Docket #0659 Date Filed: 11/12/2024

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	)	Chapter 11
LAVIE CARE CENTERS, LLC,[1]	)	Case No. 24-55507 (PMB)
Debtors.	)	(Jointly Administered)
	)	**Related to Docket Nos. 480, 481, 571, 593, 623, 624, 625, 626, 627, 628, 630, 633, 637, 650**

DEBTORS' (I) MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION AND FINAL APPROVAL OF THE DEBTORS' SECOND AMENDED COMBINED DISCLOSURE STATEMENT AND JOINT CHAPTER 11 PLAN OF REORGANIZATION AND (II) OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION

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Dated: November 12, 2024

[1] The last four digits of LaVie Care Centers, LLC's federal tax identification number are 5592. There are 282 Debtors in these chapter 11 cases, which are being jointly administered for procedural purposes only. A complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/LaVie. The location of LaVie Care Centers, LLC's corporate headquarters and the Debtors' service address is 1040 Crown Pointe Parkway, Suite 600, Atlanta, GA 30338.

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RELIEF REQUESTED

LaVie Care Centers, LLC and its subsidiaries and affiliates, as debtors and debtors-in-possession (collectively, the "Debtors") in the above-captioned chapter 11 cases, hereby submit this memorandum of law (this "Memorandum") in support of entry of a proposed form of order, filed contemporaneously herewith, granting confirmation and final approval of the *Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* dated October 1, 2024 [Docket No. 481] (the disclosure statement portion thereof, the "Disclosure Statement" and the chapter 11 plan portion thereof, the "Plan," as may be subsequently modified, amended, or supplemented from time to time, and together, the "Combined Disclosure Statement and Plan"),[2] pursuant to sections 1125, 1126, and 1129 of title 11 of the United States Code (the "Bankruptcy Code"). In support of final approval of the Disclosure Statement and Confirmation of the Plan, the Debtors rely on:

(i) the *Declaration of Jennifer Westwood of Kurtzman Carson Consultants d/b/a Verita Global Regarding the Solicitation and Tabulation of Ballots Cast on the Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 647] (the "Voting Declaration");

(ii) the *Declaration of M. Benjamin Jones in Support of Final Approval and Confirmation of Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 655] (the "Jones Declaration");

(iii) the *Declaration of James D. Decker in Support of Final Approval and Confirmation of Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 656] (the "Decker Declaration"); and

(iv) the *Declaration of Michael Krakovsky in Support of Final Approval and Confirmation of Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 657] (the "Krakovsky Declaration"),

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

each of which are fully incorporated herein by reference. In further support of Confirmation of the Plan and adequacy of the Disclosure Statement, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Plan is almost entirely consensual—a result that not only seemed unimaginable at the inception of these Chapter 11 Cases, but also as recently as a few days ago. Specifically, the Plan is supported by each of the Debtors' major stakeholders, including the ABL Lenders, Omega (consisting of one of the Debtors' DIP Lenders and prepetition secured lenders, as well as the Debtors' largest landlord), TIX 33433, LLC (the Debtors' other DIP Lender and Plan Sponsor), the Official Committee of Unsecured Creditors (the "Committee"), and a substantial majority of the unsecured creditors voting on the Plan, including, most notably, the Florida Claimants. In the past several days, following extensive discovery and depositions, the Debtors, certain non-Debtors, Recovery Corp., and the Florida Claimants have agreed to a settlement that resolves all pending objections filed by the Florida Claimants. In exchange, the Florida Claimants have agreed to, among other things, change their votes to accept the Plan and be bound by the Third-Party Release.

2. The Plan enables the Debtors to provide a comprehensive solution for substantially all of the Debtors' skilled nursing facilities,[3] pay or otherwise satisfy all administrative, priority, and secured claims, and provide for meaningful recoveries to unsecured creditors as a result of the settlement reached through mediation (the "Settlement"). This result is remarkable by any objective measure, and would not be possible without the substantial contributions and/or concessions from the Plan Sponsor and Omega. Indeed, without these contributions and

[3] The Plan contemplates assumption of the Omega Master Lease, the Welltower Master Lease, and the Elderberry Leases. As set forth in the proposed Confirmation Order, the Debtors intend to reject one lease with respect to their remaining Florida facility, Harts Harbor, and they intend to work collaboratively with Jacksonville Nursing Home, Ltd. (the "Harts Harbor Landlord") to transition facility operations to a new operator.

concessions, little to no recovery to Holders of General Unsecured Claims would be possible in these Chapter 11 Cases.

3. While the Plan enjoys the overwhelming support of the Debtors' stakeholders, eleven objections and reservations of rights were filed. The Debtors have been able to resolve several of the objections, including those filed by Recovery Corp. (substituted by the Florida Claimants), Cigna Health and Life Insurance Company, HealthSpring Life & Health Insurance Company, Inc., and certain of their affiliates (collectively, "Cigna"),[4] AFSCME, and USW. As of the date of this filing, the sole remaining objectors (collectively, the "Objectors") to the Plan are (a) the Office of the United States Trustee for Region 21 (the "U.S. Trustee"); (b) the Internal Revenue Service (the "IRS"); (c) the United States Department of Health and Human Services ("HHS") and the United States Department of Veteran Affairs ("VA"); (d) the Chubb Companies[5] ("Chubb");[6] (e) Mary Iezzoni ("Ms. Iezzoni");[7] and (f) the Harts Harbor Landlord.[8] The Debtors are actively working with each of these parties to further narrow the issues in advance of the Combined Hearing.

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[4] The Debtors and Cigna have agreed to include language in the Confirmation Order to resolve Cigna's objection regarding irrevocable notice of assumption and/or rejection of the Cigna Payor Agreements to Cigna in advance of the Effective Date.

[5] The "Chubb Companies" consist of ACE American Insurance Company, ACE Property and Casualty Insurance Company, Westchester Fire Insurance Company, Westchester Surplus Lines Insurance Company, Illinois Union Insurance Company, Indemnity Insurance Company of North America, Federal Insurance Company and each of their U.S.-based affiliates and successors.

[6] The Debtors and the Committee are in discussions with Chubb regarding its objection and have agreed to resolve certain aspects of its objection, including carving out workers' compensation claims from the Unliquidated Claim Procedures, through revised language in the Plan, proposed Confirmation Order, and revised Unliquidated Claim Procedures. With respect to the remaining issues raised by Chubb, the Debtors and the Committee are unable to evaluate the appropriateness of the requested modifications because Chubb has yet to articulate which insurance policies are held by the Debtors and are still active. Absent additional information, the Debtors are unable to justify the modifications of the Plan that Chubb is requesting.

[7] The Debtors and the Committee are in discussions with Ms. Iezzoni regarding her objections to the Unliquidated Claim Procedures and believe they will address her concerns either through a stipulated order to be filed with the Court and/or revised Unliquidated Claim Procedures in advance of Confirmation.

[8] As set forth in the proposed Confirmation Order, the Debtors intend to reject the lease with respect to their remaining Florida facility, Harts Harbor, and the Debtors intend to work collaboratively with the Harts Harbor Landlord to transition facility operations to a new operator.

4. Among other things, the Objectors, particularly the U.S. Trustee, HHS, and the IRS, take aim at the Third-Party Release contained in the Plan, arguing that it is a **non-consensual** third-party release that is impermissible following the Supreme Court's recent ruling in *Harrington v. Purdue Pharma L.P.* However, such arguments both misinterpret *Purdue* and are misplaced because the Third-Party Release embodied in the Plan is a **consensual** release, given the fact that the Releasing Parties were provided with a clear and conspicuous notice of the opportunity to opt out of the Third-Party Release either by checking an opt-out box on the solicited ballot or objecting to confirmation of the Plan. Indeed, as set forth herein, and as will be shown at the Combined Hearing, the Third-Party Release, along with the Debtor Release, the Exculpation, and the Injunction, is fair to all parties and necessary to safeguarding the global resolution memorialized by the Settlement.

5. As described more fully below, the Combined Disclosure Statement and Plan satisfies all applicable elements of Bankruptcy Code section 1129 and otherwise complies with all applicable sections of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules of the United States Bankruptcy Court for the Northern District of Georgia (the "Local Rules"), and non-bankruptcy law. Accordingly, the Debtors respectfully request that the Court overrule the Objections, approve the Disclosure Statement on a final basis, and confirm the Plan.

BACKGROUND

I. The Chapter 11 Cases

6. On June 2, 2024 (the "Petition Date"), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Georgia (the "Court"), commencing the above-captioned chapter 11 cases (collectively, the "Chapter 11 Cases"). The Debtors continue to operate their businesses and

manage its assets and affairs as debtors and debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

7. On June 13, 2024, the U.S. Trustee appointed the Committee pursuant to Bankruptcy Code section 1102(a) [Docket No. 112]. The members of the Committee were modified on October 17, 2024. *See* Docket No. 568. No trustee or examiner has been appointed in these Chapter 11 Cases.

II. The Debtors' Sale Process

8. On June 10, 2024, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets* [Docket No. 104] (the "Bidding Procedures and Sale Motion"), seeking approval of the Debtors' proposed bid procedures (the "Bid Procedures") and sale process.

9. On June 27, 2024, the Bankruptcy Court entered the *Order Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets* [Docket No. 177] (the "Bidding Procedures Order"), approving, among other things, the Bid Procedures.

10. As set forth in the Krakovsky Declaration, Stout Capital, LLC ("Stout") launched a broad marketing process to prospective buyers on June 24, 2024, ultimately reaching out to

nearly 150 prospective purchasers. As part of the process, two parties submitted written indications of interest, each of which expressed interest in acquiring only a small subset of the Debtors' facilities. Ultimately, the Debtors did not receive any qualified bids by the bid deadline, other than a letter from the DIP Lenders (already deemed to be "Qualified Bidders" under the Bidding Procedures Order) that they intend to attend and participate at the auction. Accordingly, the Debtors, in their business judgment and after consultation with the consultation parties, canceled the auction and sale hearing. On September 6, 2024, the Debtors filed the *Notice of (I) Cancellation of Auction and Sale Hearing and (II) Agreement to Seek Conditional Approval of Disclosure Statement at Disclosure Statement Hearing* [Docket No. 404].

III. The Debtors' Investigation

11. Prior to the Petition Date, on May 19, 2024, the Debtors retained an independent manager, Mr. James D. Decker, to direct and oversee all aspects of the Debtors' restructuring process and Chapter 11 Cases. In addition, Mr. Decker was charged with investigating, evaluating, and controlling the disposition or resolution of any claims or causes of action proposed to be released by the Debtors under the Plan, including any potential claims or causes of action against certain of the Debtors' affiliates and other related parties (the "Independent Investigation").

12. At the direction of Mr. Decker, the Independent Investigation began prior to the Petition Date, commencing on or about May 24, 2024, and focused on the following key areas: (a) the Debtors' divestitures of skilled nursing facilities prior to the Petition Date, including facilities in Florida and consideration received in connection with those transactions; (b) the consideration received by the Debtors in connection with the sale of the real estate owned by non-Debtors including, among others, Omega; (c) the settlement of litigation claims by the Debtors entered into prior to the Petition Date; (d) the circumstances around, and use of, additional

infusions of capital into the Debtors in fall 2022, May 2023, and in connection with the receipt of employee retention tax credits received in the fall of 2023; (e) transfers made to non-Debtors, including Synergy; and (f) the conduct of the board of directors of FC XXI.[9] As part of these analyses, the Independent Investigation closely reviewed and analyzed the estate causes of action alleged as part of the Miami Action (captioned *Healthcare Negligence Settlement Recovery Corp. v. 5405 Babcock Street Operations, LLC, et al.*, Case No. 2024-007342-CA in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida) initiated by Recovery Corp. shortly before the Petition Date.

13. Ultimately, and as more fully stated in the Decker Declaration, the Debtors concluded that the facts did not support any material viable claims or causes of action that could be asserted by the Debtors against, among others, the Released Parties. This Independent Investigation, coupled with the contemporaneous investigation being pursued by the Committee, led to extensive settlement negotiations, a lengthy mediation process, and, ultimately, provided the framework for a global settlement.

IV. Mediation and the Debtors' Combined Plan & Disclosure Statement

14. On July 23, 2024, the Debtors filed the *Debtors' Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 273] (the "Original Plan"). On August 7, 2024, the Debtors filed the *Debtors' Motion for Entry of Order (I) Approving Disclosure Statement, (II) Scheduling Confirmation Hearing, (III) Establishing Procedures for Solicitation and Tabulation of Votes on Plan, (IV) Approving Certain Forms and Notices, and (V) Granting Related Relief* [Docket No. 316] (the "Solicitation Procedures Motion"),

[9] These categories are illustrative only and should not be interpreted as reflecting the entire scope of the Internal Investigation.

15. Following the filing of the Original Plan, the Debtors, the Committee, the Plan Sponsor, and Omega engaged in extensive, good faith, and arm's-length negotiations regarding a potential settlement of various claims, counterclaims, and causes of action. To facilitate these discussions, the Debtors filed the *Joint Motion for Order Authorizing and Directing Mediation* [Docket No. 346] on August 26, 2024, seeking appointment of the Honorable Jeffery W. Cavender as mediator in the Chapter 11 Cases. The Court entered an order granting the requested relief that same day. *See* Docket No. 347.

16. On September 9 and September 11, 2024, the Debtors, the Committee, the Plan Sponsor, and Omega participated in extensive and good faith mediation sessions (the "Mediation") before Judge Cavender. Discussions continued amongst these parties through the following week; however, the parties remained at an impasse and as such, the Debtors filed the *Debtors' Combined Disclosure Statement and Joint First Amended Chapter 11 Plan of Reorganization* [Docket No. 438] (the "Non-Consensual Plan") on September 17, 2024, which provided $7 million in cash, plus Divested Accounts Receivable to Holders of General Unsecured Claims, to be reduced by excess professional fees incurred over the DIP budget in the event that the Committee did not execute a plan support agreement.

17. The Mediation continued following the filing of the Non-Consensual Plan and, on September 18, 2024, Judge Cavender circulated a mediator's proposal to the parties, which prompted additional discussions regarding the terms of a potential settlement. On September 20, 2024, following continued discussions in furtherance of the Mediation, the parties, including the Committee, agreed to the terms of a revised mediator's proposal, which provided enhanced recoveries to Holders of General Unsecured Claims over the Non-Consensual Plan. The Debtors subsequently worked extensively with the Committee, the Plan Sponsor, and Omega to incorporate

the terms of the Settlement into their proposed chapter 11 plan and filed the *Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 461] on September 26, 2024.

18. On October 1, 2024, the Debtors filed the solicitation version of the Combined Disclosure Statement and Plan [Docket No. 481], which reflected the terms of the Settlement, including the following key terms:

(a) $10,750,000 cash contribution to the GUC Trust to be funded by the Plan Sponsor on the Effective Date of the Plan;

(b) Divested Accounts Receivable assigned to the GUC Trust with a $2 million Backstop Note executed by the Reorganized Debtors and guaranteed by the Plan Sponsor with a 12-month maturity;

(c) D&O Claims are assigned to the GUC Trust (up to the policy limits) and subject to the D&O Claim Limitations;

(d) Powerback Rehabilitation's waiver of its General Unsecured Claim will be a condition to Confirmation that cannot be waived;

(e) Omega will receive no distribution from funds for General Unsecured Claims;

(f) chapter 5 causes of action (preferences, etc.) will be waived except to the extent a creditor opts out of the releases set forth in the Plan and pursues a non-Debtor for Debtor derived claims. In such instance, the chapter 5 claim will only be used defensively to offset any amount determined to be due plus costs and there would be no positive recovery to the GUC Trust;

(g) all parties will support substantive consolidation of the Debtors' estates on an OpCo Debtors/DivestCo Debtors siloed basis;

(h) Causes of Action remain with the Reorganized Debtors except for D&O Claims up to the policy limits and subject to certain limitations;

(i) the GUC Trust / GUC Contribution will not fund/pay Administrative Expense Claims (including 503(b)(9) and Priority Claims). The Plan provides that the Reorganized Debtors either assume or pay Administrative Expense Claims, not the Plan Sponsor directly. The Plan Sponsor is only obligated to fund the Plan Sponsor Contribution on the Effective Date, subject to satisfaction of the conditions of the Effective Date; and

(j) the Committee supports confirmation and will support opposition to any objecting parties.

19. Following the Mediation, as set forth in greater detail in the Decker Declaration, Mr. Decker determined, based upon advice of counsel and his reasonable business judgment, that the Debtors' likelihood of achieving a greater return for their creditors than the compromises embodied in the Plan was very low, and that pursuit of such claims and causes of action (even in a best-case scenario) would likely result in no recovery to unsecured creditors. Accordingly, as discussed in the Decker Declaration, Mr. Decker determined, in his reasonable business judgment, that the Settlement was reasonable, appropriate, and provide for material recoveries to Holders of General Unsecured Claims which would not otherwise be available to such claimants in any other reasonable chapter 7 scenario.

20. On October 21, 2024, the Debtors filed the *Notice of GUC Trust Agreement with Respect to Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 571] (the "GUC Trust Agreement").

21. On October 28, 2024, the Debtors filed the *Plan Supplement with Respect to Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 593] (the "Original Plan Supplement"), which contained (a) the Assumed Executory Contracts and Unexpired Leases List, (b) the New Governance Documents, (c) the identity of the GUC Trustee, (e) the schedule of Assumed Administrative and Priority Claims, (f) the Restructuring Transactions Memorandum, (g) the Schedule of Go-Forward Trade Contracts, (h) the ABL Exit Facility Term Sheet, (i) the Unliquidated Claim Procedures, (j) the schedule of retained Causes of Action, and (k) the Backstop Note and the Backstop Note Guaranty.

22. The following objections and reservations of rights with respect to final approval of the Disclosure Statement and confirmation of the Plan were filed:

(a) *Recovery Corp.'s Objection to Confirmation of the Combined Plan* [Docket No. 327];

(b) *Recovery Corp.'s Omnibus Objection to the Operative Combined Plan* [Docket No. 470];

(c) *United States Trustee's Objection to Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 623] (the "UST Objection");

(d) *Limited Objection of Mary Ann Iezzoni, as Agent-in-Fact for Angeline Lamana to Confirmation of Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 624] (the "Iezzoni Objection");

(e) *Objection of Cigna to Final Approval of Debtors' Disclosure Statement and Confirmation of Second Amended Joint Plan of Reorganization* [Docket No. 625] (the "Cigna Objection");

(f) *Objection to Debtors' Second Amended Combined Disclosure Statement and Confirmation of the Joint Chapter 11 Plan of Reorganization* [Docket No. 626] (the "IRS Objection");

(g) *Reservation of Rights of AFSCME to Debtors' Disclosure Statement and Reservation of Rights with Respect to Potentially Assumed Collective Bargaining Agreements* [Docket No. 627] (the "AFSCME Reservation");

(h) *Reservation of Rights of United Steelworkers to Debtors' Disclosure Statement and Reservation of Rights with Respect to Potentially Assumed Collective Bargaining Agreements* [Docket No. 628] (the "USW Reservation");

(i) *United States of America's Objection to Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 633] (the "HHS/VA Objection");

(j) *Objection of the Chubb Companies to the (I) Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization and (II) Plan Supplement* [Docket No. 637] (the "Chubb Objection"); and

(k) *Amended Objection to Debtors' Second Amended Combined Chapter 11 Plan of Reorganization and Objection to Debtors' Intent to Reject Lease* [Docket No. 650] (the "Harts Harbor Landlord Objection").

23. On November 5, 2024, the Debtors filed the *First Amended Plan Supplement with Respect to Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 630] (the "First Amended Plan Supplement" and, together with the Original Plan Supplement, as may be otherwise amended, modified, or supplemented, the "Plan Supplement"), containing (a) a revised list of assumed executory contracts and unexpired leases, (b) a revised GUC Trust Agreement, (c) an amendment to the Omega Term Loan Credit Agreement, and (d) an executed version of the ABL Exit Facility Term Sheet.

24. Contemporaneously herewith, the Debtors filed a slightly modified version of the Plan, reflecting certain technical modifications (the "Modifications") in order to narrow certain issues raised by the Objections. The Modifications are minor, immaterial, and do not impact treatment of any Class under the Plan.

V. The Solicitation Process and Voting Results

25. On October 1, 2024, the Court entered the order approving the Solicitation Procedures Motion [Docket No. 480] (the "Solicitation Procedures Order"), which, among other things, (a) approved the Disclosure Statement on a conditional basis; (b) authorized the Debtors to use the Disclosure Statement in connection with the solicitation of votes to accept or reject the Plan; (c) establishing the deadline for voting on the Plan as November 4, 2024 (the "Voting Deadline"); (d) approved the solicitation procedures regarding votes to accept or reject the Plan (the "Solicitation Procedures"); and (e) approved the form and notice of the *Notice of (I) Combined Hearing with Respect to the Debtors' Second Amended Combined Disclosure Statement and Joint*

Chapter 11 Plan of Reorganization and (II) Related Objection Deadline (the "Combined Hearing Notice"). On October 1, 2024, the Debtors filed the Combined Hearing Notice [Docket No. 483].

26. On October 7, 2024, the Debtors caused their solicitation agent, Kurtzman Carson Consultants d/b/a Verita Global (the "Solicitation Agent"), to distribute packages (the "Solicitation Packages") and accompanying ballots (the "Ballots") to Holders of Claims in Classes 3, 4, 5, 6A, 6B, and 6C (the "Voting Classes") who were entitled to vote on the Plan as of September 27, 2024 (the "Voting Record Date").[10] On October 7, 2024, the Debtors also caused the Solicitation Agent to serve the Combined Hearing Notice on all creditors, including residents, by first claim mail or electronic mail.

27. Following the Voting Deadline, the Debtors, through the Solicitation Agent, conducted an audit of all Ballots received and completed a final tabulation of votes. These audited voting results are reflected below and in the Voting Declaration:[11]

[10] On November 4, 2024, the Solicitation Agent filed the *Certificate of Service of Solicitation Materials* [Docket No. 619 (the "Solicitation COS").

[11] The dollar figures reflected below and in the Voting Declaration represent the **aggregate** dollar amount of claims filed across Debtor entities by a single creditor, rather than the dollar amount of individual filed or scheduled claims for such creditor. Such aggregation was approved in the Solicitation Procedures Order and was completed for solicitation and voting tabulation purposes only, but may not be reflective of actual claim figures for distribution purposes.

Total Ballots Counted					
Voting Class	Total Votes Cast	Accept		Reject	
		Amount	Number	Amount	Number
Class 3 (ABL Claims)	1	$2,871,000,000.00 100%	1 100%	$0 0%	0 0%
Class 4 (Omega Term Loan Claims)	1	$2,533,501,774.76 100%	1 100%	$0 0%	0 0%
Class 5 (Go-Forward Trade Claims)[12]	0	$0 0%	0 0%	$0 0%	0 0%
Class 6A (OpCo General Unsecured Claims)	201	$5,148,819,436.09 99.87%	153 76.12%	$6,184,899.94 0.13%	48 23.88%
Class 6B (DivestCo General Unsecured Claims)	646	$15,392,718,819.23 99.80%	183 28.33%	$31,161,631.25 0.20%	463 71.67%
Class 6C (Joint & Several Unsecured Claims)	1	$26,217,387.91 100%	1 100%	$0 0%	0 0%

28. As set forth above, Classes 3, 4, 6A, and 6C voted to accept the Plan. Notwithstanding the fact that Class 6B (DivestCo General Unsecured Claims) initially voted to reject the Plan, the rejecting ballots cast on behalf of the Florida Claimants are now votes to accept the Plan pursuant to the confidential settlement by and among the Debtors and certain non-Debtors and the Florida Claimants. Therefore, given the substantial support for the Plan and the Debtors' satisfaction of the standard set forth by the Bankruptcy Code and governing case law in this jurisdiction, as discussed herein, the Debtors respectfully request that the Court approve the Disclosure Statement on a final basis and confirm the Plan.

ARGUMENT

I. The Disclosures Contained in the Disclosure Statement Comply with the Bankruptcy Code and the Bankruptcy Rules and Should be Approved on a Final Basis.

29. Bankruptcy Code section 1125(b) requires that the Disclosure Statement disclose "adequate information" defined as

[12] No votes were cast in Class 5 (Go-Forward Trade Claims) because the sole Holder in Class 5 voted to accept the treatment in Class 6 and voted accordingly.

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material federal tax consequences of the plan to the debtor, any successor of the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.[13]

Thus, a debtor's disclosure statement must, as a whole, provide information that is reasonably practicable to permit an informed judgment by impaired creditors entitled to vote on the plan.[14] A disclosure statement "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution."[15]

30. The bankruptcy court has broad discretion to determine the adequacy of the information contained in a disclosure statement.[16] Accordingly, the determination of whether a disclosure statement contains adequate information is to be made on a case-by-case basis, focusing on the unique facts and circumstances of each case.[17] In that regard, courts generally examine a

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13 11 U.S.C. § 1125(a)(1).

14 *See Enron Corp. v. The New Power Co. (In re New Power Corp.)*, 438 F.3d 1113, 1118 (11th Cir. 2006); *Krystal Cadillac-Oldsmobile GMC Truck. Inc. v. Gen. Motors Corp*., 337 F.3d 314, 321–22 (3d Cir. 2003); *Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 179 B.R. 24, 29 (S.D.N.Y. 1995).

15 *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

16 *See, e.g.*, *In re Northwest Recreational Activities, Inc*., 8 B.R. 10, 11 (Bankr. N.D. Ga. 1980) ("The quality of the Disclosure Statement which will qualify as 'adequate information' will vary with the circumstances. The kind and form of information is left to the judicial discretion of the court on a case by case basis."); *In re Brandon Mill Farms, Ltd*., 37 B.R. 190, 191–92 (Bankr. N.D. Ga. 1984) ("Beyond the statutory guidelines described in the definition of 'adequate information,' the decision to approve or reject a disclosure statement is within the discretion of the Bankruptcy Court."); *In re Coastal Realty Invs., Inc*., No. 12-20564, 2013 WL 214235, at *5 (Bankr. S.D. Ga. Jan. 17, 2013) ("While the statutory language sets out the general parameters of adequacy [of information], ultimately, a court must decide when a disclosure statement meets the statutory standard in light of the particular case and surrounding circumstances.") (internal citations omitted); *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125, we discern that adequate information will be determined by the facts and circumstances of each case."); *In re River Village Assocs.*, 181 B.R. 795, 804 (E.D. Pa. 1995) ("Under § 1125(a), the Bankruptcy Court is thus given substantial discretion in considering the adequacy of a disclosure statement.").

17 *See In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001).

number of factors to determine whether the disclosure statement contains adequate information.[18] The factors are not meant to be comprehensive, nor must a debtor provide information on all of the factors.[19] Rather, the bankruptcy court must decide what is appropriate in each case.[20]

31. Here, the Disclosure Statement contains adequate information with respect to factors considered by courts: (a) the pre- and post-petition history and business operations of the Debtors; (b) the Debtors' pre-petition capital structure; (c) the reasons for the chapter 11 filings; (d) key milestones in the Chapter 11 Cases; (e) the Debtors' investigation into potential estate claims and causes of action; (f) the global settlement by and among the Debtors, the Committee, the Plan Sponsor, and Omega; (g) the feasibility of the Plan, including the Debtors' liquidation analysis and financial projections; (h) the structure of the Plan and classification scheme; (i) treatment of administrative, priority, and non-priority claims; (j) risk factors affecting the plan; (k) federal tax law consequences of the Plan; (l) the structure and purpose of the GUC Trust and distribution of recoveries to creditors; and (m) components of the Debtors' go-forward business. Accordingly, the Debtors submit that the Disclosure Statement contains the information typically considered by bankruptcy courts and found to be adequate, and respectfully requests that this Court approve the Disclosure Statement as containing "adequate information" as defined by Bankruptcy Code Section 1125(a) and required by Bankruptcy Code Section 1125(b) on a final basis.

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[18] *See, e.g.*, *In re Metrocraft Pub. Serv., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (listing 19 factors that the court considered relevant in evaluating the adequacy of a disclosure statement); *Coastal Realty Invs.*, 2013 WL 214235, at *5 (listing factors courts have considered in reviewing adequacy of information); *In re Scioto Valley Mtg. Co.*, 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988) (setting forth a non-exhaustive list of 19 categories of information that may be included in a disclosure statement); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (listing factors); *see also In re Ferretti*, 128 B.R. at 18-19 (listing similar factors).

[19] *See In re Metrocraft Pub. Services, Inc.*, 39 B.R. at 568; *In re Scioto Valle Mortg. Co.*, 88 B.R. at 170-71; *In re Ferretti*, 128 B.R. at 18-19.

[20] *In re Ferretti*, 128 B.R. at 19 (noting that not every debtor needs to provide information on each factor).

II. The Plan Should be Confirmed Because It Complies with the Standards of the Bankruptcy Code.

32. To obtain Confirmation of the Plan, the Debtors, as plan proponents, must prove by a preponderance of the evidence that each element of Bankruptcy Code sections 1129(a) and 1129(b) has been satisfied.[21] The Debtors submit that the Plan satisfies each element of Bankruptcy Code sections 1129(a) and 1129(b).

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

33. Under Bankruptcy Code section 1129(a)(1), a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]."[22] The legislative history of Bankruptcy Code section 1129(a)(1) explains that this provision also encompasses the requirements of Bankruptcy Code sections 1122 and 1123, which govern the classification of claims and the content of a plan of reorganization, respectively.[23] As explained below, the Plan complies with the requirements of Bankruptcy Code sections 1122, 1123, and 1129, as well as other applicable provisions.

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

34. The classification requirements of Bankruptcy Code section 1122(a) provide, in pertinent part, that "[e]xcept as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[24] Although the Bankruptcy Code does not define "substantially similar," these words have generally been interpreted to mean similar in legal character to other

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[21] *See In re Holywell Corp.*, 913 F.2d 873, 879 (11th Cir. 1990); *In re Aspen Village at Lost Mountain Memory Care, LLC*, 609 B.R. 536, 543 (Bankr. N.D. Ga. 2019) ("The plan proponent bears the burden of evidence and persuasion of each element of section 1129.").

[22] 11 U.S.C. § 1129(a)(1).

[23] *See* S. Rep. No. 95-989, at 126 *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re S & W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984).

[24] 11 U.S.C. § 1122(a).

claims against a debtor's assets or to other interests of the debtor.[25] Courts have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[26]

35. The Plan's classification of Claims and Interests into eleven Classes satisfies the requirements of Bankruptcy Code section 1122 because the Plan places Claims and Interests in each Class based on relevant criteria, including legal or factual distinctions. Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

(a) Class 1: Other Secured Claims
(b) Class 2: Other Priority Claims
(c) Class 3: ABL Claims
(d) Class 4: Omega Term Loan Claims
(e) Class 5: Go-Forward Trade Claims
(f) Class 6A: OpCo General Unsecured Claims
(g) Class 6B: DivestCo General Unsecured Claims
(h) Class 6C: Joint & Several OpCo General Unsecured Claims
(i) Class 7: Intercompany Claims
(j) Class 8: Existing Equity Interests
(k) Class 9: Intercompany Interests

36. Claims and Interests assigned to each particular Class listed above are substantially similar to the other Claims or Interests, as applicable, in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests.

37. The Plan's classification scheme distinguishes Holders of Other Secured Claims (Class 1), ABL Claims (Class 3), and Omega Term Loan Claims (Class 4) based on differing priority in collateral. Holders of Other Priority Claims (Class 2) are classified separately due to

[25] *See* 7 Collier on Bankruptcy ¶ 1122.03[3] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).

[26] *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992).

their required treatment and specific priority under the Bankruptcy Code. OpCo General Unsecured Claims (Class 6A), DivestCo General Unsecured Claims (Class 6B), and Joint & Several OpCo General Unsecured Claims (Class 6C) are classified separately due to the distinct origin of such Claims and based upon the terms of the Settlement. Intercompany Claims (Class 7) and Intercompany Interests (Class 9) are classified separately due to the intercompany nature of those claims and interests. Finally, Existing Equity Interests (Class 8) represent existing equity interests of the Debtors and are therefore classified separately.

38. Accordingly, the Claims or Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests in each such Class and the distinctions among Classes are based on valid business, factual, and legal distinctions. The differences in classification foster the Debtors' restructuring efforts and do not violate the absolute priority rule. Thus, the Debtors submit that the Plan fully complies with and satisfies the classification requirements of Bankruptcy Code section 1122.

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

39. Bankruptcy Code section 1123(a) sets forth eight criteria that every chapter 11 plan must satisfy.[27] As set forth below, the Plan satisfies each of these requirements.

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

40. Bankruptcy Code section 1123(a)(1) requires a plan to "designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests[.]"[28] Article V of the Plan

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[27] However, Bankruptcy Code section 1123(a)(8) is inapplicable to the Plan and not discussed herein because the Debtors are not "individuals" (as that term is defined in the Bankruptcy Code).

[28] 11 U.S.C. § 1123(a)(1).

designates eleven separate Classes and each Class contains Claims or Interests that are substantially similar,[29] thus satisfying Bankruptcy Code section 1123(a)(1).

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

41. Bankruptcy Code section 1123(a)(2) requires a plan to "specify any class of claims or interests that is not impaired under the plan[.]"[30] Article V of the Plan identifies each Class that is Unimpaired, including Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), and Class 9 (Intercompany Interests) as Unimpaired, thereby satisfying Bankruptcy Code section 1123(a)(2).

c. Treatment of Impaired Claims—Section 1123(a)(3).

42. Bankruptcy Code section 1123(a)(3) requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan[.]"[31] Article V of the Plan identifies each Class that is Impaired, including Class 3 (ABL Claims), Class 4 (Omega Term Loan Claims), Class 5 (Go-Forward Trade Claims), Class 6A (OpCo General Unsecured Claims), Class 6B (DivestCo General Unsecured Claims), Class 6C (Joint & Several OpCo General Unsecured Claims), Class 7 (Intercompany Claims), and Class 8 (Existing Equity Interests), and specifies the treatment of these Impaired Classes, thereby satisfying Bankruptcy Code section 1123(a)(3).

d. Equal Treatment of Similarly Situated Claims and Interests—Section 1123(a)(4).

43. Bankruptcy Code section 1123(a)(4) requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[32] Although

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[29] *See* Plan, Art. V. In accordance with Bankruptcy Code section 1123(a)(1), Priority Tax Claims, Administrative Expense Claims, and Professional Fee Claims have not been classified. *See* Plan, Art. IV.

[30] 11 U.S.C. § 1123(a)(2).

[31] 11 U.S.C. § 1123(a)(3).

[32] 11 U.S.C. § 1123(a)(4).

neither the Bankruptcy Code nor the legislative history precisely defines the standards of equal treatment, courts have interpreted the "same treatment" requirement under Bankruptcy Code section 1123(a)(4) to mean that all claimants in a class must have "the same opportunity for recovery."[33]

44. Here, Article V of the Plan provides that Holders of Allowed Claims or Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such Holder's respective Class, except as otherwise agreed to by a Holder of a particular Claim or Interest, thereby satisfying Bankruptcy Code section 1123(a)(4).

e. Adequate Means for Implementation—Section 1123(a)(5).

45. Bankruptcy Code section 1123(a)(5) requires that the Plan provide "adequate means" for its implementation.[34] "Adequate means" includes but is not limited to, "transfer of all or any part of the property of the estate to one or more entities," "sale of all or any part of the property of the estate," and "issuance of securities of the debtor . . . in exchange for claims or interests, or for any other appropriate purpose."[35]

46. Article VI of the Plan (Means for Implementation of the Plan), as well as other provisions thereof, provides adequate means for the Plan's implementation, including, among others:

(a) the settlement of certain Claims and Interests, pursuant to the Settlement;

(b) the sources of Cash required for payments to be made under the Plan on the Effective Date, as well as other sources of consideration for Plan distribution;

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[33] *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013); *see also In re Cent. Med. Ctr., Inc.*, 122 B.R. 568, 575 (Bankr. E.D. Mo. 1990) (concluding that a plan that "subjects all members of the same class to the same process for claim payment" is "sufficient to satisfy the requirements of section 1123(a)(4)").

[34] 11 U.S.C. § 1123(a)(5).

[35] *Id.*; *see also In re Stuart Glass & Mirror, Inc.*, 71 B.R. 332, 334 (Bankr. S.D. Fla. 1987) (stating that the proper test is whether the plan provides adequate means for its execution, as required by section 1123(a)(5), not whether alternative means might or might not be available).

(c) the execution and delivery of the GUC Trust Agreement and the creation of the GUC Trust;

(d) the cancellation of certain existing securities and other documents evidencing or creating any indebtedness or obligation or ownership in the Debtors;

(e) the authorization for the Debtors to take corporate actions necessary to effectuate the Plan;

(f) the funding of the Professional Fee Reserve;

(g) the assignment of D&O Claims, subject to certain limitations;

(h) exemption from certain transfer taxes and recording fees; and

(i) all other actions that the applicable Entities determine to be necessary or appropriate, including making filings or recordings that may be required by applicable law in connection with the Plan.

47. Additionally, various other provisions of the Plan, including, but not limited to, Article VII (Treatment of Executory Contracts and Unexpired Leases) and Article VIII (Provisions Governing Distributions), also provide adequate means for the Plan's implementation, further satisfying Bankruptcy Code section 1123(a)(5).

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

48. Bankruptcy Code section 1123(a)(6) requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities.[36] Article VI.B.8 of the Plan provides that the organizational documents of the Debtors will be amended to include, among other things, a provision prohibiting the issuance of non-voting equity securities, thereby satisfying Bankruptcy Code section 1123(a)(6), thereby satisfying Bankruptcy Code section 1123(a)(6).

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[36] *See* 11 U.S.C. § 1123(a)(6).

g. Selection of Directors and Officers—Section 1123(a)(7).

49. Bankruptcy Code section 1123(a)(7) requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy."[37] Pursuant to Article VI.B.9 of the Plan, on the Effective Date, any term of existing board of directors and officers will expire and new officers or directors will be appointed by the Reorganized Debtors.[38] On the Effective Date, the existing officers and managers of the Debtors (nearly all of which are limited liability companies) will be re-appointed as officers and managers of the Reorganized Debtors, subject to the ability of the Reorganized Debtors to make any future determination with respect to such individuals pursuant to the approval of the Reorganized Debtors after the Effective Date. Synergy is expected to provide back-office management services to the Reorganized Debtors on and after the Effective Date. Taken together, these disclosures satisfy Bankruptcy Code section 1123(a)(7).

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

a. Overview of the Plan's Compliance with Bankruptcy Code Section 1123(b).

50. Bankruptcy Code section 1123(b) sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, Bankruptcy Code section 1123(b) provides that a plan may (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases; (c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estate; and

[37] 11 U.S.C. § 1123(a)(7).
[38] *See* Plan, Art. VI.B.9.

(d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[39]

51. The Plan is consistent with Bankruptcy Code section 1123(b). Specifically, under Article V of the Plan, Classes 1, 2, and 9 are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of the Holders of Claims and Interests within such Classes. Classes 3, 4, 5, 6A, 6B, 6C, 7, and 8 are Impaired since the Plan modifies the rights of Holders of Claims and Interests within such Classes as contemplated by Bankruptcy Code section 1123(b)(1). In addition, Article VII of the Plan provides for the rejection of all Executory Contracts and Unexpired Leases, except to the extent set forth in the Plan and Plan Supplement, satisfying Bankruptcy Code section 1123(b)(2). Finally, as discussed below, the settlement and the release, exculpation, and injunction provisions contained in the Plan satisfy the governing standard and are permissible under Bankruptcy Code section 1123.

b. The Settlement Contained in the Plan Satisfies Bankruptcy Code Section 1123 and Bankruptcy Rule 9019.

52. Pursuant to Bankruptcy Code section 1123(b) and Bankruptcy Rule 9019, as part of the restructuring process, courts may approve a compromise or settlement.[40] To be approved, a settlement need only be "fair and equitable." In determining whether a settlement is fair and equitable, courts should evaluate the settlement "as a whole."[41] In making this determination, the court "should canvas the issues to determine whether the settlement falls above the lowest point in the range of reasonableness."[42] But it is not necessary for a court to conduct a "mini-trial" of the

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[39] *See* 11 U.S.C. § 1123(b).

[40] *See In re Coram Healthcare Corp.*, 315 B.R. 321, 334–35 (Bankr. D. Del. 2004) ("The standards for approval of a settlement under section 1123 are generally the same as those under Rule 9019.").

[41] *In re Wash. Mut., Inc.*, 442 B.R. 314, 329 (Bankr. D. Del. 2011) ("[E]ach part of the settlement must be evaluated to determine whether the settlement as a whole is reasonable . . . there are benefits to be recognized by a global settlement of all litigation . . . that may recommend a settlement that does not quite equal what would be a reasonable settlement of each part separately.").

[42] *In re Capmark Fin. Grp., Inc.*, 438 B.R. 471, 515 (Bankr. D. Del. 2010).

facts or the merits of the underlying disputes to be settled or "decide the numerous questions of law or fact raised by litigation."[43]

53. Courts in the 11th Circuit consider the following factors in determining whether a proposed settlement is fair, reasonable, and adequate:

(a) the probability of success in the litigation;

(b) the difficulties, if any, to be encountered in the matter of collection;

(c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and

(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.[44]

As set forth below, the Settlement contained in the Plan satisfies each of the foregoing factors, justifying its approval.

1) Probability of Success in Litigation

54. *First*, as described more fully in the Decker Declaration, the Debtors and the Committee undertook an extensive and independent evaluation of potential Estate Causes of Action arising from various prepetition transactions. Ultimately, the Debtors concluded that the facts did not support any material viable claims or causes of action that could be asserted by the Debtors against the Released Parties. Accordingly, the Debtors concluded that the value and benefits offered under the Settlement far outweighed the alternative of extended and expensive litigation with no certainty of recovery. The Committee, as a fiduciary to all unsecured creditors, also concluded that the value and benefits afforded to its constituency through the Settlement far outweighed the alternative of extended and expensive litigation with no certainty of recovery.

[43] *Id.*

[44] *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990); *In re Marvelay, LLC*, No. 18-69019-LRC, 2019 WL 3334706, at *5 (Bankr. N.D. Ga. July 23, 2019) (citing *Chira v. Saal (In re Chira)*, 567 F.3d 1307, 1312–13 (11th Cir. 2009)).

Even if litigation were to be pursued, any causes of action would be highly uncertain and would require significant, time-consuming discovery and expensive, protracted litigation were they to be prosecuted. Therefore, this factor weighs in favor of approving the Settlement.

2) The Likely Difficulties in Collection

55. *Second*, even if such Causes of Action were successfully prosecuted and resulted in an enforceable judgment, the ability to collect amounts owed by any perspective defendant may prove challenging. As a practical matter, any recovery to creditors would take years to achieve—the potential claims and Causes of Action have not yet been litigated and as such, they are nowhere close to the collection stage. Even if litigation success were achieved, a judgment by any court would likely be subject to multiple layers of appellate review. Although the Debtors have not fully analyzed the collectability of any judgment obtained against any of the putative defendants, needless to say, risks remain on achieving collection. In contrast, the Settlement secures funds for increased distribution to the Debtors' creditors, meaning that this factor also weighs in favor of approving the Settlement.

3) Complexity, Expense, and Delay Involved with Prosecuting the Causes of Action

56. *Third*, litigating the potential Causes of Action against the various potential non-Debtor defendants would require expending significant Estate resources, as such prosecution would likely involve years of contentious litigation, expensive expert analysis, and potentially lengthy appeals, all of which amount to substantial litigation costs. In general, settlements are favored in bankruptcy and this preference is particularly relevant in these Chapter 11 Cases, not only because of the limited resources available to the Debtors' Estates, but also in large part due to the expansive set of disputes that are resolved by the Settlement and the complexity and highly factual nature of the issues at play. The Debtors' current resources would be insufficient to enable

the Debtors to prosecute such Causes of Action and, even if financing were available on acceptable terms, such financing would not address the inconvenience and delay involved with such litigation, particularly at this juncture of the Chapter 11 Cases. The Settlement avoids the expense, inconvenience, and delay of prosecuting such Causes of Action and provides an expeditious, cost-effective resolution. Therefore, this factor also weighs in favor of approving the Settlement.

4) Paramount Interest of Creditors

57. *Finally*, the Settlement was negotiated with the interests of Holders of General Unsecured Claims at the forefront and is in the best interests of creditors, as it offers the best recovery outcomes compared to a chapter 7 liquidation. As discussed herein, potential recoveries for creditors in a chapter 7 liquidation, if any, would be significantly less than potential recoveries under the Plan. Both the Debtors and the Committee, each of whom spent months and significant dollars investigating these potential Claims and Causes of Action, independently determined that implementing the Settlement, thereby resolving significant issues without litigation, was in the best interests of the Debtors' Estates. As discussed more fully in the Jones Declaration, the Debtors' Waterfall Analysis meant that even if litigation were actually brought successfully and proceeds collected, such funds would likely not flow to holders of unsecured claims. Both the Debtors and the Committee independently determined that implementing the Settlement, thereby resolving significant issues without litigation, was in the best interest of the Debtors' Estates. As discussed above, the creditor recoveries currently set forth in the Plan are highly unlikely, if not impossible, to achieve absent the Settlement. Therefore, this fourth and final factor also weighs in favor of approving the Settlement.

58. Accordingly, the Settlement satisfies the *Wallis* factors, Bankruptcy Code section 1123(b), and Bankruptcy Rule 9019(a) and should be approved.

c. The Plan's Release, Exculpation, and Injunction Provisions Satisfy Bankruptcy Code Section 1123(b).

59. The Plan includes certain release, exculpation, and injunction provisions, including the Debtor Release, the Third-Party Release, the Exculpation, and the Injunction, each as defined herein. These discretionary provisions are proper because, among other things, (a) they are the product of extensive good faith, arm's-length negotiations, (b) were a material and necessary precondition for parties to enter into the Settlement, fund substantial consideration for the benefit of unsecured creditors, and support the Plan, (c) are supported by the Debtors, the Committee, and their key economic stakeholders, and (d) are consistent with applicable precedent. Further, these provisions were fully and conspicuously disclosed to all Voting Classes, Non-Voting Classes, and unclassified claimants through the applicable Ballots, Notices of Non-Voting Status, or the Combined Hearing Notice, as applicable, each of which excerpted the Third-Party Release, Exculpation, Injunction, the definitions of "Released Parties" and "Releasing Parties" as set forth in the Plan, and included a plain language disclaimer regarding the significance of the Third-Party Release.

1) The Debtor Release Complies with the Discretionary Provisions of Bankruptcy Code Section 1123(b) and Should be Approved.

60. As contemplated by Bankruptcy Code section 1123(b)(3)(A), which permits a debtor to include settlement of a debtor's claims as discretionary provisions in a chapter 11 plan, Article X.D.1 of the Plan provides for releases by the Debtors, as of the Effective Date, of, among other things, certain Causes of Action that the Debtors, the Reorganized Debtors, and their Estates

may have against the Released Parties (the "Debtor Release").[45] The Debtor Release only releases Claims and Causes of Action held by the Debtors and their Estate and is not a "third-party" release.

61. The Debtors have proposed the Debtor Release based on their business judgment, which is afforded wide deference when evaluating release of their own claims,[46] and submits that the Debtor Release easily meets the standard for Court-approved settlements, which require that a settlement "exceed the lowest point in the range of reasonableness" to be approved.[47] The Debtors believe—following an extensive independent investigation at the direction of Mr. Decker—that pursuing potential Claims or Causes of Action against the non-Debtor affiliates that are being released through the Settlement would not be in the best interests of the Debtors' various constituencies.

62. The Debtor Release reflects the important and substantial contributions, concessions, and compromises made by the Released Parties in the process of formulating and supporting the Plan and the Settlement. The Debtors believe that the Released Parties, including the Debtors' key stakeholders, likely would not have participated in the negotiations and compromises that led to the Settlement, and, ultimately, the Plan, without the Debtor Release. The Debtor Release was negotiated in good faith and at arm's-length by the parties to the Settlement, including the Debtors, the Committee, the Plan Sponsor, the DIP Lenders, and Omega, and was specifically required by the Plan Sponsor and Omega as a condition of the underlying settlement in exchange for the substantial consideration flowing to the Debtors' Estates for the benefit of

[45] *See* Plan, Art. X.D.1. The description of the Debtor Release is a summary and for convenience only. The terms of Article X.D.1 of the Plan shall control in all respects.

[46] *See In re Quincy Med. Ctr., Inc.*, No. 11-16394-MSH, 2011 WL 5592907, at *2 (Bankr. D. Mass. Nov. 16, 2011) ("With respect to a debtor's releases, there is no reason why a debtor in its reasonable business judgment should not be permitted, as part of its own plan, to propose to release whomever it chooses. Bankruptcy Code § 1123(b)(3) contemplates such plan provisions, which are analogous to Federal Rule of Bankruptcy Procedure 9019 compromises and settlements.").

[47] *See In re Martin*, 490 F.3d 1272, 1275-76 (11th Cir. 2007); *In re Exaeris, Inc.*, 380 B.R. 741, 746-47 (Bankr. D. Del. 2008); *In re Air Safety Int'l*, 336 B.R. 843, 852 (Bankr. S.D. Fla. 2005).

Holders of General Unsecured Claims. As such, the Debtor Release is an integral component of the Plan and the Settlement and complies with the Bankruptcy Code and applicable law. Accordingly, because the Debtor Release is a sound exercise of the Debtors' business judgment, a valid compromise of litigation, a critical component of the Plan, and in the best interests of the Debtors, their Estates, and their creditors, the Debtor Release should be approved pursuant to Bankruptcy Code section 1123(b)(3)(A) and Bankruptcy Rule 9019(a).

2) The Third-Party Release Complies with the Discretionary Provisions of Bankruptcy Code Section 1123(b) and Should be Approved.

63. Article X.D.2 of the Plan provides for a consensual third-party release that is an essential component of the Plan and THE Settlement (the "Third-Party Release")[48] and was conspicuously included in bold language in the Ballots and the Notices of Non-Voting Status, along with a checkbox via which the recipient could "opt out" of the Third-Party Release.

64. As discussed in greater detail herein, the U.S. Trustee, HHS, and the IRS lodge substantive objections to the Third-Party Release, arguing that it is a **non-consensual** third-party release that is no longer permitted after *Purdue*. However, as discussed in greater detail in the following sections, the Debtors submit that *Purdue* did not opine on what constitutes consent in a Third-Party Release, and did not change the landscape of "opt-out" third-party releases. To that end, each Ballot sent to the creditors in the Voting Classes and each Notice of Non-Voting Status sent to the creditors in the Non-Voting Classes contained the full text of the Third-Party Release, along with the definitions of "Releasing Parties" and "Released Parties" as well as a one-page, plain English disclaimer regarding the significance of the Third-Party Release. Additionally, the Combined Hearing Notice apprised creditors clearly and conspicuously of the existence of the

[48] *See* Plan, Art. X.D.2. The description of the Third-Party Release is a summary and for convenience only. The terms of Article X.D.2 of the Plan shall control in all respects.

Third-Party Release, the same plain English disclaimer, and set forth the mechanism by which such creditors could object to such release notwithstanding their Claim status.

65. Importantly, the contributions and waivers of claim proceeds contained in the Settlement are contingent upon the inclusion and approval of the Third-Party Release currently contained in the Plan. The global resolution embodied in the Plan and the projected recoveries for Holders of General Unsecured Claims is dependent upon substantial contributions from the Released Parties. The Released Parties may be unwilling to contribute funds for creditor recoveries without, in exchange, receiving certainty that such funds allow for certainty and finality for the parties providing the substantial contributions necessary to fund the Plan.

66. Accordingly, and as discussed in the subsequent sections, the Debtors submit that the Third-Party Release should be approved.

3) The Exculpation is Appropriate and Should be Approved.

67. Article X.E of the Plan contains an exculpation provision (the "Exculpation"), which exculpates only the Exculpated Parties[49] from certain acts or omissions, except for, among other things, (a) any Causes of Action expressly set forth in and preserved by this Plan or the Plan Supplement; and (b) any Causes of Action arising from willful misconduct, actual fraud or gross negligence of such applicable Exculpated Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction. Unlike third-party releases, exculpation provisions do not affect the liability of third parties but set a standard of care of gross negligence

[49] Under the Plan, "Exculpated Parties" means, collectively, and in each case in its capacity as such: (a) the Debtors; (b) the Committee and each member thereof (solely in its capacity as such); (c) each of the Patient Care Ombudspersons; (d) any retained Professional of the Debtors, and the Committee; and (d) the Debtors' directors and officers who served in such capacity during the pendency of the Chapter 11 Cases, including the CRO and the Independent Manager. *See* Plan, § 1.109.

or willful misconduct in future litigation by a non-releasing party against an exculpated party for acts arising out of a debtor's restructuring efforts.[50]

68. Here, the Exculpated Parties have participated in good faith in formulating, negotiating, and supporting the Plan as it relates to the Debtors, and should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties for their actions over the course of the Chapter 11 Cases. The scope of the Exculpation is targeted and has no effect on liability that is determined to have resulted from actual fraud, gross negligence, or willful misconduct. Moreover, the Exculpation and the liability standard it sets represent a conclusion of law that flows logically from certain findings of fact that the Court must reach in confirming the Plan. For example, the Court must find that the Debtors have complied with the applicable provisions of the Bankruptcy Code and that the Plan has been proposed in good faith and not by any means forbidden by law. Where such findings are made, parties who have been actively involved in such negotiations, including the Debtors and their professionals and the Committee and its professionals, should be protected from collateral attack. The Exculpation is justified by the facts and circumstances of the Debtors' restructuring and supported by applicable law. Therefore, the Exculpation should be approved.

4) The Injunction is Appropriate and Should be Approved.

69. Article X.F of the Plan implements the Plan's release and exculpation provisions, in part, by permanently enjoining all entities from, with respect to any Claims or Interests, (a) commencing or maintaining any action; (b) enforcing, attaching, collecting, or recovering any judgment; (c) creating, perfecting, or enforcing any encumbrance; (d) asserting any right of setoff,

[50] *See In re PWS Holding Corp.*, 228 F.3d 224, 230 (3d Cir. 2000) (finding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code").

subrogation, or recoupment, unless such Holder has filed a motion requesting the right to perform such setoff; (e) acting or proceeding in any manner that does not conform to or comply with the Plan; or (f) commencing or continuing any action settled pursuant to the Plan against the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties (the "Injunction"). The Injunction is a key provision of the Plan because it enforces the Debtor Release, the Third-Party Release, and the Exculpation that are centrally important to the Plan, as discussed above. As such, to the extent that the Court finds that the Debtor Release, the Third-Party Release, and the Exculpation are appropriate, the Debtors respectfully submit that the Injunction must also be appropriate. Moreover, this Injunction is narrowly tailored to achieve its purpose and accordingly should be approved.

d. The Plan Modifies the Rights of Certain Classes—Section 1123(b)(5).

70. Bankruptcy Code section 1123(b)(5) provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."[51] Article V of the Plan modifies the rights of Holders of Claims in Classes 3, 4, 5, 6A, 6B, 6C, 7, and 8. The Plan leaves unaffected the rights of Holders of Claims in Classes 1, 2, and 9. Therefore, the Plan satisfies Bankruptcy Code section 1123(b)(5).

e. The Plan Complies with Bankruptcy Code Section 1123(d).

71. Bankruptcy Code section 1123(d) provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and non-bankruptcy law."[52] The Plan provides for the satisfaction of

[51] 11 U.S.C. § 1123(b)(5).
[52] 11 U.S.C. § 1123(d).

monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan, in the ordinary course of business, or on such other terms as the parties may otherwise agree, subject to the limitations described in Article VII of the Plan, satisfying Bankruptcy Code section 1123(d).

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

72. Bankruptcy Code section 1129(a)(2) requires that the "proponent of the plan compl[y] with the applicable provisions of the [Bankruptcy Code]."[53] The legislative history of Bankruptcy Code section 1129(a)(2) explains that this provision refers to the disclosure and solicitation requirements set forth in Bankruptcy Code sections 1125 and 1126.[54] As set forth herein, the Debtors have satisfied Bankruptcy Code section 1129(a)(2) because it complied with Bankruptcy Code sections 1125 and 1126 regarding disclosure and solicitation of the Plan.

i. The Debtors Complied with Bankruptcy Code Section 1125.

a. The Debtors Obtained Conditional Approval of the Disclosure Statement in Advance of Solicitation.

73. On October 1, 2024, the Court entered the Solicitation Procedures Order, which conditionally approved both the Disclosure Statement as containing adequate information and the Solicitation Procedures.[55]

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53 11 U.S.C. § 1129(a)(2).

54 *See* H.R. Rep. No. 95-595, at 412 (1977 ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Lapworth*, No. 97-34529 (DWS), 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998 ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); *In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code").

55 *See* Docket No. 480.

b. The Debtors Complied with the Notice Requirements Set Forth in the Solicitation Procedures Order.

74. As discussed above, on October 7, 2024, the Debtors caused the Solicitation Agent to distribute the Solicitation Packages to Holders of Claims entitled to vote to accept or reject the Plan as of the Voting Record Date, as authorized by the Solicitation Procedures Order. Additionally, the Debtors also caused the Solicitation Agent to mail the Combined Hearing Notice to creditors and notice parties by first-class mail and/or electronic mail. The Combined Hearing Notice informed recipients of, among other things, (a) the date and time set for the Combined Hearing and (b) the deadline for filing objections to the Plan and adequacy of the Disclosure Statement. Based on the foregoing, the Debtors submit that they complied with the notice requirements set forth in the Solicitation Procedures Order.

c. The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Solicitation Procedures Order.

75. The forms of Ballots used to solicit votes to accept or reject the Plan comply with the Bankruptcy Rules and were approved by the Court pursuant to the Solicitation Procedures Order. No party has objected to the sufficiency of the Ballots. Based on the foregoing, the Debtors submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(c).

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

76. The Debtors' solicitation period complied with the Solicitation Procedures Order and Bankruptcy Rule 3018(b). First, the Plan and Disclosure Statement were transmitted to all Holders of Claims entitled to vote on the Plan on or about October 7, 2024. Second, the solicitation period, which lasted from October 7, 2024 to November 4, 2024, complied with the Solicitation

Procedures Order and was adequate under the particular facts and circumstances of these Chapter 11 Cases, as the Voting Classes were afforded 28 days to vote on the Plan. Accordingly, the Debtors submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(b).

e. The Debtors' Vote Tabulation Procedures Complied with the Solicitation Procedures Order.

77. The Debtors request that the Court find that the Debtors' tabulation of votes, through their Solicitation Agent, complied with the Solicitation Procedures Order. The Solicitation Agent reviewed all Ballots received, in accordance with the Solicitation Procedures approved in the Solicitation Procedures Order. Because the Solicitation Agent complied with the Solicitation Procedures, the Debtors respectfully submit that the Court should approve the Debtors' tabulation of votes.

f. Solicitation of the Plan Complied with the Bankruptcy Code and was Conducted in Good Faith.

78. Bankruptcy Code section 1125(e) provides that "a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan.[56] As demonstrated by the Debtors' arm's-length negotiations with their key stakeholders and their compliance with the Solicitation Procedures Order, the Debtors at all times engaged in good-faith negotiations and took appropriate actions in connection with the solicitation of the Plan in compliance with Bankruptcy Code section 1125. Therefore, the Debtors respectfully request that the Court grant the parties the protections provided under Bankruptcy Code section 1125(e).

[56] 11 U.S.C. § 1125(e).

ii. The Debtors Complied with Bankruptcy Code Section 1126.

79. Bankruptcy Code section 1126 specifies the requirements for acceptance of a plan of reorganization.[57] Specifically, under Bankruptcy Code section 1126, only holders of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan.[58] Bankruptcy Code section 1126 provides, in pertinent part, that: "[t]he holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . ." and "[n]otwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances to such class from the holders of claims or interests of such class is not required."[59]

80. As set forth above, in accordance with Bankruptcy Code section 1125, the Debtors solicited acceptances or rejections of the Plan from the Holders of Claims in Classes 3, 4, 5, 6A, 6B, and 6C. The Debtors did not solicit votes from Holders of Claims and Interests in Classes 1, 2, or 9 because Holders of Claims and Interests in these Classes are Unimpaired and pursuant to Bankruptcy Code section 1126(f), are conclusively presumed to have accepted the Plan. The Debtors also did not solicit votes from Holders of Claims and Interests in Classes 7 or 8 because they are Impaired and conclusively deemed to have rejected the Plan, pursuant to Bankruptcy Code section 1126(g). Thus, pursuant to Bankruptcy Code section 1126(a), only Holders of Claims in Classes 3, 4, 5, 6A, 6B, and 6C were entitled to vote to accept or reject the Plan. Based on the

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[57] *See generally* 11 U.S.C. § 1126.

[58] *See* 11 U.S.C. § 1126(a); 11 U.S.C. § 1126(f).

[59] 11 U.S.C. § 1126(f).

foregoing, the Debtors submit that they have satisfied the requirements of Bankruptcy Code section 1129(a)(2).

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

81. Bankruptcy Code section 1129(a)(3) requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law."[60] Although the term "good faith" is left undefined in the Bankruptcy Code, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirements of section 1129(a)(3) are satisfied."[61]

82. Here, the Plan was proposed in good faith to effectuate the terms and purpose of the Bankruptcy Code and not by any means forbidden by law. The Plan was the product of extensive arms-length negotiations among the Debtors, the Committee, the Plan Sponsor, the DIP Lenders, Omega, and certain other parties, and the Plan is consistent with the interests of creditors. The Plan, therefore, satisfies the "good faith" requirement of Bankruptcy Code section 1129(a)(3).

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

83. Bankruptcy Code section 1129(a)(4) requires that certain fees and expenses paid by the plan proponent or by the debtor be subject to approval by the Court as reasonable.[62] Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the court as to their reasonableness.[63]

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[60] 11 U.S.C. § 1129(a)(3).

[61] *In re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995); *see also In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Zenith Elecs. Corp.*, 241 B.R. at 107.

[62] *See* 11 U.S.C. § 1129(a)(4).

[63] *See In re Lisanti Foods, Inc.*, 329 B.R. 491, 503 (D.N.J. 2005), *aff'd*, 241 F. App'x 1 (3d Cir. 2007) ("Pursuant to § 1129(a)(4), a [p]lan should not be confirmed unless fees and expenses related to the [p]lan have been approved, or are subject to the approval, of the Bankruptcy Court."); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988).

84. The Plan satisfies Bankruptcy Code section 1129(a)(4). The Debtors submit that payment of Professional Fee Claims is the only category of payments that falls within the ambit of Bankruptcy Code section 1129(a)(4) in the Chapter 11 Cases, and the Debtors may not pay Professional Fee Claims absent Court approval. Further, pursuant to Article IV.C of the Plan, all such Professional Fee Claims and corresponding payments are subject to prior Court approval.[64] Finally, as of the Effective Date, funds in the Professional Fee Reserve shall be held in trust solely for the Allowed Professional Fee Claims.[65] Therefore, the Plan complies with the requirements of Bankruptcy Code section 1129(a)(4).

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

85. Bankruptcy Code section 1129(a)(5) requires various disclosures regarding a debtor's officers and directors after plan confirmation.[66] Specifically, Bankruptcy Code section 1129(a)(5)(A)(i) requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors.[67] Bankruptcy Code section 1129(a)(5)(B) requires a plan proponent to disclose the identity of an "insider" (as defined by Bankruptcy Code section 101(31)) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider. Additionally, the Bankruptcy Code provides that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[68] Bankruptcy Code section 1129(a)(5)(A)(ii) directs this Court to ensure that the post-confirmation governance of the reorganized debtors is in "good hands," which courts have interpreted to mean (a) experience in

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[64] *See* Plan, Art. IV.C.1.
[65] *See* Plan, Art. IX.H.2.
[66] *See* 11 U.S.C. § 1129(a)(5).
[67] *See* 11 U.S.C. § 1129(a)(5)(A)(i).
[68] *See* 11 U.S.C. § 1129(a)(5)(B).

the reorganized debtors' business and industry; (b) experience in financial management matters; (c) that the debtors and creditors believe control of the entity by the proposed individuals will be beneficial; and (d) does not perpetuate incompetence, lack of discretion, inexperience, or affiliations with groups unfavorable to the best interests of the debtor.[69]

86. The Plan satisfies section 1129(a)(5) of the Bankruptcy Code. In accordance with Article VI.B.9 of the Plan, on the Effective Date, the existing officers and managers of the Debtors (nearly all of which are limited liability companies) will be re-appointed as officers and managers of the Reorganized Debtors, subject to the ability of the Reorganized Debtors to make any future determination with respect to such individuals pursuant to the approval of the Reorganized Debtors after the Effective Date. Synergy is expected to provide back-office management services to the Reorganized Debtors on and after the Effective Date. Therefore, the Debtors submit that the above facts and circumstances satisfy Bankruptcy Code section 1129(a)(5).

F. The Plan Does Not Require Governmental Regulatory Approval—Section 1129(a)(6).

87. Bankruptcy Code section 1129(a)(6) permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change (*e.g.*, the price of utility services) provided for in the plan.[70] The Plan does not provide for the change of any rates subject to the oversight of a governmental regulatory commission, meaning that Bankruptcy Code section 1129(a)(6) is inapplicable to these Chapter 11 Cases.

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[69] *See, e.g.*, *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 760; *In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); *In re Sherwood Square Assoc.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989); *In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990); *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).

[70] *See* 11 U.S.C. § 1129(a)(6).

G. The Plan is in the Best Interests of All of the Debtors' Creditors—Section 1129(a)(7).

88. Bankruptcy Code section 1129(a)(7), commonly known as the "best interests test," requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either (a) accepted the plan or (b) will receive or retain property having a value not less than the value such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code.[71] The best interests test applies to individual dissenting holders of impaired claims and interests rather than classes[72] and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[73]

89. Under the best interests test, "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."[74] Therefore, a plan proponent satisfies its evidentiary burden with respect to the best interests test by providing "a liquidation analysis of some type that is based on evidence and not mere assumptions or assertions."[75] The court must evaluate such liquidation

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[71] *See* 11 U.S.C. § 1129(a)(7); *In re PWS Holding Corp.*, 228 F.3d at 230; *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988).

[72] *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan.").

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

[74] *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007); *In re W.R. Grace & Co.*, 475 B.R. 34, 141 (D. Del. 2012), *aff'd sub nom. In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013), and *aff'd*, 532 F. App'x 264 (3d Cir. 2013), and *aff'd sub nom. In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013), and *aff'd*, 729 F.3d 311 (3d Cir. 2013) (finding that the best interests test requires that "every creditor to a Chapter 11 reorganization receive at least the liquidation value of its claim under the plan as it would in a Chapter 7 proceeding against the debtor").

[75] *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 366 (S.D.N.Y. 2007).

analysis, keeping in mind 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."[76]

90. The best interests test is satisfied with respect to each rejecting creditor or interest holder in these Chapter 11 Cases. To demonstrate the Plan's compliance with the best interests test, the Debtors prepared the hypothetical liquidation analysis attached to the Disclosure Statement as Exhibit A (the "Liquidation Analysis"). As set forth in the Jones Declaration, the Liquidation Analysis compares the projected recoveries that would result from the liquidation of the Debtors in a hypothetical conversion to chapter 7 of the Bankruptcy Code with the estimated recoveries to Holders of Allowed Claims and Interests under the Plan. The Liquidation Analysis is based on the estimated value of the Debtors' assets and liabilities as of the Liquidation Date in a forced sale by a chapter 7 trustee, and incorporates various estimates and assumptions, including the projected costs associated with the administration of the estates and wind-down of the Debtors' operations in a hypothetical conversion to a chapter 7 liquidation. Further, the assumptions contained within the Liquidation Analysis are subject to potentially material changes, including with respect to economic and business conditions as well as legal rulings.

91. Here, the best interests test is satisfied because the Liquidation Analysis shows that projected recoveries for Impaired Classes under the Plan are equal to or in excess of the recoveries estimated in a hypothetical chapter 7 liquidation. Accordingly, because recovery for unsecured creditors provided by the Plan is equal to or far exceeds the available unsecured creditor recovery

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[76] *In re Affiliated Foods, Inc.*, 249 B.R. 770, 788 (Bankr. W.D. Mo. 2000) (citation omitted); *In re W.R. Grace & Co.*, 475 B.R. at 142 ("[T]he court need only make a well-reasoned estimate of the liquidation value that is supported by the evidence on the record. It is not necessary to itemize or specifically determine precise values during this estimation procedure. Requiring such precision would be entirely unrealistic because exact values could only be found if the debtor actually underwent Chapter 7 liquidation.").

in a chapter 7 liquidation, the Plan is in the best interests of creditors and complies with Bankruptcy Code section 1129(a)(7).

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

92. Bankruptcy Code section 1129(a)(8) requires that each class of claims or interests under a plan must either accept a plan or be unimpaired under a plan.[77] 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 vote to accept the plan— counting only those claims whose holders actually vote.[78] "A class of interests has accepted a plan if such plan has been accepted by holders of such interests . . . that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests . . . that have accepted or rejected such plan."[79]

93. As discussed above, Class 3 (ABL Claims), Class 4 (Omega Term Loan Claims), Class 6A (OpCo General Unsecured Claims), and Class 6C (Joint & Several OpCo General Unsecured Claims) voted to accept the Plan by more than two-thirds in amount and more than one-half in number.[80] Additionally, the Holders of Claims in Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), and Class 9 (Intercompany Interests) are Unimpaired under the Plan within the meaning of Bankruptcy Code section 1124 and are conclusively presumed to have accepted the Plan. Even though Class 6B (DivestCo General Unsecured Claims) voted to reject the Plan and Class 7 (Intercompany Claims) and Class 8 (Existing Equity Interests) are deemed to reject the Plan, meaning that the requirements of Bankruptcy Code section 1129(a)(8) have not been met, the Court may "cram down" the Plan over the rejection or deemed rejection by such

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77 *See* 11 U.S.C. § 1129(a)(8).
78 *See* 11 U.S.C. § 1126(c).
79 11 U.S.C. § 1126(d).
80 *See* Voting Decl., Ex. A.

Classes, subject to further protections specified in Bankruptcy Code section 1129(b), as discussed below.

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

94. Bankruptcy Code section 1129(a)(9) requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments.[81] The Plan satisfies Bankruptcy section 1129(a)(9) of the Bankruptcy Code. First, Article IV.A of the Plan satisfies Bankruptcy Code section 1129(a)(9)(A) because it provides that each Holder of an Allowed Administrative Expense Claim will receive Cash equal to the amount of such Allowed Administrative Expense Claim either in the ordinary course of business or on the later of the Effective Date and the date on which such Claim becomes an Allowed Claim (or as soon as reasonably practicable thereafter).[82] Second, the Plan satisfies Bankruptcy Code section 1129(a)(9)(B) because no Holders of the Claims specified in section 1129(a)(9)(B) are Impaired under the Plan.[83] Third, Article IV.B of the Plan specifically provides that Holders of Allowed Priority Tax Claims shall be treated in accordance with the terms of Bankruptcy Code section 1129(a)(9)(C)-(D).[84] Accordingly, the Plan thus satisfies each of the requirements of Bankruptcy Code section 1129(a)(9).

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

95. Bankruptcy Code section 1129(a)(10) provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without

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[81] *See* 11 U.S.C. § 1129(a)(9).
[82] *See* Plan, Art. IV.A.
[83] *See* Plan, Arts. IV.B, V.B.1.i.
[84] *See* Plan, Art. IV.B.

including any acceptance of the plan by any insider."[85] Here, Class 3 (ABL Claims), Class 4 (Omega Term Loan Claims), Class 6A (OpCo General Unsecured Claims), and Class 6C (Joint & Several OpCo General Unsecured Claims)—which are Impaired Classes entitled to vote on the Plan—voted to accept the Plan independent of any insiders' votes, satisfying Bankruptcy Code section 1129(a)(10) of the Bankruptcy Code.

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

96. Bankruptcy Code section 1129(a)(11) requires that the Court find that a plan is feasible as a condition precedent to confirmation.[86] For this requirement, courts look to see whether the debtor can realistically carry out provisions of the plan and whether the plan offers reasonable prospects of success.[87] To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[88] Rather, a debtor must provide only a reasonable assurance of success, which requires a relatively low threshold of proof.[89]

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

- the adequacy of the capital structure;
- the earning power of the business;
- the economic conditions;
- the ability of management;
- the probability of the continuation of the same management; and
- any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[90]

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[85] 11 U.S.C. § 1129(a)(10).

[86] *See* 11 U.S.C. § 1129(a)(11).

[87] *See In re IPC Atlanta Ltd. P'ship*, 142 B.R. 547, 559–60 (Bankr. N.D. Ga. 1992); *see also In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (citations omitted) ("This definition [of feasibility] has been slightly broadened and contemplates whether the debtor can realistically carry out its plan, . . . and whether the plan offers a reasonable prospect of success and is workable.").

[88] *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.*, 475 B.R. at 115.

[89] *See In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (noting that the Bankruptcy Code does not require a debtor to prove that success is inevitable and a relatively low threshold of proof will satisfy section 1129(a)(11), as long as adequate evidence supports a finding of feasibility); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), on reconsideration, 464 B.R. 208 (Bankr. D. Del. 2011).

[90] *See, e.g.*, *In re Aspen Village at Lost Mountain Memory Care, LLC*, 609 B.R. 536, 544 (Bankr. N.D. Ga. 2019); *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *28 (Bankr. D. Del. May 13, 2010).

98. The Plan is feasible. The Debtors and their advisors have analyzed their ability post-Confirmation to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring. The Debtors' management team designed and made significant progress in implementing a business plan that will better position the Debtors to succeed given current industry trends. Moreover, as set forth in Exhibit B to the Combined Disclosure Statement and Plan, the Debtors prepared projections of the Debtors' financial performance through the end of 2027 (the "Financial Projections"). The Financial Projections reflect a series of realistic assumptions regarding the Debtors and their industry. The detailed projections demonstrate the Debtors' ability to generate sufficient Cash to meet the ongoing financial obligations of the business and otherwise meet their obligations under the Plan. On the basis of the Financial Projections, the Debtors believe their financial future, taking into account the provisions of the Plan, is sound.

99. Accordingly, the Debtors believe the Plan is feasible and Confirmation will not be followed by a liquidation and, thus, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

L. All Statutory Fees Have Been or Will be Paid—Section 1129(a)(12).

100. Bankruptcy Code section 1129(a)(12) requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan."[91] Bankruptcy Code section 507(a)(2) provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses.[92] Article XVI.C of the Plan provides that all fees and charges under 28 U.S.C. § 1930(a), to the extent not previously paid and due and owing, will be paid for

[91] 11 U.S.C. § 1129(a)(12).
[92] 11 U.S.C. § 507(a)(2).

each quarter (or any fraction thereof) until the applicable chapter 11 case of a Reorganized Debtor is converted, dismissed, or closed, whichever occurs first.[93] Therefore, the Plan satisfies Bankruptcy Code section 1129(a)(12).

M. Bankruptcy Code Sections 1129(a)(13)-(16) Do Not Apply to the Plan.

101. Bankruptcy Code section 1129(a)(13) is inapplicable because the Debtors do not provide "retiree benefits" within the meaning of Bankruptcy Code section 1114.[94] Since the Debtors are not subject to any domestic support obligations, the requirements of Bankruptcy Code section 1129(a)(14) do not apply. Because the Debtors are not "individuals," the requirements of Bankruptcy Code section 1129(a)(15) do not apply. Finally, the Debtors are for-profit businesses—Bankruptcy Code section 1129(a)(16) is therefore inapplicable because by its terms applies only to corporations and trusts that are not "moneyed, business, or commercial."[95]

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

102. Bankruptcy Code section 1129(b)(1) provides that, if all applicable requirements of Bankruptcy Code section 1129(a) are met other than Bankruptcy Code section 1129(a)(8), a plan may be confirmed so long as the requirements set forth in Bankruptcy Code section 1129(b) are satisfied.[96] To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy Bankruptcy Code section 1129(a)(8)), the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes).[97]

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93 *See* Plan, Art. XVII.C.
94 *See* 11 U.S.C. § 1129(a)(13).
95 *Id.* at § 1129(a)(16).
96 *See* 11 U.S.C. § 1129(b)(1).
97 *See In re Riddle*, 444 B.R. 681, 686 (Bankr. N.D. Ga. 2011); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of reorganization, the

103. The Plan satisfies Bankruptcy Code section 1129(b). Four of the six Impaired Classes of Claims entitled to vote on the Plan—Classes Class 3 (ABL Claims), Class 4 (Omega Term Loan Claims), Class 6A (OpCo General Unsecured Claims), and Class 6C (Joint & Several OpCo General Unsecured Claims)— voted to accept the Plan. Class 5 (Go-Forward Trade Claims) did not cast a vote with respect to the Plan, as such Holder elected to receive treatment in Class 6A and 6B, respectively. Class 6B (DivestCo General Unsecured Claims) voted to reject the Plan and Holders of Intercompany Claims in Class 7 and Existing Equity Interests in Class 8 were deemed to reject the Plan. The Plan is nonetheless confirmable because, as discussed in greater detail below, it satisfies the "cramdown" requirements of Bankruptcy Code section 1129(b) with respect to Classes 6B, 7, and 8 (collectively, the "Rejecting Classes").

i. The Plan Does Not Discriminate Unfairly with Respect to Impaired Classes that Have Not Voted to Accept the Plan—Section 1129(b)(1).

104. Bankruptcy Code section 1129(b)(1) requires that a plan "does not discriminate unfairly . . . with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[98] Thus, under the plain language of this provision, "unfair discrimination" only applies to classes of creditors that reject the plan. Therefore, a dissenting creditor within a class that has accepted the plan cannot claim unfair discrimination.[99]

105. In general, courts have held that a plan unfairly discriminates in violation of Bankruptcy Code section 1129(b) only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so.[100] A

court shall nonetheless confirm the plan if it 'does not discriminate unfairly and is fair and equitable'"); *In re Ambanc La Mesa L.P.*, 115 F.3d 650, 653 (9th Cir. 1997).

[98] 11 U.S.C. § 1129(b)(1).

[99] *See In re Tribune Co.*, 972 F.3d 228, 242 (3d Cir. 2020); *In re Aegerion Pharmaceuticals, Inc.*, 605 B.R. 22, 32–33 (Bankr. S.D.N.Y. 2019).

[100] *See, e.g.*, *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 310-11 (Bankr. S.D.N.Y. 2016) ("Courts generally will approve placement of similar claims in different classes provided there is a 'rational' or 'reasonable' basis for doing so."); *In re Coram Healthcare Corp.*, 315 B.R. at 349 (noting that separate classification and treatment of

threshold inquiry to assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.[101] Accordingly, as between classes of claims, there is no unfair discrimination if (a) the classes each consist of dissimilar claims or interests, or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[102]

106. The Plan does not discriminate unfairly with respect to Class 6B (DivestCo General Unsecured Claims), Class 7 (Intercompany Claims), and Class 8 (Intercompany Interests) because there is a reasonable and nondiscriminatory reason for the separate classification of these Impaired Classes. Accordingly, the Plan does not discriminate unfairly with respect to Classes 6B, 7, or 8.

ii. The Plan is Fair and Equitable—Section 1129(b)(2)(B)(ii).

107. A plan is considered "fair and equitable" pursuant to Bankruptcy Code sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) if, with respect to a class of impaired unsecured claims or interests, the plan provides that either (i) an impaired rejecting class of claims or interests be paid in full or (ii) a class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[103] This is referred to as the "absolute priority rule," which requires that if the holders of claims in a particular rejecting class receive less than full value

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claims is acceptable if it is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination).

[101] *See In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *31 (Bankr. D. Del. May 13, 2010); *see also In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (indicating that the standard "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes").

[102] *See, e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 714, 715 (Bankr. S.D.N.Y. 1992) (separate classification and treatment was rational where members of each class "possess[ed] different legal rights").

[103] *See* 11 U.S.C. § 1129(b)(2)(B)-(C).

for their claims, no holders of claims or interests in a junior class may receive any property under the plan.[104]

108. The Plan is fair and equitable because, under the Plan, no Holder of a Claim or Interest junior to an Impaired rejecting Class of Claims or Interests will receive any recovery under the Plan on account of such Claim or Interest. In addition, no Class is receiving more than the value of its Claims in exchange for such Claims. In particular, no Holders of Claims or Interests junior to Class 6B, Class 7, or Class 8 will receive or retain or retain any property under the Plan. Accordingly, the Plan is "fair and equitable" with respect to the Rejecting Classes and satisfies Bankruptcy Code section 1129(b).

O. The Plan Complies with the Other Provisions of Bankruptcy Code Section 1129—Section 1129(c)-(e).

109. The Plan satisfies the remaining provisions of Bankruptcy Code section 1129. First, Bankruptcy Code section 1129(c), which prohibits confirmation of multiple plans, is not implicated here because the Plan is the only plan filed in these Chapter 11 Cases.[105] Second, Bankruptcy Code section 1129(d) provides that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[106] Here, the purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933 and no government unit or any other party has requested that the Court decline to confirm the Plan on such grounds, satisfying Bankruptcy Code section 1129(d). Finally, Bankruptcy Code section 1129(e) is inapplicable because the Chapter 11 Cases

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[104] *See Bank of Am. Nat. Trust and Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999) (describing the absolute priority rule); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (the absolute priority rule, "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan") (quotations and citations omitted).

[105] *See* 11 U.S.C. § 1129(c).

[106] 11 U.S.C. § 1129(d).

are not "small business cases."[107] Therefore, the Plan satisfies the remaining provisions of Bankruptcy Code section 1129(c)-(e).

110. In sum, because all factors under Bankruptcy Code section 1129 as well as other related factors under the Bankruptcy Code are satisfied, the Debtors submit that Confirmation of the Plan is both appropriate and merited, and all outstanding Objections suggesting otherwise should be overruled, as discussed below.

THE UNRESOLVED OBJECTIONS SHOULD BE OVERRULED

I. The UST Objection Should be Overruled.

A. The Third-Party Release is consensual and should be approved.

111. As noted above, the U.S. Trustee objects to the Third-Party Release relying, in large part, on a misreading of the Supreme Court's opinion in *Harrington v. Purdue Pharma L.P.* ("Purdue"),[108] as well as out of Circuit law applying **state contract** law to determine what constitutes consent in the **federal bankruptcy** context. For the reasons discussed herein, the Debtors submit that the UST Objection should be overruled and the Third-Party Release should be approved.

i. Nothing in *Purdue* changes the consensual nature of the Third-Party Release.

112. In support of the UST Objection, the U.S. Trustee misconstrues *Purdue*, which held that the Bankruptcy Code does not allow for the inclusion of non-consensual third-party releases in chapter 11 plans outside the context of Bankruptcy Code section 524(g) and that, if a proposed chapter 11 plan contains a release of a creditor's direct claim against a third-party non-debtor, the creditor must consent to the release of its claim.[109] Importantly, however, the Supreme Court

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[107] 11 U.S.C. § 1129(e).
[108] 144 S. Ct. 2071 (2024).
[109] *See id.*

expressly acknowledged that its opinion was narrow and did not express a view on what constitutes consent:

> As important as the question we decide today are ones we do not. **Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan**; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. **Nor do we have occasion today to express a view on what qualifies as a consensual release** . . . Confining ourselves to the question presented, we hold 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.[110]

113. The Honorable Judge Lopez in the Southern District of Texas recently highlighted this point in his opinion confirming the proposed chapter 11 plan in *RobertShaw*:

> [T]he *Purdue* decision was about non-consensual third-party releases and **the Supreme Court said nothing should cast doubt on consensual ones** . . . **Nothing is construed to question consensual third-party releases offered in connection with a chapter 11 plan.** There was also no occasion for the Supreme Court to express a view on what constitutes a consensual release. The Supreme Court confined its decision to the question presented. This Court will not narrow or expand the scope of the Supreme Court's holding. **These words must be read literally**.[111]

Accordingly, nothing in *Purdue* supports, much less mandates, revisiting longstanding practice by courts within the Eleventh Circuit and others under which **consensual** third-party releases have been consistently held to be permissible where creditors have the opportunity to opt-out. Because the Third-Party Release is consensual, as discussed below, *Purdue* does not apply to the Chapter 11 Cases and does not prohibit the inclusion of the Third-Party Release in the Plan.

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[110] *Id.* at 2088 (emphasis added).

[111] *See In re RobertShaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. Aug. 16, 2024) (emphasis added); *see also Murray v. Dinsmore & Shohl, LLP (In re Murray Energy Holdings)*, No. 19-56885, 2024 WL 4664543, at *6 (Bankr. S.D. Ohio Oct. 31, 2024) ("Purdue Pharma did not . . . otherwise alter the law governing consensual releases in Chapter 11 plans.").

ii. Bankruptcy law, rather than state law, determines what constitutes consent.

114. The U.S. Trustee submits that *Purdue* and the case law interpreting it requires the Court to examine whether the Third-Party Release is consensual under state contract law, rather than federal bankruptcy law.[112] The U.S. Trustee's arguments are unavailing.

115. Though the Debtors recognize that courts are split as to whether state law consent or federal bankruptcy issues in the bankruptcy context,[113] the Debtors believe that the more persuasive (and predominant) cases find that the law of consent under state law is not controlling.[114] Numerous courts have discussed this topic and, though pre-*Purdue*, these opinions still constitute persuasive law because, as noted above, *Purdue* does not prohibit consensual third-party releases, nor does it express a view as to what constitutes consent. By way of example, Judge Dorsey approved an opt-out provision in *Mallinckrodt* and, in analyzing the appropriateness of such mechanic, stated as follows:

> **<u>The notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system</u>**. There is no reason why this principal should not be applied in the same manner to properly noticed releases within a plan of reorganization.
>
> The result might be quite different if the notice regarding the ability to opt out was insufficient. Here, however, there is ample evidence in the record that the releasing parties were sent notices in a variety of ways that explained in no uncertain terms that action was required to preserve claims.

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[112] *See* UST Obj., ¶¶ 16-20.

[113] *See, e.g.*, *In re Smallhold, Inc.*, No. 24-10267, 2024 WL 4296938, at *3 (Bankr. D. Del. Sept. 25, 2024); *In re Tonawanda Coke Corp.*, 662 B.R. 220, 223 (Bankr. W.D.N.Y. Aug. 27, 2024).

[114] *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 273 (Bankr. D. Del. 2017) ("[T]here is no state law equivalent to confirmation of a plan. And, third party releases do not exist without regard to the bankruptcy proceeding. Rather, a ruling approving third party releases is a determination that the plan at issue meets the **<u>federally created requisites for confirmation and third party releases</u>**.") (emphasis added); *id.* ("There is no state law analogue; **<u>third party releases in chapter 11 plans are quintessentially federal in nature</u>**. Whether this requested relief [i.e., approval of nonconsensual third-party releases] is permissible or not is **<u>based entirely on federal bankruptcy law</u>**—the *Continental* hallmarks.") (emphasis added).

> **As this Court has previously stated, shareholders and creditors have an obligation to read their mail**.[115]

Similarly, Judge Sontchi approved consensual third-party releases in *Extraction Oil & Gas, Inc.*, noting that consent is a notice issue under the Bankruptcy Code and Bankruptcy Rules rather than a contractual issue and as long as sufficient notice is given, consent can be implied:

> Very importantly, these are consensual releases, these are not nonconsensual releases. I have repeatedly ruled that you can imply consent by failing to opt out or respond to a plan, either through a ballot or on the docket, that calls for a release. **I don't believe this is necessarily a contractual point . . . as much as it is a point of notice under the Bankruptcy Code and the Bankruptcy Rules**, because it's the plan that serves as the mechanism to have the release take effect and, thus, **it's really the rules, the Federal Rules of Bankruptcy Procedures that figure out whether someone has achieved proper notice and has, by not responding, given their implied consent**.
>
> Importantly, the Supreme Court recently, in the context of whether someone is consenting to the Article III jurisdiction of an Article I court, specifically held that you could imply consent by failure to preserve the right to argue that I don't have Article III powers. This is no different. **This is a court who set up a mechanism to confirm a plan that contains releases and has provided a noticing mechanism under which, if it's complied with, consent can be implied**.[116]

Finally, and importantly, Judge Cavender of this District ruled on this very issue last year, declining to apply state law to determine the consensual nature of third-party releases:

> Unlike some of my colleagues in other courts, **I do not find traditional notations of state contract law to fit the bill**.
>
> For one, **I am not convinced one state's substantive contract law would be appropriate to apply to every creditor's claims**, because the creditors and the law on which their claims are based is likely quite diverse jurisdictionally speaking.
>
> Second, I find the logic circular to rely on an unconfirmed plan choice of law provision to be determined – to determine whether to confirm the plan in the first place.

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[115] *In re Mallinckrodt*, 639 B.R. 837, 879 (Bankr. D. Del. 2022) (emphasis added)

[116] Hr'g Tr. 80:21-25, 81:1-16, *In re Extraction Oil & Gas, Inc.*, Case No. 20-11548 (CSS) (Bankr. D. Del. Dec. 22, 2020) (emphasis added).

> Third, **it is difficult to square a plan release opt-out mechanism with traditional notations of offer and acceptance under state contract law**.
>
> . . .
>
> **A properly noticed opt-out provision gives creditors the choice of whether to grant a third-party release**. Whatever the reasons may be that a creditor does not make that choice, whether it be an affirmative choice, carelessness, indifference, or mistake, the creditor was given the opportunity and failed to do so at its own risk. **Therefore, as long as the creditor is properly noticed with conspicuous disclosure, a failure to act in response has consequences**. And the Court finds that third-party releases in the Chapter 11 Plan can constitute consensual releases when creditors are given fair notice and an opportunity to opt out of the releases.[117]

116. Accordingly, the Debtors submit that bankruptcy law, not state contract law, is the governing standard here. Under governing bankruptcy law, as discussed below, the Third-Party Release is consensual.

iii. The Third-Party Release is Consensual.

117. The U.S. Trustee objects to the Third-Party Release because the Debtors solicited consent through the opt-out provisions in the Ballots and the Notice of Non-Voting Status, which, according to the U.S. Trustee, does not constitute consent.[118] As set forth in section 1.244 of the Plan, a Releasing Party[119] was required to "check the box" and submit that selection to the Solicitation Agent in order to opt out of the Third-Party Release.[120] The Debtors submit that the "opt out" mechanism utilized in these Chapter 11 Cases makes the Third-Party Release consensual,

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[117] Hr'g Tr. 25:14-25, 26:1-13, 27:20-25, 28:1-9, *In re Envistacom, LLC*, No. 23-52696 (JWC) (Bankr. N.D. GA. Nov. 8, 2023) (emphasis added).

[118] *See* UST Obj., ¶¶ 14-50.

[119] The "Releasing Parties" include (a) each Holder of a Claim that (i) votes to accept the Plan or (ii) either (1) abstains from voting or (2) votes to reject the Plan and, in the case of either (1) or (2), does not opt out of the Third-Party Release; (b) each Holder of a Claim that is deemed to accept the Plan or is otherwise Unimpaired under the Plan and who does not opt out of the Third-Party Release; (c) each Holder of a Claim that is deemed to reject the Plan or is otherwise Impaired under the Plan and does not opt out of the Third-Party Release; and (d) each Holder of an unclassified Claim who does not object to the Third-Party Release. Plan, § 1.244.

[120] *See id.*

given that each Releasing Party was provided with the opportunity to manifest consent to or opt-out of/object to the Third-Party Release.

118. To that end, each Ballot sent to the creditors in the Voting Classes contained the full text of the Third-Party Release, along with the definitions of "Releasing Parties" and "Released Parties" and advised such creditors, in plain English, that (a) a vote to accept the Plan would constitute such creditor's consent to the Third-Party Release and (b) any voting creditor that wanted to vote to reject the Plan or abstain from voting could opt of the Third-Party Release by simply checking a box on the Ballot. Additionally, each Notice of Non-Voting Status, as well as the Combined Hearing Notice, apprised creditors in the Non-Voting Classes clearly and conspicuously of the existence of the Third-Party Release and set forth the mechanism by which such creditors, even in the Non-Voting Classes, could opt out or object to such release notwithstanding their Claim status.

119. All of these mechanics clearly demonstrate that the Third-Party Release was obtained consensually from the Releasing Parties. Nevertheless, the U.S. Trustee takes issue with each category of Releasing Parties, even those who voted to accept the Plan, arguing that the opt-out mechanism only provides for impermissible "deemed consent". With respect to parties who voted to accept the Plan, the U.S. Trustee argues that "[v]oting for a plan does not reflect the unambiguous asset necessary to find consent to a release[.]"[121] However, courts generally agree that an affirmative vote to accept a plan that contains a third-party release constitutes an express consent to the release.[122] Indeed, the United States, in the HHS/VA Objection, admits as such:

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[121] UST Obj., ¶ 34.

[122] *See In re Stein Mart, Inc.*, 629 B.R. 516, 523 (Bankr. M.D. Fla. 2021) (citing *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017)); *In re Akorn, Inc.*, No. 20-11177 (Bankr. D. Del. Sept. 4, 2020) [Docket No. 673] (confirming plan where non-debtor releasing parties included "all Holders of Claims or Interests who vote to accept the Plan"); *In re Chassix Holdings, Inc.*, 533 B.R. 64, 80 (Bankr. S.D.N.Y. 2015) ("The Court agrees that 'Consenting Creditors' should include creditors who voted in favor of the Plan. The ballots and disclosure materials clearly set forth the terms of the proposed releases and the parties who would benefit from them. As

"To the extent the Proposed Plan's non-debtor releases are considered consensual, *Purdue* does not address whether they are allowed, but **courts generally agree that an affirmative vote to accept a plan that includes a non-debtor release constitutes consent to the release**."[123]

120. With respect to parties who voted to reject the Plan, abstained from voting, or who were not entitled to vote due to the unimpaired or unclassified nature of their claims but declined to opt out or object to the Third-Party Release, the U.S. Trustee argues that such creditors "are not consenting merely through silence by failing to opt out of the nondebtor release" and that such "deemed consent" is inappropriate.[124] However, as set forth above, creditors in each of the these categories received sufficient notice and the opportunity to opt out of the Third-Party Release, an opportunity that many of them exercised.[125]

121. While the U.S. Trustee cites to only two cases post-*Purdue* that declined to approve an opt-out mechanic as consent,[126] it completely ignores numerous cases, including recent confirmation opinions post-*Purdue*, that have recognized that a chapter 11 plan may include a consensual third-party release provision through the use of an opt-out mechanism.[127]

noted above, case law in this District and elsewhere supports the conclusion that the creditors' vote for the Plan constitutes a consent to the releases."); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 316, 142 (2d Cir. 2005) ("Nondebtor releases may also be tolerated if the affected creditors consent."); *In re Coram Healthcare Corp.*, 315 B.R. at 336 (holding that creditors who voted to accept the plan are bound by the releases); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (same).

[123] HHS/VA Obj., ¶ 25.

[124] *See* UST Obj., ¶¶ 38, 45, 49, 50.

[125] *See* Voting Decl., Ex. D.

[126] *See, e.g.*, *In re Smallhold, Inc.*, 2024 WL 4296938, at *3 (Bankr. D. Del. Sept. 25, 2024) ("[A]fter [*Purdue*], there does not appear to be a principled basis for authorizing 'opt out' third-party releases in cases like this one, even if such releases might be supported by strong policy arguments."); *In re Tonawanda Coke Corp.*, 662 B.R. at 223 ("We find that the mere ability to opt out of a release is insufficient to establish that consent.").

[127] *See, e.g.*, *In re RobertShaw US Holding Corp.*, 662 B.R. at 323 ("[C]ontrary to the Trustee's position, the consensual third-party releases in the Plan are appropriate, afforded affected parties constitutional due process, and a meaningful opportunity to opt out. There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan."); Hr'g Tr. at 14, *In re Invitae Corp.*, No. 24-11362 (Bankr. D.N.J. July 23, 2024) (confirming debtors' chapter 11 plan where creditors were required to opt out of third-party release provisions); *In re Mercy Hospital, Iowa City, Iowa*, No. 23-00623 (TJC) (Bankr. N.D. Iowa June 7, 2024) [Docket No. 1113] (confirming debtors' chapter 11 plan where creditors were required to opt out of third-party release provisions); *In re Envistacom, LLC*, No. 23-52696 (JWC) (Bankr. N.D. Ga.) [Docket No. 220] (confirming debtor's chapter 11 plan where creditors were required to opt out of third-party release provisions); *In re Boy*

122. While the Debtors recognize that the case law addressing this issue post-*Purdue* is split and calls for a fact and case specific analysis, the confirmation ruling in *In re Envistacom, LLC*, though pre-*Purdue*, is particularly instructive and remains persuasive law, given that *Purdue* did not act as a bar to **consensual** third-party releases. There, the Honorable Judge Jeffrey W. Cavender overruled multiple objections to the proposed third-party release and confirmed the plan, finding that third-party releases can constitute consensual releases when creditors are given fair notice and an opportunity to opt out of the releases.[128] Judge Cavender engaged in a fulsome analysis of the appropriateness of an opt-out mechanic in connection with third-party releases and ultimately found that the opt-out releases were appropriate and consensual because:

(a) *first*, the opt-out mechanism used was "clear and conspicuous" in the plan, notices, and ballots;[129]

(b) *second*, the opt-out mechanism is relatively simple and easy to understand, as for impaired creditors entitled to vote, they need only check a box on a ballot and return it to the claims agent timely;[130]

(c) *third*, no party raised any objections to the forms of notices or ballots that were filed with the solicitation motion and contained the notices to creditors that their failure to take action by either objecting to confirmation or

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Scouts of Am. and Delaware BSA, LLC, 642 B.R. 504, 677 (Bankr. D. Del. 2022) (concluding that opt-out releases were appropriate); *In re Mallinckrodt PLC*, 639 B.R. 837, 880 (Bankr. D. Del. 2022) (finding opt-out mechanic sufficient to demonstrate consent to third-party release); *In re Stein Mart, Inc.*, 629, B.R. 516, 523 (Bankr. M.D. Fla. 2021) (finding that the third-party releases contained in the plan were consensual because the decision to return or not return the opt-out form demonstrated "an absolute and unconditional acceptance or rejection of the offered release); *In re Emerge Energy Services LP*, No. 19-11563 (Bankr. D. Del. Dec. 18, 2019) [Docket No. 721] (confirming plan where the non-debtor releasing parties included claimants "that submitted a Ballot to the Voting and Claims Agent, but did not affirmatively opt out of the Third Party Release as provided on their respective Ballots"); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("As for those impaired creditors . . . who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third Party Releases may be properly characterized as consensual and will be approved."); *In re JRV Group USA L.P.*, No. 19-11095 (Bankr. D. Del.) (CSS) (June 19, 2020) (overruling objection from the United States Trustee and approving third-party release because "people have been given reasonable notice, consistent with due process; an opportunity to object or optout, they've chosen not to do so [and] I believe that's constructive consent"); *In re AtheroGenics, Inc.*, Case No. 08-78200 (Bankr. N.D. Ga. June 9, 2009) [Docket No. 288] (approving third-party release granted by parties who did not check opt out box on ballot); *In re Levitt & Sons, LLC*, Case No. 07-19845 (Bankr. S.D. Fla. Feb. 20, 2009) (same).

[128] *See* Hr'g Tr. 28:5-9, *In re Envistacom, LLC*, No. 23-52696 (JWC) (Bankr. N.D. GA. Nov. 8, 2023).

[129] *See id.*, at 29:1-3.

[130] *See id.*, at 29:10-11.

checking the opt-out box on ballots would result in the creditor being deemed to have consented to the release;[131]

(d) *fourth*, creditors were not required to grant the release in exchange for a distribution under the plan and will share equally in distributions regardless of whether they opted out of the third-party release;[132]

(e) *fifth*, the releases are limited to estate fiduciaries, parties providing substantial consideration under the plan, or affiliates of such parties;[133]

(f) *sixth*, the releases of non-estate fiduciaries are an integral part of the Plan, and the creditors affected by the opt-out releases, in other words, priority and general unsecured creditors, are receiving substantial consideration in exchange for the releases;[134] and

(g) *finally*, the plan, the global settlement, and the opt-out release are supported by the major constituents in the case, including the committee of unsecured creditors, and the plan was accepted by a large majority of voting creditors by numerosity.[135]

Following this analysis, Judge Cavender held:

> [T]he Debtor's Plan and the solicitation procedures approved in connection with that Plan provide a simple and conspicuously-disclosed mechanism for creditors to opt out of the third-party releases in this case. Some creditors followed the simple procedures and opted out of the releases and will not be bound by them. For those creditors that did not, the Court finds they have consented to the third-party releases by their failure to timely opt out and will be bound by them.[136]

123. The Third-Party Release in the Plan satisfies each of these factors and is therefore a **consensual** and permissible third-party release based on the law in this District, which has not been overruled as a result of *Purdue*. *First*, the opt-out mechanism was clear and conspicuous in the Ballots, the Notices of Non-Voting Status, and the Combined Disclosure Statement and Plan. **At the U.S. Trustee's request**, the Debtors added bolded, conspicuous plain language disclaimers

[131] *See id.*, at 32:4-11.
[132] *See id.*, at 32:14-18.
[133] *See id.*, at 32:19-22.
[134] *See id.*, at 32:23-25; 33:1-3.
[135] *See id.*, at 34:10-14.
[136] *See id.*, at 34:20-25; 35:1-6.

regarding the importance of the Third-Party Release to the Ballots, the Notices of Non-Voting Status, the Combined Disclosure Statement and Plan, and the Combined Hearing Notice. *Second*, the opt-out mechanism, explained in plain English in each of the Ballots and the Notices of Non-Voting Status, made it clear to creditors that they need only check a box on the Ballot or Notice of Non-Voting Status and return it to the Voting Agent in order to opt out of the Third-Party Release (as many creditors have done here). *Third*, only the U.S. Trustee raised an objection to the opt-out mechanism at the hearing on the adequacy of the Disclosure Statement; however, no party objected to the Ballots (other than the U.S. Trustee, which the Debtors resolved with revisions to the Ballots), Notices of Non-Voting Status, or the provisions contained therein. *Fourth*, creditors were not required to grant the release in order to recover distributions under the Plan and are set to share in distributions regardless of whether they opted out of the Third-Party Release or not. *Fifth*, as discussed above, the Third-Party Release is limited to (a) estate fiduciaries (*i.e.*, the Debtors, the Committee, the CRO, the Independent Manager, the Debtors' current officers and directors, etc.), (b) the parties providing substantial consideration, whether monetary or otherwise, under the plan (*i.e.*, the Plan Sponsor, the DIP Lenders, Omega, and the ABL Secured Parties), and (c) affiliates of these parties. *Sixth*, as discussed above, the Third-Party Release is an integral part of the Plan and the creditors affected by the Third-Party Release are receiving substantial consideration in exchange for the releases, consideration that would be otherwise unavailable absent the Settlement. *Finally*, the Plan, the Settlement, and the Third-Party Release is supported by the major constituents in the Chapter 11 Cases—namely, the Committee, the Plan Sponsor, Omega, and the ABL Secured Parties, as well as the Florida Claimants—and each of the impaired classes entitled to vote on the Plan voted in favor of the Plan, which includes the Third-Party Release.

124. In sum, because each party to be bound had sufficient notice and the opportunity to opt out, under these facts and circumstances, the Third-Party Release is a **consensual** third-party release. Accordingly, the Debtors submit that the Third-Party Release should be approved.

B. The Injunction is Appropriate.

125. The U.S. Trustee argues that the Injunction is impermissible because, according to *Purdue*, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies and these cases are not asbestos-related.[137] This again misconstrues *Purdue*. As noted above, the Supreme Court did not opine on the appropriateness of a third-party release or an injunction implementing the same when such releases were granted consensually in *Purdue*, but rather limited its holding to non-consensual third-party releases and injunctions only. Because the Third-Party Release is consensual, *Purdue* does not bar the inclusion of the Injunction in the Plan implementing the same.

126. The U.S. Trustee also argues that "[e]ven if non-debtor releases are consensual, there is no Bankruptcy Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce them."[138] Not so. Bankruptcy Code section 105(a) is frequently utilized in bankruptcy cases to implement third-party releases.[139] Moreover, the U.S. Trustee ignores the fact that injunction provisions are contained in almost every chapter 11 plan because, absent such provisions, there would be no mechanism by which the debtors could enforce a plan's

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137 *See* UST Obj., ¶¶ 55-56.

138 *Id.*

139 *See, e.g.*, *Matter of Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996) (affirming district court's ruling that Bankruptcy Code section 105 and Federal Rule of Civil Procedure 16 authorized a bankruptcy court to permanently enjoin non-settling defendants from asserting contribution and indemnification claims against a defendant consulting firm when the permanent injunction was integral to the debtor's settlement with the consulting firm and the bar order was fair and equitable); *In re Midway Gold US, Inc.*, 575 B.R. 475, 505-06 (Bankr. D. Colo. 2017) ("The Court agrees section 105(a) permits bankruptcy courts to release third parties from liability in certain, and very limited, circumstances if the release is 'appropriate' and not inconsistent with any other provision of the Bankruptcy Code, including section 524(e).").

release and exculpation provisions. Such provisions are commonly approved, even post-*Purdue*.[140]

127. Failure to include the Injunction with respect to the Third-Party Release would effectively approve the Third-Party Release but without teeth, as there would be no method by which the Debtors could enforce compliance with the Third-Party Release following the Effective Date. The consideration provided for by the Released Parties as part of the Settlement was contributed with the goal of establishing global peace and enabling the Reorganized Debtors to obtain a fresh start post-emergence. Any other result would potentially subject the newly reorganized Debtors to claims and causes of action that were released by the Releasing Parties under the Plan and potentially impact the Debtors' successful emergence from bankruptcy, if the Debtors have no ability to enforce the Third-Party Release.

128. Finally, though the U.S. Trustee suggests that "there is no reason for this Court to be involved with the post-effective date enforcement" of the Third-Party Release, the Debtors submit that this Court is precisely the appropriate venue in which to address the enforcement and applicability of the Third-Party Release. The Plan specifically provides for this Court's retention of jurisdiction to, among other things, "issue injunctions or take such other actions or make such other orders as may be necessary or appropriate to restrain interference with" the Plan and to "enforce the terms and conditions" thereof.[141] Given this Court's knowledge of and familiarity with the Chapter 11 Cases, the retention of jurisdiction to address pre- and post-Effective Date

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[140] *See, e.g.*, *In re FTX Trading Ltd.*, No. 22-11068 (Bankr. D. Del. Oct. 8, 2024) [Docket No. 26404-1] (confirmed chapter 11 plan includes injunction to enforce releases); *In re RobertShaw US Holding Corp.*, No. 24-90052 (Bankr. S.D. Tex. Aug. 16, 2024) [Docket No. 960] (confirmed chapter 11 plan included permanent injunction and consensual third-party release); *In re Rite Aid Corp.*, No. 23-18993 (Bankr. D.N.J. Aug. 16, 2024) (confirmed chapter 11 plan included permanent injunction); *In re ProSomnus, Inc.*, No. 24-10972 (Bankr. D. Del. July 30, 2024) [Docket Nos. 225, 239] (confirmed chapter 11 plan included permanent injunction and third-party release with opt-out mechanic).

[141] Plan, Art. XI.A.

issues that may arise with the Plan and the Debtors' implementation, consummation, and enforcement of the same.

129. Accordingly, for the reasons set forth above, the Debtors believe that the Injunction is necessary and appropriate and should be approved, overruling the UST Objection to the same.

C. The Plan Incorporates Various Settlements, Including the Settlement, and Satisfies Bankruptcy Rule 9019(a).

130. The U.S. Trustee objects to the Plan because it is "impermissibly deemed to be a settlement" itself under Bankruptcy Rule 9019.[142] In support thereof, the U.S. Trustee argues that "Rule 9019 governs only parties that have entered into an express settlement agreement" rather than "a blanket provision allowing general 'settlements' to be unilaterally imposed upon broad swaths of claimants that have no formal agreement with any party to 'settle' their claims."[143] In doing so, the U.S. Trustee misconstrues Bankruptcy Rule 9019(a), which provides merely that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."[144] There is no requirement in Bankruptcy Rule 9019 for an "express settlement agreement," nor does the U.S. Trustee cite any case law in support of such proposition. To the contrary, chapter 11 plans, including this one, frequently utilize Bankruptcy Rule 9019 in connection with Bankruptcy Code section 1123, to establish that the provisions of the Plan constitute a good-faith compromise and settlement of all claims, interests, causes of action, and controversies, and contain language deeming the plan to be a motion to approve the same.[145] Accordingly, this aspect of the UST Objection should be overruled.

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[142] UST Obj., ¶¶ 59-67.
[143] *Id.*, at ¶ 65.
[144] Fed. R. Bankr. P. 9019(a).
[145] *See* Plan, Art. VI.A.

II. The HHS/VA Objection Should be Overruled.

A. Provider Agreements May be Assumed and Assigned Free and Clear of Liability.

131. Article VI.O of the Plan provides that "[e]ntry of the Confirmation Order shall constitute the assumption and/or transfer, free and clear of all liens, claims and encumbrances (including any applicable overpayments) of the applicable Debtor's Medicare provider agreement and Medicare provider number to the applicable Reorganized Debtor."[146] The United States objects to this proposed transfer, stating, among other things, that "[n]o authority supports the Debtors' free-and-clear 'assumption and/or transfer' of a Medicare Provider Agreement."[147] This is simply not true. To the contrary, there is precedent in the Eleventh Circuit holding that a Medicare provider agreement is not a contract that requires the cure of defaults thereunder upon assumption and/or assignment, but rather constitutes a statutory entitlement.[148] Courts in other circuits, including courts in the Second, Third, and Ninth circuits, have similarly held that Medicare provider agreements are not executory contracts that need to be assumed under Bankruptcy Code section 365, but rather are merely statutory entitlements and assets of the estate that may be sold free and clear of any underlying interests or claims.[149]

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[146] Plan, Art. VI.O.

[147] HHS/VA Obj., ¶ 14.

[148] *See Memorial Hospital v. Heckler*, 706 F.2d 1130, 1136-37 (11th Cir. 1983) (holding that "[u]pon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right"); *see also In re BDK Health Management, Inc.*, No. 98-00609-B1, 1998 WL 34188241, at *6 (Bankr. M.D. Fla. Nov. 16, 1998) ("[T]he provider numbers are statutory entitlements, not contracts . . . The rights and duties of a health care provider and HHS are set forth not in provider numbers but rather in the Medicare Statutes and Regulations . . . Moreover, HHS' entitlement to recoup overpayments is similarly statutory and does not arise under these arrangements."); *see also* 11 U.S.C. § 525(a) ("[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, . . . a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor is or has been a debtor under this title . . . or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.").

[149] *See, e.g.*, *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014) ("We have, on occasion, stated that providers and others have contracts with the government in this area, but our decisions have turned on the regulatory regime rather than on contract principles . . . As the Eleventh Circuit Court of Appeals held when

132. Moreover, in the last few years, multiple jurisdictions have authorized the sale of provider agreements free and clear of underlying liabilities through a section 363 sale. For example, in *Center City Healthcare*, the debtors sought authority under Bankruptcy Code section 363(f) to sell and assign its residency program along with its Medicare provider agreement to a third-party purchaser. CMS objected to the proposed sale transaction and insisted, among other things, that the provider agreement was an executory contract that CCH could only assign in accordance with Bankruptcy Code section 365. The bankruptcy court rejected CMS' position and concluded that "the provider agreement, which debtors seek to sell to the consortium, is a statutory entitlement and not a contract and, as such, debtors are entitled to sell the provider agreement under

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hospitals complained of legislative impairment of their contract rights in this area because they had agreements with the Secretary: 'Upon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contract right.'") (citing *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1136-37 (11th Cir. 1983) (holding that "[u]pon joining the Medicare program . . . the hospitals received a statutory entitlement, not a contractual right")); *Hollander v. Brezenoff*, 787 F.2d 834, 839 (2d Cir. 1986) (characterizing the Medicare relationship with providers as a "statutory business relationship" – "[a]lthough the relationship may be effectuated by means of a provider contract, all rights to reimbursement arise under the applicable statutes"); *U.S. ex rel. Acad. Health Ctr., Inc. v. Hyperion Foundation, Inc.*, 2014 WL 3385189 (S.D. Miss. July 9, 2014) (holding that provider agreements are not contracts); *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*, 474 F. Supp. 2d 810, 820 (W.D. La. 2007) ("Medicare Provider Agreements create statutory, not contractual rights."); *Maximum Care Home Health Agency v. HCFA*, No. 3-97-CV-1451-R, 1998 WL 901642, at *5 (N.D. Tex. Apr. 14, 1998) ("[A] Medicare service provider agreement is not a contract in the traditional sense. It is a statutory entitlement created by the Medicare Act."); *Greater Dallas Homecare Alliance v. United States*, 10 F. Supp. 2d 638, 647 (N.D. Tex. 1998) ("Plaintiffs argue that the Medicare participation agreements . . . are essentially contracts. The court disagrees and finds that the participation agreements are not contracts, for the right to receive payments under the Medicare Act is a manifestation of government policy and, as such, is a statutory rather than a contractual right"); *Homecare Ass'n of America Inc. v. United States*, 1998 U.S. Dist. Lexis 20515 (W.D. Okla. Aug. 1998) (holding that no contractual obligation existed between government and provider of Medicare services); *In re Kings Terrace Nursing Home and Health Related Facility*, 1995 WL 65531, at *7-8 (Bankr. S.D.N.Y. Jan. 27, 1995) ("[T]he Debtor's right to reimbursement and the DSS' right to recover payments do not arise from any contract, but rather from statutory and regulatory requirements completely independent of a contract. Therefore, no executory contract with respect to such a right could have been assumed by the Debtor . . ."); *Germantown Hosp. and Med. Ctr. v. Heckler*, 590 F. Supp. 24, 30-31 (E.D. Pa. 1983), *aff'd sub nom. Germantown Hosp. & Med. Ctr. v. Schweiker*, 738 F.2d 631 (3d Cir. 1984) ("There is no contractual obligation requiring HHS to provide Medicare reimbursement. Rather, upon joining the Medicare program, providers gain a statutory entitlement to reimbursement . . . Thus, the amount of reimbursement is governed not by contract but by statute—specifically, the Medicare Act's 'reasonable cost' provisions.").

Bankruptcy Code section 363. And the purchaser, Jefferson on behalf of the consortium, does not take with successor liability."[150]

133. Similarly, in *Verity Health System*, the debtors requested approval under Bankruptcy Code section 363(f) of a sale of substantially all assets of four hospitals, including the hospitals' Medicaid provider agreements.[151] The bankruptcy court approved the sale over the initial objection of the California Department of Health Care Services ("DHCS").[152] DHCS then filed a supplemental objection to the sale, arguing that the debtors' Medicaid provider agreements should not be assigned free and clear of payments owed to DHCS because a provider agreement is an executory contract with outstanding, unperformed material obligations on behalf of both parties that needs to first be assumed and cured under Bankruptcy Code section 365.[153] The bankruptcy court overruled the objection, finding that a Medicaid provider agreement is not an executory contract but a "statutory entitlement" that may be sold free and clear of all claims.[154] The basis of the opinion centered around the finding that a governmental provider agreement is not a contract at all; instead, a provider's right to be reimbursed for services is dictated by law, not contract.[155] The bankruptcy court also held that the provider agreements were not executory in nature because the agreements did not impose any obligations on DHCS, but rather only imposed obligations on Verity that were already required to be performed by law.[156] In response to DHCS'

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[150] Hr'g Tr., *In re Center City Healthcare, LLC*, No. 19-11466 (KG) (Bankr. D. Del. Sept. 5, 2019) [Docket No. 664]. HHS initially appealed the order; however, the purchaser eventually backed out of the sale, terminated the asset purchase agreement, and closing did not occur—the parties stipulated that the pending appeal was moot and it was dismissed accordingly. *See U.S.A. v. Center City Healthcare, LLC (In re Center City Healthcare, LLC)*, No. 19-01711 (D. Del. Mar. 17, 2020). The bankruptcy court's sale order was also vacated as a result of the stipulation.

[151] *See In re Verity Health Sys. of Cal., Inc.*, No. 18-20151 (ER) (Bankr. C.D. Cal. Jan. 17, 2019) [Docket No. 1279].

[152] *See In re Verity Health Sys. of Cal., Inc.*, No. 18-20151 (ER) (Bankr. C.D. Cal. May 2, 2019) [Docket No. 2306].

[153] *See In re Verity Health Sys. of Cal., Inc.*, No. 18-20151 (ER) (Bankr. C.D. Cal. Sept. 11, 2019) [Docket No. 3043].

[154] *See In re Verity Health Sys. of Cal., Inc.*, 606 B.R. 843 (Bankr. C.D. Cal. 2019).

[155] *Id.* at 848 ("[T]he hospitals' reimbursement entitlement is dictated by the Medicare statute and the regulations promulgated thereunder.").

[156] *Id.* at 850.

citations to the cases holding provider agreements were executory contracts, the bankruptcy court stated that the Government's "authorities are not persuasive, because the issue of whether the provider agreements were executory contracts versus statutory entitlements were not litigated. Instead, the courts simply assumed, without meaningful analysis, that the provider agreements were executory contracts."[157] The bankruptcy court then concluded that "the Provider Agreements are akin to a license issued by a government agency, and therefore that the Provider Agreements may be sold under section 363" of the Bankruptcy Code, free and clear of the liabilities owed to DHCS.[158]

134. Finally, in *BDK Health Management*,[159] the debtor sought approval of a sale of its assets, including various Medicare provider agreements, to a third party purchaser, free of all liens, claims and encumbrances (including recoupment and set-off rights) pursuant to Bankruptcy Code section 363(f). HHS objected, arguing that the Medicare provider agreements were executory contracts that must be assumed and assigned to the third-party purchaser pursuant to Bankruptcy Code section 365 and that any order granting assumption and assignment of the provider agreements would have to provide for repayment of all overpayments, whether pre- or post-petition. In its reply, the debtor argued that if it could not sell the assets, including the provider agreements, it would be forced to cease operations and liquidate, almost guaranteeing little or no distribution to unsecured creditors (compared to $1 million if the sale were consummated). The bankruptcy court ultimately approved the sale over HHS' objection, holding that the Medicare

[157] *Id.* at 851.

[158] *Id.* at 851-52 ("This right to receive reimbursement for providing healthcare services is a property interest."). The debtors and DHCS subsequently entered into a stipulation regarding assumption and assignment of the provider agreements in the underlying sale and the bankruptcy court vacated its previous opinion and sale order. *See In re Verity Health Sys. of Cal., Inc.*, No. 18-20151 (ER), 2019 WL 7288754, at *1 (Bankr. C.D. Cal. Dec. 9, 2019). Nevertheless, the Debtors view this ruling and others that have been similarly vacated as persuasive law on this issue.

[159] *See generally In re BDK Health Management, Inc.*, Case No. 98-00609-B1, 1998 WL 34188241 (Bankr. M.D. Fla. Nov. 16, 1998).

provider agreements were not executory contracts but simply assets of the debtor's estate. Similar to the court in *Verity*, the bankruptcy court noted that the cases that have held that Medicare provider agreements are executory contracts[160] are distinguishable because the parties agreed and did not challenge the contractual and executory nature of the provider agreements.[161] The bankruptcy court also commented that outside of bankruptcy courts, HHS almost always argued that Medicare provider agreements were not contractual relationships in the traditional sense and that they did not create specific contractual obligations running between the government and the health care provider.[162] In approving the sale, the bankruptcy court held that the debtors were

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[160] *See, e.g.*, *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1075 n.13 (3d Cir. 1992) ("Although the Bankruptcy Code does not define 'executory contract,' the Code's legislative history states that this term 'generally includes contracts on which performance remains due to some extent on both sides . . . A Medicare provider agreement easily fits within this definition."); *In re Heffernan Memorial Hosp. District*, 192 B.R. 228, 231 n.4 (Bankr. S.D. Cal. 1996) ("The Medicare Provider Agreement is a contract providing for advance payments based on estimates and expressly permitting the withholding of overpayments from future advances."); *Tidewater Memorial Hospital*, 106 B.R. 876, 880 (Bankr. E.D. Va. 1989) ("The Hospital has not sought to accept or reject the three Medicare provider agreements, which constitute executory contracts . . ."); *In re Advanced Prof. Home Health Care*, 94 B.R. 95 (E.D. Mich. 1988) (indicating that the relationship was governed by a "complex statutory scheme" but noting that continuing such "scheme" required assuming those obligations in its bankruptcy); *In re Memorial Hosp. of Iowa*, 82 B.R. 478, 479-80 (W.D. Wis. 1988); *In re Visiting Nurse Ass'n of Tampa Bay Inc.*, 121 B.R. 114 (Bankr. N.D. Fla. 1990); *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 242 n.1 (Bankr. S.D. Fla. 1994) ("This Court concludes, as have most that address the issue, that the Provider Agreement is an executory contract subject to assumption or rejection by a debtor-in-possession.").

[161] *See In re BDK Health Management, Inc.*, 1998 WL 34188241, at *7.

[162] *See id.* (citing *Memorial Hospital v. Heckler*, 706 F.2d 1130,1136-37 (11th Cir. 1983) (holding that "[u]pon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right." Although the hospitals entered into an "agreement" with the secretary that they would abide by the rules of the Medicare program, that agreement did not obligate the secretary to provide reimbursement for any particular expenses such as Hill-Burton costs), *cert. denied* 465 U.S. 1023 (1984); *Harper-Grace Hospitals v. Schweiker*, 708 F.2d 199, 201 (6th Cir. 1983) ("[the health care provider] has not shown that the Medicare program established a contractual relationship between the hospital and federal government"); *Greater Dallas Homecare Alliance v. United States*, 10 F.Supp.2d. 638, 647 (N.D. Tex 1998) ("Plaintiffs argue that the Medicare participation agreements between [HCFA] and the [health care providers] are essentially contracts. The court disagrees and finds that the participation agreements are not contracts, for the right to receive payments under the Medicare Act is a manifestation of government policy and, as such, is a statutory rather than a contractual right"); *Homecare Ass'n of Am. Inc. v. United States*, 1998 U.S. Dist. Lexis 20515 (W.D. Okla. Aug. 1998) (holding that no contractual obligation existed between government and provider of Medicare services); *Germantown Hospital and Medical Center v. Heckler*, 590 F. Supp. 24, 30-31 (ED. Pa. 1983) ("There is no contractual obligation requiring HHS to provide Medicare reimbursement. Rather, upon joining the Medicare program, providers gain a statutory entitlement to reimbursement. 42 U.S.C. §1395f(b). Thus, the amount of reimbursement is governed not by contract but by statute—specifically, the Medicare Act's 'reasonable cost' provisions")).

authorized to sell their assets, including the provider agreements, free and clear of HHS' rights to recoup future payments from the buyers after the sale closing.[163]

135. Consistent with this authority, the Debtors submit that their Medicare provider agreements are statutory entitlements that may be assumed and assigned free and clear of liability. As such, the HHS/VA Objection should be overruled.

B. The Bankruptcy Court Does Not Lack Jurisdiction Over Claims that Arise Under the Medicare Act.

136. The United States argues that "the Court cannot modify any obligations to or amounts owed [to] CMS by the Debtors through a transfer of a Medicare provider agreement to the Reorganized Debtors" because this Court lacks jurisdiction over claims that arise under the Medicare Act.[164] In support, the United States cites *In re Bayou Shores SNF, LLC*, which held that 42 U.S.C. § 405(h) bars a bankruptcy court from exercising 28 U.S.C. § 1334 jurisdiction over claims arising under the Medicare Act.[165] While the Debtors recognize the precedential nature of the *Bayou Shores* decision in this District, the Debtors respectfully point this Court to decisions in the Fifth and Ninth Circuits which expressly disavow the non-textual approach of *Bayou Shores* and held that 28 U.S.C. § 1334 is <u>not</u> barred by the requirement for exhaustion of administrative remedies, as discussed below.

137. Section 405(h) of title 28 provides, in relevant part, that "[n]o action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter."[166] In *Matter of Benjamin*, the Fifth Circuit focused on the plain meaning of the

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[163] *See id.*
[164] *See* HHS/VA Obj., ¶ 15.
[165] 828 F.3d 1297, 1314 (11th Cir. 2016).
[166] 42 U.S.C. § 405(h).

statutory text and held that section 405(h) only barred actions under 28 U.S.C. §§ 1331 and 1346, not § 1334.[167] In *Town & Country*, the Ninth Circuit similarly read section 405(h) to only bar actions under §§ 1331 and 1346, not § 1334.[168] Regardless, the Debtors are not seeking to "recover on any claim" under the Medicare statute; rather, they are seeking a judicial determination that an asset of the estate—the Medicare provider agreement—can be transferred under the Plan free and clear. The Debtors submit that section 405(h) does not bar this Court's jurisdiction under 28 U.S.C. § 1334, given this section's noticeable absence from the statutory language of section 405(h). Accordingly, this aspect of the HHS/VA Objection should be overruled.

C. The Debtors Will Obtain Consent From the VA Prior to Assuming the VA Contracts.

138. The Plan Supplement lists the VA Contracts (as defined in the HHS/VA Objection) as potential contracts to be assumed under the Plan.[169] The United States objects to the assumption and assignment of the VA Contracts to the extent the Debtors fail to obtain the consent of the United States in violation of the Anti-Assignment Act.[170] The Debtors have no intention of violating the Anti-Assignment Act or assuming the VA Contracts without the consent of the United States. To the contrary, the Debtors have already commenced discussions with the VA regarding assumption of the VA Contracts. To the extent that such consent is not obtained in advance of the

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[167] *See Matter of Benjamin*, 932 F.3d 293, 299 (5th Cir. 2019) ("Section 405(h)'s third sentence is different from the statutory provisions in those cases. Unlike in *Tidewater Oil* and *Southern Pacific*, the third sentence is not susceptible to two plausible constructions; it is not ambiguous. It bars actions under §§ 1331 and 1346—no more, no less. There is no plausible way to read 'section 1331 or 1346 of Title 28' as secretly including § 1334 or (§ 1332 for that matter). For the same reason the deletion of 'materiality' was dispositive in *Wells*, the deletion of § 1334 jurisdiction is dispositive here. And the third sentence's plain meaning does not become clouded with ambiguity when one's gaze is expanded to the surrounding statutory text[.]").

[168] *See In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991) ("Section 405(h) only bars actions under 28 U.S.C. §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334. The rationale underlying section 1334's broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate is clear. This section allows a single court to preside over all of the affairs of the estate, which promotes a 'congressionally-endorsed objective: the efficient and expeditious resolution of all matters connected to the bankruptcy estate.'").

[169] *See* Plan Supplement, Ex. A.

[170] *See* HHS/VA Obj., ¶¶ 17-19

Effective Date, the Debtors will reject the VA Contracts and may attempt to negotiate new contracts with the VA to the extent necessary.

D. The Third-Party Release is Appropriate.

139. The United States objects to the Third-Party Release.[171] For the reasons set forth above, the Debtors submit that the Third-Party Release is consensual and appropriate and should be approved. Notably, in the HHS/VA Objection, the United States has opted out of the Third-Party Release and it will not apply to HHS or the VA.[172]

III. The IRS Objection Should be Overruled.

A. The Disclosure Statement Contains Adequate Information.

140. The IRS objects to the adequacy of the Disclosure Statement, arguing that it fails to appropriately disclose information about administrative, secured, and priority tax claims, pointing to, among other things, the disclosures in the Debtors' schedules and statements as well as the Debtors' monthly operating reports with respect to postpetition taxes.[173] Other than approximately $275,000 in Pennsylvania bed taxes that will be assumed and paid under the Plan, the Debtors are unaware of any other outstanding priority tax claims. The Debtors have confirmed that the IRS' proofs of claim contain estimated amounts that are based upon divested facilities, and the Debtors understand that the IRS is in the process of amending their proofs of claim accordingly. Accordingly, the Debtors submit that the Combined Disclosure Statement and Plan contains adequate information with respect to Priority Tax Claims and should be approved.

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[171] *See* HHS/VA Obj., ¶ 25.
[172] *See* HHS/VA Obj., ¶ 25.
[173] *See* IRS Obj., ¶¶ 7-11.

B. The Plan is Feasible.

141. The IRS argues that the Plan is not feasible, in part, because "[t]he Debtors have numerous unfiled tax returns that should be filed as a condition of confirmation."[174] However, to the Debtors' knowledge, no tax returns are outstanding and, despite multiple inquires to the IRS, no further explanation has been provided by the IRS with respect to any outstanding tax returns. As such, the Debtors object to the IRS' suggested imposition of a condition to confirmation with respect to filing unfiled tax returns that, to date, the IRS has yet to identify.

142. The IRS also objects to feasibility on the grounds that more information is needed from the Debtors regarding their entitlement to any requested tax abatements or employee retention credits ("ERCs").[175] At the request of the IRS, the Debtors have already provided detailed information on multiple occasions regarding the ERCs they have received and the ERCs that remain outstanding. To the Debtors' knowledge, no informational requests remain outstanding or owed to the IRS. Nor has the IRS provided any insight into the status of its review of the Debtors' claimed ERCs, many of which remain outstanding.

143. The IRS further objects to feasibility because (a) "it cannot be determined whether the Debtors will be able to pay all priority tax claims as required" by the Bankruptcy Code and (b) the Plan "fails to provide for adequate reserves to cover priority tax claims that have not been 'Allowed' on the Effective Date."[176] The IRS ignores the language of the Plan that states that the Reorganized Debtors "shall either assume or pay Allowed Priority Tax Claims" and "shall pay taxes required to be paid for any of the Debtors[.]"[177] As such, the Plan already provides that Priority Tax Claims may be paid in the ordinary course, subject to their allowance as set forth in

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[174] IRS Obj., ¶ 13.
[175] IRS Obj., ¶ 17.
[176] IRS Obj., ¶ 18.
[177] Plan, Arts. IV.B, VI.N.

the Plan. The Debtors submit that a priority tax reserve is not necessary, particularly given that the Debtors believe that such amounts are not significant. Accordingly, the IRS' objection to the Plan on feasibility grounds should be overruled.

C. The Plan Was Not Filed in Bad Faith.

144. The IRS suggests that the Debtors' failure to file tax returns prior to confirmation "may be evidence of bad faith" on the part of the Debtors.[178] This is not correct. Indeed, the Plan explicitly provides that the Reorganized Debtors shall "complete and file all final or otherwise required federal, state, and local tax returns and shall pay taxes required to be paid for any of the Debtors[.]"[179] Accordingly, this portion of the IRS Objection should be overruled.

SUBSTANTIVE CONSOLIDATION IS APPROPRIATE

145. The Plan contemplates entry of an order (a) substantively consolidating the OpCo Debtors' Estates (but not the OpCo Debtors themselves) and Chapter 11 Cases for purposes of voting, distribution, and confirmation, and, separately, (b) substantively consolidating the DivestCo Debtors' Estates (but not the DivestCo Debtors themselves) and Chapter 11 Cases for purposes of voting, distribution, and confirmation.[180] This proposed "siloed" substantive consolidation is a result of the significant difference in the pools of assets between the OpCo Debtors and the DivestCo Debtors—the OpCo Debtors have substantial "hard" assets, including numerous operating facilities, while the assets of the DivestCo Debtors largely consist of potential Causes of Action and the Divested Accounts Receivable. The Debtors believe that such substantive consolidation is appropriate, as the facts and circumstances satisfy the governing standard in this district.

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[178] IRS Obj., ¶ 15.
[179] Plan, Art. VI.N.
[180] *See* Plan, Art. V.A.

146. As set forth in the Combined Disclosure Statement and Plan, the doctrine of substantive consolidation is a construct of federal common law, which has been accepted in the Eleventh Circuit and other circuits.[181] A bankruptcy court's statutory authority to effectuate a substantive consolidation derives from its general equitable powers under Bankruptcy Code section 105(a).[182] In function, substantive consolidation "treat separate legal entities as if they were merged into a single survivor left with all cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor."[183] The primary purpose of substantive consolidation is to promote the fair and equitable treatment of all creditors.[184]

147. In the Eleventh Circuit, the standard for substantive consolidation is governed by *Eastgroup Properties v. Southern Motel Ass'n, Ltd.*, 935 F.2d 245 (11th Cir. 1991). In *Eastgroup*, the Eleventh Circuit held that "bankruptcy courts have the power to order substantive consolidation by virtue of their general equitable powers" and indicated that the criterion by which to evaluate a proposed substantive consolidation is "whether the economic prejudice of continued debtor

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[181] *See, e.g.*, *Eastgroup Props. v. Southern Motel Ass'n Ltd.*, 935 F.2d 245 (11th Cir. 1991); *see also In re No Rust Rebar, Inc.*, No. 21-12188-PDR, 2023 WL 4497328 (Bankr. S.D. Fla. July 12, 2023); *In re Archdiocese of Saint Paul & Minneapolis*, 888 F.3d 944, 951 (8th Cir. 2018); *First Nat'l Bank of El Dorado v. Giller (In re Giller)*, 962 F.2d 796, 798–99 (8th Cir. 1992); *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005); *Reider v. F.D.I.C. (In re Reider)*, 31 F.3d 1102, 1107-08 (11th Cir. 1994); *Woborn Assoc. v. Kahn (In re Hemingway Transport Inc.)*, 954 F.2d 1, 11–12 (1st Cir. 1992); *Union Sav. Bank v. Augie/Restivo Banking Co. (In re Augie/Restivo Banking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987).

[182] *See Archdiocese of Saint Paul & Minneapolis*, 888 F.3d at 951.

[183] *Owens Corning*, 419 F.3d at 205 (quoting *Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005)); *Archdiocese of Saint Paul & Minneapolis*, 888 F.3d at 951 (noting that substantive consolidation combines the assets and liabilities of multiple debtors to satisfy creditors from a combined pool of assets); *see In re Clayton General, Inc.*, No. 15-64266 (WLH) (Bankr. N.D. Ga. Jun. 8, 2018) [Docket No. 938] ("Substantive consolidation is an equitable remedy that has the effect of creating 'one common pool of assets, liabilities and a single body of creditors, while extinguishing the intercorporate liabilities of the consolidated estates.'" (citing *In re Credit Serv. Corp.*, 195 B.R. 680, 689 (Bankr. S.D. Ohio 1996); *In re Bonham,* 229 F.3d 750, 764 (9th Cir. 2000)); *see also In re Beaulieu Group, LLC*, Case No. 17-41677 (MGD) (Bankr. N. D. Ga. Mar. 16, 2018) [Docket No. 638] (same).

[184] *See Eastgroup Props.*, 935 F.2d at 248.

separateness outweighs the economic prejudice of consolidation."[185] In other words, a court must "conduct a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts on objecting parties."[186]

148. In setting forth the standard, the *Eastgroup* court indicated that "the proponent of substantive consolidation must show that (a) there is substantial identity between the entities to be consolidated; and (b) consolidation is necessary to avoid some harm or to realize some benefit."[187] Once the proponent has made this prima facie case for consolidation, "the burden shifts to an objecting creditor to show that (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation."[188] If an objecting creditor makes this showing, the court may order consolidation "only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm."[189]

149. In *Eastgroup*, the Eleventh Circuit suggested framing the ask for substantive consolidation using the following seven factors:

(a) the presence or absence of consolidated financial statements;
(b) the unity of interests and ownership between various corporate entities;
(c) the existence of parent and intercorporate guarantees on loans;
(d) the degree of difficulty in segregating and ascertaining individual assets and liabilities;
(e) the existence of transfers of assets without formal observance of corporate formalities;
(f) the commingling of assets and business functions; and
(g) the profitability of consolidation at a single physical location.

185 *Id.* at 248–49; *see also In re Reider*, 31 F.3d 1102, 1107–08 (11th Cir. 1994) ("Pursuant to the general equitable power conferred by Bankruptcy Code section 105, a court may order substantive consolidation of corporate entities upon an evaluation of 'whether the economic prejudice of continued debtor separateness' outweighs 'the economic prejudice of consolidation.'").

186 *Eastgroup Props.*, 935 F.2d at 249.

187 *Id.*

188 *Id.*

189 *Id.*

The Eleventh Circuit also mentions additional factors that could be presented in some cases, including:

(a) the parent owning the majority of the subsidiary's stock;
(b) the entities having common officers and directors;
(c) the subsidiary being grossly undercapitalized;
(d) the subsidiary transacting business solely with the parent; and
(e) entities disregarding the legal requirements of the subsidiary as a separate organization.

The Eleventh Circuit noted that the foregoing factors are only "examples of information that may be useful to courts charged with deciding whether there is a substantial identity between the entities to be consolidated and whether consolidation is necessary to avoid some harm or to realize some benefit."[190] "No single factor is likely to be determinative in the court's inquiry."[191]

150. The Debtors submit that they satisfy the governing standard, meriting substantive consolidation. *First*, there is substantial identity between the OpCo Debtors and the DivestCo Debtors, respectively.

151. With respect to the OpCo Debtors, the OpCo Debtors consist of the Debtor entities that will be operating and managing the go-forward facilities (42 in total)[192] of the Debtors. The Debtors as a whole, including the OpCo Debtors, have consolidated financial statements and utilize a consolidated cash management system for collection and disbursement activities with respect to the OpCo Debtors. The Debtors' largest trade vendors, including Powerback and HSG, operate through consolidated contracts with the OpCo Debtors and each of the OpCo Debtors receives management services through Debtor CMC II and back-office services from non-Debtor Synergy. These services include IT infrastructure, banking support, and other support that occurs on a

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[190] *Id.* at 250.
[191] *Id.*
[192] As set forth herein and in the proposed Confirmation Order, the Debtors intend to reject the lease with respect to their remaining Florida facility, Harts Harbor, and subsequently transfer facility operations to a new operator.

consolidated basis at the OpCo Debtors. The OpCo Debtors are all directly or indirectly owned by Debtor LaVie Care Centers, LLC and the governing body of each of the OpCo Debtors was indirectly provided through the Board of Directors of non-Debtor FC XXI. Substantially all of the OpCo Debtors are joint and several co-obligors and/or guarantors under the ABL Exit Facility, the DIP Facility, and the Omega Term Loan Credit Agreement, as well as certain of the Debtors' master leases and prepetition settlement agreements with the United States. The OpCo Debtors also engage in voluminous intercompany transactions with one another on a daily basis. Given these factors, there is clearly "substantial identity" between the OpCo Debtors, justifying their substantive consolidation.

152. With respect to the DivestCo Debtors, the DivestCo Debtors consist of the Debtor entities which, among other things, previously operated facilities that were divested in advance of the Chapter 11 Cases. Like the OpCo Debtors, the DivestCo Debtors are all directly or indirectly owned by Debtor LaVie Care Centers, LLC and the governing body of each of the DivestCo Debtors was indirectly provided through the Board of Directors of non-Debtor FC XXI. The DivestCo Debtors have consolidated financial statements and also utilize the Debtors' consolidated cash management system in collecting accounts receivable. Additionally, virtually all of the Debtors' operations transfer agreements involving the DivestCo Debtors contain intercorporate guarantees on the obligations contained in those agreements. The DivestCo Debtors are all also obligors under the DIP Facility. Accordingly, there is "substantial identity" between the DivestCo Debtors, justifying their substantive consolidation.

153. *Second*, substantive consolidation of the OpCo Debtors and the DivestCo Debtors, respectively, is necessary to both avoid harm to and benefit the Debtors' Estates. The compromises contained in the Plan are premised upon substantive consolidation between the OpCo Debtors, on

the one hand, and the DivestCo Debtors, on the other, meaning that, subject to Court approval, the OpCo Debtors will be substantively consolidated and the DivestCo Debtors will be substantively consolidated for voting, distribution, and confirmation of the Plan. The parties to the Mediation, including the Committee, the Plan Sponsor, and the Omega Secured Parties, have agreed to support substantive consolidation only on this basis. Without substantive consolidation (or "deemed" substantive consolidation), the substantial contributions made by the Released Parties, including the Plan Sponsor, would not be available, and the Committee would not be supportive of the Settlement or the Plan. As such, substantive consolidation is necessary to avoid harming creditors of the Estates and negatively impacting their projected recoveries, justifying its approval.

154. In sum, the Debtors submit that substantive consolidation of the OpCo Debtors' Estates and substantive consolidation of the DivestCo Debtors' Estates for voting, distribution, and confirmation purposes only is appropriate, reasonable, and necessary.

MODIFICATIONS TO THE PLAN

155. Bankruptcy Code section 1127(a) provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of Bankruptcy Code sections 1122 and 1123.[193] Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications to a plan after such plan has been accepted will be deemed to have been accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder.[194] Interpreting Bankruptcy Rule 3019, courts have consistently held that a proposed modification to a previously accepted plan will

[193] *See* 11 U.S.C. § 1127(a).

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

be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[195] Resolicitation following the modification of a plan is not automatically required, as this would require unnecessary delay where a plan has already been accepted and was not materially altered and could create perverse incentives for creditors to change votes for strategic purposes.[196] Moreover, courts have found that "there is no practical reason to undertake this expensive proposition" of resolicitation of every dissenting creditor where a portion of the class necessary to carry the class voting has already consented in writing to the modifications.[197]

156. Contemporaneously herewith, the Debtors will be filing a modified version of the Plan, which implements certain technical Modifications. The Modifications are immaterial and non-substantive, as they do not adversely affect the treatment of any Holder of Claims or Interests. The purpose of the Modifications was to, among other things, further narrow certain issues raised in certain of the Objections. Given the immaterial nature of the Modifications, the fact that they do not adversely affect creditors and stakeholders, and the support for the Modifications expressed by the Committee, the Modifications comply with Bankruptcy Code section 1127 and Bankruptcy Rule 3019. Accordingly, the Debtors submit that no additional solicitation or disclosure is required on account of the Modifications, and that such Modifications should be deemed accepted by all creditors that previously accepted the Plan.

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[195] *See, e.g.*, *In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009); *In re Burns & Roe Enters., Inc.*, No. 08-4191 (GEB), 2009 WL 438694, at *23 (D.N.J. Feb. 23, 2009).

[196] *See In re Dow Corning Corp.*, 237 B.R. 374, 378-79 (Bankr. E.D. Mich. 1999).

[197] *Id.* at 379.

GOOD CAUSE EXISTS TO WAIVE THE STAY OF THE CONFIRMATION ORDER

157. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise."[198] Bankruptcy Rules 6004(h) and 6006(d) provide similar stays of orders authorizing the sale of property and assignments of executory contracts or unexpired leases, respectively.[199] These rules also permit modification of the stay upon court order.

158. Good cause exists for waiving any stay of the proposed Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the proposed Confirmation Order may become effective immediately upon its entry. As noted above, the Chapter 11 Cases have been conducted in good faith and with a high degree of transparency and public dissemination of information. Thus, the Debtors request a waiver of the stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may become effective immediately upon its entry.

CONCLUSION

159. For all the reasons set forth herein, in the Jones Declaration, the Decker Declaration, the Voting Declaration, and the Krakovsky Declaration, and as will be further shown at the Combined Hearing, the Debtors respectfully request that the Court (a) approve the adequacy of the information contained in the Disclosure Statement on a final basis; (b) confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the proposed Confirmation Order; (c) overruling any remaining objections to adequacy of the Disclosure Statement or Confirmation of the Plan to the extent not resolved prior to or at the Combined Hearing; (d) waive the stay of the proposed Confirmation Order; and (e) grant such other and further relief as is just and proper.

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[198] Fed. R. Bankr. P. 3020(e).
[199] *See* Fed. R. Bankr. P. 6004(h); Fed. R. Bankr. P. 6006(d).

Dated: Atlanta, Georgia
November 12, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024, all ECF participants registered in this case were served electronically with the foregoing document through the Court's ECF system at their respective email addresses registered with this Court. The Debtors' claims and noticing agent will be filing a supplemental certificate of service on the docket to reflect any additional service of the foregoing document, including on the Limited Service List.

Dated: Atlanta, Georgia
November 12, 2024

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