to such Classes will receive or retain any property under the Plan. Second, no Class of Claims or Interests will receive or retain property

[127] *See* 11 U.S.C. §§ 1129(b)(2)(B)(ii), (b)(2)(C)(ii); *see also Bank of Am. Nat'l Tr. & Sav. Ass'n*, 526 U.S. at 441–42. The "fair and equitable" requirement may also be met: (a) with respect to a dissenting impaired class of unsecured claims if 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, see 11 U.S.C. § 1129(b)(2)(B)(i); and (b) with respect to a dissenting impaired class of interests, if 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, and fixed redemption price to which such holder is entitled, or the value of such interest. See 11 U.S.C. § 1129(b)(2)(C)(i). However, such subsections need not be invoked in this instance because the Plan meets other applicable requirements of the "fair and equitable" standard as set forth herein.

[128] *See id.*

[129] *See In re Chemtura Corp.*, 439 B.R. 561, 592 (Bankr. S.D.N.Y. 2010).

under the Plan that has a value greater than 100% nor has any party asserted as such. Accordingly, the Plan satisfies the requirements of sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) and, therefore, is fair and equitable with respect to Classes 5, 6, and 7.[130]

xv. Section 1129(c) of the Bankruptcy Code Is Satisfied.

100. Section 1129(c) of the Bankruptcy Code provides that the bankruptcy court may confirm only one plan.[131] Because the Plan is the only plan before the Court, section 1129(c) of the Bankruptcy Code is satisfied.

xvi. The Principal Purpose of the Plan Is Not Tax Avoidance (Section 1129(d)).

101. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act of 1933. The Plan has been proposed in good faith and not for the avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act of 1933. Moreover, no federal, state or local government unit, or any other party has raised any objection to the Plan on these or any other grounds, and all Priority Tax Claims will be paid in full pursuant to the Plan. The Debtors therefore submit that the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

xvii. Re-solicitation of the Plan Was Not Required.

102. Section 1127(a) of the Bankruptcy Code provides that the proponent of a plan may modify such plan at any time prior to confirmation, provided that such plan, as modified, meets the requirement of sections 1122 and 1123 of the Bankruptcy Code.[132] Section 1127(c) of

[130] *See* DiDonato Declaration ¶¶ 39-40.

[131] *See* 11 U.S.C. § 1129(c).

[132] *See* 11 U.S.C. § 1127(a).

the Bankruptcy Code further provides that the proponent of plan modification shall comply with the disclosure requirements of section 1125 of the Bankruptcy Code with respect to the plan, as modified.[133]

103. The filing of additional disclosure and re-solicitation is only necessary if the plan is materially modified in a manner that has an adverse impact on creditors. The legislative history of section 1127(c) of the Bankruptcy Code states that "if the modification were sufficiently minor, the court might determine that additional disclosure was not required under the circumstances."[134] Similarly, Bankruptcy Rule 3019 provides that if the court finds that a proposed modification does not adversely change the treatment of a creditor who has not accepted the modification in writing, the modification shall be deemed accepted by all creditors who have previously accepted the plan.[135]

104. The leading case interpreting section 1127(c) and Rule 3019 is *In re American Solar King Corp.*, decided in 1988 by the Bankruptcy Court for the Western District of Texas.[136] As established therein, a court "[must] look[] to whether the modification 'materially' impacts a claimant's treatment to determine whether the change is sufficiently adverse to require resolicitation."[137] "The severity of the modification need not be such as would motivate a claimant to change their [sic] vote — only that they would be apt to reconsider acceptance."[138] Anything

[133] *See* 11 U.S.C. § 1127(c).

[134] H.R. Rep. No. 95-595 at 411.

[135] *See* Fed. R. Bankr. P. 3019.

[136] *See In re Am. Solar King Corp.*, 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988).

[137] *In re Mesa Air Grp., Inc.*, No. 10-10018 (MG), 2011 WL 320466, at *6 (Bankr. S.D.N.Y. Jan. 20, 2011) (citing *Am. Solar King Corp.*, 90 B.R. at 826).

[138] *See Am. Solar King Corp.*, 90 B.R. at 824.

less, according to the *American Solar King* court, would be so insignificant as to represent a *de facto* satisfaction of all section 1125 disclosure requirements. The court reasoned that:

> [b]allots solicited with the original disclosure statement previously approved by the court will still be valid for the modified plan, because that disclosure statement is presumed already to contain 'adequate information' to cover minor modifications . . . . Additional disclosure would serve no purpose and would therefore not be required . . . . The goal after all is consensual plans. Requiring such a formalistic step [as additional disclosure] in the face of a merely technical negative impact heightens the risk of plan failure without satisfying any countervailing public policy. . . . [Rule 3019] permits modifications that might technically have a negative impact on claimants where the modifications are not substantial . . . . Thus, if a modification does not "materially" impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.[139]

105. Courts have explicitly held that additional disclosure is unnecessary where a modification did not materially and adversely affect the plan treatment of any creditor, or where the modification has only affected the interests of one creditor.[140] Plan modifications that maintain or improve the recovery for affected creditors are not "adverse" or "material" modifications and therefore do not require re-solicitation.[141]

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[139] *Id.* at 824–26.

[140] *Peltz v. Worldnet Corp. (In re USN Commc'ns, Inc.)*, 280 B.R 573, 596 (Bankr. D. Del. 2002); *In re Century Glove, Inc.*, No. 90-400 (SLR), 1993 WL 239489, at *12 (D. Del. Feb. 10, 1993).

[141] *See In re Mangia Pizza Invs., LP*, 480 B.R. 669, 689 (Bankr. W.D. Tex. 2012) (stating that there were no material modifications to the modified plan because the "amounts payable under the [] plan are all better than or equal to the plan as solicited"); *In re Dow Corning Corp.*, 237 B.R. 374, 378 (E.D. Mich. 1999) (acknowledging that no re-solicitation was required when sufficient claim holders in the unsecured creditors class agreed to the plan modifications pursuant to a settlement such that the class tipped from a rejecting class to an accepting class); *In re Am. Solar King Corp.*, 90 B.R. at 824 (holding that a 1% dilution in value as a result of a plan modification did not warrant re-solicitation); *In re Mount Vernon Plaza Comm. Urban Redev. Corp. I*, 79 B.R. 305, 306 (Bankr. S.D. Ohio 1987) (permitting modification without re-solicitation because the modification does not "negatively affect[] the repayment of creditors, the length of the [p]lan, or the protected property interests of parties in interest"); *In re Century Glove, Inc.*, 1993 WL 239489, at *6 n. 9.

106. In this case, the modifications contained in the amended Plan, annexed to the proposed Confirmation Order filed concurrently herewith, do not require re-solicitation of votes from previously accepting creditors because (a) they do not result in a material adverse change in the treatment of creditors, and (b) they are otherwise immaterial.[142]

107. Specifically, the modified Plan makes certain non-material modifications, including fixing typographical errors, incorporating consensual language agreed to by various stakeholders, and including other non-material, technical changes requested by the U.S. Trustee, the Committee and other parties in interest in exchange for its support of certain aspects of the Plan.

108. These modifications do not adversely impact creditors in any material manner and would not cause a claimant to change its vote to accept or reject the plan, and, accordingly, are not material.[143] Accordingly, the Debtors did not need to resolicit votes from any creditors of the Debtors.

IV. OMNIBUS REPLY IN SUPPORT OF PLAN CONFIRMATION AND IN OPPOSITION TO OBJECTIONS.

109. To the extent not consensually resolved prior to the Combined Hearing, all objections to confirmation of the Combined Disclosure Statement and Plan should be overruled. The Debtors have addressed and responded to the UST Objection and the NHTSA Objection by incorporating revised language into the Combined Disclosure Statement and Plan and are working with the SEC and Committee to discuss language that would resolve certain portions of the SEC

[142] *See* DiDonato Declaration ¶¶ 42-45.

[143] *See Boylan Int'l, Ltd.*, 452 B.R. 43, 51 (Bankr. S.D.N.Y 2011) ("A modification which is not 'material' is by definition one which will not affect an investor's voting decision. Additional disclosure would serve no purpose and would therefore not be required.") (quoting *Am. Solar King Corp.*, 90 B.R. at 824 n.28).

Objection. The Debtors' replies to the third-party release and exculpation arguments are set forth above. Below, the Debtors address the arguments from the UST Objection regarding the Combined Disclosure Statement and Plan including an impermissible discharge and providing for the disparate treatment of similarly situated creditors.

A. The Combined Disclosure Statement and Plan Does Not Provide an Impermissible Discharge Under Section 1141(d)(3).

110. Contrary to the U.S. Trustee's assertion, the Combined Disclosure Statement and Plan does not provide an impermissible discharge of the Debtors in violation of section 1141(d)(3) of the Bankruptcy Code.[144] As set forth in the Reply Brief, the language of the Combined Disclosure Statement and Plan is clear that nothing therein is granting the Debtors a discharge.[145] The U.S. Trustee even recognizes the Debtors' inclusion of this clarifying language.[146] And this language is expressly made applicable to the releases contained in Article XII.B of the Combined Disclosure Statement and Plan by providing that such releases are only granted "[e]xcept as otherwise provided in the Plan."[147] Moreover, the Third Party Releases are further qualified as such releases are only granted "to the fullest extent authorized by applicable law" (e.g., section 1141(d)(3) of the Bankruptcy Code.[148]

111. The release of the Debtors in the Combined Disclosure Statement and Plan is consistent with liquidating plans approved by this Court. For example, in *In re Near*

[144] *Cf.* UST Obj. ¶¶ 92–100

[145] *See* ¶ 15 (citing Combined Disclosure Statement and Plan, Art. XII.G).

[146] *See* UST Obj. ¶ 95 n.10.

[147] Combined Disclosure Statement and Plan, Art. XII.B.

[148] *Id.*; *see also In re Project Sage M Holdings Oldco, Inc.*, No. 24-10245 (JTD) (Bankr. D. Del. June 18, 2024) [D.I. 450] (granting a third-party release of the debtors in a plan that, unlike the Combined Plan and DS here, did not include the express non-discharge override provision and only stated that the third-party releases would be granted to the extent permitted by applicable law).

Intelligence, this Court confirmed a plan of liquidation where the debtors were included in the definition of "Released Parties" receiving third-party releases.[149] As here, the *Near Intelligence* plan provided that "[i]n accordance with section 1141(d)(3) of the Bankruptcy Code, the Combined Disclosure Statement and Plan does not discharge the Debtors." Despite receiving an objection from one party in interest that the plan provisions "attempt[ed] a workaround of the prohibition contained in § 1141(d)(3),"[150] the plan was ultimately confirmed with the "Released Parties" definition and the non-discharge language unchanged.[151]

112. Accordingly, the Debtors respectfully request that the Court overrule the U.S. Trustee's impermissible discharge objection.

B. The Combined Disclosure Statement and Plan Does Not Provide for Disparate Treatment of Similarly Situated Creditors.

113. The U.S. Trustee takes issue with the Debtors' efforts to address Stop-Sale Holds and ensuring the ongoing safety and drivability of the Fisker vehicles, as contemplated by the Plan. These concerns are misplaced and misconstrue the purpose of the reimbursement mechanisms set forth in the Plan.

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[149] Case No. 23-11962 (TMH) (Bankr. D. Del. Mar. 15, 2024) [D.I. 345].

[150] *See Limited Objection to Debtors' Third Amended Combined Disclosure Statement and Plan and Chapter 11 Plan of Liquidation of Near Intelligence, Inc. and its Affiliated Entities*, No. 23-11962 (TMH) (Bankr. D. Del. Mar. 15, 2024) [D.I. 314].

[151] *See Findings of Fact, Conclusions of Law, and Order Approving Adequacy of Disclosures on a Final Basis and Confirming the Modified Third Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Near Intelligence, Inc. and its Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code*, No. 23-11962 (TMH) (Bankr. D. Del. Mar. 15, 2024) [D.I. 346] (confirming plan that provided "[i]n accordance with section 1141(d)(3) of the Bankruptcy Code, the Combined Disclosure Statement and Plan does not discharge the Debtors" and included debtors in definition of "Released Parties"). *See also In re Project Sage M Holdings Oldco, Inc.*, No. 24-10245 (JTD) (Bankr. D. Del. June 18, 2024) [D.I. 450]; *In re Trex Wind-Down Inc.*, No. 23-11878 (JKS) (Bankr. D. Del. May 6, 2024) [D.I. 338]; *In re MVK Farmco LLC*, No. 23-11721 (LSS) (Bankr. D. Del. Mar. 29, 2024) [D.I. 858]; *In re AeroCision Parent, LLC*, No. 23-11032 (KBO) (Bankr. D. Del. Mar. 4, 2024) [D.I. 357].

114. At the outset, it is important to note that the construct for reimbursing or funding labor costs associated with remedying the recalls related to the Door Handle Stop-Sale Hold and the June 26 Stop-Sale Hold (the "**Door Handle and Water Pump Labor Costs**") has been modified in the *Second Amended Combined Disclosure Statement and Plan* filed contemporaneously herewith (the "**Second Amended Plan**"), thereby undermining much of the U.S. Trustee's objection. Generally, prior versions of the Plan contemplated that (a) pre- and post-Effective Date, a vehicle owner could directly pay a Service Provider for the labor costs associated with remedying the recalls related to the Door Handle Stop-Sale Hold and the June 26 Stop-Sale Hold and (b) to the extent proceeds were, in the future, recovered on account of the Reimbursement Claims, the Liquidating Trust would pay a portion of such proceeds to the Fisker Owners Association to reimburse such out-of-pocket expenses of vehicle owners.

115. After extensive discussions with NHTSA (as well as the Department of Justice which represents NHTSA in the Chapter 11 Cases) and certain other parties, the Debtors agreed to the construct memorialized in the Second Amended Plan, which, at a high level, provides that (x) to the extent that, prior to the Effective Date, an existing vehicle owner paid a Service Provider directly for any Door Handle and Water Pump Labor Costs, any such vehicle owner may, following the Effective Date, seek reimbursement from the Liquidating Trust and (y) following the Effective Date, existing vehicle owners may contact their desired Service Providers to schedule a repair, after which the Service Provider will submit a Service Request to the Liquidating Trust and the Liquidating Trustee will remit payment to such Service Provider pursuant to such Service Request. As was true of the prior versions of the Plan, and as the First Amended Plan crystalizes, Pre-Effective Date Owner Reimbursement Claims or Post-Effective Date Labor Costs are not distributions under the Plan. Rather, the Amended Plan simply provides the Liquidating Trust

with a pool of funds to reimburse, by federal mandate, Fisker vehicle owners (*not* select General Unsecured Creditors) for necessary repairs to their Fisker vehicles. These are not distributions under the Plan and do not show preference to some General Unsecured Creditors over others.

116. The Plan construct (as amended) for addressing Stop-Sale Holds following the Effective Date was extensively negotiated with NHTSA to ensure compliance with the Safety Act.[152]

117. The Plan contemplates that the Liquidating Trust will be funded with the Liquidating Trust Additional Amount ($750,000), which amount may be used by the Liquidating Trust to address open recalls as of the Effective Date. The Plan further provides that, to the extent each Trustee consents (in their sole discretion) the Liquidating Trust Additional Amount may be increased to continue to address open recalls as of the Effective Date.[153] The U.S. Trustee objects to any increase to the Liquidating Trust Additional Amount.[154]

118. First, the U.S. Trustee contends that the ability to increase the Liquidating Trust Amount first appeared in the revised version of the Plan and was absent from the solicitation version of the Combined Disclosure Statement and Plan. Not so.[155]

119. Second, the U.S. Trustee's assertion that the funds available on the Effective Date to address open Stop-Sale Holds (i.e., the Liquidating Trust Additional Amount) and any increase to such amount (i.e., the Liquidating Trust Additional Funding Amount) "single out a

[152] *See* 11 U.S.C. 1129(a)(c) (a court shall not confirm a plan that is "by any means forbidden by law."); *see also* NHTSA Obj. ¶ 8.

[153] The Plan defines the amount of any such increase as the "Liquidating Trust Additional Funding Amount."

[154] UST Obj. ¶¶ 47, 101–103.

[155] *See* Combined Disclosure Statement and Plan [D.I. 541], Art. VIII.D (providing that there will be a $750,000 cap, "unless otherwise agreed to by the IP/Austria Assets Trustee and the Liquidating Trustee (for the avoidance of doubt, each in its sole discretion")).

subset of general unsecured creditors for special treatment" is misplaced for several reasons, including:

a. The Liquidating Trust Additional Amount and the Liquidating Trust Additional Funding Amount (if applicable) are being funded to the Liquidating Trust—not any individual creditor—and will be used to address open recalls to ensure the safety of the Debtors' vehicles in operation (other than the vehicles sold pursuant to the Fleet Sale Agreement) to the extent possible. Any Pre-Effective Date Owner Reimbursement Claims or Post-Effective Date Labor Costs that are paid by the Liquidating Trust are not being distributed to Fisker owners on account of their claims against the Debtors. Rather, any such distributions will be made comply with the Safety Act and to ensure the continuing safety and drivability of the Fisker vehicles. In short, Pre-Effective Date Owner Reimbursement Claims and Post-Effective Date Labor Costs do not constitute distributions under the Plan and therefore and are unrelated to the class of General Unsecured Creditors.

b. Notably, NHTSA informed the Debtors that it would object to confirmation unless the Plan provides for the ability for the Liquidating Trust Additional Amount to be increased.

c. Moreover, "[s]hould Fisker fail to provide for these ongoing remediation efforts, NHTSA may have a priority claim [i.e., not a general unsecured claim] against the Estate."[156]

120. Accordingly, the Debtors submit that the reimbursement and payment mechanics for the Door Handle and Water Pump Labor Costs not only do not constitute disparate treatment of similarly situated creditors, but is also in the best interest of the Debtors' estates, existing vehicle owners, and all parties in interest. The Debtors therefore respectfully request that the Court overrule the U.S. Trustee's objection as to disparate treatment.

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[156] NHTSA Obj. ¶ 12.

CONCLUSION

For all the foregoing reasons, the Debtors respectfully request that the Court enter the Confirmation Order approving the Disclosure Statement on a final basis, confirming the Plan and overruling all objections thereto, to the extent not previously resolved.

Dated: October 8, 2024
Wilmington, Delaware

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Exhibit A

Name	D.I.	Objection	Resolution
U.S. Securities and Exchange Commission ("**SEC**")	630	• Nonconsenusal third-party releases are prohibited under *Purdue*.	• The Plan's third-party releases are consensual and permitted under *Purdue*. *See* Combined Disclosure Statement and Plan, Art. XII.B; Conf. Br. ¶¶ 55-64.
		• Plan must contain language that adequately preserves the SEC's police and regulatory powers with respect to its pending investigation and possible future actions.	The Debtors, the SEC, and the Committee are continuing to discuss revisions that would resolve this objection.
U.S. Trustee ("**UST**")	636	• Non-consensual third-party releases are prohibited by *Purdue* and applicable state law.	• The Plan's third-party releases are consensual. The are permitted under *Purdue* and are consistent with applicable state law. *See* Combined Disclosure Statement and Plan, Art. XII.B; Conf. Br. ¶¶ 55-64.
		• Exculpation provision is overly broad.	• The Plan's exculpation provision is appropriate in scope and consistent with prior precedent. *See* Combined Disclosure Statement and Plan, Art. XII.C; Conf. Br. ¶¶ 65-68.
		• Injunction grants the liquidating debtors a discharge.	• The Plan's injunction does not grant a discharge. *See* Combined Disclosure Statement and Plan, Art. XII.B, XII.D, XII.G; Conf. Br. ¶¶ 110-12.
		• Plan proposes a reimbursement structure for certain vehicle owners that violates the absolute priority scheme.	• The Plan does not provide for disparate treatment of similarly situated creditors. *See* Combined Disclosure Statement and Plan, Art. VIII.D; Conf. Br. ¶¶ 113-20.

Name	D.I.	Objection	Resolution
United States of America, on behalf of National Highway Traffic Safety Administration ("**NHTSA**")	650	• Plan does not comply with the Safety Act and cannot be confirmed under section 1129(a)(3) of the Bankruptcy Code.	Revisions to the Plan will be made to address this objection.
American Lease LLC ("**AL**")	655	• Confirmation should be adjourned to resolve an operational issue.	• Debtors will reply separately to the AL Objection.