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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FULCRUM BIOENERGY, INC., *et al.*,	Case No. 24-12008 (TMH)
Debtors.[1]	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE AMENDED CHAPTER 11 PLAN OF LIQUIDATION

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April 9, 2025

[1] The debtors and debtors in possession in these chapter 11 cases, along with each debtor's federal tax identification numbers are: Fulcrum BioEnergy, Inc. (3733); Fulcrum Sierra BioFuels, LLC (1833); Fulcrum Sierra Finance Company, LLC (4287); and Fulcrum Sierra Holdings, LLC (8498). The location of the Debtors' service address is: Fulcrum BioEnergy Inc., P.O. Box 220 Pleasanton, CA 94566. All Court filings can be accessed at: https://www.veritaglobal.net/Fulcrum.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

BACKGROUND 3

I. GENERAL BACKGROUND 3

II. PLAN AND DISCLOSURE STATEMENT 5

III. PLAN SOLICITATION AND VOTING RESULTS 6

ARGUMENT 7

I. THE COURT HAS JURISDICTION AND NOTICE WAS PROPER. 7

A. Jurisdiction and Venue 7

B. Adequate Notice of Confirmation Hearing 8

II. THE PLAN SHOULD BE CONFIRMED. 8

A. The Plan Meets All Applicable Requirements of the Bankruptcy Code. 8

1. The Plan Complies with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(1)). 9

a. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code. 9

b. The Plan Satisfies the Mandatory Plan Requirements of Section 1123 of the Bankruptcy Code. 11

c. The Plan Appropriately Contains Certain Discretionary Components Permitted By Section 1123(b) of the Bankruptcy Code 13

d. The Plan's Release, Injunction and Exculpation Provisions Are Appropriate and Should be Approved. 15

TABLE OF CONTENTS (Continued)

Page

(i) The Debtor Releases Are Permissible and Should Be Approved. 16

(ii) Third-Party Releases Are Permissible and Should Be Approved. 22

(iii) The Plan's Exculpation Provisions Are Permissible and Should Be Approved. 24

(iv) The Plan's Injunction Provisions Are Permissible and Should Be Approved. 25

2. The Plan Complies with Applicable Provisions of Section 1129(a)(2) of the Bankruptcy Code. 26

3. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law (Section 1129(a)(3)). 26

4. The Plan Provides for Court Approval of Payments for Services or Costs and Expenses (Section 1129(a)(4)). 27

5. The Plan and Plan Supplement Disclose the Liquidation Trustee and Delaware Trustee (Section 1129(a)(5)). 28

6. The Plan Does Not Require Governmental Regulatory Approval of Rate Changes (Section 1129(a)(6)). 29

7. The Plan is in the Best Interests of Creditors and Interest Holders (Section 1129(a)(7)). 29

8. Section 1129(a)(8) of the Bankruptcy Code Does Not Preclude Confirmation. 32

9. The Plan Provides for Payment in Full of All Allowed Administrative and Priority Claims (Section 1129(a)(9)). 33

B. General Background 33

1. Debtors Amended Schedules and Statements and the Filed Claims 35

TABLE OF CONTENTS (Continued)

Page

2. The Debtors Amended Joint Chapter 11 Plan....37

C. The Debtors' Plan provides for the payment of Allowed Priority Tax Claims....37

1. Sales and Use Tax....38

2. Modified Business Tax....40

a. Interest and Penalties....41

b. The NV Tax Department's Tax Claim Fails to Acknowledge their Own Prior Voluntary Reduction of the Claim by Approximately $89 Million....41

D. Conclusion....42

1. At Least One Impaired Class of Claims That Was Entitled to Vote Has Accepted the Plan (Section 1129(a)(10)).....43

2. The Plan Is Feasible (Section 1129(a)(11)).....43

3. The Plan Provides for Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12)).....44

4. Sections 1129(a)(13)–(16) of the Bankruptcy Code Are Not Applicable to the Plan.....45

5. The Plan Meets the Requirements for Cramdown (Section 1129(b)).....45

a. The Plan Does Not Discriminate Unfairly With Respect to Impaired Rejecting Classes.....46

b. The Plan Is Fair and Equitable With Respect to the Rejecting Classes.....47

6. Section 1129(c) of the Bankruptcy Code Is Satisfied....48

7. The Principal Purpose of the Plan Is Not Tax Avoidance (Section 1129(d)).....48

CONCLUSION....49

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999) 29, 47

Grogan v. Garner,
498 U.S. 279 (1991) 8

In re Abeinsa Holding, Inc.,
562 B.R. 265 (Bankr. D. Del. 2016) 46

In re Adelphia Commc'ns Corp.,
368 B.R. 140 (Bankr. S.D.N.Y. 2007) 29

In re Affiliated Foods, Inc.,
249 B.R. 770 (Bankr. W.D. Mo. 2000) 30

In re Armstrong World Indus., Inc.,
464 B.R. 208 (Bankr. D. Del. 2011) 8

In re Armstrong World Indus., Inc.,
348 B.R. 111 (D. Del. 2006) 8, 46

In re Caribbean Petroleum Corp.,
512 B.R. 774 (Bankr. D. Del. 2014) 18

In re Chemtura Corp.,
439 B.R. 561 (Bankr. S.D.N.Y. 2010) 48

In re Coastal Broad. Sys., Inc.,
570 F. App'x 188 (3d Cir. 2014) 9

In re Coram Healthcare Corp.,
315 B.R. 321 (Bankr. D. Del. 2004) 17

In re Drexel Burnham Lambert Grp., Inc.,
138 B.R. 723 (Bankr. S.D.N.Y. 1992) 27, 30, 46

In re Emerge Energy Servs. LP,
2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019) 22

In re Exaeris, Inc.,
380 B.R. 741 (Bankr. D. Del. 2008) 17

TABLE OF AUTHORITIES (Continued)

Page(s)

In re Exide Techs.,
303 B.R. 48 (Bankr. D. Del. 2003) 18

In re Fisker, Inc.,
Case No. 24-11390 (TMH) (Bankr. D. Del. Oct. 11, 2024) 23

In re FTX Trading Ltd.,
Case No. 22-11068 (JTD) (Bankr. D. Del. Oct. 7, 2024) 23

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

In re HRI Holding Corp.,
No. 19-12415 (MFW) (Bankr. D. Del. Nov. 5, 2020) 25

In re Indianapolis Downs, LLC,
486 B.R. 286 (Bankr. D. Del. 2013) 23, 44

In re Jersey City Med. Ctr.,
817 F.2d 1055 (3d Cir. 1987).....9, 46

In re Johns-Manville Corp.,
68 B.R. 618 (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) 46

In re Kaplan,
104 F.3d 589 (3d Cir. 1997).....43

In re Nuverra Env't Solutions, Inc.
590 B.R. 75 (D. Del. 2018).....46

In re PPI Enters. (U.S.), Inc.,
228 B.R. 339 (Bankr. D. Del. 1998) 26

In re Pace Indus., LLC,
No. 20-10927 (MFW) (Bankr. D. Del. Apr. 12, 2020).....25

In re Printing Dimensions, Inc.,
153 B.R. 715 (Bankr. D. Md. 1993) 27

In re S & W Enter.,
37 B.R. 153 (Bankr. N.D. Ill. 1984) 8

In re Smallhold, Inc.,
Case No. 24-1067 (CTG) (Bankr. D. Del. Sept. 25, 2024).....23

TABLE OF AUTHORITIES (Continued)

Page(s)

In re Trans World Airlines, Inc.,
261 B.R. 103 (Bankr. D. Del. 2001) 14

In re Tribune Co.,
464 B.R. 126 (Bankr. D. Del. 2011) 8, 43-44

In re Tribune Co.,
476 B.R. 843 (Bankr. D. Del. 2012) 9

In re W.T. Grant Co.,
699 F.2d 599 (2d Cir. 1983) 17

In re Wash. Mut., Inc.,
442 B.R. 314 (Bankr. D. Del. 2011) 17-18, 22

In re Wash Mut., Inc.,
461 B.R. 200 (Bankr. D. Del. 2011) 44

In re Western Glob. Airlines, Inc.,
No. 23-11093 (KBO) (Bankr. D. Del. Nov. 21, 2023) 25

In re Wheel Pros, LLC,
Case No. 24-11939 (JTD) (Bankr. D. Del. Oct. 15, 2024) 23

In re World Health Alts., Inc.,
344 B.R. 291 (Bankr. D. Del. 2006) 17

In re WorldCom, Inc.,
No. 02-13533 (AJG), 2003 WL 23861928 (Bankr. S.D.N.Y. Oct. 31, 2003) 46

In re Zenith Elecs. Corp.,
241 B.R. 92 (Bankr. D. Del. 1999) 17-18, 26, 45

John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.,
987 F.2d 154 (3d Cir. 1993) 9

Kane v. Johns-Manville Corp.,
843 F.2d 636 (2d Cir. 1988) 43, 45

Mercury Cap. Corp. v. Milford Conn. Assocs., L.P.,
354 B.R. 1 (D. Conn. 2006) 22, 47

NLRB v. Bildisco & Bildisco,
682 F.2d 72 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984) 14

Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.,
872 F.2d 36 (3d Cir. 1989) 14

TABLE OF AUTHORITIES (Continued)

Page(s)

U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.),
426 B.R. 114 (Bankr. D. Del. 2010) 17-18, 21

United States v. Energy Res. Co.,
495 U.S. 545 (1990) 43

Other Authorities

H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 ..... 8, 26

Plan of Liquidation (the "Committee's Statement") 20

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 ..... 8, 26

Rules and Statutes

11 U.S.C. § 365 13-14

11 U.S.C. § 507 11

11 U.S.C. § 511 37

11 U.S.C. § 1102 4

11 U.S.C. § 1107 3

11 U.S.C. § 1108 3

11 U.S.C. § 1114 45

11 U.S.C. § 1122 ..... *passim*

11 U.S.C. § 1123 ..... *passim*

11 U.S.C. § 1126 ..... *passim*

11 U.S.C. § 1125 26

11 U.S.C. § 1129 ..... *passim*

28 U.S.C. § 157 7

28 U.S.C. § 1334 7

28 U.S.C. § 1408 7

28 U.S.C. § 1409 7

TABLE OF AUTHORITIES (Continued)

Page(s)

28 U.S.C. § 1930 44

Fed. R. Bankr. P. 2002 ..... 3, 7

Fed. R. Bankr. P. 6004 3

Fed. R. Bankr. P. 6006 ..... 3, 7

Fed. R. Bankr. P, 9007 ..... 3, 7

Fed. R. Bankr. P. 9014 7

Fed. R. Bankr. P. 9019 17

Securities Act of 1933 § 5 48-49

Other Authorities

H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 8

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 8

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 *Amended Chapter 11 Plan of Liquidation* [D.I. 456] (as may be amended, modified and/or supplemented, the "Plan").[2] In further support of the Plan, the Debtors have filed concurrently herewith (a) the *Declaration of Mark Smith in Support of Confirmation of the Debtors' Amended Chapter 11 Plan of Liquidation* [D.I. 525] (the "Smith Declaration") and (b) a proposed form of order confirming the Plan (as may be amended, modified and/or supplemented, the "Confirmation Order"). The Debtors also rely upon the balloting tabulation prepared by Kurtzman Carson Consultants, LLC dba Verita Global ("Verita"), the Debtors' balloting agent, which was filed with the Court on April 9, 2025 [D.I. 524] (the "Voting Declaration"), and the applicable affidavit of service filed by Verita in connection with Plan solicitation [D.I. 510].

PRELIMINARY STATEMENT

1. The Debtors commenced these Chapter 11 cases seven months ago with the goal of maximizing recoveries to creditors. As a result of the tireless work of their directors, officers, advisors, and the cooperation of the major case constituents, the Debtors have achieved this goal through the consummation of four asset sales of substantially all of their assets and the negotiation of a liquidation plan.

2. The Debtors now are at the precipice of confirming a plan that has been approved overwhelmingly *by every single class entitled to vote*. Of the eight (8) classes entitled to vote, five (5) classes voted unanimously to accept the plan and six (6) classes voted over ninety-eight (98) percent in amount and 95% in number in favor of the Plan. This incredible result stands

[2] Capitalized terms used but not defined herein are defined in the Disclosure Statement or the Plan, as applicable.

in stark contrast to the dire situation the Debtors were facing before these cases were filed: a freefall out of court shut down or Chapter 7 filing.

3. Prior to the Petition Date, the Debtors were a pioneer in the clean energy space, having developed, constructed and briefly started operations of a first of a kind plant to convert municipal solid waste into transportation fuel. Despite the successful concept, the Debtors faced significant liquidity issues in part due to the delays in reaching operational status.

4. Notwithstanding months of unsuccessful efforts to obtain a buyer or locate additional funding sources, the Debtors were able to locate a stalking horse bidder and DIP lender at the eleventh hour that permitted the Debtors to file Chapter 11 and pursue a structured marketing process for their assets. The process ultimately achieved the objective of a competitive auction that increased the sale price of their assets by approximately 281%.

5. Following these sales, the Debtors negotiated with their key constituencies, including the Committee, the Bonds Trustee, and PCL, on the terms of an acceptable plan. Combined, the parties' efforts will result in recoveries for creditors, an efficient Plan confirmation process, and the formation of a liquidating trust to pursue causes of action, when at the beginning of these cases there was no prospect for any recovery.

6. The Plan is the best option for maximizing recoveries to the Debtors' creditors. If confirmed, the Plan will (a) provide funding to pay all amounts required under the Plan, including payment in full of all Allowed Administrative Claims, Allowed Tax Claims and Allowed Other Priority Claims, and (b) fund the Liquidation Trust to make Distributions under the Plan and pursue causes of action for the benefit of Trust beneficiaries.

7. 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 should therefore be confirmed.

BACKGROUND

I. GENERAL BACKGROUND

8. On September 9, 2024 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

9. The factual background relating to the Debtors' commencement of these chapter 11 cases is set forth in the *Declaration of Mark Smith, Restructuring Advisor to Fulcrum BioEnergy, Inc. in Support of Chapter 11 Petitions and First Day Relief* [D.I. 9] (the "First Day Declaration"), which is incorporated herein by reference.

10. On September 11, 2024, the Debtors filed the *Debtors' Motion for (I) an Order Pursuant to Sections 105, 363, 364, 365 and 541 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006 and 9007 and Del. Bankr. L.R. 2002-1 and 6004-1 (A) Approving Bidding Procedures for the Sale of Substantially All of the Debtors' Assets; (B) Approving the Debtors' Entry Into Stalking Horse Agreement and Related Bid Protections (C) Approving Procedures for the Assumption and Assignment or Rejection of Designated Executory Contracts and Unexpired Leases; (D) Scheduling an Auction and Sale Hearing; (E) Approving Forms and Manner of Notice of Respective Dates, Times, and Places in Connection Therewith; and (F) Granting Related Relief; (II) an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of Claims, Liens, and Encumbrances; and (B) Approving the Assumption and Assignment of Designated Executory*

Contracts and Unexpired Leases; and (III) Certain Related Relief [D.I. 12] (the "Bidding Procedures Motion").

11. On September 19, 2024, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "Committee") pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

12. On October 11, 2024, the Court entered an order [D.I. 153] establishing bidding procedures for the sale of the Debtors' assets and approving the Debtors' entry into the Stalking Horse Agreement (the "Bidding Procedures Order"). Through these chapter 11 cases, the Debtors conducted a systematic and robust sale process, including setting up a data room and responding to due diligence requests from numerous bidders. On November 7, 2024, in accordance with the Bidding Procedures Order, the Debtors held an auction which resulted in achieving higher and better sale prices through two separate bids from Switch, Ltd and Refuse, Inc. On November 19, 2024, the Debtors closed the sales to Switch, Ltd. and Refuse, Inc., bringing approximately $57,150,000 in cash into the estates. Further, on February 3, 2025, the Debtors closed the sale of Catalyst, bringing an additional $900,000 in cash to the estates. On February 13, 2025, the Debtors closed the sale with PCL, reducing $10,000,000 in the Debtors' obligation to PCL. On March 25, 2025, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of All Encumbrances; (II) Approving the Debtors' Entry Into the Stock Purchase Agreement; and (III) Granting Related Relief* [D.I. 496] (the "UK Sale Motion"). The UK Sale Motion seeks the entry of an order authorizing the sale of the issued and outstanding share held by Debtor Fulcrum BioEnergy, Inc. ("Fulcrum") in Fulcrum BioEnergy, Ltd. free and clear of all liens, claims, interests and

encumbrances; (ii) approving Fulcrum's entry into the Stock Purchase Agreement, by and between Northpointe Energy, Ltd. (together with its successors and permitted assigns) and Fulcrum, dated March 25, 2025; and (iii) granting related relief. A hearing on the UK Sale Motion is set for April 14, 2025, at 10:00 a.m. (prevailing Eastern Time).

II. PLAN AND DISCLOSURE STATEMENT

13. The Debtors filed their initial *Disclosure Statement for the Joint Chapter 11 Plan of Liquidation* on February 3, 2025 [D.I. 415]. On March 6, 2025, the Debtors filed an *Amended Disclosure Statement* [D.I. 455] (the "Disclosure Statement") and an *Amended Joint Chapter 11 of Liquidation* [D.I. 456] (the "Plan").

14. On March 7, 2025, the Court entered an order (a) approving the Disclosure Statement, (b) scheduling a hearing to confirm the Plan, and (c) establishing procedures for the solicitation of the Plan and tabulation of votes to accept or reject the Plan [D.I. 458]. The Debtors commenced solicitation of the Plan on March 13, 2025.

15. On March 24, 2025, the Debtors filed their plan supplement [D.I. 487] (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 (i) the Liquidation Trust Agreement, and (ii) the identities of the Liquidation Trustee and the Delaware Trustee.

16. On April 9, 2025, the Debtors filed a *Second Amended Joint Chapter 11 Plan of Liquidation* [D.I. 522].

17. 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 providing for the orderly wind down of the Debtors.

18. Specifically, the Plan provides for:[3]

a. payment in full of all Allowed Administrative Expense Claims, Allowed Fee Claims, U.S. Trustee Fees, Secured Claims, and other Priority Claims;

b. holders of General Unsecured Claims shall receive a Pro Rata Share of Cash from the Liquidation Trust after payment of (or the establishment of a sufficient Reserve for) all Liquidation Trust Expenses and all senior Claims;

c. funding of a Liquidation Trust to govern the liquidation of the Debtors' estates and remaining assets following the Effective Date; and

d. distributions under the Plan shall be funded from Cash on hand, including the proceeds of the Sales Transactions that are received before, on, or after the Effective Date.

III. PLAN SOLICITATION AND VOTING RESULTS

19. On March 13, 2025, the Debtors began soliciting votes on the Plan by distributing the Disclosure Statement and related materials to holders of Classes 2A-2C, 3A-3C, and 4A-4C Claims that were entitled to vote under the Plan, as required by the Solicitation Procedures Order. Specifically, the Debtors transmitted: (a) the *Notice of (I) Approval of Disclosure Statement, (II) Deadline for Casting Votes to Accept or Reject the Plan, and (III) the Hearing to Consider Confirmation of the Plan* [D.I. 477] (the "Confirmation Hearing Notice"); (b) the Disclosure Statement and Plan; (c) the Solicitation Procedures Order; and (d) a printed copy of the appropriate ballot (the "Ballot") and voting instructions to all known holders of Class 2A-2C, 3A-3C, and 4A-4C Claims, the Classes entitled to vote to accept or reject the Plan.

20. In addition, the Debtors caused to be served the (i) Confirmation Hearing Notice on the parties listed in the creditor matrix and all other parties entitled to receive such notice

[3] 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.

pursuant to the Solicitation Procedures Order, (ii) Non-Voting Notice on Holders of Other Priority Claims in Class 1 (Other Priority Claims), and in Class 5 (Interests) (collectively, the "Non-Voting Classes").

21. The voting deadline and the Plan objection deadline were scheduled for March 31, 2025. The Confirmation Hearing is scheduled for April 14, 2025 at 10:00 a.m. (ET). *See* Confirmation Hearing Notice [D.I. 477].

22. Prior to the Plan objection deadline, the Debtors received formal objections to the Plan from the State of Nevada, *ex rel*. its Department of Taxation (the latest filed on March 31, 2025 [D.I. 508]), and a formal objection from Abeinsa Abener Teyma General Partnership [D.I. 513] (the "Abengoa Objection"). The Debtors and their stakeholders have resolved all informal comments to the Plan.

23. As set forth in the Voting Declaration, Classes 2A-2C, 3A-3C, and 4A-4C voted overwhelmingly to accept the Plan.[4] The Voting Declaration sets forth the dollar amounts of Claims and the number of holders of Claims voting to accept or reject the Plan, and holders of Claims that abstain from voting.[5]

ARGUMENT

I. THE COURT HAS JURISDICTION AND NOTICE WAS PROPER.

A. Jurisdiction and Venue

24. 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

[4] *See* Voting Decl. Ex. A.

[5] *See id*.

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 Confirmation Hearing

25. In accordance with Bankruptcy Rules 2002, 6006, 9007, and 9014, the Solicitation Procedures Order, the Confirmation Hearing Notice, and the solicitation procedures set forth therein, adequate notice of (i) the time for filing objections to confirmation of the Plan, (ii) the transactions, settlements and compromises contemplated thereby, and (iii) the Confirmation Hearing Notice was provided to all holders of Claims and Interests and other parties in interest entitled to receive such notice under the Bankruptcy Code and the Bankruptcy Rules. No other or further notice of the Confirmation Hearing is necessary or required.

II. THE PLAN SHOULD BE CONFIRMED.

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

26. To confirm the Plan, the Court must find that the provisions of section 1129 of the Bankruptcy Code have been satisfied by a preponderance of the evidence.[6] The Debtors submit that based on the record of these chapter 11 cases, the Smith 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

[6] *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) ("[T]he preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants. . . .") (citations omitted).

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.

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

27. 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.[7] Consequently, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the 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.

28. 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." 11 U.S.C. § 1122(a).

29. The Third Circuit "permits the grouping of similar claims in different classes" as long as those classifications are reasonable.[8] The classifications, however, cannot be "arbitrarily designed" to secure the approval of an impaired class when "the overwhelming

[7] 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.").

[8] *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).

sentiment of the impaired creditors [is] that the proposed reorganization of the debtor would not serve any legitimate purpose."[9] Accordingly, the Third Circuit has held that the only requirement for classification is that it be "reasonable."[10] 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."[11] Courts have recognized that this gives both the debtor and the bankruptcy court considerable discretion in determining whether similar claims may be separately classified.[12] Furthermore, if it is evident 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.

30. Section 1122 of the Bankruptcy Code also expressly permits a Plan to "designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience."[13]

31. Here, the Plan's classification of Claims satisfies section 1122(a) of the Bankruptcy Code. The Plan designates a total of eleven Classes of Claims of the Debtors. This classification satisfies section 1122(a) of the Bankruptcy Code because each Class contains only

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

10 *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).

11 *John Hancock Mut. Life Ins. Co.*, 987 F.2d. at 159.

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

13 11 U.S.C. § 1122(b).

Claims that are substantially similar to each other. Furthermore, the classification scheme used by the Plan is based on the similar nature of Claims contained in each Class and not on any impermissible classification factor. 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. Therefore, the Court should approve the classification scheme as set forth in the Plan as consistent with section 1122(a) of the Bankruptcy Code.

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

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

33. Sections 1123(a)(1)-(4). Specifically, Sections 3 and 4 of the Plan satisfy the first four requirements of section 1123(a) by: (a) designating eleven Classes of Claims, 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).

34. Section 1123(a)(5). Furthermore, Section 6 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.[14] The implementation mechanisms in the Plan include, among other things:

- distributions under the Plan to be funded from Cash on hand including the proceeds of the Sale Transactions;
- the establishment of a Liquidation Trust to govern the liquidation of the Debtors' assets and remaining Assets following the Effective Date; and
- appointment of the Liquidation Trustee to coordinate the liquidation and dissolution of the Debtors and distribution of recoveries to creditors.

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

36. 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.[15] 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.

37. 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."[16] Pursuant to Section 6.6 of the Plan, on the Effective Date, each

[14] 11 U.S.C. § 1123(a)(5).

[15] *Id.* § 1123(a)(6).

[16] *Id.* § 1123(a)(7).

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. Moreover, pursuant to Section 6.3 of the Plan and the Liquidation Trust Agreement, on the Effective Date, the Liquidation Trustee and Delaware Trustee shall be appointed. The Debtors disclosed the identities of the Liquidation Trustee and Delaware 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.

38. 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, Section 3 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, Section 9 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, Section 6.12 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 Section 12 of the Plan, the Liquidation 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, Section 4 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.

39. 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."[17] 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.[18] 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.[19]

40. Section 9.1 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 a Sale Transaction) shall be deemed automatically rejected pursuant to sections 365 and 1123 of the Bankruptcy Code, unless such Executory Contract or Unexpired Lease: (i) as of the Effective Date is subject to a pending motion to assume such Unexpired Lease or Executory Contract; or (ii) is a D&O Policy or an insurance policy.

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[17] *Id.* § 1123(b)(2).

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

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

41. 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 Wind-Down Estates, if not rejected. 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 notice of occurrence of the Effective Date, to file a proof of claim relating to rejection damages. 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.

42. 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.

43. Section 12 of the Plan provides for: (a) releases by the Debtors of the Released Parties;[20] (b) releases of any Released Parties by and among the other Released Parties;

[20] "**Released Parties**," as defined in Section 1.125 of the Plan, means collectively and in each case, solely in their respective capacities as such: (i) the Debtors; (ii) the Debtors' directors and officers that have served in such capacity postpetition, as set forth in Exhibit A; (iii) the Holdings Trustee, Holdings Collateral Agent, BioFuels Trustee and BioFuels Collateral Agent, (iv) the Prepetition Agent and each Prepetition Fulcrum Lenders, (v) the Consenting Bondholders, (vi) the Committee and each of its members, (vii) the Agent and lenders under the BioFuels Unsecured Term Loan Facility; (viii) the Wind-Down Estates; and (ix) with respect to any Person or Entity in the foregoing clauses (i) through (viii), current and former affiliates' directors, managers, officers, shareholders, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, participants, successors, assigns (whether by operation of law or otherwise), subsidiaries, current, former, and future associated entities, managed or advised entities, accounts or funds, partners, limited partners, general partners, principals, members, management companies, fund advisors, managers, fiduciaries, trustees, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, other representatives, and other professionals,

(Continued . . .)

(c) releases of any Released Parties by the Releasing Parties;[21] (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 certain parties related to Court-approved transactions in these chapter 11 cases. As set forth in full detail in the Plan, these provisions comply with the Bankruptcy Code and applicable non-bankruptcy law and are necessary integral components of the Plan. The releases in the Plan are in exchange for, and are supported by, fair, sufficient, and adequate consideration provided by the parties receiving such releases and are a good faith compromise of the Claims released. 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.[22]

(i) The Debtor Releases Are Permissible and Should Be Approved.

representatives, advisors, predecessors, successors, and assigns, each solely in their capacities as such (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of a Person), and the respective heirs, executors, estates, servants, and nominees of the foregoing (collectively, the "Related Parties"); provided that if any of the foregoing parties object to the releases in Section 12.5 of this Plan, or holders of Secured Claims in Classes 2A-2C, Deficiency Claims in Classes 3A-3C, and Undersecured and General Unsecured Claims in Classes 4A-4C vote in favor of the Plan and opt out of the voluntary release contained in Section 12.5 of the Plan, abstain from voting, or vote to reject the Plan, such parties will no longer be considered a Released Party; provided further that none of the former directors, managers or officers of the Debtors' or the Debtors' affiliates shall be a Released Party.

[21] "**Releasing Parties**" as defined in Section 1.126 of the Plan, means collectively, and in each case, solely in their respective *capacities* as such: (i) the Released Parties and (ii) all holders of Secured Claims in Classes 2A-2C, Deficiency Claims in Classes 3A-3C, and Undersecured and General Unsecured Claims in Classes 4A-4C, who vote to accept the Plan and do not opt out of the voluntary release contained in Section 12.5 of the Plan by checking the "opt out" box on the ballot and returning it in accordance with the instructions set forth thereon.

[22] *See* Smith Decl. ¶¶ 18-19.

44. Section 12.4 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.

45. In the Abengoa Objection, Abengoa argued that the Debtors' Plan extinguished creditors' recoupment and setoff rights. The Debtors have reached an agreement with Abengoa through additional language to the Confirmation Order that preserves Abengoa's setoff and recoupment rights. *See* Confirmation Order. The additional language also provides that the Liquidation Trustee shall include in the Disputed Claim Reserve a pro rata amount for one claim filed by Abengoa in each of Class 4A and 4C, thus resolving Abengoa's objection.

46. 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."[23] Furthermore, a debtor may release claims under section 1123(b)(3)(A) of the

[23] 11 U.S.C. § 1123(b)(2); *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); *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).

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."[24]

47. 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.[25]

48. No one factor is dispositive, nor is a plan proponent required to establish each factor for the release to be approved.[26]

49. 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. Such efforts include the following, among others:

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[24] *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).

[25] *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).

[26] *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); *In re Caribbean Petroleum Corp.*, 512 B.R. 774, 778 (Bankr. D. Del. 2014) (finding "no question" that release of the Debtors' claims was proper because non-debtor "provided Debtors with substantial consideration in exchange for the releases, providing the justification for the Court approving the releases.").

Released Party	Consideration Provided
The Committee	• Expending time and effort to represent the interests of the general unsecured creditors. • Propounding documentary discovery requests to the Debtors as part of evaluating the robustness of the sale process. • Actively supporting a consensual liquidation of the Debtors through the implementation of the Plan. • Negotiating in good faith the terms of the Liquidation Trust Agreement on behalf of the Liquidation Trust Beneficiaries.
Current Directors, Officers, Agents, Members of Management and Other Employees of the Debtors	• Significant efforts on behalf of the Debtors prior to, and continuing throughout, these chapter 11 cases to effectuate the transactions set forth in the Plan, including, among other things, overseeing the marketing process (both prior to and during the bankruptcy proceeding). • Significant efforts in connection with the Sale Transactions and Plan processes to maximize value for the Debtors' Estates. In particular, the Debtors' directors, officers and management were critical to maintaining and preserving the value of the Debtors' assets—the sales of which are the sources of the anticipated recoveries to creditors in these cases. Such efforts included negotiating the business terms of the asset purchase agreements, reviewing and responding to due diligence requests from numerous bidders, and overseeing the closings of both sales and ensuring a smooth transition process. • Ensuring the uninterrupted operation of the Debtors' business during these chapter 11 cases and preserving the value of the Debtors' estates in a challenging operating environment. • 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.
Professionals of the Debtors and Committee	• Active representation, participation, negotiation and documentation of the transactions during the prepetition and postpetition periods.

50. Second, the Debtor Releases are critical to the Plan as a whole and represent valid and appropriate settlements of claims the Debtors may have against the Released Parties.

The Plan was reached after extensive arm's-length negotiations among the Debtors, the Committee, the Bonds Trustee, and PCL. The releases constitute an integral aspect of these negotiations and without such protections, the Plan and the Sale Transactions may not have garnered the necessary support of the requisite parties, making it impossible for the Debtors to have moved as promptly through these chapter 11 cases.

51. 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. Importantly, the Debtors' former officers and directors are not being released. 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.

52. 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—is supportive of the Debtor Releases. The Committee lodged several challenges to the proposed sale process, but ultimately supported the sale and Plan process, which was the most likely mechanism to maximize creditor recoveries. As stated in the *Committee's Statement of the Official Committee of Unsecured Creditors Regarding the Disclosure Statement for Joint Chapter 11 Plan of Liquidation* (the "Committee's Statement") [D.I. 425]:

> The Disclosure Statement and Plan are unquestionably in the best interests of the Debtors and their estates, and represent an optimal outcome for all of the Debtors' stakeholders. Accordingly, for the reasons set forth herein, the Committee supports approval of the Disclosure Statement, the Motion, and confirmation of the Plan.

53. The Debtors also do not believe they are releasing any material claims. Pursuing non-material claims against the Released Parties would not be in the best interests of the Debtors' various constituencies as the cost involved would likely outweigh any potential benefit of pursuing such claims. In light of these facts, it is a valid exercise of the Debtors' business judgment to conclude that the pursuit of any claims which no party to date has been able to identify would be unlikely to benefit their estates and parties in interest, as the costs of pursuing and prosecuting such claims would almost certainly outweigh any potential benefit to the Debtors, their estates and parties in interest.

54. In the NV Tax Department's Third Objection (each as defined herein), the NV Tax Department argues that "the Debtor's Plan includes language that would prohibit the Department from pursuing responsible persons who may be liable for the tax deficiency, and the Department respectfully objects to the release of any potential responsible persons due to inappropriate plan language." The NV Tax Department has a material misunderstanding of the releases set forth in Section 12 of the Plan. The NV Tax Department is neither a Releasing Party nor a Released Party. As such, any alleged claims the NV Tax Department may assert against the Debtors' directors, officers, or employees are unaffected by the releases in the Plan.

55. The Abengoa Objection further demands clarification that Abengoa is neither a Releasing Party nor a Related Party. As set forth in Section 12 of the Plan, Abengoa abstained from voting and thus, is not a Releasing Party or a Released Party.

56. For these reasons, the Debtor Releases satisfy section 1123(b)(3)(A) of the Bankruptcy Code, and the Debtors submit that the Debtor Releases are fair, reasonable, in the best

interests of their estates, and should be approved as a valid exercise of the Debtors' business judgment.[27]

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

57. The Plan also provides for releases by certain non-Debtors. Section 12.5 of the Plan provides a limited consensual release in favor of the Released Parties only by and among the Releasing Parties, which are comprised of: (i) the Released Parties; (ii) all holders of claims in Classes 2A-2C, 3A-3C, and 4A-4C who vote to accept the Plan and do not opt out of the voluntary release contained in Section 12.5 of the Plan by checking the "opt out" box on the ballot and returning it in accordance with the instructions set forth thereon; and (iii) with respect to any Person or entity in the foregoing clauses (i) through (ii), the Related Party of such Person or Entity solely with respect to derivative claims that such Related Party could have properly asserted on behalf of a Person or Entity identified in clauses (i) through (iii) (the "Third-Party Releases" and, collectively with the Debtor Releases, the "Releases").

58. The Third-Party Releases are consensual, appropriate and consistent with established precedent. Courts in this District allow releases of third-party claims against debtors where there is express consent of the party giving the release.[28] Notably, what constitutes a consensual third-party release remains unchanged following the Supreme Court's recent decision

[27] *See Spansion, Inc.*, 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).

[28] *See In re Emerge Energy Servs. LP*, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (consistent with the Court's holding requiring affirmative consent for a third party release to be consensual, here, holders in Class 3 received the ability to opt out and holders in Class 4 received the ability to opt in to third party releases); *see also Wash. Mut.*, 442 B.R. at 352 (requiring affirmative consent).

in *Harrington v. Purdue Pharma, L.P.*[29] In *Purdue*, the United States Supreme Court held "only that the Bankruptcy Code does not authorize a release and injunction that, as part of a plan of reorganization under chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[30] The Supreme Court's holding only applies to nonconsensual releases.[31] Courts in this District has continued to approve opt-out third-party releases post-*Purdue*.[32]

59. Here, the Third-Party Releases do *not* apply to, nor will there be any attempt to impose them on, a nonconsensual basis. In addition, with respect to abstaining creditors and creditors who voted to reject the Plan, such parties will not be deemed to grant a Third-Party Release. Moreover, the Third-Party Releases by holders of Claims are sufficiently narrow, do not provide a blanket immunity, and provide a specific carve-out for acts or omissions that constitute fraud, gross negligence or willful misconduct.[33] Importantly, former directors and officers of the Debtors are not being released under either the Debtor Releases or the Third-Party Releases.

60. The Third-Party Release provisions are appropriate. Proper notice was provided to apprise holders of Claims in Classes 2A-2C, 3A-3C, and 4A-4C of their obligation to opt out if they did not wish to grant the proposed releases. Courts in this District "have consistently held that a plan may provide for a release of third-party claims against a non-debtor upon consent

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29 *See generally* 603 U.S. 144 S. Ct. 2071 (2024).

30 *Id*. at 2087.

31 *Id*. at 2088.

32 *See In re Number Holdings, Inc*., Case No. 24-10719 (JKS) (Bankr. D. Del. Jan. 24, 2025) [D.I. 1756]; *In re FTX Trading Ltd.*, Case No. 22-11068 (JTD) (Bankr. D. Del. Oct. 7, 2024) [D.I. 26412]; *In re Wheel Pros, LLC*, Case No. 24-11939 (JTD) (Bankr. D. Del. Oct. 15, 2024) [D.I. 257]; *In re Fisker, Inc*., Case No. 24-11390 (TMH) (Bankr. D. Del. Oct. 11, 2024) [D.I. 706]; *In re Smallhold, Inc.*, Case No. 24-1067 (CTG) (Bankr. D. Del. Sept. 25, 2024) [D.I. 288].

33 *See* Smith Decl. ¶ 17.

of the party affected."[34] No creditor or party in interest has objected to the releases in the Plan. Here, the limited consensual Third-Party Releases under the Plan are permissible and should be approved.

(iii) The Plan's Exculpation Provisions Are Permissible and Should Be Approved.

61. In addition to the Releases discussed above, the customary exculpation provisions found in Section 12.6 of the Plan should be approved. They are narrowly tailored and limited to parties who served in a fiduciary capacity in connection with the chapter 11 cases. The exculpation provisions exculpate the Exculpated Parties[35] from claims arising out of or related to, among other things, the administration of these chapter 11 cases, the postpetition marketing and sale process, the postpetition purchase, sale, or rescission of the purchase or sale of any security or asset of the Debtors, the creation of the Liquidation Trust; and the negotiation, formulation, and preparation of the Plan and Disclosure Statement.

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[34] *In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013) (citing *Zenith*, 241 B.R. at 111); *see also* Revised Modified Second Am. Joint Chapter 11 Plan of Reorganization of smarTours, LLC and its Debtor Affiliate, *In re smarTours, LLC*, No. 20-12625 (KBO) [D.I. 192] at 11-12; Findings of Fact, Conclusions of Law, and Order Approving the Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Prepackaged Chapter 11 Plan of Reorganization, *In re Quorum Health Corp.*, No. 20-10766 (KBO) [D.I. 556] at 17; Findings of Fact, Conclusions of Law, and Order Confirming Third Am. Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code, *In re Starry Grp. Holdings, Inc.*, No. 23-10219 (KBO) [D.I. 487] at 16; Findings of Fact, Conclusions of Law and Order Confirming Chapter 11 Plan for Tonopah Solar Energy, LLC, *In re Tonopah Solar Energy, LLC*, No. 20-11884 (KBO) [D.I. 291-1] at 15; *In re Gorham Paper and Tissue, LLC*, No. 20-12814 (KBO) [D.I. 438-1] at 35; Findings of Fact, Conclusions of Law, and Order Confirming the Second Am. Joint Plan of Liquidation of Stimwave Technologies Incorporated and Stimwave LLC Pursuant to Chapter 11 of the Bankruptcy Code, *In re Stimwave Techs. Inc.*, No. 22-10541 (TMH) [D.I. 791-1] at 11-12.

[35] "**Exculpated Parties**" as defined in Section 1.42 of the Plan, means collectively, and in each case solely in their capacity as such: (i) the Debtors; (ii) the Debtors' directors and officers that have served postpetition; (iii) the Committee and each of its members; and (iv) to the extent they are or are acting as or for Estate fiduciaries at any time between the Petition Date and the Effective Date, the successors and assigns, subsidiaries, members, employees, partners, officers, directors, agents, attorneys, advisors, accountants, financial advisors, investment bankers, consultants, and other professionals of or for any of the Persons identified in (i) through (iii) above on or after the Petition Date solely in their capacity as such.

62. The exculpation provisions are appropriate under both the applicable law and the facts of these chapter 11 cases. Courts in the Third Circuit have approved exculpation provisions for estate fiduciaries for acts taken in connection with the Debtors' restructuring efforts, and do not extend to fraud, gross negligence and willful misconduct.[36] Furthermore, no party has objected to or opposed the Plan's exculpation provisions.

63. Here, the scope of the exculpation provision is appropriately limited to the Debtors, the Committee and the other estate fiduciaries 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. Therefore, the Debtors respectfully request that the Court approve the exculpation set forth in Section 12.6 of the Plan.

(iv) The Plan's Injunction Provisions Are Permissible and Should Be Approved.

64. The injunction contained in Section 12.7 of the Plan (the "Plan Injunction") is necessary to effectuate the Releases and the Exculpation provisions of the Plan and to protect the Debtors from any potential litigation after the Effective Date from prepetition stakeholders whose claims and interests are addressed in the Plan. Without the Plan Injunction, there would be no mechanism to enforce the provisions of the Plan, the Liquidation Trust and the Wind-Down Estates—which are liquidating and have limited wind down funding—could be faced with numerous lawsuits in various jurisdictions related to Claims and Interests that are treated under the Plan.

[36] *See, e.g.*, *In re Western Glob. Airlines, Inc.*, No. 23-11093 (KBO) (Bankr. D. Del. Nov. 21, 2023) [D.I. 473] at 5 (confirming a bankruptcy plan that included debtors, the debtors' current managers, the unsecured creditors' committee, and their professionals as exculpated parties).

65. The Plan Injunction is a key component of the liquidation of the Estates and is similar to those previously approved in this District.[37] Accordingly, the Debtors submit that the Plan Injunction should be approved.

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

66. 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.[38] 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 Disclosure Statement and Plan.

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

67. 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."[39] In the Third Circuit, "good faith" requires that a "plan be 'proposed with honesty, good intentions and a basis for expecting

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[37] *See, e.g., id.*; *In re HRI Holding Corp*., No. 19-12415 (MFW) (Bankr. D. Del. Nov. 5, 2020) [D.I. 816] at 8; *In re Pace Indus., LLC*, No. 20-10927 (MFW) (Bankr. D. Del. Apr. 12, 2020) [D.I. 215] at 21-22.

[38] 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.").

[39] 11 U.S.C. § 1129(a)(3).

that a reorganization can be effected with results consistent with the objectives and the purposes of the Bankruptcy Code.'"[40]

68. Here, the Plan is designed to maximize stakeholder recoveries and complies with the objectives and the mechanisms of the Bankruptcy Code.[41] The Plan is the product of arm's-length negotiations among the Debtors and their key stakeholders, including the Committee, the Bonds Trustee, PCL, the U.S. Trustee, and other parties in interest.[42]

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

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

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

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.[43]

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

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[40] *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).

[41] *See* Smith Decl. ¶ 24.

[42] *See id.*

[43] 11 U.S.C. § 1129(a)(4).

bankruptcy court as reasonable.[44] Section 2.3 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.[45] Further, the Debtors' ordinary course professionals will be paid in the ordinary course as holders of Administrative Expense Claims consistent with the *Order Authorizing the Retention and Employment of Professionals Used in the Ordinary Course Nunc Pro Tunc to the Petition Date* [D.I. 355]. Therefore, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

5. The Plan and Plan Supplement Disclose the Liquidation Trustee and Delaware Trustee (Section 1129(a)(5)).

71. 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."[46] Section 1129(a)(5)(B) of the Bankruptcy Code further requires a plan 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."[47]

72. The Debtor has satisfied the foregoing requirements. Section 6.6 of the Plan provides for the winding down of the Debtors' corporate entities. On the Effective Date, each of

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[44] *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).

[45] *See* Smith Decl. ¶ 25.

[46] 11 U.S.C. § 1129(a)(5)(A)(i)–(ii).

[47] *Id.* § 1129(a)(5)(B).

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 Delaware Trustee. 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.[48] Accordingly, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

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

73. 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.

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

74. 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.[49]

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[48] *See* Smith Decl. ¶ 14(g).

[49] *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").

75. 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."[50] 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."[51] 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."[52] Under section 1129(a)(7), the liquidation analysis applies only to non-accepting holders of impaired claims or equity interests.[53]

76. The Liquidation Analysis annexed as Exhibit B to the Disclosure Statement demonstrates that the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code and that under a chapter 7 liquidation holders of Claims and Interests would receive less than is projected under the Plan.[54]

77. 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. In light of the foregoing, the Plan satisfies the requirements of section 1129(a)(7).

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

[51] *See id.*

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

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

[54] *See* Smith Decl. ¶ 29.

78. The "best interests" test is not implicated with respect to the following Classes: holders of Claims in Classes 2A-2C, 3A-3C, and 4A-4C, which voted in favor of the Plan; and holders of Class 1 (Other Priority Claims), which was 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 Class 5 Claims (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.

79. 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 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.[55]

80. Here, as set forth in the Liquidation Analysis and the Smith Declaration, all rejecting holders of Impaired 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

[55] *See id.*

liquidated under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.[56]

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

81. 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.[57] 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.[58] Conversely, a class is deemed to have rejected a plan if such plan provides 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.[59]

82. Here, Class 1 (Other Priority Claims) is unimpaired under the Plan and therefore is deemed to have accepted the Plan. In addition, as set forth in the Voting Declaration, in accordance with the Solicitation Procedures Order, Classes 2A-2C, 3A-3C and 4A-4C overwhelmingly 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.

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[56] *See id.* at ¶¶ 28-30.

[57] *See* 11 U.S.C. § 1126(c).

[58] *See id.* § 1126(f).

[59] *See id.* § 1126(g).

83. However, Class 5 (Interests) is 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.

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

84. As required by section 1129(a)(9) of the Bankruptcy Code, except to the extent that a holder of a particular Claim has agreed to a different treatment of such Claim, Section 2.1 of the Plan provides for payment in full of Allowed Administrative Claims, Section 2.4 of the Plan provides for payment in full of Allowed Priority Tax Claims, and Section 4.1 of the Plan provides for payment in full of Other Priority Claims.

State of Nevada Department of Taxation's Objection

B. General Background

85. During the period of January 2015 through August of 2018, the Debtors entered into a number of agreements (the "Tax Abatement Agreements") with the Nevada Governor's Office of Economic Development ("GOED"), which provided certain tax abatements and incentives to the Debtors.

86. On or about February 1, 2024, the Debtors received a notification letter from the State of Nevada Department of Taxation (the "NV Tax Department") notifying the Debtors of an upcoming audit relating to the abatement of certain Sales & Use Tax and Modified Business Tax paid by the Debtors. During the months of February through May of 2024, the Debtors were in correspondence with the NV Tax Department and collecting documents and data related to the audit; however, before the audit process could be completed, the Debtors were unable to obtain additional funding to sustain operations, ceased operations, and laid off all of its workforce. As a

result, the Debtors were unable to complete the audit and provide the NV Tax Department with all of the documents necessary to confirm that the Debtors had complied with the requirements of the Tax Abatement Agreements.

87. On or about August 30, 2024, the Debtors received a Notice of Audit Determination letter (the "2024 Audit Letter") from the NV Tax Department with information related to an audit determination for three types of taxes (i) Business Use Tax; (ii) Sales and/or Use Tax; and (iii) Modified Business Tax. According to the 2024 Audit Letter, the Debtors owed $116,430,813.85 in Business Use Tax; $4,907,251.21 in Sales and/or Use Tax; and (iii) $350,904.91 in Modified Business Tax, totaling $121,688,969.97 in owed taxes, interest and penalties.

88. On September 9, 2024, pursuant to the terms of the 2024 Audit Letter, the Debtors filed a petition for redetermination (the "Petition for Redetermination") with the NV Tax Department indicating its disagreement with the NV Tax Department's findings in the 2024 Audit Letter.

89. On or about September 13, 2024, the Debtors received a Revised Notice of Audit Determination letter (the "2024 Revised Audit Letter," together with the 2024 Audit Letter, the "Audit Letters") from the NV Tax Department; however, the audited tax totals remained unchanged.

90. On March 11, 2025, the NV Tax Department filed the *State of Nevada, Ex Rel. Its Department of Taxation's Objection to Confirmation of Debtor's Joint Chapter 11 Plan of Liquidation* [D.I. 471] (the "Objection").

91. On March 12, 2025, the NV Tax Department filed the *State of Nevada, Ex Rel. Its Department of Taxation's Amended Objection to Confirmation of Debtor's Amended Joint*

Chapter 11 Plan of Liquidation [D.I. 473] (the "First Amended Objection"), attaching thereto as Exhibit A, the cover page of the 2024 Audit Letter and as Exhibit B the Petition for Redetermination. The NV Tax Department withdrew its Objection on March 14, 2025.

92. On March 14, 2025, the NV Tax Department again filed the *State of Nevada, Ex Rel. Its Department of Taxation's Amended Objection to Confirmation of Debtor's Amended Joint Chapter 11 Plan of Liquidation* [D.I. 480] (the "Second Amended Objection"), removing the exhibits that were originally filed with the First Amended Objection.

93. On March 31, 2025, the NV Tax Department again filed *State of Nevada, Ex Rel. Its Department of Taxation's Second Amended Objection to Confirmation of Debtor's Joint Chapter 11 Plan Of Liquidation* [D.I. 508] (the "Third Amended Objection," together with the Objection, the First Amended Objection, and the Second Amended Objection, the "Objections").

94. None of the Objections provided any basis, factual or legal, to support the Objections.

1. Debtors Amended Schedules and Statements and the Filed Claims

95. On September 19, 2024, BioEnergy and BioFuels filed their initial Schedules of Assets and Liabilities [D.I. 66, 68] (the "Schedules"). The Debtors included the following claims on their schedules for the NV Tax Department:

a. Fulcrum BioEnergy: Claim 1: $23,005.69; Claim 2: Undetermined
b. Fulcrum BioFuels: Claim 1: $51,130.15; Claim 2: Undetermined

96. On October 3, 2024, the NV Tax Department filed a proof of claim ("Claim No. 19") for $121,340,878.46, $120,321,903.18 of which was identified as a priority unsecured

claim and $1,019,785.28 of which was identified as a general unsecured claim.[60] Attached to Claim No. 19 was a statement of liability which included only the amounts allegedly owed from the Audit Letters for Business Use Tax and Sales and/or Use Tax.

97. On the same day, the NV Tax Department filed an additional proof of claim ("Claim No. 20," together with Claim No. 19, Claim No. 70, Claim No. 173, and Claim No. 174, the "Claims") for $376,556.27, $346,786.78 of which was identified as a priority unsecured claim and $29,769.49 of which was identified as a general unsecured claim.[61] Attached to Claim No. 20 was a statement of liability which included only the amounts allegedly owed from the Audit Letters for Modified Business Tax.

98. After a review of the Debtors' books and records, the Debtors determined that the NV Tax Department had only one claim at BioEnergy in the amount of $23,005.69 for unpaid Modified Business Taxes from the three-month period ending June 30, 2024 and no claims at BioFuels. This claim was reflected on Claim No. 20 with the addition of a penalty in the amount of $2,300.57 and interest in the amount of $345.09.

99. The additional claim for $51,130.15 against BioFuels was, as of the Petition Date, listed on the NV Tax Department's website as due and owing as a result of the audit, so the Debtors listed the claim on the BioFuel's Schedules as a precaution. This claim has been superseded by the disputed filed Claims.

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60 On December 10, 2024, the NV Tax Department filed an amended claim ("Claim No. 70"), which amended Claim No. 19. The NV Tax Department then filed a duplicate claim on February 19, 2025 ("Claim No. 174") that does not appear to amend Claim No. 70.

61 The NV Tax Department filed a duplicate claim on February 19, 2025 ("Claim No. 173") that does not appear to amend Claim No. 20.

2. The Debtors Amended Joint Chapter 11 Plan

100. On March 6, 2025, the Debtors filed the Plan. Pursuant to Section 2.4 of the Plan, Allowed Priority Tax Claims will receive (i) Cash in an amount equal to such Allowed Priority Tax Claim on the later of (a) forty five (45) calendar days after the Effective Date (or as soon as reasonably practicable thereafter), (b) the first Business Day after the date that is thirty (30) days after the date such Priority Tax Claim becomes an Allowed Priority Tax Claim, and (c) the date such Allowed Priority Tax Claim is due and payable in the ordinary course, or as soon thereafter as is reasonably practicable, or (ii) equal annual Cash payments in an aggregate amount equal to the amount of such Allowed Priority Tax Claim, together with interest at the applicable rate under section 511 of the Bankruptcy Code, over a period not exceeding five (5) years from and after the Petition Date.

101. Pursuant to Section 1.7 of the Plan, an "Allowed" Claim is a Claim "arising on or before the Effective Date as to which a Proof of Claim has been filed and ***no objection to allowance or priority has been interposed and not withdrawn within the applicable period fixed by the Plan*** or applicable law. Pursuant to Section 8.1 of the Plan, the Debtors must interpose an objection to claims by the Claims Objection Bar Date, which is the date that is 180 days after the Effective Date, subject to extension by the Bankruptcy Court. *S*ee Plan, Section 1.35.

C. The Debtors' Plan provides for the payment of Allowed Priority Tax Claims

102. The Debtors timely filed the required quarterly Modified Business Tax returns, the monthly Business Use Tax returns and the monthly Sales & Use Tax returns, which accurately reflected the taxes owed by the Debtors. Simultaneously with the filing of the tax returns, the Debtors submitted the taxes due to the NV Tax Department. The NV Tax Department's Claims are derived from the Audit Letters, and as described herein, the erroneous

actions, methodologies, and formulas used by the NV Tax Department and reflected in the Audit Letters are incorrect. When properly calculated, the NV Tax Department's Claims should be reduced to zero. As such, the NV Tax Department does not have an Allowed Priority Tax Claim that is entitled to be paid on the effective date.

103. Specifically, in order to support its audit determination, the NV Tax Department provided certain schedules (the "Audit Schedules") to support the amounts listed in the Audit Letters. The detailed Audit Schedules contained numerous errors including (i) the elimination of allowable deductions, (ii) the erroneous use of certain average purchases that were flawed and reflected unrealistic and practically impossible assumptions of the Debtors' operations, and (iii) the reversal of abatements granted to the Debtors under the Tax Abatement Agreements. Together, these errors were used by the NV Tax Department to calculate taxes, which led to millions of dollars of additional taxes allegedly owed by the Debtors.

104. Based on the Debtors' books and records and a review of the taxes paid during the periods covered by the Audit Letters, the Debtors assert that all taxes, other than a tax in the amount of $23,005.69 from unpaid Modified Business Taxes for the three (3) month period ending June 30, 2024, have been paid.

105. As such, the Debtors do not believe the NV Tax Department has an Allowed Priority Tax Claim in the amounts stated in the Claims and intend to file an Objection by the applicable Claims Objection Bar Date in the Plan. Although this is not a confirmation issue, to provide the Court with background of the NV Tax Department's claims, the Debtors set forth the bases for their objections to these claims.

1. Sales and Use Tax

106. Sales & Use Taxes are imposed on the sale, transfer, barter, licensing, lease, rental, use or other consumption of tangible personal property in Nevada. Pursuant to the Tax

Abatement Agreements, the Debtors were given a two (2) year partial abatement of Sales and Use Taxes, thereby reducing the applicable Sales and Use Tax rate from 7.6% to 2% on the Debtors' capital investment in certain acquired property. The NV Tax Department audited two categories of Sales and Use Tax: (i) regular Business Use Tax for self-reported invoices, which were not subject to the Tax Abatement Agreements and (ii) Sales and Use Tax on certain acquired property, which was subject to the Tax Abatement Agreements.

107. Business Use Tax: On a monthly basis, the Debtors self-reported to the NV Tax Department and paid the 7.6% use tax when vendors did not include use tax on their invoice for the Debtors' purchase of tangible property that was not eligible for abatement. Although the Debtors reported on their monthly tax return filings the actual purchases of taxable personal property, the NV Tax Department erroneously reported on their Audit Schedules property purchases that were estimated or calculated using averages of random periods, which grossly overstated purchases resulting in erroneous additional taxes. For example, the application of averages as shown on the NV Tax Department's Audit Schedule 2A-001 led to the following erroneous calculations:

a. From September 1, 2017 through October 31, 2018, the NV Tax Department used an average of $309,907.31 per month for property purchases, totaling $4,338,702.34 compared to the Debtors' actual reported total purchases of $147,854.64 during the same period. **These unsubstantiated additional purchases added by the NV Tax Department resulted in approximately $318,504.43 of erroneous tax.**

b. For reasons unclear to the Debtors, from November 1, 2018 through August 31, 2020, the NV Tax Department entered monthly purchase amounts that were different than the amounts reported by the Debtors on their monthly use tax filings. These erroneous purchase figures totaled $31,621,143.83 more than the purchases reported by the Debtors. In addition, the NV Tax Department eliminated the tax abatement on all purchases during this period. **These unsubstantiated purchase figures used by the NV Tax Department combined with the elimination of the tax abatement resulted in approximately $13.1 million of erroneous additional tax.**

c. Lastly, for the period of May 1, 2021 through February 28, 2023, the NV Tax Department used an average of $3,897,740.39 per month of purchases, totaling $85,750,288.58 compared to the Debtors' actual reported total purchases of $6,360,779.26 during the same period. These additional purchases calculated by the NV Tax Department totaled $79,389,509.32. **These unsubstantiated purchase figures used by the NV Tax Department, when multiplied by the 7.6% tax rate, resulted in $6,033,602.71 of erroneous additional tax.**

108. Sales and/or Use Tax: In calculating the Sales and Use Tax on the purchases of tangible property, the NV Tax Department again utilized average purchases to calculate additional purchases of the Debtors from March 1,2023 through April 30, 2024.

a. The NV Tax Department calculated two separate averages of additional purchases of $3,897,740.39 and $492,634.25 per month of additional purchases which were used by the NV Tax Department and totaled $56,089,601.82 in purchases, which differed significantly from the Debtors reported purchases of $1,745,325.38 during the same period. **This resulted in more than $4,130,165.01 of erroneous tax.**

2. Modified Business Tax

109. The Modified Business Tax in the State of Nevada is a payroll tax imposed on businesses operating within the state. In accordance with Nevada's quarterly tax return form, TXR-020.05, taxable wages included a deduction of 100% of employee health benefits paid by the Debtors' during the quarter. Taxable wages were then taxed at the current tax rate, with taxes associated with eligible tax abatement wages reduced by 50%. Payroll taxes on non-abatement total wages were paid at 100% of the current tax rate. The First Amended Objection filed by the NV Tax Department reflected a total Modified Business Tax owed by the Debtors of $350,904.91, which included (i) tax of $274,689.21, (ii) interest of $48,746.78, and (iii) penalty of $27,468.92.

110. Upon review of the detailed Audit Schedules provided in support of the Audit Letters, the Debtors identified several errors made by the NV Tax Department, including (i) the elimination of over $6,100,000 of eligible employee health benefits paid by the Debtors during the audit period, which erroneously created additional taxes of more than $84,000, (ii) eliminated

the 50% abatement of payroll taxes provided for in the Tax Abatement Agreements, which erroneously created nearly $79,000 of additional taxes, and (iii) the failure to include more than $102,300,000 of taxes paid by the Debtors for the nine-month period ending September 30, 2023. Together, these errors account for nearly the entire tax liability claimed by the NV Tax Department.

a. Interest and Penalties

111. The NV Tax Department has filed multiple conflicting claims, and it is not clear from the Objections which amounts the NV Tax Department are allegedly owed. Of the total claim listed in paragraph 1 of the NV Tax Department's Third Objection, interest and penalties make up $98,043,258.53 of the amount. Because, however, the NV Tax Department's claims should be disallowed for the reasons stated above, this almost $100 million in interest and penalties is similarly erroneous and cannot be supported.[62] As such, the Debtors do not believe that the NV Tax Department's Claim of $121,688,969.97 is valid, a fact already admitted to by the NV Tax Department.

b. The NV Tax Department's Tax Claim Fails to Acknowledge their Own Prior Voluntary Reduction of the Claim by Approximately $89 Million

112. On November 27, 2024, a NV Tax Department audit supervisor by the name of Stacy Maraven emailed the Debtors identifying incorrect calculations on the interest schedules reflected in the Audit Letters. Ms. Maraven stated that there was an error on the Sales and Use Tax interest calculation schedule in which it incorrectly calculated the interest based on the running

[62] For context, interest and penalties make up more than 80% of the NV Tax Department's claims. The Debtors reserve the right to object to this incredibly high amount of tax and penalty asserted by the NV Tax Department as a pecuniary penalty that (a) should not be entitled to priority, and (b) should be disallowed.

balance monthly. The error was allegedly corrected and resulted in a reduction of the interest for the Business Use Tax from $96,585,687.73 to $7,551,323.56.

113. According to Ms. Maraven, there was an additional error on the Modified Business Tax interest calculation schedule in which it calculated the interest at a monthly rate instead of at a quarterly rate. This increased the interest of the Modified Business Tax from $29,425.68 to $35,786.97. These two interest calculation errors reduced the claims by approximately $89 million dollars.

114. Neither of these errors, however, were reflected in the Tax Department's Objections to the Plan, and instead the NV Tax Department appears to be attempting to recover approximately $90 million that it already admitted was incorrect.[63]

D. Conclusion

115. What was first made clear by the NV Tax Department's auditor in November of 2024 and what the Debtors have been able to interpret from the Audit Schedules associated with the Audit Letters is that there are serious issues with the audit that allegedly supports the NV Tax Department's Claims, Claims that have already been flagged by the department's auditor as incorrect, were not then accurately reflected in the Objections, and are still subject to more questions than answers. As such, the NV Tax Department does not have an Allowed Priority Tax Claim that needs to be paid on the effective date.

[63] To add to this confusion, the NV Tax Department appears to have recognized this error in its filed proofs of claim – but not its filed Objections to the Plan – as the NV Tax Department amended Claim No. 19, which seeks $121,340,878.46, with Claim No. 70. Claim No. 70 reduced the amount sought in Claim No. 19 from $121,340,878.46 to $32,306,513.23. Regardless of whether the NV Tax Department is now seeking payment of a priority claim in the amount of $121 million or $32 million, either amount is grossly overstated for the reasons set forth above.

116. For these reasons, the treatment of Allowed Administrative Claims, Allowed Tax Claims and Allowed Other Priority Claims satisfies the requirements of, and complies in all respects with, section 1129(a)(9) of the Bankruptcy Code.

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

117. 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."[64] As evidenced by the Voting Declaration, Classes 2A-2C, 3A-3C and 4A-4C overwhelmingly voted to accept the Plan, and does not include votes of any insider. Therefore, section 1129(a)(10) of the Bankruptcy Code is satisfied as to each Debtor.

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

118. 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."[65] Finding "feasibility" of a chapter 11 plan does not require a guarantee of success by the debtor.[66] Rather, a debtor must demonstrate only a reasonable assurance of success.[67] There is a relatively low threshold of proof necessary to satisfy

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64 *Id.* § 1129(a)(10).

65 *Id.* § 1129(a)(11).

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

67 *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 Invs. 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.[68] Bankruptcy courts in this District have approved plans that were subject to uncertain and contingent future events.[69]

119. As set forth in the Smith 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.[70] In addition, the Debtors estimate that the Liquidation Trust will have sufficient funding to meet its obligations under the Plan to administer post-Effective Date responsibilities of the Debtors and wind down the Debtors' Estates.

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

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

121. 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.[71] Section 14.3 of the Plan provides that the Debtors shall pay all fees arising under 28 U.S.C. § 1930 on the date such U.S. Trustee Fees become due,

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68 *Tribune I*, 464 B.R. at 185 (quoting *In re Briscoe Enters, Ltd.*, 994 F.2d 1160, 1166 (5th Cir. 1993)).

69 *See, e.g.*, *Indianapolis Downs*, 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. 200, 252 (Bankr. D. Del. 2011) (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).

70 *See* Smith Decl. ¶ 34.

71 11 U.S.C. § 1129(a)(12).

until such time as a final decree is entered closing these chapter 11 cases, these chapter 11 cases are converted or dismissed.[72] Thus, the Plan satisfies the requirements of section 1129(a)(12).

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

122. 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.[73]

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

123. Section 1129(b) of the Bankruptcy Code allows a debtor to confirm a plan even though all impaired classes and interests have not accepted the plan. The mechanism for obtaining confirmation over dissenting classes of claims and interests is known as a "cram down."[74] Section 1129(b) provides in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the plan.[75]

124. Thus, under section 1129(b) of the Bankruptcy Code, the Bankruptcy Court may "cram down" a plan over rejection by impaired classes of claims or interests as long as the

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[72] *See* Smith Decl. ¶ 35.

[73] *See* Smith Decl. ¶ 36.

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

[75] *See id.* § 1129(b)(1).

plan does not "discriminate unfairly," and is "fair and equitable" with respect to such classes. Here, the Plan does not discriminate unfairly and is fair and equitable to the non-accepting impaired classes.

a. The Plan Does Not Discriminate Unfairly With Respect to Impaired Rejecting Classes.

125. 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 the value it will receive under a plan when compared to the value given to all other similarly situated classes.[76] 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,[77] or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[78]

126. The Plan does not discriminate unfairly against the impaired Class that is deemed to have rejected the Plan, as the Plan provides only one class that is impaired and deemed

[76] *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).

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

[78] *See, e.g., 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 Env't 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).

to reject the Plan (i.e., Classes 5). 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."[79]

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

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

128. 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.[80] 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

[79] *See Mercury Cap. Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 10 (D. Conn. 2006).

[80] *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, 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)(B)(i), (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.

a plan on account of its junior claim or interest.[81] 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.[82]

129. Here, the Plan satisfies the absolute priority rule with respect to the rejecting Classes. First, no Class of Claims or Interests junior to such Class will receive or retain any property under the Plan. Second, no Class of Claims or Interests will receive or retain property 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 Class 5.[83]

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

130. Section 1129(c) of the Bankruptcy Code provides that the bankruptcy court may confirm only one plan.[84] Because the Plan is the only plan before the Court, section 1129(c) of the Bankruptcy Code is satisfied.

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

131. 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

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81 *See id.*

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

83 *See* Smith Decl. ¶ 37.

84 *See* 11 U.S.C. § 1129(c).

of taxes or avoidance of the requirements of Section 5 of the Securities Act of 1933.[85] 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.

CONCLUSION

For all the foregoing reasons, the Debtors respectfully request that the Court enter the Confirmation Order confirming the Plan and overruling all objections thereto, to the extent not previously resolved.

[85] *See* Smith Decl. ¶ 38.

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