UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
Medley LLC,[1]	Case No. 21-10526 (KBO)
Debtor.	

PLAN PROPONENTS' MEMORANDUM OF LAW (I) IN SUPPORT OF (A) FINAL APPROVAL OF THE ADEQUACY OF DISCLOSURE STATEMENT UNDER SECTION 1125 OF THE BANKRUPTCY CODE AND (B) CONFIRMATION OF THE THIRD AMENDED COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF MEDLEY LLC AND (II) IN RESPONSE TO OBJECTIONS TO APPROVAL OF, AND CONFIRMATION OF, COMBINED DISCLOSURE STATEMENT AND PLAN

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[1] The last four digits of the Debtor's taxpayer identification number are 7343. The Debtor's principal executive office is located at 280 Park Avenue, 6th Floor East, New York, New York 10017.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

1. Medley LLC as debtor and debtor in possession in the above-captioned case (the "Debtor"),[2] the Committee (as defined below), and Medley Capital LLC ("Medley Capital," and together with the Debtor and the Committee, the "Plan Proponents"), submit this memorandum of law (this "Memorandum") in support of the Plan Proponents' request for entry of an order, substantially in the form filed concurrently herewith, (a) granting final approval of the adequacy of disclosure under section 1125 of the Bankruptcy Code, and (b) confirming and approving the *Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* [Docket No. 324] (as may be modified, amended, or supplemented from time to time, the "Combined Disclosure Statement and Plan or the "Plan"). This Memorandum is the legal support for confirmation of the Plan pursuant to section 1129 of the Bankruptcy Code and a response to the objections filed by the United States Trustee for Region 3 (the "U.S. Trustee") [Docket No. 381] (the "UST Objection") and the U.S. Securities and Exchange Commission (the "SEC," and, together with the U.S. Trustee, the "Objecting Parties") [Docket No. 382] (the "SEC Objection," and, together with the UST Objection, the "Objections").

2. The Plan Proponents also submit the: (a) *Declaration of Michelle A. Dreyer in Support of Confirmation of the Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* (the "Dreyer Declaration"); (b) *Declaration of Howard Liao in Support of Confirmation of the Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* (the "Liao Declaration"); (c) *Declaration of Adam M. Rosen in Support of Confirmation of the Third Amended Combined Disclosure Statement and Chapter 11 Plan of*

[2] Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed thereto in the Plan or the Solicitation Procedures Motion (each as defined herein), as applicable.

Medley LLC (the "Rosen Declaration," and together with Dreyer Declaration and the Liao Declaration, the "Confirmation Declarations" filed concurrently herewith); and (d) *Declaration of James Lee Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Third Amended Combined Disclosure Statement of the Chapter 11 Plan of Medley LLC*, filed on September 28, 2021 [Docket No. 385] (the "Initial Ballot Report") and *Amended Declaration of James Lee Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Third Amended Combined Disclosure Statement of the Chapter 11 Plan of Medley LLC*, filed on October 1, 2021 [Docket No. 387] (the "Amended Ballot Report," and, together with the Initial Ballot Report, the "Ballot Report").

3. For the reasons set forth herein and in the Confirmation Declarations, the Plan satisfies the requirements for confirmation set forth in Bankruptcy Code section 1129.

PRELIMINARY STATEMENT

4. The Plan presented to this Court for confirmation maximizes the value of the Debtor's Estate for the benefit of its creditors. It is the byproduct of extensive analysis of all viable options and represents the consensus view of all of the Plan Proponents of the best way forward to avoid the potential further negative consequences of a prolonged chapter 11 case, much less the disastrous impact of attempting to convert this case to a chapter 7. The Plan has been vetted by each of the Plan Proponents and their advisors, all of whom have their own independent and differing constituencies, and has been overwhelmingly approved by the Debtor's unsecured creditors.

5. The core of the Plan is straight forward. The Debtor, a non-operating holding company, will benefit from having its sole remaining viable asset, its non-debtor operating subsidiary Medley Capital, continue to do what it has historically done (*i.e.*, operate and earn revenue by providing ongoing advisory and administrative services to non-debtor affiliates on

account of Remaining Company Contracts) through the orderly termination of those contracts on or before the Wind-Down Date. That newly earned revenue, after Medley Capital's expenses and operation costs are accounted for, can then be used by the Debtor to fund a further recovery for its creditors. Absent implementation of this strategy, there is no other viable alternative to earn a similar, much less greater, recovery for the Debtor's creditors.

6. Effectuation of the Plan is contingent upon two key and interrelated factors controlled by non-debtors: (a) Medley Capital must remain capable of providing the services necessary to earn revenue under the Remaining Company Contracts; and (b) the contractual counter-parties, notably Sierra, must believe that Medley Capital can still meet its contractual obligations to provide the agreed-upon services, such that they will continue to pay for the services. For both of these factors to happen, Medley Capital must remain operational and solvent.[3] In other words, the expenses and obligations associated with Medley Capital operating must continue to be paid—most notably, Medley Capital's employees (its primary asset) must be assured that they will continue to be compensated consistent with the agreed-upon expectations. If that was not to happen, it is unquestionable that those employees will leave their jobs and Medley Capital will be unable to meet its contractual obligations, both foreclosing the ability for the Debtor to earn additional revenue to funds its creditors' recovery, and exposing the non-debtor affiliate advisors, Medley Capital, and the Debtor to potential liability for breach of contract.[4] Put simply, the Debtor

[3] *See* Liao Decl., ¶ 23, n. 8. The SEC Objection misconstrues Mr. Liao's prior testimony regarding the solvency of Medley Capital. *See* SEC Obj. at n. 6.

[4] Lest the Court be led to believe by the SEC that this is merely claims that "the sky will fall" (SEC Obj, ¶ 63), this concern is based on the actual evidentiary record. From the Petition Date to the announcement of the Non-Debtor Compensation Plan, Medley Capital lost nearly 50% of its employees, and currently sits at the precipice of its minimum employee threshold to adequately service its contracts. Liao Decl., ¶ 17. The remaining employees have told Medley Capital management that, absent the assurance under the Non-Debtor Compensation Plan that they will receive their annual end-of-year lump sum payment as part of their compensation structure, they will assuredly leave as their colleagues have already done, and Sierra has informed Medley Capital that additional

cannot earn revenue from Medley Capital's work to apply towards its creditors if no one pays for the costs of Medley Capital operations necessary to earn those funds.

7. To achieve this result, the Plan Proponents have managed to negotiate for significant contributions to the Plan from non-debtors. First, the funding of the Non-Debtor Compensation Plan will include *no* estate resources, but rather will be funded exclusively by non-debtor Medley Capital and by a $2.1 million voluntary contribution from Sierra, separate and in addition to any fees Sierra is required to pay under its existing contracts. That compensation is exclusively to fund the operational expenses of Medley Capital and is being provided to Medley Capital executives and employees exclusively for their work on behalf of the non-debtor Medley Capital. Second, Medley Capital's current management, who were almost all not in management positions prior to the chapter 11 filing,[5] agreed to assume those positions, as well as taking similar titles at the Debtor, to facilitate the orderly wind down of the businesses and the proper servicing of Medley Capital's contractual obligations. They have taken on this additional responsibility and work for no additional compensation and, in fact, will each earn *less* for their work in 2021 than they did in 2020, even with the Non-Debtor Compensation Plan.

8. Yet, despite the Plan being widely supported by all pertinent constituencies[6] as the best way forward and only being possible due to contributions by non-debtors, the SEC objects to the Plan. It does not do so because it has an alternative plan that it believes will provide a greater recovery to creditors, nor because it believes the Debtor's assets are of greater value than the Plan

attrition will cause it to conclude that Medley Capital is no longer able to meet its contractual obligations. Liao Decl., ¶¶ 19–22.

[5] The one exception is Richard Allorto, the CFO, who was and remains in that position.

[6] Notably, SEC holds a disputed, contingent, and unliquidated claim and, as such, its position in this case is entirely duplicative or derivative of the claims of bondholders, which voted overwhelming to approve the Plan.

ascribes to them.[7] It does not question the independence of the Debtor's independent director, Michelle Dryer, or the Committee and its advisors, nor that either constituency was not fully informed of its options and that they were fully considered. Nor does the SEC allege any impropriety in the actions of current management. And most importantly, the SEC does not contest that any recovery for the creditors will only be generated if advisory services are actually rendered. The Debtor will benefit from the profits solely to the extent that it ensures that the advisory services are actually rendered from the only subsidiary that is capable of rendering the services: Medley Capital.

9. Instead the SEC's objection is based on the faulty and legally improper premise that the Debtor should take advisory revenue from its subsidiaries without accounting for the costs of providing those advisory services at the subsidiary level. The SEC suggests that the Debtor's non-debtor advisors who receive the payments for Medley Capital's work should not abide by their contractual obligations to reimburse Medley Capital for its expenses, and instead should send all of the gross revenue to the Debtor. In the SEC's words, "[t]he Debtor is the profit center of the overall Medley enterprise."[8] But by that, the SEC does not mean a profit center as that term is typically understood—the portion of the business that earns profits for the enterprise—that is Medley Capital; rather, the SEC means that the Debtor is where profits are upstreamed for distribution. But profits are only determined *after* expenses have been accounted for—here the

[7] Tellingly, the SEC nakedly floats the notion that the case could be converted to a chapter 7, but then states that the SEC is not asking for that result, before suggesting to the Court that it can do so of its own volition. *See* SEC Obj., at n. 16. The SEC offers no alternative liquidation analysis demonstrating a greater recovery under chapter 7 or any real critique of the liquidation analysis set forth in the Plan other than the baseless suggestion that Medley Capital may have been able to earn the same revenue without its expenses being funded. The SEC, and all other constituencies, are not asking for a conversion to a chapter 7 because as laid out in the liquidation analysis, it would be disastrous for the creditors of the Debtor.

[8] SEC Obj., ¶ 32.

expenses of Medley Capital. The SEC's objection hinges on this conflation of gross revenue and profits, but they are neither the same as a matter of finance nor in their treatment under the relevant contracts.

10. At bottom, the SEC's theory is that the Debtor should gain the benefits from Medley Capital working for it, but no one should pay Medley Capital for that work. Remarkably, the SEC asks the Court to believe that not only is that legally permissible and economically viable, which it clearly is not, but that the employees of Medley Capital will agree to continue to provide the necessary services despite not being paid, in many cases the majority of their compensation.[9] Economic common sense, the evidence from Medley Capital's employees and Sierra, and the clear terms of the applicable contracts, all make clear that the SEC's objections are meritless, and the Plan should be confirmed.

SUMMARY OF PLAN TRANSACTIONS AND DEBTOR'S BUSINESS

11. The Plan provides for the orderly wind-down of the Debtor's business in a manner that maximizes value for the Debtor's Estate. This is accomplished by the transfer of the Debtor's assets to the Liquidating Trust, which will be administered by the Liquidating Trustee under the

[9] The SEC (and to a far more limited extent the U.S. Trustee) have launched a collateral attack on the Plan by trying to torpedo it by alleging that the lynchpin Non-Debtor Compensation Plan is impermissible under section 503(c). But the Non-Debtor Compensation Plan is a plan for non-debtor entities Medley Capital and Sierra to compensate non-debtor employees of Medley Capital. It includes no Estate funds, nor are any of its recipients employees of the Debtor, much less its insiders. This includes Msrs. Liao, Crowe, Richards, and Allorto, who are only employed and compensated by Medley Capital (and contrary to the SEC's assertions, the only Non-Debtor Compensation Plan participants with any title at the Debtor). The fact that they agreed to take on titles at the Debtor post-bankruptcy to help it through the process should not foreclose them from participating in the compensation plan of their non-debtor employer. However, if the Objecting Parties are to insist upon demanding that no plan recipient receive a payment for their work at a non-debtor if they hold a title at a debtor entity (a proposition that they offer no law to support), then each of the four executives will simply relinquish their title at the Debtor, which will only hurt the Debtor as it will mean that no employee of Medley Capital can serve in a leadership position at the Debtor and still receive their expected compensation, thus requiring the Debtor to incur the unnecessary additional expense of having to hire outside leadership. As the SEC points out, courts look with disfavor on parties that try to game the system to avoid the standards of Section 503(c); the same should be true here where the SEC is attempting to use the technicality of Medley Capital executives also holding titles at the Debtor to try to improperly impose the requirements of section 503(c) on non-debtor compensation.

oversight of the Oversight Committee. However, because the Debtor does not provide any investment or administrative services directly, the wind-down is facilitated by contributions and cooperation provided by Medley Capital (a Plan Proponent, non-Debtor Affiliate, and the primary provider of services within the Debtor's business structure) and Sierra (the largest client of the Debtor's business). Pursuant to the Plan, Medley Capital will continue to provide services to Sierra and other investment clients in accordance with the terms of the applicable agreements governing such relationships, which in turn will generate revenues that, after allowing for the payment of employee compensation and other operating expenses as required by the applicable governing documents, will pass on to the Debtor's Estate in the form of an equity distribution. Stated in the simplest terms, between the Effective Date and the Wind-Down Date, Medley Capital can operate its business at a profit, which profit will directly benefit the Estate.

12. Each of the Plan Proponents has determined, after consideration of alternatives and consultation with its advisors, that this arrangement is the only viable path for obtaining a recovery for the Debtor's unsecured creditors.[10] However, in order to obtain the benefits of this arrangement, the Plan must allow for the fulfillment of contractual obligations under the existing client agreements and the applicable governing documents and must provide for the reasonable compensation of the Medley Capital employees who will provide the services that will generate this income. As the Liquidation Analysis demonstrates, even after providing for the necessary costs and expenses associated with implementing the Plan, the Debtor's Estate will obtain a significantly greater recovery than it would in a chapter 7 liquidation.[11]

[10] Dreyer Decl., ¶¶ 42–44; Liao Decl., ¶ 22–27; Rosen Decl., ¶ 13.

[11] Rosen Decl., ¶¶ 9, 10.

A. Governing Contractual Obligations.

13. The obligations of Medley Capital and the Advisors to their clients are governed by contractual arrangements, usually in the form of an IMA, which require that Medley Capital and the Advisors provide certain services to the client and provides for Medley Capital and the Advisors to earn certain fees in exchange. In addition, the relationships between the Debtor, Medley Capital, and the Advisors are governed by applicable LLC agreements and operating agreements, which provide for the distribution of profits to the applicable equity holder, but only after payment of, or otherwise accounting for, necessary costs and expenses. It is a simple tenet of business law that an entity cannot disburse funds to its equity holders until it has accounted for the claims of its creditors. In this case, any Cash held by Medley Capital or the Advisors must be used to satisfy the claim of their respective creditors before it can be disbursed up to the Debtor in the form of an equity distribution. It is also important to note that, absent Medley Capital's and the Advisors' continued performance under the existing IMAs, those entities could be subject to claims brought by the clients for breach of contract, and amounts for such claimed damages would also have to be accounted for prior to distributing funds up to the Debtor. This practice is required by the terms of the applicable governing documents and consistent with the prior practice of the Debtor, Medley Capital, and the Advisors.[12]

B. Medley Capital Employees and the Non-Debtor Compensation Plan.

14. The Debtor does not have any employees and is not a registered investment advisor. As such, the Debtor cannot provide the services required under the IMAs. Instead, consistent with the Debtor's prior practice, these services are provided by Medley Capital and the Advisors, with

[12] *See, e.g.*, Servs. and Licensing Agmt., § 7(a).

all of the business' employees being employed by Medley Capital.[13] These employees are Medley Capital's only material asset and allow Medley Capital to generate revenue, which ultimately benefits the Debtor.[14] However, since the Petition Date, employee headcount has decreased at a far greater percentage than the amount of assets managed across investments by Medley Capital for its clients over the same period.[15] The headcount reduction has likely been driven by the uncertainty of the Chapter 11 Case and the current high demand for such employees in the broader job market.[16] Further attrition could jeopardize Medley Capital's ability to continue providing services to the clients, which in turn could jeopardize the recovery for the Debtor's Estate.

15. To retain Medley Capital's employees, who are essential for the successful implementation of the Plan and for maximizing the recovery for the Debtor's creditors, the Plan provides for the Non-Debtor Compensation Plan. Every major constituent in this Chapter 11 Case was involved in the development of the Non-Debtor Compensation Plan and it was extensively vetted and negotiated among the Plan Proponents and their respective professionals. The Non-Debtor Compensation Plan will be funded by Medley Capital and from a $2.1 million contribution from Sierra, a contribution that is ***in addition to*** the fees Sierra is required to pay under the various contracts with Medley Capital and SIC Advisors. After extensive negotiation and consideration, each of the Plan Proponents determined that the implementation of the

[13] Liao Decl., ¶¶ 9–10, 16.

[14] Indeed, Medley Capital and the Advisors are not able to sell the IMAs without client consent, so the assets that Medley Capital has are the employees that can perform the investment management services, which in turn generates revenue for all affiliated entities. Liao Decl., ¶¶ 9–10, 16.

[15] On the Petition Date, Medley Capital had 47 employees and managed approximately $1.3 billion in assets across more than 200 investments. Liao Decl., ¶ 29. Medley Capital currently has only 26 employees and manages approximately $930 million in assets across approximately 200 investments. *Id*.

[16] Liao Decl., ¶ 17–18.

Non-Debtor Compensation Plan is essential to the success of the Plan because it provides fair market compensation to the employees to induce them to continue to provide services to the clients, which in turn (after accounting for other costs and expenses) will result in funds available for distribution to the Debtor's Estate for the benefit of its creditors.

CHAPTER 11 CASE BACKGROUND

A. Commencement of the Chapter 11 Case.

16. On March 7, 2021, the Debtor commenced this Chapter 11 Case by filing a petition for relief under chapter 11 of the Bankruptcy Code. Certain factual background regarding the Debtor, including its business operations, its capital and debt structures, and the events leading to the filing of this Chapter 11 Case, is set forth in detail in the *Declaration of Richard T. Allorto, Jr. in Support of Chapter 11 Petition and First Day Pleadings* [Docket No. 5] (the "First Day Declaration").

17. The Debtor is managing and operating its businesses as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

18. On April 22, 2021, the U.S. Trustee appointed the Official Committee of Unsecured Creditors pursuant to section 1102(a) of the Bankruptcy Code (the "Committee") to serve in this Chapter 11 Case.

B. Postpetition Negotiations and Development of the Plan.

19. On July 1, 2021, the Committee filed a motion [Docket No. 234] (the "Exclusivity Termination Motion") seeking to terminate the Debtor's exclusive period during which it may file and solicit votes on a plan (the "Exclusivity Period").

20. On July 6, 2021, the Debtor filed the *Combined Disclosure Statement and Chapter 11 Plan of Reorganization and Wind-Down of Medley LLC* (the "Original Plan") and a motion

[Docket No. 243] (the "Exclusivity Extension Motion") seeking to extend the Debtor's Exclusivity Period.

21. On July 14, 2021, the Debtor filed a motion [Docket No. 255] (the "Solicitation Procedures Motion") seeking approval, on an interim basis, of the adequacy of disclosures in the Combined Disclosure Statement and Plan, and approval of certain procedures governing the solicitation of votes to accept or reject the Plan (the "Solicitation Procedures") and certain dates and deadline related thereto.

22. During July 2021, the Debtor, Medley Capital, and the Committee engaged in extensive discussions with the aim of reaching a consensual resolution of the Chapter 11 Case. Thereafter, the Debtor filed that certain plan term sheet, dated July 21, 2021 [Docket No. 276] (the "Plan Term Sheet"), which sets forth the material terms of the Plan supported by the Plan Proponents.

23. On August 2, 2021, the Plan Proponents filed the *First Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* [Docket No. 284].

24. On August 4, 2021, the Committee filed a notice [Docket No. 293] withdrawing the Exclusivity Termination Motion.

25. On August 5, 2021, the Committee filed a statement in support of extending the Debtor's exclusivity period and in support of the Plan [Docket No. 297] (the "Committee Plan Support Statement").

26. On August 10, 2021, the Court entered an order [Docket No. 310] extending the Debtor's Exclusivity Period (a) to file a plan through October 3, 2021, and (b) to solicit votes on a plan through December 2, 2021.

27. On August 11, 2021, the Plan Proponents filed the *Second Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* [Docket No. 315].

28. On August 12, 2021, the Court held a hearing to consider approval, on an interim basis, of the adequacy of the disclosures in the Combined Disclosure Statement and Plan, and approval of the solicitation procedures and dates and deadlines requested in the Solicitation Procedures Motion.

29. On August 13, 2021, the Plan Proponents filed the *Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* [Docket No. 324].

C. The Solicitation Process

30. On August 16, 2021, the Court entered an order [Docket No. 328] (the "Solicitation Procedures Order") approving the Solicitation Procedures Motion, including the Solicitation Procedures, dates, and deadlines requested therein. Specifically, August 12, 2021 was established as the Voting Record Date and September 24, 2021 was established as the deadline by which all Ballots to accept or reject the Plan must be submitted to the Voting Agent. In addition, under the Solicitation Procedures Order, September 28, 2021 was established as the deadline to file objections to the adequacy of disclosures or confirmation of the Combined Disclosure Statement and Plan and the hearing to consider final approval of the Combined Disclosure Statement and Plan was scheduled for October 5, 2021 (the "Combined Hearing"). The Solicitation Procedures Order also approved, among other things, the notice of the Combined Hearing (the "Combined Hearing Notice"), the Ballots provided to Holders of Claims in the Voting Classes, and certain notices to the Holders of Claims and Interests in the Non-Voting Classes (the "Notice of Unimpaired Non-Voting Status" and "the Notice of Impaired Non-Voting Status," together, the "Notice of Non-Voting Status")

31. Following entry of the Solicitation Procedures Order, the Debtor distributed solicitation packages containing the Combined Disclosure Statement and Plan, the Solicitation Procedures Order, the Combined Hearing Notice, a letter to creditors from the Committee in support of the Combined Disclosure Statement and Plan, and the applicable Ballot to holders of Claims in the Voting Classes as of the Voting Record Date.[17]

32. The Debtor distributed the Combined Hearing Notice and the applicable Notice of Non-Voting Status to all known Holders of Claims and Interests in the Non-Voting Classes.[18]

33. The Debtor distributed the Combined Hearing Notice to all known creditors of the Debtor and distributed the Combined Disclosure Statement and Plan, the Solicitation Procedures Order, and the Combined Hearing Notice to all parties that have requested notice in this Chapter 11 Case pursuant to Bankruptcy Rule 2002 and Local Rule 2002-1(b).[19]

34. On August 18, 2021, the Debtor filed a notice [Docket No. 336] showing that the Combined Hearing Notice (with such changes as appropriate for purposes of publication) was published in the national edition of the *New York Times*.

35. On September 17, 2021, the Debtor filed the *Notice of Plan Supplement* [Docket No. 371] (the "Plan Supplement Notice"). Included within the Plan Supplement was the Liquidating Trust Agreement, an amended liquidation analysis (the "Amended Liquidation Analysis"), the Wind-Down Budget, and a list of executory contracts to be rejected or assumed.

36. On September 28, 2021, the Plan Proponents filed a notice [Docket No. 383] (the "Oversight Committee Notice"), which identifies the initial members of the Oversight

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[17] *See Certificate of Service* [Docket No. 343] (the "Certificate of Service").

[18] *See id*.

[19] *See id*.

Committee in accordance with the terms of the Plan. Two members of the Oversight Committee were initially identified on September 17, 2021 in the Liquidating Trust Agreement, which was included in the Plan Supplement.

D. The Voting Results

37. On October 1, 2021, the Voting Agent filed the Amended Ballot Report. The Amended Ballot Report sets forth the dollar amounts of Claims and number of Holders voting in favor of the Plan in each Class, with respect to the votes actually cast, summarized in the charts below:

Dollars Actually Voted

Class	Class Description	Total Dollars Voted	Dollars Accepted (% Accepting)	Dollars Rejected (% Rejecting)
4	Notes Claims	$21,225,366	$19,801,900 (93.29%)	$1,423,465 (6.71%)
5	General Unsecured Claims	$7,709,583	$7,709,583 (100%)	$0 (0%)

Numbers Actually Voted

Class	Class Description	Total Number Voted	Number Accepted (% Accepting)	Number Rejected (% Rejecting)
4	Notes Claims	537	471 (87.71%)	66 (12.29%)
5	General Unsecured Claims	5	5 (100%)	0 (0%)

38. Accordingly, both of the Voting Classes have overwhelmingly voted in favor of confirmation of the Plan, and it should be confirmed.

ARGUMENT

I. Final Approval of the Disclosure Statement Is Warranted and the Plan Proponents Complied with the Solicitation Procedures Order.

A. The Combined Disclosure Statement and Plan Satisfies the Requirements of the Bankruptcy Code.

39. The primary purpose of a disclosure statement is to provide material information, or "adequate information," that allows parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[20] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[21] Courts within the Third Circuit and elsewhere acknowledge that determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code resides within the broad discretion of the court.[22]

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[20] *See, e.g., Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) ("Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing adequate information to enable a creditor to make an informed judgment about the Plan.") (internal quotation marks omitted); *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote.").

[21] 11 U.S.C. § 1125(a)(1) ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 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."); *First Am. Bank of N.Y. v. Century Glove, Inc.*, 81 B.R. 274, 279 (D. Del.) (noting that adequacy of disclosure for a particular debtor will be determined based on how much information is available from outside sources), *aff'd in part,* 860 F.2d 94 (1988).

[22] *See, e.g., In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court."); *In re River Village Assocs.*, 181 B.R. 795, 804 (E.D. Pa. 1995) (same); *In re Phx. Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) (same); *see also Cadle Co. II, Inc. v. PC Liquidation Corp. (In re PC Liquidation Corp.)*, 383 B.R. 856, 865 (E.D.N.Y. 2008) ("The standard for disclosure is, thus, flexible and what constitutes adequate information in any particular situation is determined on a case-by-case basis, with the determination being largely within the discretion of the bankruptcy court.") (internal quotation marks and citations omitted); *In re Lisanti Foods, Inc. v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 507 (D.N.J. 2005) (same), *aff'd*, 241 F. App'x 1 (3d Cir. 2007).

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

a. the events which led to the filing of a bankruptcy petition and the relationship of a debtor with the affiliates;

b. a description of the available assets and their value based on the present condition of the debtor while in chapter 11;

c. the anticipated future of the company and the claims asserted against a debtor;

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

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

f. the future management of a debtor;

g. the chapter 11 plan or a summary thereof;

h. the financial information, valuations, and projections relevant to the claimants' decision to accept or reject the chapter 11 plan;

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

j. the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;

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

l. the tax attributes of a debtor.[23]

41. The Combined Disclosure Statement and Plan contains, among other things, descriptions and summaries of: (a) the classification and treatment of claims and interests under the Plan, including who is entitled to vote and how to vote on the Plan; (b) the Debtor's corporate history and corporate structure, business operations, and prepetition capital structure and

[23] *See In re U.S. Brass Corp.*, 194 B.R. 420, 424–25 (Bankr. E.D. Tex. 1996); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (listing the factors courts have considered in determining the adequacy of information provided in a disclosure statement); *In re Metrocraft Publ'g Servs., Inc.,* 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same). Disclosure regarding all topics is not necessary in every case. *Phx. Petroleum*, 278 B.R. at 393; *U.S. Brass*, 194 B.R. at 425.

indebtedness; (c) events leading to the Chapter 11 Case; (d) certain important effects of confirmation of the Plan; (e) the releases and exculpations contemplated by the Plan; (f) certain financial information about the Debtor, including liquidation and valuation analyses; (g) the statutory requirements for confirming the Plan; and (h) certain risk factors holders of claims should consider before voting to accept or reject the Plan and information regarding alternatives to confirmation of the Plan.

42. For the reasons set forth above, the Plan Proponents submit that the Combined Disclosure Statement and Plan contains adequate information within the meaning of Bankruptcy Code section 1125(a) in satisfaction of section 1126(b)(2) and should be approved on a final basis.

B. The Plan Proponents Substantially Complied with the Solicitation Procedures Order.

43. As set forth above, on August 16, 2021, the Court entered the Solicitation Procedures Order, and approved, among other things, the Combined Hearing Notice, Voting Record Date, Voting Deadline, Solicitation Procedures, forms of Ballots, and voting tabulation procedures.[24] The Plan Proponents substantially complied with the procedures approved in the Solicitation Procedures Order.

1. The Plan Proponents Substantially Complied with the Notice Requirements Set Forth in the Solicitation Procedures Order.

44. The Plan Proponents substantially satisfied the notice requirements set forth in the Solicitation Procedures Order, Bankruptcy Rule 3017, and Local Rule 3017-1. On August 23, 2021, the Voting Agent mailed the solicitation materials (by First Class U.S. Mail and electronically), which included the Combined Disclosure Statement and Plan and Combined Hearing Notice, the applicable Ballots to holders of Claims in the Voting Classes as of the Voting

[24] *See* Solicitation Procs. Order ¶¶ 3–23.

Record Date entitled to vote to accept or reject the Plan, and the Notice of Non-Voting Status, as applicable.[25] Further, the Combined Hearing Notice included instructions on how to obtain the Combined Disclosure Statement and Plan without a fee through the Debtor's restructuring website, https://www.kccllc.net/medley, or at the Court's PACER website, www.deb.uscourts.gov. In addition, no party has asserted defective service.

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

45. The form of Ballots used complied with the Bankruptcy Rules and were approved by the Court pursuant to the Solicitation Procedures Order.[26] No party has objected to the sufficiency of the Ballots. Based on the foregoing, the Plan Proponents submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(c).

3. The Plan Proponents' Solicitation Period Complied with the Solicitation Procedures Order and Bankruptcy Rule 3018(b).

46. The Plan Proponents' solicitation period complied with the Solicitation Procedures Order and Bankruptcy Rule 3018(a). *First*, as demonstrated above, the Combined Disclosure Statement and Plan was transmitted to all holders of claims entitled to vote on the Plan. *Second*, the solicitation period complied with the Solicitation Procedures Order and was adequate under the particular facts and circumstances of this Chapter 11 Case. Accordingly, the Plan Proponents submit that they substantially complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(a).

[25] Certificate of Service [Docket No. 343].

[26] *See* Solicitation Procs. Order ¶ 4.

4. The Plan Proponents' Vote Tabulation Procedures Complied with the Solicitation Procedures Order.

47. The Voting Agent reviewed all Ballots received in accordance with the procedures described in the Solicitation Procedures Order and the Solicitation Procedures Motion.[27] Because the Voting Agent substantially complied with the Solicitation Procedures, the Plan Proponents respectfully submit that the Court should approve the Debtor's tabulation of votes confirming that in Classes 3 and 4, the only two Classes entitled to vote on the Plan, the requisite majorities in amount and number of Claims voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code.

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

48. 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.

49. As demonstrated by the Plan Proponents' substantial compliance with the Solicitation Procedures Order, the Plan Proponents at all times engaged in arm's-length, good-faith negotiations and took appropriate actions in connection with the solicitation of the Plan in compliance with Bankruptcy Code section 1125. Therefore, the Plan Proponents respectfully request that the Court grant the parties the protections provided under section 1125(e) of the Bankruptcy Code.

[27] *See generally* Ballot Report.

II. The Plan Satisfies the Requirements of Bankruptcy Code Section 1129 and Should Be Confirmed.

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

50. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision also encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the content of a plan of reorganization, respectively.[28] As explained below, the Plan complies with the requirements of Bankruptcy Code sections 1122, 1123, and 1129, as well as other applicable provisions.

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

51. The classification requirement of section 1122(a) of the Bankruptcy Code provides, in pertinent part, as follows:

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

52. For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class.[29] Instead, claims or interests designated to a particular class must be substantially similar to each other.[30] Courts in

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[28] S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re 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) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was most directly aimed at were [s]ections 1122 and 1123.") (citation omitted).

[29] *See In re Armstrong World Indus., Inc.*, 348 B.R 136, 159 (D. Del. 2006).

[30] *See id*.

this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[31]

53. The Plan's classification of claims and interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places claims and interests into separate classes, with claims and interests in each class differing from the claims and interests in each other class in a legal or factual way or based on other relevant criteria.[32] Specifically, the Plan provides for the separate classification of claims and interests into the following classes:

a. Class 1: Secured Claims;

b. Class 2: Other Priority Claims;

c. Class 3: Notes Claims;

d. Class 4: General Unsecured Claims;

e. Class 5: Intercompany Claims; and

f. Class 6: Interests in Debtor.

54. The Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests

[31] Courts have identified grounds justifying separate classification, including: (i) where members of a class possess different legal rights, and (ii) where there are good business reasons for separate classification. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes); *see also Chateaugay Corp.. v. LTV Steel Co. (In re Chateaugay Corp.),* 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis on account of the bankruptcy court-approved settlement); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan"); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (although discretion is not unlimited, "the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case") (internal quotations omitted).

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

into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests. Namely, the Plan separately classifies the Claims because each Holder of such Claims or Interests may hold (or may have held) rights in the Debtor's estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification. For example:

a. Secured Claims (Class 1) are classified separately due to their required treatment under the Bankruptcy Code.

b. Other Priority Claims (Class 2) are classified separately due to their required treatment under the Bankruptcy Code.

c. Notes Claims (Class 3) are classified separately because they arise on account of the Notes.

d. General Unsecured Claims (Class 4) are classified separately because they represent general unsecured, non-priority, third-party Claims against the Debtor except for those arising on account of the Notes

e. Intercompany Claims (Class 5) are classified separately because they consist of Claims among the Debtor and the non-Debtor Affiliates.

f. Interests (Class 6) are classified separately because they are based upon equity ownership in the Debtor.

55. Accordingly, the Claims or Interests assigned to each particular Class under the Plan 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 Plan Proponents submit that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code.

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

56. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. The Plan satisfies each of these requirements.

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

57. Section 1123(a)(1) of the Bankruptcy Code requires that a chapter 11 plan designate classes of claims and interests, subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates five Classes of Claims and one Class of Interests, subject to section 1122 of the Bankruptcy Code.[33] Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

b. **Classes that Are Not Impaired (§ 1123(a)(2)).**

58. Section 1123(a)(2) of the Bankruptcy Code requires that a chapter 11 plan specify which classes of claims or Interests are unimpaired under the plan. The Plan meets this requirement by setting forth, in Article V of the Plan, the treatment of each Class that is not impaired.

c. **Treatment of Impaired Classes (§ 1123(a)(3)).**

59. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan meets this requirement by setting forth, in Article V of the Plan, the treatment of each impaired Class.

d. **Equal Treatment within Classes (§ 1123(a)(4)).**

60. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." The Plan meets this requirement because Holders of allowed Claims or Interests will receive the same rights and treatment as other Holders of allowed Claims or Interests within such holders' respective Class, except to the extent otherwise agreed to by the Plan Proponents and any such Holder.

[33] Plan, Art. V.

e. **Means for Implementation (§ 1123(a)(5)).**

61. Section 1123(a)(5) of the Bankruptcy Code requires a plan provide "adequate means" for its implementation. Article VII of the Plan (and elsewhere in the Plan) provides a detailed description of the transactions that will occur under the Plan. Specifically, the Plan and the Plan Supplement provide, among other things: (a) the global settlement of numerous Debtor-Creditor and inter-Creditor issues; (b) the transfer of all the Debtor's Assets to the Liquidating Trust; (c) the appointment of the Liquidating Trustee, and the specification of its responsibilities and duties; (d) the establishment of the Liquidating Trust; (e) the establishment of the Oversight Committee; (f) the disposition of the Debtor's books and records; and (g) the closing of the Chapter 11 Case. The precise terms governing the execution of these transactions are set forth in the applicable Definitive Documents or forms of agreements included in the Plan and the Plan Supplement. Moreover, the Debtor will have sufficient Cash to make all payments required upon the Effective Date pursuant to the terms of the Plan. Thus, the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

f. **Issuance of Non-Voting Securities (§ 1123(a)(6)).**

62. Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of non-voting equity securities, and requires amendments to a debtor's corporate governance documents to so provide. The Plan is a liquidating plan pursuant to which all the Debtor's assets will be transferred to the Liquidating Trust and the Debtor will ultimately be dissolved in accordance with the timeline set forth in the Plan. As such, the Plan does not provide for the issuance of non-voting equity securities, and the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

g. **Directors and Officers (§ 1123(a)(7)).**

63. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any other successor thereto,

be "consistent with the interests of creditors and equity security holders and with public policy." Article VII of the Plan, regarding the appointment of the Liquidating Trustee, is consistent with the interests of creditors and interest holders and with public policy. Moreover, pursuant to Section 8.1 of the Liquidating Trust Agreement,[34] "the fiduciary duties that applied to the Creditors' Committee and its members prior to the Effective Date shall apply to the Oversight Committee and all members thereof, regardless of whether or not any member of the Oversight Committee served on the Creditors' Committee." Accordingly, the Plan satisfies the requirements of Bankruptcy Code section 1123(a)(7).

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

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

64. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) 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; (d) modify the rights of holders of claims and interests; and (e) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[35]

[34] Ex. A to Plan Supplement [Docket No. 371].

[35] *See* 11 U.S.C. § 1123(b)(1)–(3), (5), (6).

b. **Impairment/Unimpairment of Claims and Interests (§ 1123(b)(1)).**

65. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." Under Article V of the Plan, Classes 1 and 2 are unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of the Holders of Claims within such Classes.[36] On the other hand, Classes 3, 4, and 6 are impaired since the Plan modifies the rights of the Holders of Claims and Interests within such Classes as contemplated in section 1123(b)(1) of the Bankruptcy Code.[37] Accordingly, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

c. **Assumption/Rejection of Executory Contracts and Leases (§ 1123(b)(2)).**

66. Section 1123(b)(2) of the Bankruptcy Code allows a plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Article VIII of the Plan provides that on the Effective Date, all of the Debtor's Executory Contracts and Unexpired Leases will be deemed assumed unless (a) identified as rejected on the Rejected Executory Contracts and Unexpired Leases Schedule, (b) previously expired or terminated pursuant to their own terms, (c) the Debtor previously assumed, assumed and assigned, or rejected such Executory Contract or Unexpired Lease, (d) prior to the Effective Date, the Debtor moved to assume, assume and assign, or reject an Executory Contract or Unexpired Leases and such motion is still pending, or (e) have an ordered or requested effective date of rejection that is after the Effective Date. Accordingly, the treatment

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

[37] *See id*. Intercompany Claims (Class 5) are either impaired or unimpaired as set forth in Article V of the Plan.

of executory contracts and unexpired leases in the Plan is authorized by, and its consistent with, section 1123(b)(2) of the Bankruptcy Code.

d. **Settlement, Releases, Exculpation, Injunction, and Cancellation of Liens (§ 1123(b)(3)).**

67. Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."

(i) Global Settlement

68. Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, the Plan incorporates a global settlement of numerous Debtor-Creditor and inter-Creditor issues.

69. Compromises and settlements are "a normal part of the process of reorganization"[38] and are one of the Bankruptcy Code's primary objectives.[39] Bankruptcy Rule 9019 provides, in relevant part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise and settlement." This standard also applies when the settlement is incorporated into a chapter 11 plan.[40] To approve a compromise and settlement under Rule 9019(a), the court does not have to be convinced that the settlement is the best possible compromise.[41] Rather, the court

[38] *In re Exide Techs.*, 303 B.R. 48, 66 (Bankr. D. Del. 2003) ("A plan may include a provision that settles or adjusts any claim belonging to the debtor or the estate") (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)); *see also In re Coram Healthcare Corp.*, 315 B.R. 321, 329 (Bankr. D. Del. 2004) (citing *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) and noting that "[c]ompromises are generally favored in bankruptcy").

[39] "To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy." *Martin*, 91 F.3d at 393 (internal quotation marks omitted); *see also Will v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006) ("[s]ettlements are favored [in bankruptcy]"); *Key3Media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.)*, No. 03-10323 (MFW), 05-828-SLR, 2006 WL 2842462, at *3 (D. Del. Oct. 2, 2006) (same); *ACC Bondholder Grp. V. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 348 (Bankr. S.D.N.Y. 2007) (same).

[40] *See Nutritional Sourcing*, 398 B.R. at 832 ("the standards for approving settlements as part of a plan of reorganization are the same as the standards for approving settlements under Fed. R. Bankr. P. 9019"); *Coram Healthcare*, 315 B.R. at 334 (holding that the "standards for approval of a settlement under section 1123 are generally the same as those under Rule 9019").

[41] *Coram Healthcare*, 315 B.R. at 330.

must only determine that the compromise or settlement is fair and equitable and falls within the reasonable range of litigation possibilities somewhere above the lowest point in the range of reasonableness.[42] In determining whether a proposed settlement is fair and equitable, courts have found the following factors to be the most pertinent: (a) the probability of success on the merits in the litigation being settled; (b) the likely difficulties in collecting a judgment; (c) the complexity of the litigation and the attendant expense, inconvenience, and delay; and (d) the paramount interest of creditors.[43]

70. Here, the settlements embedded in the Plan are the result of extensive good faith and arm's-length negotiations between the Debtor, Medley Capital, the Committee, Sierra, and other parties in interest. In reaching these settlement terms, the Plan Proponents considered, among other things: (a) the Debtor's prepetition operations, which relied upon services provided by Medley Capital and other non-Debtor Affiliates; (b) the obligations of the Debtor, Medley Capital, and other non-Debtor Affiliates to perform under their respective agreements; and (c) the cost, expense, and delay associated with litigating related disputes.[44]

71. Absent the approval of the Global Settlement, the potential costs to the Debtor's estate of litigating Debtor-Creditor and inter-Creditor issues would be prohibitive. Moreover, it is likely that the result of any further due diligence and litigation regarding the various Debtor-Creditor and inter-Creditor issues would lead to the same conclusion upon which the Plan's

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[42] *Id.* at 330; *see also In re Integrated Health Serv., Inc.,* No. 00-389 (MFW), 2001 Bankr. LEXIS 100, at *7 (Bankr. D. Del. Jan. 3, 2001) ("The responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness.") (ellipses in original) (citations omitted).

[43] *Martin,* 91 F.3d at 393; *see also In re TSIC, Inc.,* 393 B.R. 71, 78 (Bankr. D. Del. 2008).

[44] *See* Dreyer Decl., ¶¶ 19–33, 42–44; Liao Decl., ¶ 23–27, 33–44.

global settlement is based—litigating every Debtor-Creditor and every inter-Creditor dispute is a futile and cost-prohibitive endeavor.

72. The implementation of the global settlement is a critical Plan mechanism providing significant benefit and net value for the Estate, and therefore, pursuant to section 1123(b)(6) of the Bankruptcy Code and Bankruptcy Rule 9019, the Court is authorized to approve the global settlement on the terms of and subject to the conditions set forth in the Plan.

(ii) Release and Exculpation Provisions

73. The Plan also contains release and exculpation provisions that were integral components of the complex negotiations and compromises underlying the Plan. Specifically, the Plan contains:

- Releases in Article XI.C of the Plan by the Debtor, the Estate, and the Liquidating Trustee in favor of the Released Parties[45] (collectively, the "Debtor Release"); and
- An exculpation provision in Article XI.D of the Plan in favor of the Exculpated Parties[46] with respect to actions taken in or arising out of this Chapter 11 Case.

These provisions, among other things: (a) are the product of extensive, good-faith, arms'-length negotiations; (b) were a material inducement for parties to vote for or otherwise support the Plan; (c) are supported by the Plan Proponents; and (d) are consistent with applicable precedent.

(I) The Debtor Release Is Appropriate.

74. The Debtor Release is narrow and is limited to Medley Capital, certain officers of the Debtor, Sierra, and the respective agents and representatives of each of the foregoing. In

[45] "Released Parties" means (a) Medley Capital, (b) Dean Crow ("Crow"), (c) Howard Liao ("Liao"), (d) David G. Richards ("Richards"), (e) Sierra, and (f) the Related Parties of the foregoing.

[46] "Exculpated Parties" means (a) the Independent Manager, (b) the Medley Executives, (c) the Committee and the members of the Committee (in their capacity as such), (d) Sierra, and (e) the Related Parties of the foregoing.

particular, the Plan provides for releases by the Debtor of any and all Causes of Action that the Debtor or parties derivatively on behalf of the Debtor could assert against the Released Parties. For the avoidance of doubt, the Debtor Release does not extend to Brook Taube, Seth Taube, any members of the Taube family, or any entities controlled by Brook Taube, Seth Taube, or the Taube family.

75. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[47] Further, a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[48] In determining whether a debtor release is proper, courts in Delaware and elsewhere generally may consider the following five factors:

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

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

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

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

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

[48] *U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.),* 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.") (alteration added) (internal quotation marks and citation omitted); *In re Akorn, Inc.*, Case No. 20-11177 (KBO) (Bankr. D. Del. Sept. 4, 2020) (approving debtor release based upon debtor's business judgment), Tr. of Hr'g. 5:25–6:13, a copy of which is attached hereto as **Exhibit A**.

e. whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release.[49]

Not all of the above factors need to be satisfied for a court to approve a debtor release.[50] Rather, such factors are "helpful in weighing the equities of the particular case after a fact-specific review."[51]

76. The Debtor has satisfied the business judgment standard in granting the Debtor Release under the Plan. The Debtor Release meets the applicable standard because it is fair, reasonable, and in the best interests of the Debtor's Estate.

77. ***First***, each of the Released Parties has made a substantial contribution to the Debtor's Estate. The Released Parties played an integral role in the formulation of the Plan as amended and contributed to the Plan by expending significant time and resources analyzing and negotiating the issues presented by the Debtor's prepetition transactions.[52] The Committee agreed to support the Plan as a Plan Proponent and negotiated to provide its constituents the best possible outcome given the facts of this Chapter 11 Case. Medley Capital has committed, in accordance with the terms of the Plan, to provide the Medley Capital Non-Debtor Compensation Plan Payment and to provide the Medley Capital Plan Contribution, which will include payments on the Effective Date to fund emergence and additional payments between the Effective Date and the Wind-Down Date to fund the Additional GUC Funds. Sierra has committed, in accordance with the terms of

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[49] *See, e.g., In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)), *aff'd sub nom. Nordoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180 (3d Cir. 2001); *Spansion*, 426 B.R. at 143 n.47 (citing *Zenith* factors).

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

[51] *In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013).

[52] Dreyer Decl., ¶¶ 21–22.

the Plan, to continue performing under the Sierra IAA, which, as set forth herein, will provide value to the Debtor's Estate, and to provide the Sierra Non-Debtor Compensation Plan Payment, which will allow Medley Capital to retain the employees necessary to receive the benefits of the ongoing contractual arrangement. Without these contributions from Sierra, the arrangements necessary to implement the Plan would not be possible and the Debtor's Estate would fail to realize this significant additional value.[53] Further, Medley Capital, Liao, Crowe, Richards, and Sierra have been instrumental in negotiating and formulating the transactions contemplated under the Plan and will continue to be crucial to the implementation of those transactions in accordance with the Plan.[54]

78. ***Second***, the Debtor Release is essential to the Debtor's restructuring because it constitutes an integral term of the Plan. Indeed, absent the Debtor Release, it is highly unlikely the Released Parties would have agreed to support the Plan.[55] As described above, each of the Released Parties contributed substantial value to this Chapter 11 Case, and did so with the understanding that they would receive releases from the Debtor. In the absence of these parties' support, the Debtor would not be in a position to confirm the Plan and conclude the Debtor's Chapter 11 Case.[56] The Debtor Release, therefore, was a critical component to ensuring that the Debtor maximized the value of its assets.

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[53] Dreyer Decl., ¶ 22.

[54] *Id*.

[55] *Id*., ¶ 23.

[56] *Id*.

79. ***Third***, as evidenced by the Ballot Report, an overwhelming number of Holders of Claims in the Voting Classes voted in support of the Plan.[57] Additionally, the Committee, as a fiduciary for all general unsecured creditors in the Chapter 11 Case, actively negotiated the terms of the Plan, including the scope of the releases by the Debtor, and supports the Plan's release, exculpation, and injunction provisions as a Plan Proponent. Given the critical nature of the Releases to the Plan, this degree of consensus evidences the Debtor's stakeholders' support for the Debtor Release and the Plan.

80. ***Fourth***, the Plan specifically excludes from the Releases and Exculpation (a) Brook Taube, (b) Seth Taube, (c) any members of the Taube family, (d) any entities controlled by Brook Taube, Seth Taube, or any members of the Taube family, and their successors and assigns, and (e) Allorto, except to the extent he is a Chapter 5 Released Party and for any post-Petition Date services (collectively, the "Excluded Parties").[58] All Causes of Actions against the Excluded Parties are preserved and will be transferred to the Liquidating Trust upon the Effective Date of the Plan. It is the Debtor's business judgment that the Released Parties should be released and the Plan Proponents (including the Committee) ensured that the Excluded Parties would not benefit from a release under the Plan.[59]

81. ***Fifth***, the Plan provides for recoveries for creditors. Further, the Debtor does not believe valuable causes of action will be released pursuant to the Debtor Release.[60] In addition, the Committee conducted its own investigation with respect to certain potential claims and causes

[57] Amended Ballot Rept., Ex. A.

[58] *See* Plan, definition of "Related Parties."

[59] Dreyer Decl., ¶ 25.

[60] *Id*., ¶ 26.

of action that may be asserted on behalf of the Debtor's estate.[61] And the Committee independently concluded that the likelihood of success on the merits of any potential claims were greatly outweighed by the risk, delay, and expense of pursuing such claims.[62] First, pursuing such claims did not provide a viable option for maximizing value for the unsecured creditors as a whole because pursuing such claims likely would have required pursuing claims against the very same parties who are providing the only path to exit from this Chapter 11 Case—Sierra and Medley Capital.[63] Second, absent resolution on these issues, the Debtor may have faced far grimmer prospects, including a potential liquidation, instead of the value-maximizing wind-down that is before the Court.[64] Finally, Liao, Crowe, and Richards were not executive officers of the Debtor until after commencement of this Chapter 11 Case, only taking on those positions after the former executives stepped down.[65] The Debtor and Committee concluded that there were no likely causes of action that could be brought against Liao, Crowe and Richards for pre-petition or post-petition conduct.[66]

82. For these reasons, the Debtor Release is justified, is in the best interests of creditors, is an integral part of the Plan, and satisfies key factors considered by courts in determining whether a debtor release is proper. The Debtor has therefore satisfied the business judgment standard in granting the Debtor Release.

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61 *See id*.

62 *Id*.

63 *Id*.

64 *Id*.

65 *Id*.

66 *Id*.

(II) The Exculpation Provision Is Appropriate.

83. Courts evaluate the appropriateness of exculpation provisions based on a number of factors, including whether the plan was proposed in good faith, whether liability is limited, and whether the exculpation provision was necessary for plan negotiations.[67] Exculpation provisions that apply only to estate fiduciaries, and are limited to claims not involving actual fraud, willful misconduct, or gross negligence, are customary and generally approved in this district under appropriate circumstances.[68] In addition, courts in this district have approved similarly limited exculpation provisions for non-estate-fiduciaries.[69] Critically, unlike third party releases, exculpation provisions do not affect the liability of third parties *per se*, but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtor's restructuring.[70] A properly-tailored exculpation provision, which the Exculpation is, simply makes explicit the legal consequences of the "good faith" findings inherent to an order confirming a chapter 11 plan where, as here, multiple stakeholder groups came together to negotiate an arm's-length restructuring of the debtor that is fair and equitable and in the best interests of the debtor's estate and creditors.

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[67] *See, e.g.*, *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (evaluating the exculpation clause based on the manner in which the clause was made a part of the agreement, the necessity of the limited liability to the plan negotiations, and that those who participated in proposing the plan did so in good faith).

[68] *See Wash. Mut.*, 442 B.R. at 350-51 (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate).

[69] *See, e.g.*, *In re Nassau Broadcasting Partners L.P.*, Case No. 11-12934 (KG) (Bankr. D. Del. July 31, 2013) [Docket No. 1000] (ruling that limited exculpation for non-estate-fiduciary and related parties was appropriate), Tr. of Hr'g at 50:3–51:9, 54:9–55:6, a copy of which is attached hereto as **Exhibit B** ("*Nassau* Transcript").

[70] *See In re PWSHolding Corp.*, 228 F.3d 224, 245 (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"); *see also In re Premier Int'l Holdings, Inc.,* No. 09-12019 (CSS), 2010 WL 2745964, at *10 (Bankr. D. Del. Apr. 29, 2010) (approving exculpation provision); *In re Spansion, Inc.*, No. 09-10690 (KJC), 2010 WL 2905001, at *16 (Bankr. D. Del. Apr. 16, 2010) (same).

84. Here, the Exculpated Parties under the Plan consist of (a) the Independent Manager (Dreyer as the independent manager of the Debtor), (b) the Medley Executives (Allorto, Crowe, Liao, and Richards in their capacities as officers of the Debtor), (c) the Committee and the members of the Committee (in their capacity as such), (d) Sierra, and (e) the Related Parties of the foregoing.[71]

85. The Plan's exculpation provision is the product of arm's-length negotiations, was critical to obtaining the support of various constituencies for the Plan, and, as part of the Plan, has received support from the Debtor's major stakeholders.[72] The exculpation provision was important to the development of a feasible, confirmable Plan, and the Exculpated Parties participated in this Chapter 11 Case in reliance upon the protections afforded to those constituents by the exculpation.[73]

86. The Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtor and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties.

87. Moreover, the exculpation provision and the liability standard it sets represents a conclusion of law that, in part, flows logically from certain findings of fact that the Court must reach in confirming the Plan as it relates to the Debtor.

88. As discussed above, this Court must find, under Bankruptcy Code section 1129(a)(2), that the Plan Proponents have complied with the applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3) of the Bankruptcy

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71 *See* Plan, definition of "Exculpated Parties."

72 Dreyer Decl., ¶ 28.

73 *Id*.

Code, that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtor and, by extension, to the Debtor's officers, directors, employees, and professionals. Further, these findings imply that the Plan was negotiated at arm's length and in good faith.

89. Here, the Debtor and its officers, manager, and professionals actively negotiated with the Committee and holders of claims in connection with the Plan and this Chapter 11 Case.[74] Such negotiations were extensive and the resulting agreements were implemented in good faith with a high degree of transparency, and as a result, the Plan enjoys support from impaired accepting classes sufficient to satisfy the Bankruptcy Code's requirements for confirmation of the Plan.[75] The Exculpated Parties played a critical role in negotiating, formulating, and implementing the Plan and related documents in furtherance of the restructuring transactions.[76] Accordingly, the Court's findings of good faith vis-à-vis the Debtor's Chapter 11 Case should also extend to the Exculpated Parties.

90. Additionally, the promise of exculpation played a significant role in facilitating Plan negotiations.[77] All of the Exculpated Parties played a key role in developing the Plan that paved the way for a successful confirmation, and likely would not have been so inclined to participate in the plan process without the promise of exculpation.[78] Exculpation for parties

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74 *Id.*, ¶ 30.

75 *See, e.g.*, Amended Ballot Rept., Ex. A; *see also* Dreyer Decl., ¶ 30.

76 *See* Hr'g Tr. 58:18-19, *In re Verso Corp*, No. 16-10163 (KG) (Bankr. D. Del. June 24, 2016) [Docket No. 1231] ("[T]he debtors did not do this alone; they did it with the help of many others.").

77 Dreyer Decl., ¶ 31.

78 *Id.*

participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability.[79]

91. Further, the exculpation provision is necessary and appropriate to protect parties who have made substantial contributions to the Debtor's reorganization from future collateral attacks related to actions taken in good faith in connection with the Debtor's restructuring. Notably, Sierra, pursuant to the Sierra Commitment Letter, has agreed to continue its relationship with Medley Capital and SIC Advisors during the wind-down period following the Effective Date, and Sierra is contributing $2.1 million (in additional funds not currently required under the its existing contracts) towards funding the Non-Debtor Compensation Plan, which is essential to success of the Plan and the anticipated recovery for unsecured creditors.[80] While Sierra is not a fiduciary of the Estate, this is one of those rare circumstances, like that found by the court in *Nassau Broadcasting*, where the contributions made by Sierra are so significant and so crucial to the successful conclusion of the Chapter 11 Case, and where the provision of those contributions was premised on the expectation of receiving an exculpation, that including Sierra among the Exculpated Parties under the Plan is warranted.[81]

92. Finally, the exculpation provision is limited to acts during this Chapter 11 Case and does not extend beyond such time period.[82]

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[79] *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

[80] Dreyer Decl., ¶ 32.

[81] *See Nassau* Tr. at 50:3–51:9, 54:9–55:6.

[82] *See* In re Melinta Therapeutics Inc., Case No. 19-12748 (LSS) (Bankr. D. Del. Apr. 3, 2020) (Judge Silverstein holding that exculpation applies only through the effective date of the plan).

93. Accordingly, under the circumstances, it is appropriate for the Court to approve the exculpation provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[83]

(iii) The Injunction Provision Is Appropriate.

94. The injunction provision set forth in Article XI.E of the Plan implements the Plan's release, discharge, and exculpation provisions, in part, by permanently enjoining all entities from commencing or maintaining any action against the Debtor, the Liquidating Trustee, the Exculpated Parties, the Released Parties, or the Chapter 5 Released Parties, or taking any action which would interfere with the implementation or Consummation of the Plan. In addition, the injunction provision enjoins MDLY from transferring the Company Tax Refund (*e.g.*, to its equity holders), which is necessary to avoid the potential misappropriation of property of the Debtor's Estate, and provides that all rights regarding ownership of the Company Tax Refund are reserved. Thus, the injunction provision is a key provision of the Plan because it enforces the release and exculpation provisions that are centrally important to the Plan. Moreover, this injunction provision is narrowly tailored to achieve its purpose.

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

95. Section 1123(d) of the Bankruptcy Code 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 nonbankruptcy law."

96. The Plan complies with Bankruptcy Code section 1123(d). Article VIII.C of the Plan provides for the satisfaction of any cure amounts associated with Executory Contracts to be

[83] *See PWS Holding*, 228 F.3d at 246-47 (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *Indianapolis Downs*, 486 B.R. at 306 (same).

assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. In accordance with Article VIII.C of the Plan and section 365 of the Bankruptcy Code, the Debtor or the Liquidating Trustee, as applicable, will satisfy any monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan on the Effective Date, or as soon as reasonably practicable thereafter, or on such other terms as the parties to such Executory Contract or Unexpired Lease may otherwise agree.

B. The Plan Proponents Complied with the Applicable Provisions of the Bankruptcy Code (§ 1129(a)(2)).

97. The Plan Proponents have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The legislative history of Bankruptcy Code section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 Bankruptcy Code.[84] As discussed below, the Plan Proponents have substantially complied with sections 1125 and 1126 Bankruptcy Code regarding disclosure and solicitation of the Plan.

1. The Debtor Complied with Bankruptcy Code Section 1125.

98. As discussed in Part I of this Memorandum, the Plan Proponents substantially complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code.

[84] *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"); *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).").

2. The Debtor Complied with Bankruptcy Code Section 1126.

99. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Specifically, under section 1126 of the Bankruptcy Code, 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. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> (b) Notwithstanding 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 with respect to such class from the holders of claims or interests of such class is not required.[85]

100. As set forth above, in accordance with section 1125 of the Bankruptcy Code, the Plan Proponents solicited acceptances or rejections of the Plan from the Holders of Allowed Claims in Classes 3 and 4—the only impaired Classes entitled to vote under the Plan.

101. The Debtor did not solicit votes from Holders of Claims in Classes 1 or 2 because Holders of Claims in these classes are unimpaired and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have accepted the Plan.

102. Additionally, Holders of Interests in Class 6 are deemed to reject the Plan because they will receive no distribution on account of their claims or interests. Thus, pursuant to Bankruptcy Code section 1126(a), only holders of claims in Classes 3 and 4 were entitled to vote to accept or reject the Plan.[86]

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[85] 11 U.S.C. § 1126(a), (f).

[86] *See* Plan, Art. V. Claims in Class 5 (Intercompany Claims) were either unimpaired or receiving no recovery under the Plan and are either deemed presumed to accept or deemed to reject the Plan.

103. Sections 1126(c) and 1126(d) of the Bankruptcy Code specify the requirements for acceptance of a plan by classes of claims and interests:

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

104. As described above, the Classes of Claims voting to accept the Plan did so in sufficient number and by sufficient amounts as required by the Bankruptcy Code.[87] Based upon the foregoing, the Plan Proponents submit that they satisfy the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. The Plan Is Proposed in Good Faith (§ 1129(a)(3)).

105. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[88] To determine whether a plan seeks

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87 *See* Ballot Report.

88 *See, e.g., PWS Holding,* 228 F.3d at 242 (quoting *In re Abbotts Dairies of Pa., Inc.,* 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship),* 116 F.3d 790, 802 (5th Cir. 1997) (quoting *In re Sun Country Dev., Inc.,* 764 F.2d 406, 408 (5th Cir. 1985)); *Century Glove*, 1993 WL 239489, at *4 ; *In re NII Holdings, Inc.,* 288 B.R. 356, 362 (Bankr. D. Del. 2002).

relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[89]

106. The Plan Proponents negotiated, developed, and proposed the Plan in accordance with section 1129(a)(3) of the Bankruptcy Code. The Plan was negotiated with, and is supported by, the Committee (as a Plan Proponent) and other key stakeholders of the Debtor, including Sierra, who came to consensus after arm's length negotiations. Notably, the Plan provides significant value to the Debtor's unsecured creditors compared to the alternative of a chapter 7 liquidation. The Plan Proponents believe that the Plan was proposed in good faith and not by any means forbidden by law, has a high likelihood of success, and will achieve a result consistent with the objectives of the Bankruptcy Code.

107. The Plan will enable the holders of Class 3 Notes Claims and Class 4 General Unsecured Claims to recover on account of such Claims.

108. Throughout the negotiation of the Plan, the Plan Proponents have sought a resolution that would maximize the value of the Debtor's Estate for the benefit of all creditors. Accordingly, the Plan and the Plan Proponents' conduct satisfy section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Provides that the Debtor's Payment of Professional Fees and Expenses Are Subject to Court Approval (§ 1129(a)(4)).

109. Bankruptcy Code section 1129(a)(4) requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable. Courts have construed this section to

[89] *See, e.g.*, *T-H New Orleans*, 116 F.3d at 802 (quoting *Sun Country Dev.*, 764 F.2d at 408); *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012); *Century Glove*, 1993 WL 239489, at *4.

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.[90]

110. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code. The Plan Proponents submit that payment of the Professional Claims is the only category of payments that fall within the ambit of section 1129(a)(4) of the Bankruptcy Code in this Chapter 11 Case, and the Debtor may not pay professional claims absent Court approval.[91] Further, all such Professional Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 and 330 of the Bankruptcy Code.[92] Article IV.B of the Plan, moreover, provides that the Professionals shall file all final requests for payment of Professional Claims no later than 45 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Claims.

E. The Plan Proponents Disclosed All Necessary Information Regarding Directors, Officers, and Insiders (§ 1129(a)(5)).

111. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of reorganized debtors. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the identity of an "insider" (as defined by section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the "nature of any compensation for such insider."[93]

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[90] *See Lisanti Foods*, 329 B.R. at 503 ("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 Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

[91] *See, e.g.*, *Order Granting Application for Entry of an Order Authorizing and Approving the Employment of Morris James LLP as Co-Counsel to the Debtor* Nunc Pro Tunc *to March 7, 2021* [Docket No. 145].

[92] 11 U.S.C. §§ 328(a), 330(a)(1)(A).

[93] *See also In re Texaco, Inc*, 84 B.R. 893, 908 (Bankr. S.D.N.Y. 1988) (finding requirements of § 1129(a)(5)(B) satisfied where the plan discloses debtors' existing officers and directors who will continue to serve after plan

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.[94] The "public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[95] As described below, the Plan Proponents satisfied section 1129(a)(5) of the Bankruptcy Code.

112. As set forth in the Plan, the new "management" will be the Liquidating Trustee, overseen by the Oversight Committee, who will be authorized to take all actions necessarily to monetize the assets transferred to the Liquidating Trust, and to ultimately close the Chapter 11 Case and dissolve the Debtor. The Plan Supplement identifies Anthony M. Saccullo as the Liquidating Trustee and the Oversight Committee Notice identifies the members of the Oversight Committee. The fees and expenses of the Liquidating Trustee will be paid from the assets of the Liquidating Trust pursuant to the terms of the Plan and the Liquidating Trust Agreement. In addition, pursuant to the Liquidating Trust Agreement, the Oversight Committee shall be governed by the same fiduciary duties that applied to the Committee and its members.

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

113. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over the rates of the debtor after confirmation has approved any rate change provided for in the plan. The Debtor does not have

confirmation); *In re Apex Oil Co.*, 118 B.R. 683, 704–05 (Bankr. E.D. Mo. 1990) (finding § 1129(a)(5)(B) satisfied where plan fully disclosed that certain insiders will be employed by reorganized debtor and the terms of employment of such insiders).

94 11 U.S.C. § 1129(a)(5)(A)(ii).

95 7 COLLIER ON BANKR. ¶ 1129.02[5][b] (16th ed. 2018).

rates that are regulated. Thus, section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Plan.

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

114. Section 1129(a)(7) of the Bankruptcy Code, commonly known as the "best interests test," provides, in relevant part:

> With respect to each impaired class of claims or interests—
>
> (a) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .

115. The "best interests test" applies to individual dissenting holders of impaired claims and interests rather than classes, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[96] In this case, the best interests test is satisfied because the treatment that Holders of Claims of Interests in each of the Impaired Classes receives under the Plan is not less than what such Holders would receive in a hypothetical chapter 7 liquidation.[97]

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[96] *Bank of Am. Nat'l Tr. & Savs. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 441 n. 13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *Century Glove*, 1993 WL 239489, at *7; *Adelphia Commc 'ns,* 368 B.R. at 251 (stating that section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

[97] *See 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.'") (internal citations omitted).

116. The Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the "best interests test." As set forth in the Combined Disclosure Statement and Plan,[98] as amended in the Plan Supplement,[99] and the Rosen Declaration, the Debtor, with the assistance of its financial advisors, prepared a Liquidation Analysis that estimates recoveries for members of each of the Classes under the Plan.[100] The projected recoveries for these Classes under the Plan are equal to or in excess of the recoveries estimated in a hypothetical chapter 7 liquidation.[101] Specifically, as demonstrated by the Amended Liquidation Analysis, Classes 3 and 4 will receive a greater recovery under the Plan than under a hypothetical chapter 7 liquidation. Class 6 (Interests) will not receive a recovery under the Plan and would not receive a recovery if the Debtor's Chapter 11 Case were converted to a case under Chapter 7 of the Bankruptcy Code.

117. The SEC insinuates that somehow the Debtor's creditors might be better off if all of Medley Capital's employees were terminated and the Debtor liquidated in chapter 7.[102] However, when understood in light of the contractual obligations of Medley Capital and the Advisors, among other things, there is no basis to support this conjecture. As noted above, the client agreements are profitable and, if performed, will provide a return for the Debtor's Estate even after accounting for the costs required to perform the services.[103] However, if Medley Capital and the Advisors do not perform the advisory and administrative services required under the client

98 *See* Plan, Ex. A.

99 *See* Plan Suppl., Ex. B.

100 Rosen Decl., ¶ 8.

101 Plan Suppl., Ex. B; Rosen Decl., ¶¶ 9, 10.

102 SEC Obj., ¶ 44.

103 Liao Decl., ¶¶ 10, 23, 31.

contracts, then they would not be paid for such unperformed services and the Debtor would not be able to capture this profit for the benefit of its creditors.[104] Indeed, receiving fees for advisory services but not actually providing those services could expose Medley Capital or the Advisors to liabilities for, among other things, violation of the Investment Advisers Act of 1940.[105] Moreover, if Medley Capital and the Advisors ceased to perform under the client contracts, they would be subject to claims for damages based on breach of contract, which could consume any Cash currently held by Medley Capital or the Advisors, leaving nothing for distribution to the Debtor as equity holder.[106] Accordingly, despite the SEC's unfounded allegations, the Plan satisfies the best interests test.

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

118. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan.

119. Classes 3 and 4 voted to accept the Plan, but holders of Interests in Class 6 are deemed to have rejected the Plan and, thus, were not entitled to vote. Consequently, while the Plan does not satisfy Bankruptcy Code section 1129(a)(8) with respect to Class 6, the Plan is confirmable nonetheless because it satisfies sections 1129(a)(10) and 1129(b) of the Bankruptcy Code, as discussed below.

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104 *Id.*, ¶ 22.

105 *See, e.g.*, Complaint at 2, 7, *Sec. and Exch. Comm'n. v. Madoff, et al.*, Case No. 08-CIV-10791 (S.D.N.Y. Dec. 11, 2008) [Docket No. 1]

106 As noted above, in addition to potential damages claims for breach of contract, Medley Capital and the Advisors are obligated to first account for all costs and expenses owing to their creditors before disbursing any amounts up to the Debtor in the form of an equity distribution. Liao Decl., ¶¶ 10, 16, 24.

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

120. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain secured claims receive deferred cash payments. In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in sections 507(a)(1) or (4) through (7) of the Bankruptcy Code—generally wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). Finally, section 1129(a)(9)(C) of the Bankruptcy Code provides that the holder of a claim of a kind specified in Bankruptcy Code section 507(a)(8)—*i.e.*, priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.

121. The treatment of Administrative Claims, Professional Claims, and Priority Tax Claims under Article IX of the Plan and Secured Claims under Article IV of the Plan, satisfies the requirements of, and complies in all respects with, Bankruptcy Code section 1129(a)(9).

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

122. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider," as an alternative to the requirement under

section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan.

123. Here, Classes 3 and 4, which are impaired, voted to accept the Plan independent of any insiders' votes. Thus, the Plan has been accepted by at least one voting Class holding non-insider Claims.

K. The Plan Is Feasible (§ 1129(a)(11)).

124. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that a plan is feasible as a condition precedent to confirmation. Specifically, the Court must determine that: "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, *unless such liquidation or reorganization is proposed in the plan*."[107]

125. In this case, the "liquidation" of the Debtor's assets is "proposed in the Plan." Further, the Debtor is able to make all payments due on the Effective Date or thereafter required under the Plan.

126. To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[108] Rather, a debtor must provide only a reasonable assurance of success.[109] There is a

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[107] 11 U.S.C. § 1129(a)(11) (emphasis supplied).

[108] *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); *W.R. Grace & Co.*, 475 B.R. at 115; *In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986).

[109] *Kane*, 843 F.2d at 649; *Flintkote Co.*, 486 B.R. at 139; *W.R. Grace & Co.*, 475 B.R. at 115; *see also In re Pizza of Haw. Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation") (citation omitted); *accord In re Capmark Fin. Grp. Inc.*, No. 09-13684 (CSS), 2011 WL 6013718, at *61 (Bankr. D. Del. Oct. 5, 2011) (same).

relatively low threshold of proof necessary to satisfy the feasibility requirement.[110] As demonstrated below, the Plan is feasible within the meaning of Bankruptcy Code section 1129(a)(11).

127. *First*, the Debtor expects to have sufficient funds to make all payments contemplated by the Plan to be paid on the Effective Date and to satisfy Professional Claims as required under the Plan.[111] *Second*, in accordance with the Plan, all of the Debtor's assets will be transferred to the Liquidating Trust, including any excess Cash not required to pay Professional Claims, and other payments having priority over General Unsecured Claims. The Debtor will eventually be dissolved and, therefore, there will not be a need for further reorganization. For the reasons set forth above, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

L. All Statutory Fees Have Been or Will Be Paid (§ 1129(a)(12)).

128. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under chapter 123 of title 28" are afforded priority as administrative expenses.

129. The Plan satisfies the requirements of section 1129(a)(12) Bankruptcy Code because Article IV.A of the Plan provides for the payment of all fees due and payable by the Debtor under 28 U.S.C. § 1930.

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[110] *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility") (citation omitted); *Berkeley Fed. Bank & Tr. v. Sea Garden Motel & Apartments (In re Sea Garden Motel & Apartments)*, 195 B.R. 294, 305 (D. N.J. 1996); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

[111] *See* Rosen Decl., ¶ 10.

M. Bankruptcy Code Sections 1129(a)(13)–(a)(16) Are Inapplicable.

130. Section 1129(a)(13) of the Bankruptcy Code requires that all "retiree benefits," as defined in section 1114 of the Bankruptcy Code, continue to be paid post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. Section 1114 of the Bankruptcy Code defines "retiree benefits" as those payments made for the purpose of providing or reimbursing payments for retired employees, their spouses, and their dependents for medical benefits.[112] The Debtor does not provide retiree benefits within the meaning of section 1114 of the Bankruptcy Code. Therefore, section 1129(a)(13) of the Bankruptcy Code does not apply to the Plan.

131. Section 1129(a)(14) of the Bankruptcy Code requires domestic support obligations to be paid, if required by judicial or administrative order or statute, which first become payable after the date of filing the petition.[113] The Debtor is not an individual and, therefore, does not owe any domestic support obligations. Therefore, section 1129(a)(14) of the Bankruptcy Code does not apply to the Plan.

132. Section 1129(a)(15) of the Bankruptcy Code requires that an individual chapter 11 debtor, in a case in which the holder of an allowed unsecured claim objects to plan confirmation, either pay all unsecured claims in full or that the debtor's plan devote an amount equal to five years' worth of the debtor's disposable income to unsecured creditors.[114] The Debtor is not an "individual" as contemplated by this section of the Bankruptcy Code. Therefore, section 1129(a)(15) of the Bankruptcy Code does not apply to the Plan.

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[112] *See* 11 U.S.C. § 1114(a).

[113] *See id.* § 1129(a)(14).

[114] *See id.* § 1129(a)(15).

133. Section 1129(a)(16) of the Bankruptcy Code conditions confirmation of a plan on the fact that all transfers under the plan will be made in accordance with applicable provisions of "nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust."[115] The Debtor is not a nonprofit corporation or trust as contemplated by this section of the Bankruptcy Code. Therefore, section 1129(a)(16) of the Bankruptcy Code does not apply to the Plan.

N. The Plan Should Be Approved under Bankruptcy Code Section 1129(b).

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

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the plan.[116]

135. Thus, under section 1129(b) of the Bankruptcy Code, the Bankruptcy Court may "cram down" a plan over rejection by impaired classes of claims or interests as long as the plan does not "discriminate unfairly," and is "fair and equitable" with respect to such classes. As set forth above, the only impaired Class that rejected the Plan is Class 6. The Plan may nonetheless be confirmed over the rejection of the Plan by Class 6 because the impaired Voting Classes voted

[115] *See id.* § 1129(a)(16).

[116] *See id.* § 1129(b)(1).

to accept the Plan and the Plan does not discriminate unfairly and is fair and equitable to the non-accepting impaired class.

1. The Plan Does Not Discriminate Unfairly

136. "The Bankruptcy Code does not define unfair discrimination."[117] Nevertheless, "[g]enerally speaking, this standard ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes."[118] In this Chapter 11 Case, the only impaired rejecting class is Class 6 (Interests). Because there is no other "similarly situated class" by definition, the Plan does not discriminate.

2. The Plan is Fair and Equitable

137. Sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if the plan provides that the holder of any claim or interest that is junior to the claims or interests of such class will not receive or retain any property under the plan on account of such junior claim or interest.[119] The fair and equitable rule is a codification of the "absolute priority rule."[120]

138. As illustrated by the Liquidation Analysis, each Class of unsecured Claims (Classes 3 and 4) are not expected to receive full payment. The Plan satisfies the absolute priority rule because Class 6 consists of the Interests in the Debtor and no class junior to either Class 6 is receiving a distribution. For this reason the Plan is "fair and equitable," and thereby also satisfies the requirements for "cram down" under section 1129(b) of the Bankruptcy Code.

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117 *In re Tribune Co.*, 972 F. 3d 228, 240 (3rd Cir. 2020).

118 *Id.*, *citing*, *In re Armstrong World Indus. Inc.*, 348 B.R. at 121 (D. Del. 2006) (quoting *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986)).

119 *See* 11 U.S.C. §§ 1129(b)(2)(B)(ii), (C)(ii).

120 *In re Armstrong World Indus.*, 432 F.3d 507, 513 (3d Cir. 2005)

O. Bankruptcy Code Section 1129(c) is Inapplicable.

139. Section 1129(c) of the Bankruptcy Code prohibits confirmation of multiple plans and is not implicated because there is only one proposed plan of reorganization before the Court.

P. The Plan Complies with the Other Provisions of Bankruptcy Code Section 1129 (§§ 1129(d)-(e)).

140. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code.

141. Section 1129(d) of the Bankruptcy Code provides that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[121] The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no governmental unit or any other party has requested that the Court decline to confirm the Plan on such grounds. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

142. Lastly, Bankruptcy Code section 1129(e) is inapplicable because the Chapter 11 Case is not a "small business case."[122] Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements.

Q. Modifications to the Plan.

143. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan.

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[121] *See* 11 U.S.C. § 1129(d).

[122] *See* 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,490,925[] (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101(51D)(B).

Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[123]

144. Prior to the Confirmation Hearing, the Plan Proponents anticipate filing a modified version of the Plan, which will make technical clarifications and resolves certain formal and informal comments to the Plan by parties in interest. The modifications are immaterial and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. Accordingly, the Plan Proponents 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.

R. Good Cause Exists to Waive the Stay of the Confirmation Order.

145. 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." Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory

[123] *See, e.g., In re Global Safety Textiles Holdings LLC,* No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation); *In re Burns & Roe Enters., Inc.,* No. 08-4191 (GEB), 2009 WL 438694, at *23 (D.N.J. Feb. 23, 2009) (confirming plan as modified without additional solicitation or disclosure because modifications did "not adversely affect creditors").

contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

146. The Plan Proponents submit that good cause exists for waiving and eliminating any stay of the proposed Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the proposed Confirmation Order will be effective immediately upon its entry.[124] As noted above, the issues in this Chapter 11 Case and the terms of the Plan have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information. Additionally, each day the Debtor remains in chapter 11 it incurs significant administrative and professional costs.

147. For these reasons, the Plan Proponents, their advisors, and other key constituents are working to expedite the Debtor's performance under the Plan as swiftly as possible after the Confirmation Date. Based on the foregoing, the Plan Proponents request a waiver of any stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry.

III. The Unresolved Objections Should Be Overruled.

148. To the extent not already addressed in this Memorandum, this Part III responds to specific arguments raised in the Objections and establishes why they should be overruled.

[124] *See, e.g.*, *In re Source Home Entm't, LLC,* No. 14-11553 (KG) (Bankr. D. Del, Feb. 20, 2015) [Docket No. 650] (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re GSE Envtl., Inc.*, No. 14-11126 (MFW) (Bankr. D. Del. July 25, 2014) [Docket No. 340] (same); *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Dec. 23, 2013) [Docket No. 197] (same); *In re Gatehouse Media, Inc.*, No. 13- 12503 (MFW) (Bankr. D. Del. Nov. 6, 2013) [Docket No. 137] (same); *In re Dex One Corp.*, No. 13-10533 (KG) (Bankr. D. Del. Apr. 29, 2013) [Docket No. 192] (same); *In re Geokinetics Inc.*, No. 13-10472 (KJC) (Bankr. D. Del. Apr. 25, 2013) [Docket No. 280] (same).

A. Cash Management under the Applicable Agreements between the Debtor, Medley Capital, and the Advisors.

149. The SEC Objection is founded on flawed conclusions that ignore the fundamental tenets of corporate law and orders of this Court. More perplexing is that the SEC Objection also fails to comprehend basic issues that relate to the operations of the investment advisory business of Medley Capital and the Advisors, notwithstanding the fact that the SEC spent nearly 16 hours deposing witnesses on these issues.

150. The Debtor has no operations, generates no revenue, and has no employees.[125] The Debtor is a holding company that obtains funds solely through equity distributions from its subsidiaries.[126]

151. Medley Capital is the main operating subsidiary of the Debtor.[127] Medley Capital is a registered investment advisor under the Investment Advisers Act of 1940 and generates revenue by providing investment advisory and related administrative services in the private credit market to clients of the Advisors. The Advisers are affiliates created specifically to be contract counter-parties with clients.[128] The Advisors have no employees and are not separately registered advisors under the Investment Advisors Act (instead each of the Advisors is a "relying advisor" under the Investment Advisers Act, meaning they are considered to be registered investment

[125] Liao Decl., ¶ 8; First Day Decl., ¶¶ 11–12.

[126] Liao Decl., ¶ 8.

[127] *Id.*, ¶ 9.

[128] *Id*.

advisers under the Form ADV adviser registration for Medley Capital).[129] Accordingly, Medley Capital provides all of the investment advisory services to clients.[130]

152. The operations of the business are structured so that the Advisor entities contract with clients directly while all of the investment advisory and administrative services are provided by Medley Capital.[131] A general illustration of how business is conducted by Medley Capital and the Advisors is attached to the Liao Declaration as Exhibit A. In summary:

- Each Advisor entity enters into an investment management agreement ("IMA") with its applicable client.[132]
- The IMAs generally provide that the Advisor will perform certain investment advisory and administrative services to the client.[133]
- In exchange for those services, the client agrees to pay certain fees to the Advisor.[134]
- Since the Advisors do not have employees to provide the investment advisory and administrative services, the Advisors are party to that certain Services and Licensing Agreement, dated December 12, 2017, by and between the Debtor, Medley Capital and each of the Advisors. A copy of which is attached hereto as **Exhibit D** (the "Services and Licensing Agreement").[135]
- The Services and Licensing Agreement requires Medley Capital to perform the investment advisory and administrative services to the clients of each

[129] *Id*.

[130] *Id*.

[131] *Id.*, ¶ 10.

[132] *See, e.g.*, Investment Advisory Agreement dated April 5, 2012 by and between Sierra and SIC Advisors, as may be amended, restated, supplemented, or otherwise modified from time to time, a copy of which is attached hereto as **Exhibit C**.

[133] *See id.* at Section 1.

[134] *See id.* at Section 3.

[135] Liao Decl., ¶ 10. Sierra is also party to the Administration Agreement, dated April 5, 2012, by and between Sierra and Medley Capital (the "Administration Agreement"). Pursuant to the Administration Agreement, Sierra also pays Medley Capital directly for certain administrative services.

> Advisor and the Advisors are required to pay Medley Capital for the costs associated with the services provided from the fees received by the Advisor from its client.[136]
>
> - The Debtor does not provide any services to the Advisors or their clients.[137] Instead, as a holding company, the Debtor is entitled to receive the profits of the business in the form of an equity distribution, but only after accounting for all current and future costs and expenses.[138]

153. The SEC Objection, and the inflammatory and baseless accusations set forth therein, hinges on the faulty premise that the Debtor, as an equity holder of its subsidiaries, is entitled to receive equity distributions from those subsidiaries without regard to whether those subsidiaries have satisfied their contractual and other obligations that are superior in priority to equity. The SEC goes so far as to say that "management fees contractually belong to the Debtor."[139] These assertions are false.

154. The SEC focuses on section 4 of the Services and Licensing Agreement in saying Medley Capital cannot be paid or reimbursed for employees or other expenses.[140] However, this selective reading of the agreement ignores the provisions in section 7 of the Services and Licensing Agreement, which provides as follows:

> As noted above, Medley [defined jointly as the Debtor and Medley Capital] shall bear all of the fees, costs and expenses related to providing the Advisers with the Medley Services [identified on Exhibit A to the Services and Licensing Agreement, including specified administrative services and other services agreed to by the parties], the Dual-Hatted Employees and the Facilities (the "Medley Expenses"). ***Each Adviser hereby acknowledges and consents to Medley incurring the Medley Expenses on its behalf and agrees to***

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136 *See* Servs. and Licensing Agmt. at Section 7.a.

137 Liao Decl., ¶ 10.

138 *Id*.

139 SEC Obj., ¶ 65.

140 SEC Obj., ¶ 36.

> ***promptly reimburse Medley for (i) all amounts attributable solely to such Adviser and (ii) its pro rata share (based on fee-earning assets under management, as of the date(s) on which such Medley Expenses were incurred) of all amounts attributable to two or more Advisers (collectively, the "Reimbursement"). Subject to the immediately preceding sentence, Medley shall determine, in its sole discretion, if, and to the extent that, any Medley Expenses are attributable to a particular Adviser. Medley will send each Adviser a quarterly invoice setting forth the Medley Expenses attributable to such Adviser during the prior quarter. The invoice will include a detailed accounting of the Medley Expenses attributable to such Adviser. Each Adviser shall remit payment of the Reimbursement to Medley within 90 days of its receipt of the invoice***.[141]

155. Medley Capital employs all of the employees and provides all of the services to the Advisors that give rise to the "Medley Expenses" referenced above in section 7 of the Services and Licensing Agreement and the reimbursement for those services is owed from the Advisors to Medley Capital.[142] The SEC's suggestion that Medley Capital should incur these expenses and provide these services to the Advisors yet not be reimbursed for them in accordance with the Services and Licensing Agreement would ignore fundamentals of corporate law, including the separateness of the corporate entities, and evidences a fundamental misunderstanding on the SEC's part as to how this business operates. If Medley Capital did as the SEC suggested and ignored its right to reimbursement under the Services and Licensing Agreement, Medley Capital would become insolvent and would be forced to default on its contractual obligations to clients, among others, which would shut down the revenues for the business and create significant damages liabilities. Fortunately for all involved, that is not how the business is structured, as evidenced by the provisions of the Services and Licensing Agreement set forth above, which require the

[141] Servs. and Licensing Agmt., § 7(a).

[142] Liao Decl., ¶¶ 9–10, 16.

Advisors to reimburse Medley Capital for the expenses it incurs and services it provides to the Advisors.

156. In addition, the SEC's position ignores fundamental principles of business, as well as bankruptcy and non-bankruptcy law. Equity securities are junior in right and payment priority to debt.[143] Further, this assertion is not consistent with the past practices of the Debtor and its subsidiaries prior to the Petition Date and as discussed further below.[144]

157. Finally, these assertions would elevate equity distributions to the Debtor to the status of secured debt, without so much as a reference to the contractual or legal grounds that would justify such a drastic determination. The operating agreements that govern equity distributions explicitly state that distributions can be made to equity only after the entity accounts for current and future obligations.[145] Pursuant to the Medley Capital LLC Agreement, "Distributable Cash" that can be distributed to the Debtor as the sole equity holder is defined as follows:

> for any Fiscal Year, the cash proceeds from Company operations or investments . . . ***net of all Company expenses for such period, less an additional amount reasonably anticipated for the succeeding period to pay, or reserve for, all Company expenses, debt payments, capital improvements, replacements and contingencies in such annual periods, plus any reserves in respect of prior periods***, all as determined by the Board of Managers in accordance with the terms of this Agreement."[146]

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143 *See, e.g.*, THE LAW DICTIONARY, "Junior Security;" "Fraudulent Transfer."

144 Liao Decl., ¶¶ 13, 15, 25.

145 *See* Amended and Restated Limited Liability Company Agreement of Medley Capital LLC, dated October 27, 2010, as amended and restated from time to time (the "Medley Capital LLC Agreement"); Limited Liability Company Agreement of SIC Advisors LLC, dated January 31, 2012, as amended and restated from time to time (the "SIC Advisors LLC Agreement"), a copy of which is attached hereto as **Exhibit E**.

146 Medley Capital LLC Agmt. at 4 (emphasis added).

158. Moreover, pursuant to the SIC Advisors LLC Agreement, "Distributable Cash" is defined as "an amount equal to all fees or other amounts received by the Company from the BDC pursuant to the Advisory Agreement ***other than any amounts referenced in Section 9.6***."[147] Notably, Section 9.6 of the SIC Advisors LLC Agreement provides for special distributions including "[a]ll amounts that are paid to the Company from the BDC as . . . (ii) general and administrative expenses incurred or funded by the Company . . ."[148] In both the Medley Capital LLC Agreement and the SIC Advisors LLC Agreement, it is required that expenses of Medley Capital and SIC Advisors be satisfied or reserved for, prior to making equity distributions to the Debtor.

159. The SEC Objection is dependent on the argument that equity distributions from the non-Debtor subsidiaries to the Debtor take priority over the creditors and contractual counterparties of the non-Debtor subsidiaries. For the foregoing reasons, the SEC's position is legally inaccurate, not supported by contract, facts, or the past practices of the Debtor and the non-Debtor subsidiaries. Accordingly, the SEC Objection should be overruled.

B. The Debtor Is Not Violating the Cash Management Order.

160. Contrary to the SEC's accusations, the Debtor is not violating the terms of the Cash Management Order.[149] These allegations distort the facts of this case and cherry pick provisions of this Court's order to advance the SEC's agenda.

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147 SIC Advisors LLC Agmt. at 3 (emphasis added).

148 *Id*. Section 9.6(a).

149 "Cash Management Order" means that certain *Final Order (I) Authorizing, but Not Directing, the Debtor to Continue and Maintain Its Existing Cash Management System, Bank Account and Business Forms, (II) Authorizing the Continuation of Ordinary-Course Intercompany Transaction, and (III) Granting Related Relief* [Docket No. 83].

161. Prior to the Petition Date, in the ordinary course of business, when Advisor entities received payment from clients for advisory services, those fees would be deposited into the account of the applicable Advisor.[150] In accordance with the Advisors' contractual obligations, the applicable Advisor would use a portion of those funds to pay Medley Capital for the advisory and administrative services due and owing. Then, after payment of its obligations, the Advisor would transfer a portion of the funds to the Debtor as an equity distribution.[151]

162. The Cash Management Order, provides that "[t]he Debtor is authorized, but not directed, and subject to this Final Order, to continue to use the Cash Management System, including the Bank Account, in the ordinary course of business."[152] Neither the Cash Management Order nor the Cash Management Motion[153] provide that all funds held by the Debtor's subsidiaries must be swept to the Debtor. That reading of the documents is contrary to the plain language and the past practices of the Debtor.

163. It is unclear why, at the outset of these cases, the Debtor (managed at that time by Brook and Seth Taube) chose to alter the movement of cash through the system and divert all cash to the Debtor. Nevertheless, after Brook and Seth Taube resigned, Michelle Dreyer was appointed the independent manager of the Debtor and Mr. Liao was appointed CEO of Medley Capital. At

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150 Liao Decl., ¶ 12.

151 *Id*. Further evidence of the prepetition ordinary course operations of the Debtor can be found in the SEC Objection. Paragraph 36 of the SEC Objection states that "the Debtor's Statement of Financial Affairs that shows months-long gaps in 2020 between transfers from the Debtor to Medley Capital." SEC Obj. ¶ 36, citing [Docket No. 63] at 34. The reason for this those gaps is that prior to the Petition Date, the Advisors would pay Medley Capital directly, resulting in fewer transfers from the Debtor to Medley Capital. *See also* Liao Decl., ¶ 12.

152 Cash Mgmt. Order, ¶ 2.

153 "Cash Management Motion" means that certain *Debtor's Motion for Entry of Interim and Final Orders (I) Authorizing, but Not Directing, the Debtor to Continue and Maintain Its Existing Cash Management System, Bank Account and Business Forms, (II) Authorizing the Continuation of Ordinary-Course Intercompany Transaction, and (III) Granting Related Relief* [Docket No. 3].

that time, the Debtor, the Committee, and Medley Capital undertook a review of the Cash Management Order, the flow of funds through the system prepetition, and the contractual obligations of the various entities.[154] After the Debtor filed the Amended Cash Management Motion[155] and the Committee objected, the parties engaged in several discussions regarding cash management and the Plan. Ultimately, the parties determined that the Cash Management Order, as entered, provided for the continuation of the cash management system in the ordinary course as it was administered prior to the Petition Date. Based on that understanding, in early July 2021, the Debtor and its subsidiaries continued to use the cash management system as it was used prior to the Petition Date.

164. The SEC misunderstands the business operations and contractual arrangements of the Debtor and its subsidiaries and makes that misunderstanding the basis for accusations of wrong-doing. It is clear from prepetition operations, the contracts, operating agreements, and orders of this Court, that the flow of funds through the cash management system is appropriate and authorized by the Cash Management Order.

165. The SEC also mischaracterized the Cash Management Order's granting of administrative expense claims for intercompany transfers as a benefit to the Debtor. To the contrary, such administrative expense claims could have been a material detriment to the Debtor and its creditors. The Cash Management Motion defines the term "Intercompany Transfers" as the Debtor's ". . . transfer of funds from one Non-Debtor Affiliate, through the Debtor, to another Non-Debtor Affiliate for the payment of certain Company obligations (the 'Intercompany

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154 *See* Liao Decl., ¶ 11.

155 "Amended Cash Management Motion" means that certain *Debtor's Motion for Approval and Entry of Amended and Restated Final Order (I) Authorizing, but Not Directing, the Debtor to Continue and Maintain Its Existing Cash Management System, Bank Account and Business Forms, (II) Authorizing the Continuation of Ordinary-Course Intercompany Transactions, and (III) Granting Related Relief* [Docket No. 217].

Transactions').”[156] Effectively, when the funds passing through the cash management system are moving incorrectly (*i.e.*, equity distributions from the subsidiaries to the Debtor and then transfer from the Debtor back to the subsidiaries to pay contractual obligations) each non-Debtor subsidiary is being granted an administrative expense claim against the Debtor for that transfer. That system of cash management could create material administrative expense claims at the Debtor. In the alternative, when the funds passing through the cash management system are moving correctly, (*i.e.*, from a client to an Advisor, then from the Advisor to Medley Capital to cover expenses) the transactions do not qualify as “Intercompany Transactions” because they do not flow through the Debtor. Therefore, they do not get designated as administrative expenses of the Debtor.

C. The Debtor Release is Appropriate and Should Be Approved.

166. As set forth above in section II.A.3.d.ii.I of this Memorandum, the Debtor Release is appropriate and should be approved.

D. The Plan's Exculpation Provisions Are Appropriate and Should Be Approved.

167. As set forth above in section II.A.3.d.ii.II of this Memorandum, the Plan's exculpation provisions are appropriate and should be approved.

E. Payment of the Notes Trustee Fees Is Warranted Pursuant to Bankruptcy Code Section 1123(b)(6)

168. The U.S. Trustee contends that section 503 of the Bankruptcy Code is the exclusive provision that allows for the payment of the Notes Trustee Fees.[157] This assertion is mistaken as

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[156] Cash Mgmt. Mot., ¶ 14.

[157] As noted in the UST Objection, the Notes Trustee Fees to be paid under the Plan reflect only a portion of U.S. Bank's fees and expenses, “estimated to be approximately $716,375 through June 30, 2021[,]” which includes the nearly two month period at the start of the Chapter 11 Case before the appointment of the Committee. During that period, Kelley Drye & Warren LLP and FTI Consulting, Inc., counsel and financial advisor for the Notes Trustee, sought to fill the void by undertaking the tasks and duties typically engaged in by the professionals for an official committee. The Notes Trustee intends to exercise the Notes Trustee Charging Lien against Distributions to Class 3 Notes Claims for the payment of the remainder of the Notes Trustee Fees.

a matter of law. It was recently rejected in the District of Delaware by Judge Walrath,[158] and has been rejected in other districts, most notably the Southern District of New York.[159]

169. Bankruptcy Code section 1123(b)(6) gives plan proponents broad latitude to "include any . . . appropriate provision not inconsistent with the applicable provisions of this title."[160] This is a "broad grant of authority" and "reorganization plans, after they get the requisite assent, may allocate and distribute the value of the debtors' estates by a broad variety of means."[161] The Plan Proponents' decision to pay the Notes Trustee Fees was an essential component of the global settlement embodied in the Plan and a sound exercise of the Debtor's business judgment. As such, the UST Objection should be overruled.

170. The U.S. Trustee predictably cites the *Lehman* decision in support of the argument that section 503 governs the payment of the Notes Trustee Fees under the Plan.[162] This reliance, however, is misplaced.

171. The concerns identified in *Lehman* pertained to payment of the fees and expenses of official committee members specifically in their role as such. The analysis in *Lehman* began with the proposition that the fees of individual creditors' committee members "cannot be treated

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158 *See In re Southeastern Grocers, LLC*, Case No. 18-10700 (MFW) (Bankr. D. Del. May 14, 2018) ("*Southeastern Grocers*") ("With respect to the payment of expenses, 503(b)(3)(D) is not the only way where such expenses can be approved and paid in a case."), Confirmation Hr'g Tr. 37:23–25, a copy of which is attached hereto as **Exhibit F**.

159 *In re Aegean Marine Petroleum Network, Inc.*, Case No. 18-13374-MEW (Bankr. S.D.N.Y. April 1, 2019), Hr'g Tr. 24–25 ("*Aegean Marine*"), a copy of which is attached hereto as **Exhibit G**.

160 *See* 11 U.S.C. § 1123(b)(6).

161 *In re Adelphia Commc'ns Corp*., 441 B.R. 6, 18 (Bankr. S.D.N.Y. 2010) ("*Adelphia*").

162 *See* UST Objection at ¶ 36 (*citing Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.)*, 508 B.R. 283 (S.D.N.Y. 2014) ("*Lehman*").

as [prepetition] claims" because they were based on rights to payment that arose postpetition.[163] The court in *Lehman* therefore ruled that payment of such fees must satisfy the standards of section 503(b).[164] By contrast, here the rights of the Notes Trustee to payment of fees and expenses stem from the Notes Indenture, a prepetition agreement between the Debtor and the Notes Trustee, and the Notes Trustee has a prepetition, contractual right to payment that is distinct from any administrative expense claims. The Plan Proponents propose to pay the Notes Trustee Fees as part of the treatment of the Notes Claims under the Plan.

172. Judge Wiles of the Southern District of New York addressed this precise point regarding *Lehman's* non-relevance to the payment of an indenture trustee's fees and expenses under a trust indenture pursuant to a chapter 11 plan. In ruling on an agreement to pay such fees and expenses under the chapter 11 plan in *Aegean Marine*, Judge Wiles rejected a nearly identical objection asserted in that case by the U.S. Trustee:

> "[T]he difference [from *Lehman*] is they're not coming to me saying, we made a post-petition agreement to do things differently from what the Bankruptcy Code says, and we put it in the plan, and you should ignore what the Bankruptcy Code says because we've agreed among ourselves to modify it. That's what bothered Judge Sullivan. [The debtors here] come to me with a pre-bankruptcy contract that says that they get their fees paid by the Debtors . . . There is nothing in the [Bankruptcy] Code that says that a contract – a valid pre-bankruptcy contract for an indenture[] trustee to get its fees must be dishonored in bankruptcy or cannot be paid or cannot be assumed or cannot be reinstated or cannot be made part of a modified deal after the case. Not that I know of."[165]

173. Judge Walrath reached a similar conclusion in *Southeastern Grocers*:

> "I think it is perfectly appropriate to agree pre-bankruptcy to the payment of those expenses without the necessity of a court having to approve them after the fact in order to get the parties to come to the table and negotiate what ultimately in this

[163] *Lehman*, 508 B.R. at 293.

[164] *Lehman*, 508 B.R. at 293–294.

[165] *Aegean Marine*, Hr'g Tr. 24–25.

> case is a very successful reorganization of this entity. So I think that the fact that the debtors agreed to that pre-bankruptcy was perfectly appropriate, and that there is no necessity that I review those expenses or otherwise interfere with that agreement."[166]

174. While Judge Walrath was considering the payment of an indenture trustee fees and expenses pursuant to a pre-negotiated chapter 11 plan, while in this case the Notes Trustee Fees are being paid as part of a postpetition settlement, the rationale articulate by both her and Judge Wiles is directly on point here. Section 503(b) is simply not applicable. The payment of the Notes Trustee Fees is a term of the Global Settlement that is integral to the Plan, and is an "appropriate provision" that can be included in the Plan pursuant to section 1123(b)(6).

175. The U.S. Trustee also asserts that payment of the Notes Trustee Fees would contravene section 1129(a)(4), which provides that payments to be made under a plan for costs and expenses incurred in connection with the case are subject to the approval of the court as "reasonable."[167] This contention is meritless. Indeed, courts have expressly cited section 1129(a)(4) along with section 1123(b)(6) as statutory support for rulings in favor of chapter 11 plans which provide for payment of a creditor's fees and expenses.[168]

176. For example, these provisions were applied in *AMR*, where Judge Lane approved the payment of the professional fees of individual creditors through the plan, and rejected the U.S. Trustee's argument that "[s]ection 503(b) provides the exclusive vehicle for these creditors to receive fees."[169] Judge Lane observed that Bankruptcy Code sections 1123(b)(6) and 1129(a)(4)

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166 *Southeastern Grocers*, Confirmation Hr'g Tr. 37:23–25.

167 11 U.S.C. § 1129(a)(4).

168 *See, e.g.*, *In re AMR Corp.*, 497 B.R. 690 (Bankr. S.D.N.Y. 2013) ("*AMR*").

169 *AMR*, 497 B.R. at 695.

"endorse[] the notion that a debtor will sometimes need to negotiate certain payments to stakeholders in order to come to a consensual resolution and get a plan approved."[170]

177. Here, as in *AMR*, the payment of the Notes Trustee Fees is part of a global settlement between the Plan Proponents that will facilitate an efficient, cost-effective confirmation process.[171] Indeed, the Plan has received overwhelming creditor support,[172] and no other party with an economic stake in this case has objected to payment of the Notes Trustee Fees.[173]

F. The Non-Debtor Compensation Plan Does Not Implicate Section 503(c) of the Bankruptcy Code and Provides Significant Value to the Debtor's Estate.

178. The ***Non-Debtor*** Compensation Plan is being funded by ***non-debtors*** (Medley Capital and Sierra) to pay employees of a ***non-debtor*** (Medley Capital) and does not implicate the Debtor or its Estate, except in that it will provide a mechanism (in fact, the only mechanism) for realizing the value of the Remaining Company Contracts—value that will flow up to the Debtor in accordance with the agreements between the Advisors, Medley Capital, and the Debtor, and will directly benefit of the Estate.[174]

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170 *Id*.

171 *See* Plan at 11 ("The Debtor, Creditors' Committee and Medley Capital reached an agreement on a global plan settlement documented in the Plan Term Sheet [Docket No. 276]"); Plan Term Sheet at 12 ("the reasonable fees and expenses of the Notes Trustee, which shall be paid in full in cash on the Effective Date").

172 *See also AMR*, 497 B.R. at 695–96 (Bankr. S.D.N.Y. 2013) (citing *Adelphia* and finding that professional fees contemplated under a consensual plan were permissible under sections 1129(a)(4) and 1123(b)(6) and "approved given the overwhelming support of the [p]lan by creditors").

173 It should also be noted that Article VII.R of the Plan provides that "[t]he Notes Trustee shall provide no less than ten (10) days' notice to the U.S. Trustee of the submission of documentation for payment of the Notes Trustee Fees to the Liquidating Trustee before such amounts are paid and shall, upon request, provide copies of such documentation (which may be redacted as reasonably necessary) to the U.S. Trustee." The U.S. Trustee will therefore have an opportunity to review the Notes Trustee Fees prior to payment.

174 Liao Decl., ¶ 31.

179. At no point in the Objections do the SEC or the U.S. Trustee even assert, much less establish, that the Non-Debtor Compensation Plan will be an administrative expense of the Debtor's Estate. Notwithstanding this fact, the Objections attempt to challenge the Non-Debtor Compensation Plan on the grounds that it violates section 503(c) of the Bankruptcy Code, a section that addresses *administrative expense payments from a debtor's estate*. As set forth herein, section 503(c) of the Bankruptcy Code is clearly not apply to the Non-Debtor Compensation Plan.

180. "Section 503(c) only applies to the allowance and payment of administrative expenses by the debtor."[175] The Plan Proponents have not requested that the Non-Debtor Compensation Plan payments be allowed as an administrative expense of the Estate, nor would they because the Estate is not paying for the Non-Debtor Compensation Plan in the first place.[176] The Non-Debtor Compensation Plan is being funded by non-debtors and, as such, it cannot be an administrative expense of the Debtor's Estate.[177] Accordingly, section 503(c) of the Bankruptcy Code is not applicable to the Non-Debtor Compensation Plan.

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[175] 4 COLLIER ON BANKR. ¶ 503.18 (16th ed. 2021); *see also In re Airway Industries, Inc.*, 354 B.R. 82, 87–88 (Bankr. W.D. Pa. 2006) (finding section 503(c) inapplicable to bonus plan included as part of chapter 11 plan because, among other things, bonus plan payment would not be administrative expenses of the debtor's estate); *In re Journal Register Co.*, 407 B.R. 520, 535–36 (Bankr. S.D.N.Y. 2009) (recognizing that "courts generally deny administrative claim status to expenses that become payable upon confirmation of a chapter 11 plan and not before" and holding that compensation plan that took effect after confirmation was not subject to section 503(c)); *In re AMR Corp.*, 490 B.R. 158, 167 (Bankr. S.D.N.Y. 2013) ("By presenting their request as part of a proposed plan of confirmation, the debtors in Journal Register took the proposed incentive payments outside of the coverage of Section 503 and placed them within the confines of Section 1129(a)(4).").

[176] In addition, the funds that will be used by Medley Capital to pay its portion of the Non-Debtor Compensation Plan did not flow through the Debtor and, therefore, cannot be construed as an administrative expense under the Intercompany Transaction provisions of the Cash Management Order. *See* Cash Management Motion at ¶ 14 (defining "Intercompany Transaction" as a transaction that flows (a) from a non-Debtor subsidiary, (b) through the Debtor, then (c) to another non-Debtor subsidiary).

[177] *Airway Indus.*, 354 B.R. at 88 (section 503(c) did not apply where compensation plan was funded with non-estate assets); *Journal Register*, 407 B.R. at 534 (finding incentive plan payments in debtor's chapter 11 plan to be outside the scope of section 503(c) because, among other things, they were funded by secured lender).

181. Further, section 503(c)(1) does not apply to the Non-Debtor Compensation Plan because it is expressly limited to "transfer[s] made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with ***the debtor's business***." (emphasis added). In this case, the employees that will receive payments under the Non-Debtor Compensation Plan are employees of, and will remain employees of, Medley Capital—they are not employees of the Debtor.[178]

182. Therefore, while it is true that the Plan Proponents must satisfy section 1129(a)(1) of the Bankruptcy Code, which requires that the Plan comply with *applicable* provisions of the Bankruptcy Code, section 503(c) is not such a provision and, therefore, is not relevant for confirmation of the Plan and the Objections to the contrary should be overruled.

183. Moreover, the Non-Debtor Compensation Plan is eminently reasonable and provides significant value to the Debtor's Estate. The compensation provided in the Non-Debtor Compensation Plan is market-level, consistent with prior compensation for Medley Capital employees (in fact, the all-in compensation for the four executives of Medley Capital is less than was paid in 2020), and a standard compensation package that is expected by employees in this industry.[179] Without this expected, industry-standard compensation, the employees of Medley Capital (who are currently in high demand and very desirable to other firms) would not have remained and Medley Capital and the Advisors would have defaulted on their contractual obligations to clients, resulting in significant claims for damages.[180] Recognizing this, the Plan Proponents incorporated the Non-Debtor Compensation Plan into the broader Plan transaction to

[178] Liao Decl., ¶ 8, 28–31.

[179] *Id.*, ¶ 28.

[180] *Id.*, ¶ 29–31.

signal to the employees and to clients that the employees would continue to be properly compensated for their work in order to maximize the value of the Debtor's Estate for the benefit of all stakeholders.[181] Importantly, the Non-Debtor Compensation Plan is supported by the Debtor, by the Committee, and by the Debtor's creditors as evidenced by their overwhelming votes to accept the Plan.

184. In Medley Capital's industry, employees expect to receive a base salary during the course of each year and a year-end lump sum compensation payment for performance in that year.[182] These two compensation components, while paid out at different times, are understood to be part of the overall employee compensation package, and an employee expects to receive this lump sum payment at the end of the year as compensation for the work that is being performed throughout the year. In this way, even though the lump sum payment may be referred to as an incentive "bonus" and can vary year-to-year, it is the expectation of the employees that this payment is being earned during the course of each year.[183] This is market compensation in this industry and absent the end of year compensation, employees will not continue their employment with Medley Capital.[184]

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[181] *Id.*, ¶ 28. This messaging was effective. Since the initial filing of the proposal for the Non-Debtor Compensation Plan on July 22, 2021 (when the first iteration of the Non-Debtor Compensation Plan was filed as Exhibit 1 to the Plan Term Sheet [Docket No. 276]), only two employees have resigned. Prior to that, twenty-two employees resigned between the Petition Date and July 22, 2021.

[182] *Id.*, ¶ 19.

[183] *Id.* Typically, an employee's base salary may only be one-third of total compensation, with the remaining two-thirds received at year-end in the form of that year-end compensation payment. If there is reason to think, as some employees did following the Debtor's bankruptcy filing, that the two-thirds of compensation expected for work already performed and for work to be performed during the rest of the year will not be paid, then an employee would not be incentivized to stay with their current employer. This, coupled with the uncertainty of the Debtor's bankruptcy case, contributed to the loss of nearly half of all employees at Medley Capital since the Petition Date.

[184] *Id.*, ¶¶ 19–20.

185. In light of the critical role that Medley Capital's employees play, the expectations that the employees have regarding industry-standard compensation, and the desirability of the employees to other firms, it is simply not possible to continue to generate revenue from investment advisory services without paying the remaining 26 employees (who are each doing significantly more work on a day-to-day basis than last year) market-level compensation.[185] If the employees had not received notice of this plan (including through the Combined Disclosure Statement and Plan and a letter to the employees) and do not receive a guarantee of adequate and expected compensation, then the employees will leave the firm.[186] Further, if the employees were not adequately compensated to ensure that Medley Capital could perform the advisory and administrative services, the clients would terminate their contracts with the Advisors.[187] This, in turn, would destroy the value that could otherwise have been created through performance of the advisory and administrative services, thereby eliminating any profits that could have been distributed up to the Debtor. In particular, Sierra indicated that it would not continue under its existing contract (which is the most profitable of the Remaining Company Contracts) unless there was a guarantee that employees would be treated fairly such that the employees would remain through the Wind-Down Date.[188]

186. With this backdrop, the Plan Proponents determined that implementing the Non-Debtor Compensation Plan was in the best interest of the Debtor and its Estate. This is not a situation where the employees of Medley Capital are asking for something extra or

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185 *Id.*, ¶ 22.

186 *Id.*

187 *Id.*

188 *Id.*

extraordinary—they will simply be guaranteed the compensation that they already expected for the year, including for work that was already performed throughout the first part of this year, consistent with prior compensation practices. In addition, many of these employees are now performing additional work because of the significant attrition that has occurred since the Petition Date.[189]

187. The Non-Debtor Compensation Plan provides a net benefit to the Debtor and its Estate by allowing it to realize earnings on the Remaining Company Contracts, all of which are profitable, but none of which could be profitably performed without Medley Capital's remaining employees. The Debtor, as the equity owner of Medley Capital and the Advisors, will be entitled to receive the profits earned from the continued performance of these contracts by way of an equity distribution, after accounting for applicable costs and expenses, but will not be required to expend any resources from the Estate. As a result, implementation of the Non-Debtor Compensation Plan creates significant value for the Debtor and its stakeholders.

G. Medley Capital's Initial Appointment to the Oversight Committee.

188. The SEC further objects that Medley Capital should not have "veto power" over the Oversight Committee, and in fact, should be removed from it. In reality, Medley Capital has no such veto power. The Oversight Committee has two representatives appointed by the Committee, and one representative from Medley Capital (a position that only exists because the Creditors Committee requested a Medley Capital representative be added for institutional knowledge).[190] If *any* member dissents on a decision, their only recourse is not a veto right, but

[189] *Id.*, ¶ 28. Further, except for one, none of the employees participating in the Non-Debtor Compensation Plan were exeuctives of the Debtor or Medley Capital prior to the Petition Date and none of Mr. Liao, Mr. Crowe, or Mr. Richards was involved in, or benefitted directly from, the bond issuances in 2016 or 2017. Liao Decl, ¶ 30.

[190] *See* Plan, Article VII.G. The SEC provides no basis to disregard the Committee's judgment that it would be beneficial to have a Medley Capital representative on the Oversight Committee.

rather, to seek adjudication of the dispute by this Court.[191] That said, the Plan Proponents, recognizing that Medley Capital only agreed to take a position on the Oversight Committee to assist the Committee and not to advance its own interests, are amenable to modifying the Plan to provide that the Medley Capital member of the Oversight Committee will not have the right to independently raise an issue that they dissent upon to the Court, thus ensuring that any dispute brought to the Court's attention will need to be dissented to by one of the members appointed by the Creditors Committee.[192]

H. There is No Basis to Appoint a Fee Examiner in the Chapter 11 Case.

189. The SEC's request that the Court appoint a fee examiner to ensure that Estate resources are not improperly expended on unauthorized professional fees is premised on faulty and uneconomical assumptions. The SEC's concern that Paul Hastings' fees should not be paid with Estate funds, is unfounded. Paul Hastings has at all times to date, and will be going forward, only been retained by Medley Capital and certain non-debtor affiliates of Medley Capital. Paul Hastings is not counsel to the Debtor and, pursuant to the express terms of Paul Hastings' engagement with Medley Capital, Paul Hastings will not provide any services to the Debtor. Consistent with that exclusive retention, Paul Hastings' fees have never been submitted to, nor have they ever been paid by, the Debtor or from assets of the Debtor's Estate.[193] In accordance

[191] The Plan Proponents are not so presumptuous as to assume that the Court will always agree with Medley Capital, such that they would have an effective veto of any Oversight Committee decisions.

[192] Moreover, to the extent this proposed modification does not satisfy the SEC's concerns, the Plan Participants are willing to remove the requirement that any dissenting member who elects to raise an issue to the Court's attention will be compensated for their attorney fees.

[193] Liao Decl., ¶ 32. The SEC does not dispute this fact. Rather, the SEC's stated concern is that Paul Hastings "*may* seek to be paid pursuant to the Plan, and have their claims treated as administrative expenses, without court oversight." SEC Obj., ¶ 27 (emphasis added). This ungrounded speculation does not warrant the added expense of an examiner for fees that there is no reason to believe will be submitted to the Estate.

with these facts, Paul Hastings' fees are included as a line item in the Wind-Down Budget as an obligation and payment from Medley Capital.[194] As such, there is no need, nor basis, to appoint a fee examiner to address Paul Hastings' fees.

190. Nor is the appointment of a fee examiner to account for any fee application by Lowenstein necessary or prudent. There is no basis to believe that any value derived from an examiner reviewing Lowenstein's fee application will exceed the cost associated with such a review. This is particularly so where the Committee is already incentivized to perform the same exacting analysis, and in fact, has negotiated a prudent settlement with Lowenstein which materially reduces the fees being sought. If consummated, Lowenstein would seek Court approval of the settlement that would provide notice to and an opportunity for all creditors and parties in interest to object.

191. For the reasons set forth above and in the Confirmation Declarations, each of the unresolved Objections should be overruled.

CONCLUSION

192. For all of the reasons set forth herein and in the Confirmation Declarations, and as will be further shown at the Confirmation Hearing, the Plan Proponents respectfully request that the Court approve the disclosures in the Combined Disclosure Statement and Plan as adequate under section 1125 of the Bankruptcy Code on a final basis and confirm the Combined Disclosure Statement and Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by overruling any remaining objections, entering the proposed Confirmation Order, and granting such other and further relief as is just and proper.

[194] Rosen Decl., ¶ 14.

Dated: October 1, 2021

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Exhibit A

Transcript of Hearing
In re Akorn, Inc., Case No. 20-11177 (KBO) (Bankr. D. Del. Sept. 4, 2020)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
AKORN, INC., *et al.*,	Case No. 20-11177 (KBO)
	Courtroom No. 1
	824 North Market Street
	Wilmington, Delaware 19801
Debtors.	September 4, 2020
	10:00 A.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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INDEX

(Proceedings commenced at 11:35 a.m.)

THE COURT: Thank you very much, Dina.

Good morning, everyone. This is Judge Owens. I hope everyone had a restful afternoon and evening, following the conclusion of yesterday's Akorn proceeding.

We're gathered today on the phone so I can render my ruling with respect to confirmation of the debtors' proposed plan. And at the outset, let me reiterate my thanks to all counsel for their thorough presentations in support to the opposition to the proposed plan and for their professionalism during our hearing. I acknowledge that trying a matter remotely is difficult and you did a bang-up job.

With respect to confirmation of the plan, I am prepared to overrule the objection and confirm the plan. Based on the record, I find that it's (indiscernible) all applicable provisions of the Bankruptcy Code, including Sections 1122, 1123 and 1129.

Although many arguments have been made in opposition to the plan, the primary objections prosecuted can be (indiscernible) to four premises.

One, that there is no non-insider impaired acceptance class;

two, that value rightly belonging to general unsecured creditors exists in the form of potential estate

causes of action against current former directors, officers and employees, and that the plan inappropriately extinguishes that value as a result of the debtors' releases, proposed to be granted therein;

Three, that the debtors have not proposed the plan in good faith and;

Four, that the CVR claims held by the settling shareholders should not be classified as Class VII subordinated claims.

I will briefly address each one in turn, and to the extent other objections have been raised that are not related to or addressed by one of these four claims, they are overruled following consideration of the record and the legal briefing, with the exception of the Fresenius reclassification issues raised in the standalone motion which will be reserved in the confirmation order as set forth on the record yesterday and was agreed to by the parties.

So with respect to the four main issues. First, I find that the Class III term loan claims is an impaired non-insider second class. The claims still exist as the sale has not yet been consummated. And the plan provides that on account of such claims, the holders will receive the purchase assets as and solely to the extent set forth in the sale order, as treatment is an impairment.

Second, with respect to the debtor releases, the

debtors have determined in their business judgment to grant the releases to the released parties. A much constituency has decided to support their judgment, including the committee who is an estate fiduciary and who performed its own investigation and analysis into the nature, extent, viability and value of the released claims which was not meaningfully challenged.

The judgment underlining the debtor releases was based, in part, on the voice that meaningful estate causes of action exist given the COVID settlement and the related releases therein and the lack of avenues for recovery on account of the claims, if they do, in fact, exist given the terms of the debtors' applicable insurance policies and/or the prepetition exhaustion of such policies.

On the other hand, the objectors who face no recovering of new cases and understandably seek to identify and pursue any possible avenue on account (indiscernible) pursue any possible value on account of their claims is ultimately liquidated and allowed, (indiscernible) the theories as to why viable claims and causes of action do, in fact, do exist, despite the settlements and releases and why they could have obtained recovery on account of those claims from the debtors' insurance policies.

However, a (indiscernible) and argument the pathway to recovery on account of these potential claims and

causes of action is attenuated and speculative, fraught with multiple stats, including denial of confirmation and the conversion of these cases to Chapter 7, each of which comes with great uncertainty and risk, significant litigation involving complex issues and no committed funding.

To disrupt the business judgment of the debtors, deny confirmation of the plan and reject an organized and efficient pathway to finalizing these cases and satisfying an outstanding Chapter 11 administrative and other priority claims in order for the alternative pathway suggested by the objecting parties to be pursued would not, in my opinion, been in the best interest of these cases or parties in interest.

Moreover, it would jeopardize -- it could jeopardize the sale given the termination provisions of the asset purchase agreement which would be triggered if the court does not confirm the plan and ultimately convert the cases or prove another version of the plan proposed by the debtors.

Following confirmation, parties will still maintain the direct claims against the released parties, to the extent they do not opt into the plan third party release, a plan administrative will be able to pursue any worthwhile routine causes of action following this (indiscernible), including those subject to the debtor release carve-out for

fraud, willful misconduct or gross negligence.

On the third point with respect to good faith, the series of allegations made substantially by the MDL objectors are not supported by the record for the legal and economic realities that brought these debtors to bankruptcy that underly the prepetition settlement to shareholders and (indiscernible) support the plan process, the approved transaction and the resulting proposed plan.

In determining whether a plan is proposed in good faith, courts consider the totality of the circumstances, more to the process of plan development, then the content of the plan. Good faith is shown when the plan has been proposed for the purpose of reorganizing the debtor, preserving the value of the estate, and delivering that value to creditors.

On the other hand, good faith has been found to be lacking if the plan is proposed with ulterior motives. Here, the record developed during both the sale and confirmation proceedings, indicates that, among other things, the debtors sought to and did, in fact, maximize value to stakeholders. And that the plan is proposed simply reflects the outcome of those efforts.

Its contents are not atypical for cases such as these and, again, the plan serves to provide efficient and structured finality. Nothing in the record suggests to me

that the lenders and the debtors have behaved improperly, pre- or post-petition and the debtors even voluntarily amended the plan which was originally proposed to address certain items viewed as objectionable to parties.

They narrowed the exculpation provision, modified the third-party releases to align them with my previous opinions on the subject to ensure that they would be considered consensual mainly providing for an opt-in third-party release and they reclassified the CVR claim to a subordinated Class VII claim from its original placement in Class IV.

It is unfortunate that the objecting parties are unlikely to receive anything on account of their claims and interest under the plan. But there are no sale proceeds available for them under the waterfall. And as highlighted by the debtors in their confirmation brief, it is not the court’s place to force a purchase to assume liability in the 363 sale that do not benefit the purchase objector.

Fourth and finally, with respect to classification, I find that the classification of the CVR claim as subordinated is proper under Section 510(b). The claim arises from the settling shareholders equity ownership of Akorn. More specifically, the CVR’s were intended to compensate the settling shareholders for losses related to their equity interest that were allegedly suffered as a

result of the shareholder's alleged secured claim.

While Gabelli argues that subordination of the CVR claim is not appropriate because of settling shareholders struck an intervening bargain which resulted in them giving up their participatory exposure to the company in exchange for a debt (indiscernible) that would be coupled from equity performa, I'm not persuaded. I find that the cases they (indiscernible) in support to be distinguishable.

Among other things, I agree with the parties in support of the subordination that (indiscernible) and the other similar cases upon which Gabelli relies did not involve an instrument given the settlement consideration for a claim that would, otherwise, be subordinated.

Moreover, unlike the former interest holders in Noble (indiscernible), Montgomery Ward and Cybersite, the settling shareholders did not exchange their shares for CVRs and did not divest themselves a potential investment risk and benefit. Rather, they were entitled to keep their shares and, in fact, received even more. The nexus or casual connection required to employ Section 510(b), thus still exists and the benefit and the failure to subordinate the CVRs and allow them as unsecured claims would inappropriately allow the shareholders to benefit as a (indiscernible) equity holdings and that benefit would not be dependent on company's success. Accordingly, I will not modify the classification

of the CVR claim.

In light of the foregoing, I do find that the debtors have carried their burden to demonstrate the plan is sufficient for confirmation and I am prepared to enter the proposed confirmation order.

I understand that there was a proposed form of order that was filed on September 2nd and I believe it's Docket Entry Number 661 and I had the opportunity to review that. I have no questions or comments. But let me ask for the record, are there further changes that have been made or need to be made for the order and do you have a form of order that you would like to walk the court through?

MS CORNISH: Your Honor, this is Kelley Cornish from Paul Weiss on behalf of Fresenius.

I just want to be sure that we get a provision into the confirmation order that addresses the, you know, withdrawal without prejudice and preservation of the subordination issues that we discussed yesterday and that Your Honor made reference to at the beginning of this hearing. So we'll work with the debtors on that.

THE COURT: Okay. Thank you, Ms. Cornish, that was one of the items I thought, perhaps, needed to be modified in the order.

I'll ask debtors' counsel is there any other further changes that you need to make to reflect any

agreements that you reached with the objecting parties that you reached a resolution with prior to the start of the confirmation hearing?

MR. HAYES: For the record, Christopher Hayes of Kirkland Ellis.

Your Honor, we had no further changes from the version you identified that was filed at Docket 661. A Ms. Cornish noted, we will work with her on language for the related to the withdrawal of their objection and preservation of their rights. And I would propose once we finalize that language submitting it under certification of counsel.

THE COURT: Okay. That would be great, Mr. Hayes. I appreciate that. Please work with Ms. Cornish and once you reached your resolution and finalize the form of order, please go ahead and submit it under certification of counsel.

And if you could have someone just notify chambers that it's been submitted, I would greatly appreciate it. It will aid the time -- shorten the time for us to get it entered for you.

Well is there anything else that we should discuss with respect to the confirmation?

MR. NASH: Pat Nash, I don't think so. Thanks, Judge.

THE COURT: Okay. Thank you, Mr. Nash. I appreciate the confirmation.

Okay. I hope everyone has a wonderful Labor Day and that you're well and continue to be well. I will consider this hearing adjourned. Thank you, all, very much. Take care.

(A Chorus of "Thank you, Your Honor")

(Proceedings conclude at 11:46 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski September 8, 2020
Mary Zajaczkowski, CET**D-531

Exhibit B

Transcript of Hearing
In re Nassau Broadcasting Partners L.P., Case No. 11-12934 (KG)
(Bankr. D. Del. July 31, 2013)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	) Case No. 11-12934 (KG)
	) Chapter 11
NASSAU BROADCASTING PARTNERS L.P., *et al.*	)
	) Courtroom No. 3
Debtors.	) 824 Market Street
	) Wilmington, Delaware 19801
	)
	) July 31, 2013
	) 11:00 A.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording: transcript produced by transcription service.

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INDEX

THE CLERK: Please rise.

THE COURT: Good morning, everyone, thank you. Please be seated. We are here for an important event. Good morning, Ms. Guilfoyle, how are you today?

MS. GUILFOYLE: Doing well, thank you, Your Honor.

THE COURT: Good.

MS. GUILFOYLE: Good morning, Tori Guilfoyle of Blank Rome on behalf of the Debtors. Present with me in the Courtroom today is Ms. Regina Kelbon and Mr. Leon Barson of Blank Rome.

THE COURT: Yes, they need no introduction.

MS. GUILFOYLE: And also Mr. Peter Tonks the chief financial officer of the Debtors is also here today.

THE COURT: Welcome back.

MS. GUILFOYLE: And Ms. Stephenie Kjontvedt from Bankruptcy Solutions is on the phone.

THE COURT: Yes, thank you.

MS. GUILFOYLE: And as you know --

THE COURT: And Ms. Zigman is here. Good to see you, again, Ms. Zigman and, of course, Ms. Sarkessian, Mr. DeFranceschi [*phonetic*] hiding in the back, good morning, everyone.

MS. GUILFOYLE: -- as you know we are here today on the confirmation of the Debtors' proposed second amended Chapter 11 plan of liquidation which was filed with the Court

on July 26th, 2013, and appears at docket number 976. As a preliminary matter I am happy to report that the limited objection filed by Ace American Insurance Company has been or will soon be withdrawn.

THE COURT: Very well.

MS. GUILFOYLE: If I may, I would like to go through the order in which the Debtors proposed to proceed today.

THE COURT: Yes.

MS. GUILFOYLE: First I will provide some context for confirmation of the plan, and then if the Court finds it helpful I will go through the revisions to the second amended plan all of which incorporates Ms. Sarkessian suggested revisions, but for the exculpation provision which will be addressed later in the hearing.

THE COURT: Absolutely, yes.

MS. GUILFOYLE: Next, I will review the documents that were filed in support of plan confirmation, and I will request that the Court take judicial notice of those documents. And then with the Court's permission, I will cede the podium to Ms. Sarkessian to present the Office of the United States Trustee limited objection to the narrow aspect of the proposed exculpation provision in the plan.

THE COURT: All right, Ms. Guilfoyle, that is fine.

MS. GUILFOYLE: And then Mr. Barson and Ms. Zigman will present the Debtors and the agent's positions with

respect to the exculpation provisions after Ms. Sarkessian presents her position.

THE COURT: And then I will rule.

MS. GUILFOYLE: And, finally, if Your Honor deems it appropriate, I will go through the revisions to the proposed confirmation order which also incorporate Ms. Sarkessian, all of Ms. Sarkessian's comments.

THE COURT: Very well. That sounds like a good plan, Ms. Guilfoyle, I appreciate it.

MS. GUILFOYLE: Okay. The plan represents the culmination of nearly twenty one months of efforts on the part of the Debtors with the active participation of the Debtors' senior secured lender's agent to successfully sell, substantially, all of the Debtors' assets, radio operating assets. And as you are aware, the Debtors sought and secured this Court's approval of six Section 363 sales comprised of all the operating radio stations which yielded proceeds in the approximate aggregate amount of $63 million dollars.

The Debtors obtained the applicable regulatory authorizations to consummate those sales. And these sales resulted in the hiring by the purchasers of many of the Debtors' former employees, and realized significant value for the benefit of the Debtors' creditors. This has paved the way for what is reasonably anticipated based on our current estimates to yield up to 100% distribution to holders of

allowed ordinary course trade claims. And through these efforts, the Debtors have completed the difficult task of formulating a consensual plan of liquidation that enjoys the support of each of the primary constituents in these Chapter 11 cases.

And as a reminder to the Court, there is no Committee in these cases, but the Debtors believe that the agent effectively filled the void once the sale process was underway starting in March 2012, and continuing throughout the rest of the case. The Debtors really would not have been able to achieve the result without the agent's support. And as detailed in the declaration of Stephenie Kjontvedt on behalf of Epiq Bankruptcy Solutions regarding voting and tabulation of ballots accepting and rejecting the amended Chapter 11 plan of liquidation for Nassau Broadcasting Partners and its affiliated Debtors, all of the classes entitled to vote on the plan have voted in favor of the plan. The plan is --

THE COURT: Very favorably, in fact.

MS. GUILFOYLE: Right. The plan and proposed confirmation order give the Debtors the discretion to abandon avoidance actions. No one has objected to the language in the plan or the proposed confirmation order, and the Debtors' lenders, who would be the primary recipients of any or beneficiaries of any recoveries yielded from such avoidance

actions, are okay with the proposed abandonment. If the plan is confirmed the liquidating Debtors, with the assistance of Mr. Tonks, will complete the claim's reconciliation process and will make distributions on account of allowed claims.

Then the liquidating Debtors will focus on the wind down of their Chapter 11 cases. And as of today the Debtors currently have cash in the approximate amount of $1,548,000 which consists of the wind down payment in the amount of 1.1 million, and additional cash of $448,000.00. The Debtors have also established a separate trade account which has on deposit the $2 million dollar trade account distribution. Importantly, this distribution was funded by the agent. Based on the Debtors' estimates and projections these funds are sufficient to satisfy the anticipated administrative and priority claims, make distributions under the plan, and fund the wind up of the Debtors' Chapter 11 cases.

For these reasons, and for the reasons set forth in the Debtors' memorandum of law in support of confirmation of the second amended plan, and in response to the limited plan confirmation objections, which was filed with the Court on Friday, July 26th and appears at docket number 980, the Debtors believe that the plan satisfies the applicable provisions of the bankruptcy code, and requests that the plan be confirmed.

THE COURT: It was certainly a very thorough brief,

and I think fully addressed and satisfied or, at least, indicated how all of the requirements of Section 1129 have been satisfied. So I do not think that unless you would like to, Ms. Guilfoyle, and I am not trying to in any way curtail you from doing so, I do not know that we need to go through each of the factors, certainly, but you are -- again, you are welcome if that was to be part of your presentation, and you wish it to be part of our record.

MS. GUILFOYLE: No.

THE COURT: Otherwise, I think the memorandum would stand instead of that.

MS. GUILFOYLE: Yes, we are happy to rest on our papers in that regard.

THE COURT: Sure.

MS. GUILFOYLE: If Your Honor would find it helpful I can go through the revisions to the second amended plan or I do not know if you have already had a chance to review them.

THE COURT: I did, I did review them. And I certainly understand them and accept them. And certainly think that -- I am assuming that most of those revisions were at the request of the United States Trustee's Office?

MS. GUILFOYLE: The vast majority of them were, yes.

THE COURT: Yes, all right. If there are any you wish to highlight I am happy to hear from you.

MS. GUILFOYLE: No I think, you know, most of them were to accommodate some requests by Ms. Sarkessian, and then there were also, you know, some wordsmithing on the part of the Debtors just to try to make some of the provisions a little clearer.

THE COURT: Of course.

MS. GUILFOYLE: I request that the Court take judicial notice of the following documents that were filed with the Court in support of confirmation of the plan.

THE COURT: Yes.

MS. GUILFOYLE: First, on June 17th, 2013 the Debtors filed the disclosure statement with respect to the amended joint Chapter 11 plan of liquidation for Nassau Broadcasting Partners and its affiliated Debtors; that appears at docket number 912. On June 4th and July 9th, three affidavits of services were filed at the docket, on the docket at docket numbers 878, 936 and 938, and those reflect that the various iterations of the disclosure statement, the plan and the notice of the disclosure statement were properly served.

On June 19th Your Honor entered the order approving the disclosure statement, and that appears at docket number 920. On July 9th, 2013 the affidavit of service of solicitation materials of Epiq Bankruptcy Solutions was filed at docket number 933 reflecting that the solicitation materials were properly transmitted in compliance with the

procedures approved by the Court pursuant to the disclosure statement order. On July 26th, 2013 the declaration of Stephenie Kjontvedt on behalf of Epiq Bankruptcy Solutions regarding voting and tabulation of ballots accepting and rejecting the amended joint Chapter 11 plan was filed at docket number 978.

And, finally, on July 26th the Debtors filed the proposed proffer of Peter D. Tonks in support of confirmation of the plan which appears at docket number 979. And if no one objects, the Debtors request that the Court take judicial notice of Mr. Tonks proffer or, if the Court prefers, I can read the proffer into the record?

THE COURT: Let me ask if anyone has any objection to my taking notice of that proffer of Mr. Tonks who is in the Courtroom and available for cross examination of anyone who should wish? All right, hearing no one then I will take notice of that proffer. It is part of our record in the case, and I certainly am pleased to take that proffer into consideration in the context of this confirmation hearing.

MS. GUILFOYLE: Thank you, Your Honor. And with the Court's permissions may I cede the podium to Ms. Sarkessian so she can address her narrow issue regarding the exculpation provision?

THE COURT: Yes, you certainly may.

MS. GUILFOYLE: Thank you, Your Honor.

THE COURT: Thank you. Thank you, Ms. Guilfoyle. Ms. Sarkessian, good morning. I know we have been, I think, I do not know if you and I have been through this before, but I have certainly been through the issue relating to exculpation. I have, sort of, a policy question for you to begin with.

MS. SARKESSIAN: Yes, Your Honor.

THE COURT: Not to throw you off your argument, and I am certainly waiting for that and we will listen to you. But I am confused why there is a -- if we all agree that the cases provide that fiduciaries, insiders, are able to be exculpated why shouldn't and, of course, they have a very highest duty, there is a very high responsibility of fiduciaries, why shouldn't, why is there this distinction relating to non-fiduciaries?

MS. SARKESSIAN: Well, Your Honor, I do not think I have announced my -- Juliet Sarkessian on behalf of the U.S. Trustee.

THE COURT: I am sorry, yes.

MS. SARKESSIAN: Yes, Your Honor, I am happy to address that issue first. I think the reason is there is three kinds of things that are rather similar that we see in plans. So there is Debtors' releases, releases that are given by the Debtors, okay.

THE COURT: Right.

MS. SARKESSIAN: And the cases analyze those releases under the Zenith and Master Mortgage cases, and there are various factors the Courts consider, including whether the release of parties that made a substantial contribution to the plan, so that is an important element there. So that is one kind of release. Then you have third party releases, so that would be releases given by, for example, the creditors and other parties and interest to non-Debtors, such as the lenders. We do not have that in this case by the way, but in many cases we do have that.

Now there what the Court's focus on and, obviously, this is covered by Washington Mutual and Tribune, and other cases is that the creditors whoever are giving these releases to the non-Debtors must consent. So item on the ballot there should be an opt out provision that notifies the voters that you can opt out, you do not need to give these releases to these third parties or that is the better method, but at the very least the ballot must, clearly, indicate to the people voting that, and generally creditors it could be interest holders in some instances that if you vote in favor of the plan you are agreeing to give releases to these third parties.

THE COURT: Right.

MS. SARKESSIAN: So it is consensual.

THE COURT: Yes.

MS. SARKESSIAN: Then you have an exculpation.

THE COURT: Right.

MS. SARKESSIAN: Now, an exculpation is like a limited non-consensual third party release because the creditors [*indiscernible*] nobody gets to vote on that, nobody to gets to opt on that. Okay? It is limited in the sense that it is limited from time. It covers actions from the petition date to the effective date that relate to the case, and there are exceptions. The exceptions are the gross negligence or the willful misconduct.

THE COURT: Sure.

MS. SARKESSIAN: So, that is it is like a limited, non-consensual third party release. And I think for that reason, I think that is one of the reasons and I will actually get into some other reasons, but I think that is one of the reasons that Courts have in this District, Your Honor, I would say uniformly other than the one decision, well, I know I called it a decision you made an oral ruling in the NewPage case saying that that case was, you used the phrase uniquely unique, but other than that the two published cases in this District which is Washington Mutual of Judge Walrath and of Judge Carey's decision in Tribune say as a matter of law exculpations only apply to fiduciaries.

Judge Shannon yet if he has a decision it is a written decision it is not published, but it is available in

[*indiscernible*] agreed, and actually does a very good analysis of the Third Circuit case dealing with this issue which is PWC which I will talk more about in a minute. And then in a minute I will get into Judge Sontchi has also ruled, similarly, so then it is a matter of law. It is limited to estate fiduciaries because the creditors do not get a choice. They do not get to opt out.

Now I think there is another reason if you look at the exceptions, so one of the exceptions is gross negligence. With respect to a fiduciary their duty is to the estate, right, to the Debtors, to the estate, to the creditors of the estate. So you know how to determine the gross negligence they were grossly negligent in carrying out their duties, their fiduciary duties to the estate and the creditors. You have a lender, unless the lenders want to say we have a fiduciary duty to the Debtors, and I do not think they want to say that, who is their duty to, to their shareholders? If you are an agent bank your duty is to the lenders and the consortium.

So when you look at to try to determine whether they have been grossly negligent, grossly negligent in their duties to their shareholders? It does not make any sense in the context of an exception to the exculpation because they have different duties. We understand what the duties of the Debtors' directors and officers are they are fiduciaries they

owe the duty to the estate to the creditors of the estate. We understand Debtors' counsel and other professionals who they owe the duty to, the same duty to the estate.

This is not the case with lenders, and the lender's professionals, well, they owe a duty to the lenders. What are going to say they were grossly negligent, were they grossly negligent in their duty to the lenders? It is just an analysis that does not make any sense in the context of this. And I think that, actually, Judge Shannon's analysis of the Third Circuit opinion in PWS is very helpful. And in Judge Shannon's case also has an acronym it is PTC, so that is a little confusing, PTC, Judge Shannon analyzing the Third Circuit opinion in PWC.

THE COURT: Yes, yes.

MS. SARKESSIAN: But what he says is, and you can see this in looking at PWC is their entire analysis had to do with Section 1103(c) of the code because there the issue was whether a Creditor's Committee could be exculpated. And so Judge Shannon quotes from the Third Circuit saying, "the Third Circuit said that Section 1103(c) has been interpreted to imply, both, the fiduciary duty to Committee constituents and a limited grant of immunity to Committee members. That immunity covers Committee members for action within the scope of their duties."

So, again, if you look to see is there something

similar for lenders, well, there is no code provision that provides that is interpreted to, as far as I know, that is interpreted to imply that the lenders have a fiduciary duty to the Debtors, and that limits their -- gives them some type of limited immunity. There is just nothing similar. So, in that sense and I think that is the reason why that the Judges in this District, you know, in general have viewed the Third Circuit opinion in PWS to say that only fiduciaries can be included in the exculpation clause. Does not mean they cannot be included in a release.

And, in fact, the lenders here are getting a very broad release from the Debtors. They are not getting, they did -- as far as I can tell they did not ask for third party release. There is no third party release provisions in the plan. They could have asked for that and done it, you know, as long as they did it in accordance with what they have to do in this District, but they did not. So, that was an alternative they could have taken.

THE COURT: But if your argument is, and when I ask a question it is really a question I am not arguing with you, believe me. But if your point is that lenders and the like do not owe a duty to the estate which is what I am hearing --

MS. SARKESSIAN: In general, I mean, there is some limited duties.

THE COURT: -- then why wouldn't the Debtors and the

lenders come in on the DIP financing? Is the U.S. Trustee so concerned about provisions relating to immunity and the like?

MS. SARKESSIAN: I am sorry, Your Honor, I missed the part about the DIP financing.

THE COURT: The lenders try to extend and expand their limitation of liability.

MS. SARKESSIAN: Yes.

THE COURT: And the U.S. Trustee makes certain that that is limited.

MS. SARKESSIAN: Yes, Your Honor.

THE COURT: But if they have no duty, if your argument is they have no duty to the estate, then --

MS. SARKESSIAN: And, Your Honor, I do not want to say there is no duty at all because, obviously, I am sure there is case law out there that there are certain duties. And there are certain lender liability, I mean, that there is some of that out there, but there are not generally used as a fiduciary to the estate. Now if Your Honor is ruling that the lenders are a fiduciary then --

THE COURT: No.

MS. SARKESSIAN: Okay.

THE COURT: No I am not taking it that far.

MS. SARKESSIAN: Okay.

THE COURT: My concern is that if a fiduciary can be exculpated why shouldn't someone who is you have indicated

does not even have a duty to the estate, why should I deny them exculpation I suppose? And I am not sure of what the rationale is for that.

MS. SARKESSIAN: Well, again, I think that part of it is in determining the exceptions, the gross negligence; you have a framework with the fiduciaries to determine whether they were grossly negligent because you know who they owe the duty to. The non-fiduciaries owe different duties to different parties. To look at whether they were negligent it is, sort of, like apples and oranges. You are looking at who their duty is to it is primarily to; again, the lenders would be to their shareholders.

It almost takes out that exception. It makes the exception, kind of, non-applicable because it is very difficult to figure out how you are going to make that determination. And, again, I think the other important thing is that the non-Debtors do have the ability to get third party releases if they follow all the rules.

THE COURT: Yes.

MS. SARKESSIAN: In this particular -- if they had a third party release here, they did it right, they put in on the ballot, and they let people opt out of it. They would have that. They did not ask for that, and that is their choice. But they are, kind of, trying to back door it through an exculpation clause that is limited. It is not as

broad as a release would be, but it is -- and I think that that is one of the reasons why that should be treated differently because, again, the creditors do not have an ability to opt out of giving that release as they would in a third party release. And also I just want to read something else from the PWS opinion from the Third Circuit.

THE COURT: Please.

MS. SARKESSIAN: So they, again, talking about the Committee they point out that in talking about how the Committee has a fiduciary duty they cite to actually Colliers saying, actions against Committee members in their capacity as such should be discouraged. If members of a Committee can be sued in person by people unhappy with the Committee's performance during a case or unhappy with the outcome, it would be difficult to find members to serve on an official Committee. And I think, similarly, for Debtors say professional who do have a concern, well, wait a minute we do our job, we do not want to get sued down the line because then we are not going to want to do.

We are not going to want to be professionals in bankruptcy. I do not think the lenders are going to do that. I mean, the lenders have their, you know, they make their decisions, and typically lend long before the Debtor is in bankruptcy. So that, again, is something else that the Third Circuit is talking about in evaluating the exculpation

clause. It really has no application. And, Your Honor, I also want to, you know, bring us all back to the main provision in the bankruptcy code that is relevant to this which is 524(e) which is a provision that says that the discharge of the Debtor does not operate to relieve non-Debtors of their liabilities.

All of these things, the releases, the third party releases, the exculpations, are all really exceptions that are carving down that. It is carving down, it is whittling down the 524(e) to a point where there is it almost has no effect. We have all these other people it is not just the lenders it is the lender's professionals, and the lender's D's and O's, and the lender's employees, and anybody whoever walked into the lender's offices. This is very, very broad. And, Your Honor, it is in every single plan I get.

Typically, the first draft of the plan the exculpation clause has everybody who is covered by a release, the third party releases, everybody that they can think of except the unsecured creditors, typically, do not get in there. But other then, well, the Committee does, but not the actually [*indiscernible*], but apart from them anybody else gets thrown in there. And then we have to take the time to negotiate that, frequently they will just take it out, but if not we have to bring it to the Court. We are using up Court time. We are using up estate resources for something that

has been is, essentially, in my -- virtually settled law in this District.

And, Your Honor, I do want to address the Debtors do not cite to any written opinions, published or unpublished from any Judge in this District in support of their position. What they do is they cite to Your Honor's oral ruling in NewPage which I will get to in a minute. And then they cite to four orders, okay, not opinions, not written decisions, four orders from Judge Sontchi, all but one of which predate the Washington Mutual decision, one is a prepack deal.

They are just orders that cite this, sort of, standard language you see findings of facts, and conclusions of law. It does not even say who is an exculpated party. You have to go to the plan and read through three levels of definitions to even figure out that there are non-fiduciaries in that definition. But what the Debtors do not cite to is a and, again, this is an oral ruling by Judge Sontchi earlier this year in Southern Air Holdings, March 14th, 2013. And in that instance unlike these other cases, the other cases as far I can tell nobody raised this issue with the Judge.

Nobody brought it to his attention. In Southern Air Holdings a U.S. Trustee objected to the exculpation covering lenders. And Judge Sontchi ruled from the Bench. He sustained the objection, and he said I do believe Judge Walrath is correct, and that is a reference to the Washington

Mutual case that had been subject to the oral argument, I do believe Judge Walrath is correct that the other opinions on this matter are correct. That exculpation provision should be narrowly tailored to apply to the estate fiduciaries, and need not be expanded unnecessarily.

And I also want to mention in that case I heard counsel say something earlier this morning that because there was no Committee in this case, that the lenders, sort of, acted like a Committee, that was actually one of the same arguments that was made in Southern Air. There was eventually a Committee, but apparently it was not the form for quite some time, and Debtors' counsel is saying and the lenders acted, sort of, like an outside force on the parties to reach this, you know, settlement that was embodied in the plan. And it did not make any difference.

It is a matter of law as to what the exculpation clause is for and what the purpose is. So, Your Honor, now I would like to turn to your oral --

THE COURT: And, just so I am clear when you say it is a matter of law, you mean a matter of decision the decision --

MS. SARKESSIAN: Decisional, I am sorry, decisional the decisional law --

THE COURT: Yes, right.

MS. SARKESSIAN: -- the way that the -- the way that

I interpret the cases that I have cited here. There is no -- they are not looking at any facts other then whether the parties are fiduciaries. It does not matter if they contributed to the plan that is relevant for the Debtor releases. But it does not, none of these things matter, the only thing that matter is one question, are they a fiduciary or not? That is how it is addressed in Washington Mutual by Judge Walrath, that is how Judge Carey addresses in Tribune; that is how Judge Shannon addresses it in the unpublished opinion that I quoted from, and that is how Judge Sontchi addresses it. That is the only issue. It is really easy.

THE COURT: And is that what the Third Circuit's decision turned on, is that your position?

MS. SARKESSIAN: Well, the Third Circuit's decision because it was dealing with the Committee, it was only dealing with the Committee. That was the only issue before it.

THE COURT: Correct.

MS. SARKESSIAN: It was not dealing with somebody who was a non-fiduciary. And the Third Circuit's analysis was focused completed on the fact that there was a code provision, 1103(c), that has this is the Third Circuit's language that has been interpreted to imply, both, the fiduciary duty, the Committee constituents, and the limited grant of immunity to Committee members. And the Courts in

this District have interpreted that, and Judge Shannon actually goes into quite a lot of detail about that this has been interpreted to mean that a party's exculpation is based upon its role or status as a fiduciary.

THE COURT: And remind for just one moment when you read that quote the Third Circuit said fiduciary duty to whom?

MS. SARKESSIAN: To Committee constituents and a limited grant of immunity to Committee members.

THE COURT: Not to the Debtor?

MS. SARKESSIAN: It does not say to the Debtor although, well, I think there is fiduciary duty to the Debtors to the estate as well there.

THE COURT: Okay. Okay.

MS. SARKESSIAN: I mean, the Court did not mention that, but -- and then the Third Circuit went on to say this immunity covers Committee members for actions within the scope of their duties now.

THE COURT: Okay.

MS. SARKESSIAN: I mean, I cannot say to you, you know, it is subject to interpretation. I mean, the Court was not dealing with an issue of an exculpation clause that was covering a non-fiduciary. It was covering -- it was not that they were not dealing with an issue of exculpation clause that was covering a non-fiduciary. It was covering the -- it

was not they were not dealing with an exculpation clause that cover the lenders. I mean, they did not [*indiscernible*] in that. The only issue that was before them was covering the Committee. The focus of their analysis had to do with their fiduciary duty. And it has been interpreted, again, by many other Judges in this District, and that way I understand Your Honor that, obviously, that is not binding on you.

THE COURT: I certainly respect, highly, respect my colleagues and their opinions, but.

MS. SARKESSIAN: Yes, Your Honor, and I know you do.

THE COURT: Yes.

MS. SARKESSIAN: I do want to mention, I do want to talk a little bit about Your Honor's ruling in NewPage.

THE COURT: In New Page. Yes.

MS. SARKESSIAN: Let me, where is NewPage, there we go. By the way, Your Honor, I do have the transcript of Southern Air, I am happy to give it you and the other parties here if anybody wants it.

THE COURT: I would appreciate that. Yes, thanks, Ms. Sarkessian.

MS. SARKESSIAN: Your Honor, may I --

THE COURT: Please, yes, of course. Thank you, good morning. Thank you.

MS. SARKESSIAN: I can point out what page the Judge's ruling is on. It begins on page 21 at line 22, and

then it goes on to the next page, well; I think it is like to the top of 23.

THE COURT: To estate fiduciary, okay. All right, yes, NewPage.

MS. SARKESSIAN: NewPage.

THE COURT: Be kind to the old Judge.

MS. SARKESSIAN: Now, Your Honor, so with respect to NewPage --

THE COURT: Yes.

MS. SARKESSIAN: -- I want to start out by quoting what Your Honor said, and let me make sure I have -- that is in there okay, sorry, Your Honor, on page 55 at the very end of ruling you say you did overrule the U.S. Trustee's objection that said, "I think that no one should walk out of the Courtroom thinking that there has been a sea of change in the law in this District, but in this particular case these exculpation provisions are certainly appropriate, and I will approve the provisions." Now, Your Honor, that case was significantly different than this one.

I mean, I will say my argument is based as a matter of law it does not really matter but, you know, I think it is appropriate to point out that case the NewPage was a re-organization. This case is a liquidation. And the Debtors' counsel or lender's counsel or both of them made the point that the lenders became the owners of the Debtor. So, the

part of the plan was the lenders then owned the Debtor. And their argument was that if they were sued, if they the lenders were sued then in order to defend that suit they would end up having to use the senior management of the Debtors, and that that would distract from their duties to try to reorganize the, you know, the company to go forward.

So that, you know, may have been a factor in that case. That is, obviously, not a factor here. Everything sold, really the only thing that is left at this point is that the liquidating agent which would be Mr. Tonks is just going distribute the money --

THE COURT: Right.

MS. SARKESSIAN: -- there is maybe some small amount of property that is left to be sold. But all of the main -- everything is done already. So there is very, very little to do here. And there is no reason, I mean, there is nothing to indicate that anybody is planning on suing anybody. And again, frankly, with an exculpation clause the lenders could still be sued. It is just that then the issue becomes were they grossly negligent or intentionally done something wrong. It does not eliminate the possibility, but it may very well be that because the NewPage was a re-organization and that, you know, they made that argument, perhaps, that influenced Your Honor. I, obviously, do not know.

THE COURT: Oh that was such a bitterly fought case,

and the settlement was so difficult to achieve that I think I was I just did not want to upset the apple cart as much as anything in that particular case.

MS. SARKESSIAN: And, Your Honor, that may have been why you said it was a uniquely unique case. And you also mentioned that there was mediation that the settlement was a result of that the plan was a result of -- the word mediation was used whether that was formal mediation or not, I do not know.

THE COURT: Yes.

MS. SARKESSIAN: And that may be what Your Honor is referring to.

THE COURT: Yes.

MS. SARKESSIAN: One moment, Your Honor, I have to see if I have anything left. Yes, Your Honor, so, you know, I would reserve the opportunity to respond to whatever the Debtors and the lenders might argue.

THE COURT: You bet.

MS. SARKESSIAN: But with that unless Your Honor has any further questions the U.S. Trustee would request that the Court not confirm the plan unless the provision grant the exculpation to the lenders and their related parties, the professionals etc., be stricken from the plan. Thank you, Your Honor.

THE COURT: Thank you, Ms. Sarkessian, as usual that

was a very excellent argument and helpful to the Court.

MS. SARKESSIAN: Thank you, Your Honor.

THE COURT: Mr. Barson, nice to you again.

MR. BARSON: Your Honor. Thank you, Your Honor, nice to see you the Court.

THE COURT: Twenty one months.

MR. BARSON: It was a long process, Your Honor, but we got there.

THE COURT: Yes, yes. Yes.

MR. BARSON: Leon Barson for the Chapter 11 Debtors, Your Honor.

THE COURT: Well, you more than got there you did a wonderful job in this case.

MR. BARSON: Thank you, Your Honor, I appreciate that.

THE COURT: And it was a difficult case, and I know how hard you worked, and how many matters came before me. And always very well presented, and that is what got us to where we are today.

MR. BARSON: Much appreciated, Your Honor. And, of course, to lead into my argument I could not have done it without the agent or their counsel.

THE COURT: No, that is right.

MR. BARSON: Before if I may, Your Honor, dissect PWS, and I think counsel's concession that nowhere in that

opinion did it at all suggest that an exculpation is limited in scope and consistent with the carve out for gross negligence and willful misconduct can only be cabined or limited to fiduciaries. Indeed, the word fiduciary only appears once in the entire opinion. And I think Ms. Sarkessian quoted it. And before I also dissect the several other opinions, published and otherwise, I would like to set some context because I think it is important to understand the framework of this case in connection with Your Honor's ultimate ruling, and why we think the limited exculpation for the agent and the members of the lender group, and its professionals, is appropriate under the uniquely unique facts of this case.

THE COURT: And I will also note that just quickly reading the Southern Air Holdings case Judge Sontchi does say that it should be limited to fiduciaries unless there is some other necessity.

MR. BARSON: I think that is right. Your Honor, where I come out is I do not think any Judge in this District has ever suggested that under no circumstances can others then a fiduciary be folded under the tent with respect to a limited exculpation. Indeed, it would be an anomaly for the 98.5% creditor group who is paying the other 1.5% to walk out of the Courtroom and say, let me be subjected to even frivolous suits and I should not get the same protection that

the Debtors did when I paved the way for all of these recoveries.

This case is indisputably the result of the agent, the lender groups, and the Debtors. There was no Committee. And not one unsecured creditor is walking into this Courtroom and complaining about the exculpation. And to suggest that they could not have opted out is not the way that exculpations work, unlike third party releases where you can opt in or opt out or be deemed to have opted in under Indy Downs and DBSD and others. They could have objected. That provision has been in there from the beginning, and not one unsecured creditor is coming through this door, Your Honor, saying we have an issue. They certainly could have objected. Let me if I may, just briefly, give you context.

THE COURT: Yes.

MR. BARSON: Because this case is all about context. When the Debtors and I embarked after several months, Your Honor, of thinking and deliberating on a 363 process, and asked the agent and its lender group as part of their credit bid for ten stations to fund a distribution, to trade creditors of up to $2 million dollars based on our estimates that are in the range of $1.5 to $1.7 million dollars that would, likely, fund a full distribution, they said yes. And when we asked them as part of that credit bid to fund a wind down budget of $1.63 million dollars, only reduced to 1.2

million because Rothchilds already been paid their $500,000.00 remaining success fee --

THE COURT: Yes.

MR. BARSON: -- they said yes. But never in my wildest imagination would I have called the managing director of Goldman Sachs, the agent for the lender group, and said but you will not be folded into our limited exculpation. When I called them and the Debtors called them, and said we need you to fund a $575,000.00 severance program as part of the sale process that we brought before Your Honor last summer, and you approved, for both the rank and file and the senior management, all employees that were eligible if they did not receive offers of employment from our six purchasers, the agents and the lender groups said yes, we will fund it if there is no cash.

And they did not say to me, oh, and I do not want to be part of any limited exculpation that since I have been helping you in terms of the framework of what is going to be the cornerstone of a plan; they did not suggest that, nor would I have imagined otherwise. And when I went to them as part of the sale process, and Your Honor will remember, to create a consensual resolution with the principle of the Debtor Mr. Mercantanti who had disputes, ownership disputes as to real property, title disputes, and the agent said as part of a resolution we will, we will release our lien on $20

million dollars of Keyman life insurance policies that we have a pledge of from the Debtors, they did not say, and by the way, I do not want to be part of your limited exculpation.

No, I do not expect that. That is because we could not have imagined otherwise. So when you look at these factors and what they have done as the 98.5% of the capital structure in terms of the claims of the petition date, $285 million versus $2 or $3 million dollars at best of trade, at best. They have every step of the way when the sale process was commenced made sure that those creditors were taken care of. But for them allowing interim use of cash collateral with no adequate protection payments, not one, allowing professionals to be paid for almost two years, senior management to continue with their existing compensation, trade claims to be funded out of their collateral, a wind down budget of now $1.1 million dollars to be funded, severance programs, all on their backs.

No one would fairly dispute that, no one. So I could not have hardly imagined that when I drafted a plan and had the agent's input, although they are admittedly not a co-proponent, but had their input throughout. It was almost *a fait accompli* that a limited exculpation in this case was perfectly warranted, was appropriate under the circumstances, because they made sure that this case with the Debtors'

assistance admittedly came to a successful conclusion. And no creditor has argued otherwise nor could they fairly argue otherwise against that backdrop.

I think we should focus on the law. Not once in PWS does it suggest that a non-fiduciary, not once, cannot be folded under the tent of a limited exculpation that comports with the standard and the carve outs --

THE COURT: Right.

MR. BARSON: -- which we have done. Not once.

THE COURT: Right.

MR. BARSON: And let me role forward for a moment, this is not Washington Mutual, a hotly contested case. And I know what Judge Walrath did say in terms of her extrapolation of PWS, which has rolled forward, admittedly, in Tribune in one short paragraph and one sentence where Judge Carey concurred, although the note holders objected there, creditor groups objected to it there, not just the U.S. Trustee. And then let's look at PTL. What did Judge Shannon say, he said that PWS, and I quote, "implies," underscore implies, "that a party's exculpation is based upon its role or status as a fiduciary." It is not the case under PWS, it is not the case.

Having said that, Your Honor, I think that under the uniquely unique facts of this case this lender, while not a fiduciary, at 98.5% of the capital structure did fill the

bridge. They did step into the fold. They made sure that the creditors holding allowed claims will likely get paid in full. And allocated money to class 5, and agreed not to share in a distribution that they accepted. Perfectly permissible under the law, and has paved the way for a fully consensual plan, but for a limited exculpation with all due respect to the U.S. Trustee withstanding is taking a rigid myopic approach, and the facts of this case are such that I think that you have to look at it and say, no, the Third Circuit did not say under no circumstances can we do this, they did not.

And she concedes that. But what she does say, Ms. Sarkessian does say, and she has case law that we think your brethren and your sister Judges, Your Honor, respectfully, have said that under no circumstances can it be anyone other than a fiduciary. Think of the anomaly for a moment. Think of the anomaly. The lenders can get prepetition releases of derivative claims, indeed, we have given it, and no one has raised an issue. Fairly standard for an agent and a lender group in this capacity; I think we would all agree. They could have asked for third party releases check the box ones, would have gotten them; did not ask for that.

That was not this kind of case. But what they did request, and what I signed on for was after all of their efforts to know that when they leave the Courtroom some

creditor cannot say, hey, you know what, I wanted interest. Thanks for the 100 cents, but maybe I wanted more. They did not sign on for that, Your Honor. And so when we started this process and they made those series of herculean concessions, and I am not overstating it, this was fairly expected.

I acknowledge, unlike NewPage, that it was not the cornerstone of a 9019 settlement that they explicitly relied on. But, Your Honor, it certainly was implicit, and I always expected to deliver it once we came hand in hand into Your Honor every step of the way since the sale process started. This case is not WaMu. This case is not Tribune. And Your Honor does not need to have or implement a sea change in law. And Your Honor does not need to stretch far to say that it is perfectly appropriate to give a limited exculpation to a limited number of parties, not to everybody and their mother. We did not open the, you know, back up the truck and say anybody gets it, but the lender group deserves it. And what is more not one creditor has argued otherwise.

THE COURT: Would a creditor even have standing to sue the lender in this case? In other words, that is why I have been discussing with Ms. Sarkessian, you know, the responsibility. Ms. Sarkessian has stated that there was no responsibility to this lender to the estate. That, in effect, I am exculpating, I suppose, the lender from its own

whomevers, who would sue the lender, but not the estate or its creditors. That is why it seems to me that what is being asked is really of no mind as far as the Debtor is concerned.

MR. BARSON: I don't disagree with that, but let me put a finer point, if I may, Your Honor.

THE COURT: Yes.

MR. BARSON: Anybody can walk into the clerk's office and get a time stamp of a complaint.

THE COURT: Oh yes.

MR. BARSON: With merit or otherwise and try to hold a potential deep pocket like Goldman Sachs hostage.

THE COURT: Right.

MR. BARSON: And it's likely not going to happen here, and Ms. Sarkessian said that. But in a case where they have made so many monetary concessions where their recovery is roughly 24 cents, why shouldn't they have that piece of mind, Your Honor, under this particular case.

And why should some class five Creditor, as few as they are, who might have a rejection damage claim, come in later and say, you know, I'm glad you didn't agree to take your distribution. And you've ceded effectively $220 million dollars of your deficiency so that the money can be round tripped to me and I can get 10 or 11 cents based on our estimate, but you know what, I wanted 15 cents. Couldn't you have gone down deeper in your pocket? It's just not

appropriate, and that's not what we signed on for together.

But, Your Honor, you're there and I'm here. We will respect your ruling, but PWS, which by the way, Huff, the subordinated Creditor, we all know in that case was about to sue the Committee. I mean let's be honest, that's what happened in PWS. Huff was on the Committee. They were getting nothing under the plan. They weren't happy with the valuation, and they made it clear they're going to sue all their other co-Committee members. That case was unique and the ruling was limited.

It might have morphed a bit in this District, but we need to tether it. And we need to focus on what PWS's limited holding was, and with all due respect, Your Honor, this case cries out for a limited exculpation for our agent and its lender group. Thank you, Your Honor.

THE COURT: Well, thank you. Thank you very much, Mr. Barson. I appreciate that. Ms. Zigman, are you going to speak?

MS. ZIGMAN: Yes, Your Honor, thank you, for the record Abigail Zigman of Weil Gotshal & Manges on behalf of the Agent and the Lenders.

THE COURT: Yes.

MS. ZIGMAN: I won't waste any of the Court's time. I think Mr. Barson did an excellent job.

THE COURT: You would never waste my time and

certainly Mr. Barson didn't, nor did Ms. Sarkessian, so that's just fine.

MS. ZIGMAN: Thank you. I think Mr. Barson did an excellent job of setting forth the argument as to why in this particular case the Agent and the Lenders based on the applicable law and the facts at hand are deserving of the exculpation. And so unless Your Honor has any specific questions for me I would rest my case on Mr. Barson's argument.

THE COURT: Thank you, Ms. Zigman, that's fine, I do not.

MS. ZIGMAN: Thank you.

THE COURT: Thank you very much. It's back to you Ms. Sarkessian if you're ready, and if you need a few minutes you're certainly welcome to them.

MS. SARKESSIAN: Yes, thank you, Your Honor, I'll try to be brief. I just want to respond to a number of arguments that Mr. Barson made and again for the record Juliet Sarkessian on behalf of the U.S. Trustee. Unless I misunderstood Mr. Barson I thought that he said that no case in this District had held that exculpations are limited to a state fiduciary.

This is the language from Washington Mutual, "An exculpation clause must be limited to the fiduciaries who have served during the Chapter 11 proceedings, call it Estate

Professionals, the Committees and their members and the Debtors, Directors and Officers." I don't know how that could be any clearer, must be limited. And then Judge Carey in Tribune stated, he explicitly stated he --

THE COURT: Now but she included the, right the lawyers?

MS. SARKESSIAN: The professionals.

THE COURT: Yes.

MS. SARKESSIAN: But they have a fiduciary duty. Professionals of the Debtor have a fiduciary duty to the estate.

THE COURT: All right.

MS. SARKESSIAN: Absolutely, Your Honor. I certainly hope they do. It's always been my understanding that they do. And, Your Honor, I do want to mention you had said, at least I think that you had said that I said that the Lenders had no obligations to the estate.

Now, that's not what I intend to say. As far as I understand they are taking the position they are not fiduciaries. That doesn't mean that there's no obligation whatsoever. I mean look there is certain obligations under the law. There are certain Lender liabilities under the law, but I don't believe that raises them to be fiduciaries. If they want to agree that they're fiduciaries then I'll withdraw my objection.

You know, by the way, Your Honor, it's not just the Lenders themselves and the Agent that are exculpated. It's their current and former officers, partners, directors, employees, agents, members, shareholders, advisors and professionals.

THE COURT: Yes.

MS. SARKESSIAN: That's a pretty long group of people. And I certainly appreciate that the Lenders, I mean at the beginning of the case I think there was a lot of issues between the Debtor and the Lenders. It started out as an involuntary. I think there was a lot of issues between them. I'm happy that they resolved that and I'm glad to see that the Lenders, you know, helped in this process.

But, Your Honor, I can say in the vast majority of my cases, I mean once there's a plan generally the Lenders have worked together with the Debtors to put together a plan. I have many cases where they waived plans, where they have put in pots of money, and that's why they are able to get the Debtor releases because the Debtor releases require a substantial contribution to the plan under Zenith and Washington Mutual and all those other cases that uses the standard. That is relevant and that's why I'm not objecting to the Debtor release here of the Lenders.

And I believe the Debtor release is limited just to the Lenders and the Agent. It's not of a large group of

people. So I'm not, you know, there's not others that haven't contributed.

THE COURT: Of course.

MS. SARKESSIAN: So that's why I'm not objecting; however, I do think that it's very clear that both Washington Mutual and Tribune state, that an exculpation must be limited to estate fiduciaries. This Court can disagree. Obviously it's not bound, but I think it would be dishonest to say that those decisions say something different.

With respect to Southern Air Holdings, and this actually addresses Mr. Barson's argument, and I've heard it many times, pretty much every time the exculpation issue comes up, that Washington Mutual is *sui generis*, it was based on unusual facts. That argument was made to Judge Sontchi and Judge Sontchi said I disagree with the characterization of Judge Walrath's opinion as one of being results oriented to the extent its max. I'm not sure what the word max is, max of really intellectual dishonesty.

Certainly that is not the case with Judge Walrath. I think we're all quite aware of her intellectual vigor and the only objective approach to the facts and the law. I think Judge Sontchi is saying no, the decision in Washington Mutual was not just based on the facts of that case. It's very clear from the holding with respect to the exculpation that the Judge was not saying well, in this case because of

these facts, no, this was a statement in every case this is what an exculpation must be limited to, not releases.

The Lenders could have gotten third party releases, consensual third party releases. I don't know why they didn't. That was their decision. They have that opportunity, it's not that they have no other alternative. It's just that the exculpation is the wrong alternative. And like I said in most cases what the Lenders do and what other parties, non-fiduciaries do is they want everything. They want the release. They want the third party debtor release and the exculpation. And you know, I think it's unfortunate because that certainly shouldn't be the rule. And I think that that's, at least from what I have seen that's how the plan starts out until we negotiate or the Court rules on something different.

And I also want to mention, I understand that the Lenders don't want to be sued. Nobody wants to be sued. This exculpation is not going to prevent them from being sued. They can still be sued. It's just the question if somebody has standing to sue them. Remember, the Debtors are releasing them.

THE COURT: Correct.

MS. SARKESSIAN: So there would have to be some type of a direct claim because they couldn't make a claim through the Debtor, but have some direct claim that a Creditor had

against the Lender. I think it's pretty farfetched, which again is another reason why a Creditor could have a claim against the Committee.

A Creditor could have a claim against a Debtor. A Creditor or an interest holder could have a claim against an estate fiduciary. And that's why the exculpation clause is there to protect them. But it would have to have some type of a direct claim against the Lender. I'm not sure what kind of claim that would be.

THE COURT: Right.

MS. SARKESSIAN: Which again why you're sort of trying to fit like a square peg in a round hole by putting the Lenders in an exculpation clause. But nevertheless, they don't get a free pass. There's still the exception. So somebody can still go down and file a complaint, and the Lenders will have to respond to it.

It's just that the focus will then be, does this rise to the level of gross negligence, or intentional misconduct, or is it plain negligence, or something else or is there no cause of action at all. It doesn't take it off the plate. If they wanted that they should have sought a consensual third party release because that would take it off the plate. Typically there are no exceptions in those.

It's just a blanket from the beginning of time to the end of the earth we are releasing the Lenders as opposed

to the exculpation which is limited in time and has the exceptions. So I think that they just chose the wrong vehicle in this instance. I don't deny that they made significant contributions as many Lenders do and many other parties do in many cases, but I don't think that that raises them to that uniquely unique level that they should have something that really is meant for fiduciaries of the estate. Thank you, Your Honor.

THE COURT: Thank you, Ms. Sarkessian, as usual.

MR. KAROTKIN: Your Honor?

THE COURT: Yes.

MR. KAROTKIN: Your Honor?

THE COURT: Yes.

MR. KAROTKIN: Steve Karotkin.

THE COURT: Mr. Karotkin, good to hear from you.

MR. KAROTKIN: Sorry, I couldn't be there in person, but I was trying to save the estate money.

THE COURT: Of course.

MR. KAROTKIN: I've been sitting here patiently, which you know, Your Honor, is very, very difficult for me.

THE COURT: Yes, I know.

MR. KAROTKIN: I'd just like to make two remarks and I'll be extremely brief.

THE COURT: Go ahead, please because, you know, this is, please do, it's important to your clients.

MR. KAROTKIN: It's very hard for me to upstage Mr. Barson's eloquence and I wouldn't even try, but in any event this case, Your Honor, is the poster child for an exculpation. I frankly don't understand what Ms. Sarkessian is saying other than the U.S. Trustee as Mr. Barson said is a myopic policy of challenging exculpations, and that's what she's doing here.

But, you know, what she said is why should Goldman Sachs in this case, in this case as Mr. Barson indicated where they've made the distribution available to Unsecured Creditors and basically financed the case, of course for the benefit of themselves, but for the benefit of Unsecured Creditors who would have gotten zero, but for Goldman Sachs, why should they be subject to lawsuits in 50 States by Creditors for any reason.

As Mr. Barson said a Creditor can file a lawsuit for any reason. Why shouldn't they have the ability to come into this Court with the benefit of the exculpation and get that case dismissed or heard by this Court immediately. They are entitled to that under the circumstances of this case.

This case is not uniquely unique. This is case is uniquely, uniquely, uniquely unique. And as I've said if Your Honor wants to follow what Ms. Sarkessian is saying and disincentive Creditors like Goldman Sachs in situations like this to do what they did that's what you will do. And I

don't think that's what any Judge in any District is looking to do. Again, this is the poster child for exculpation. Thank you.

THE COURT: Thank you, Mr. Karotkin. Ms. Sarkessian, I'll certainly give you an opportunity to be heard. What I hear you're arguing basically is that your view is that the law requires me to deny this exculpation based upon prior rulings from this Court.

MS. SARKESSIAN: Your Honor, again, obviously, it's not on precedent for all the Judges in this District.

THE COURT: Right.

MS. SARKESSIAN: This has been, It's clear from those cases that at least those Judges believe that this is an issue and it's a matter of law, you're either a fiduciary or you're not.

And I do agree with Mr. Barson and Judge Shannon that the Third Circuit opinion in PWS strongly implies that this will be limited to fiduciaries. No, it does not say that. It was dealing with the fiduciary. So it didn't need to address that issue.

THE COURT: Right.

MS. SARKESSIAN: But I would like to respond just to say that again the U.S. Trustee's office is not taking the position that there is nothing that a Lender can do. What we're saying is they chose the wrong vehicle. If you want

this type of protection, and in fact much better protection then an exculpation clause will give you, you need to try to get a consensual third party release from the Creditors and interest holders, give them an opportunity to opt out, etc. as they're required to do under the laws of this District. That's what you do. It's an option.

It's not that they're foreclosed. It's not that they're foreclosed from being protected. They just picked the wrong vehicle in this instance, a vehicle that doesn't give the Creditors a chance to opt out. And also again this is not going to protect them. They can still get cases filed against them in 50 States. It's just that those parties can argue, would have to argue that the Lender acted in a way that was grossly negligent or intentionally wrong.

This doesn't prevent the lawsuits. It just changes the focus of what the lawsuit is going to be about. Third party release on the other would have gotten a different result. It would have prevented the lawsuits from those who agreed, from those Creditors and interest holders who agreed who didn't opt out.

THE COURT: Right.

MS. SARKESSIAN: Thank you, Your Honor.

THE COURT: Thank you, Ms. Sarkessian. Well, let me say this, first of all its clear to me that this is a situation which really would benefit from a written decision

because of the different opinions or I should say because I'm going to rule differently than my colleagues may have ruled. And I do think the exculpation clause is appropriate here.

My difficulty is because of personal circumstances I'm not going to have an opportunity to write on this for a little while and I do not want to delay confirmation on this one issue. On the other hand I would like to say more then I'm probably going to be able to say just off of the arguments without going back and actually writing something.

But let me say this, I do not read the Third Circuit as saying that exculpation is limited strictly to fiduciaries. Judge Walrath, whose intellect and integrity I don't question at all. I think she is as fine as there is. Had a situation in Wamu where there was an awful lot of questionable conduct taking place. So I can well understand how she arrived at her opinion. And I know that others interpreting her opinion have said well it had nothing to do with the facts of that case, Judge Sontchi said that.

But I start with the proposition that the Third Circuit has not ruled that exculpation clauses or protections are limited to fiduciaries. And accordingly I think that I am at liberty to disagree with the decisions out of this District that have held that it is limited to fiduciaries, exculpation that is.

This is a case whose facts really do cry out for the

relief being requested. It's clear that the Agent and the Lenders really sacrificed a great deal in order to have a result where a plan can be confirmed. I think without those efforts and those contributions we would not be where we are today. And as a result having found that I don't think that in my opinion exculpation is not limited to fiduciaries, and given the extraordinary circumstances here, and the extraordinary contributions of the Agent and the Lenders I am going to permit the exculpation.

But I would like to hear why the exculpation should be extended beyond the Agent and the Lenders to the myriad of other parties who are included in the exculpation, you know, the officers, and directors and alike. That seems to me to go beyond what we should have.

MR. BARSON: Would you like to hear from me about that?

THE COURT: Mr. Barson, yes, sir.

MR. BARSON: Thank you, if I may just briefly.

THE COURT: Or Ms. Zigman or Mr. Karotkin for that matter.

MR. BARSON: Well --

THE COURT: It's really Mr. Karotkin's issue I think or Ms. Zigman's issue.

MR. BARSON: I think that's right so I'll be brief, at least give my vantage points having penned the plan.

THE COURT: Yes, please.

MR. BARSON: You know, obviously some input in that. I can say a few observations, the debt in this case has at least before the filing traded, there were different constituents in the Lender group at times. So that can speak to at least sort of the predecessors' and what happened.

THE COURT: Right.

MR. BARSON: Throughout the case we dealt with certain individuals, key individuals that were members of certain of the Lenders in the syndicate. At least one of whom we dealt throughout the case. I would certainly think if the Court was even thinking about redlining some of that we would want to at least provide and capture the protections for those individuals because, you know, particularly for Goldman Sachs and even say for Fortress in there who, you know, attended the auction with representatives. The agent actually hired certain professionals and advisors.

You know, I would be hard pressed to limit it just to the entities themselves. I couldn't suggest to you that it couldn't be redlined in terms of some of the language, and I defer to Mr. Karotkin, but I wanted to, at least, give you those observations as to, you know, real people and Agents for the Lender group. You know, FTI they hired valuation people. They hired other companies that were Agents. So there are real parties that should be beneficiaries of that.

And so I think we need to be mindful if we are putting pen to paper. I couldn't suggest that some language couldn't be fairly modified. And I'd defer to Mr. Karotkin as to the scope of it, but I wanted to at least give you the benefit of those observations from the Debtors' perspective.

THE COURT: All right, thank you, Mr. Barson. Ms. Zigman or Mr. Karotkin.

MR. KAROTKIN: Yes, Your Honor, I can address that.

THE COURT: All right.

MR. KAROTKIN: Putting aside the personal [indiscernible]. I think there's a very simple answer to the question. When people, you know, people are very crafty and clever in who they can sue. And if they are not permitted to sue the company then they look to the officers of the company. They will sue the directors of the company. They will sue the employees and of course that drags the lawsuit because the company is required to defend all those people.

So this merely protects and appropriately protects and end run around what the exculpation is designed to protect. So excluding individuals or limited the breath of it merely gives a back door to someone to accomplish what they should not be able to accomplish.

THE COURT: All right, let me add just one other thing by the way to my ruling because I do think it is significant as Mr. Karotkin pointed out. And we have heard

argument that well, even exculpation does not prevent someone from bringing a lawsuit; however, the exculpation provision in the plan enjoins the prosecution of such lawsuits that is why it's particularly significant I think and appropriate despite the fact that others might be able to bring suit. Someone once told me you can't stop somebody from suing, but you can stop them from collecting. But here it would actually I think put a stop to the litigation itself.

I am going to permit the additional language for the exculpation because I do think that one of the purposes for which I am allowing exculpation namely the benefit to the estate and to the Creditors as well as the function of the exculpation which is to prevent lawsuits from being brought and prosecuted are applicable to those individuals and entities as well. So I will permit that.

And as I said I regret that circumstances will not enable me to, you know, immediately write an opinion which therefore, I mean I suppose I could approve this and sort of withhold the decision on exculpation, but I don't know that that works actually as I'm thinking about it. So I think that my oral ruling is going to have to be clear enough. And this is an issue that I'm sure will arise again.

And I just want to be very clear that it's my opinion that exculpation is not limited to fiduciaries, that the Third Circuit has not addressed that matter and has not

so held at this point. And that the decisions of my colleagues, as far as the Court is concerned, as far as I am concerned, although, very helpful and very, very important in my thinking limited to those cases and those facts before those judges in those cases. And that the facts here rally do I think command the result that the Court has applied.

MR. BARSON: Thank you, Your Honor.

THE COURT: And I do think, Ms. Guilfoyle, we do have to go through a little bit, the proposed order. Do I have the proposed order with the changes in it at this point?

MS. GUILFOYLE: No, Your Honor, but I have a copy, if I may approach.

THE COURT: Oh, please, yes, you sure may. Thank you. Terrific; thank you.

MS. GUILFOYLE: For the record Tori Guilfoyle on behalf of the Debtors.

THE COURT: Yes and you don’t have to, you know, go over the minor types of changes where for example I see the change of address and alike.

MS. GUILFOYLE: Right, you know, we added the proposed proffer.

THE COURT: Proffer, yes, that’s certainly appropriate.

MS. GUILFOYLE: On page 5, we just wanted to add a caviat to say that, you know, the return of any funds to the

Agent for the benefit of the Lenders is subject to a 7.7 that provides for possibly *de minimis* contribution to a charity that's specified in the plan.

THE COURT: Wonderful, yes.

MS. GUILFOYLE: We also added on page 6, the proposed compensation for Mr. Tonk's as the liquidating agent. And this was, you know, with the consent of the agent and Ms. Sarkessian was happy with the disclosure in there as to the compensation. Also on page 7, we added --

THE COURT: Is Mr. Tonk's happy with that?

MS. GUILFOYLE: I think he is. He should be. On page 7, we just wanted to make clear that although there's a limitation of liability and protections for the liquidating agent and his professionals that creditors who have allowed claims may still seek injunctive relief if there's any kind of, you know, impact to some distribution to them.

THE COURT: Yes.

MS. GUILFOYLE: Page 13, perhaps presumptively the, you know, added our thing, but the objections were, if not, resolved on the record at the hearing overruled.

THE COURT: All right.

MS. GUILFOYLE: We also had the corresponding change there from Mr. Tonk's compensation. On page 15, we added a paragraph that discusses compliance with tax requirements. Just to make it clear that if there's a requirement that a

holder of an allowed claim provided W-9, perhaps, to the liquidating agent that, you know, they must do that or else they won't be able to get a distribution, because we need to be able to apply with any kind of applicable tax withholding law.

Page 16 and paragraph 38, we wanted to make it clear that it was going to be 38 days from the service of the notice of the entry of a confirmation order as opposed to the effective date and that's for the rejection damages claims.

THE COURT: Sure.

MS. GUILFOYLE: And page 19 and paragraph 43, we added a parallel language from our plan about the opportunity for parties to be able to object to any proposed setoff that might occur.

THE COURT: Yes; sure.

MS. GUILFOYLE: And then last, but not least, we added paragraph 50 which discusses the payment of U.S. Trustee fees.

THE COURT: Oh good.

MS. GUILFOYLE: And that's it.

THE COURT: All right, all right. Does anyone wish to be heard with respect to these changes? Yes, Ms. Sarkessian.

MS. SARKESSIAN: Your Honor, Juliet Sarkessian on behalf of the U.S. Trustee. I just wanted to point out that

the compensation for the liquidating agent.

THE COURT: Yes.

MS. SARKESSIAN: I believe that the Court should make a ruling on whether that's reasonable under 1129(a)(4). That was one of the reasons I asked that it be disclosed because the way that I read 1129(a)(4) this would be part of, you know, a payment that would be subject to the Court's determination on that. So I would just request that the Court make a ruling on that. Thank you.

MR. BARSON: Your Honor, may I be -- sorry, I didn't mean to interrupt you. May I be heard before you do so?

THE COURT: Yes, of course.

MR. BARSON: Just because I think it would be relevant; just a bit of context in terms of that. Your Honor may or may not recall and if the --

THE COURT: I have a memory like a steel trap, Mr. Barson.

MR. BARSON: I know and so I probably shouldn't have started. Your Honor will undoubtedly recall that the wind down budget that has been agreed to and is an exhibit to the disclosure statement and which is subject to reasonable change with the consent of the agent --

THE COURT: Right.

MR. BARSON: Has a provision in there. It does have for the compensation of liquidating agent. At the time, we

weren't certain who it was. Mr. Tonks was the likely candidate. And the agent has agreed to that. And so consistent with that budget, we've come to an amount that Ms. Zigman and myself and her client think is reasonable in the sort of near term; call it the next five months. I think the aggregate compensation was around $80,000.00.

THE COURT: Okay.

MR. BARSON: Consistent with the wind down budget. Rather than sort of try to forecast thereafter what may unfold, while we don't expect a lot to happen after the end of the year where distribution should be made, this is a relatively straightforward case; at least, we reasonably expect that. We put a place holder for any amounts thereafter to be mutually agreed upon with the consent of the agent.

And I think it's important in terms of any ruling you make to understand that this is, again, money that comes out of the agent's collateral. They funded that. And any excess, if there is any from this wind down budget, reverts to them under the plan, so they have a key interest in monitoring, among other things, the compensation of the liquidating agent. So against that backdrop, which I thought would be helpful, and hopefully was, I wanted Your Honor to understand, you know, the compensation structure and how it works mechanically with the wind down budget.

THE COURT: Thank you, Mr. Barson.

MR. BARSON: Thank you, Your Honor.

THE COURT: Thank you. Anyone else? Well I certainly understand the purpose for the provision and I think that the format works with the concept that in the first three months, there will be, certainly, far more work to be done by Mr. Tonks in the later months. And that it is still subject to oversight by the agent. I think the amount is certainly reasonable. I'm prepared to make that finding for certain. And I am well aware of the fine services that Mr. Tonks has provided and his value to this case and his ability to serve as the liquidating agent or trustee. I guess is the liquidating agent is unquestionable.

So with that, I will make that finding of reasonableness of that provision in compensation; certainly, certainly. And I am prepared to sign the order. Before I do I just want to really commend counsel, it was a pleasure. I know that in the papers, I think there was a reference to 21 months of extraordinary efforts, and I think that that really puts it mildly. I think that the efforts were, I'm not going to say extraordinarily extraordinary, because I don't want to do that again. But they were really just quite spectacular I thought and the result was excellent. And really I thought that the assistance and the cooperation and the hard work of the agent and lenders and their counsel was certainly

critical to the success and the result. And everyone is commended here.

I know that at the beginning of the case, it appeared that things might be a little more in conflict between the parties, but certainly I think that that cooperation is what enabled the parties to reach this day and it was a pleasure to have all of you in Court before me and to see and enjoy your excellent professional efforts. I hope to see you again back here in other cases.

And with that, I'm going to sign the findings of fact and the order. I greatly appreciate it. It's a pleasure to have good counsel, excellent counsel and a very fine result.

MR. BARSON: Thank you, Your Honor.

MR. KAROTKIN: Your Honor, I just like to thank the Court as well and Mr. Barson on behalf of Goldman Sachs and the lenders.

THE COURT: Well thank you, Mr. Karotkin, it was a pleasure having you in this Court again. And you certainly always represent your clients, but within, I think, you're very, very fine professional and civil grounds. It's always good to have you here.

MR. KAROTKIN: Thank you, sir, that's because I have my attorney Ms. Zigman protecting me.

THE COURT: Well I'll tell you, I have a feeling

that Ms. Zigman would definitely be a calming influence. I can just tell. So with that, I've signed the order and we'll get it on the docket and thank you all and I wish you well and a good day to you. And we'll stand in recess.

(Court Adjourned)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski
Mary Zajaczkowski, CET**D-531

August 8, 2013
Date

UNITED STATES BANKRUPTCY COURT
District of Delaware

In Re:
Nassau Broadcasting Partners, L.P., et al.
619 Alexander Road, Third Floor
Princeton, NJ 08540
EIN: 22−3349866

Chapter: 11

Case No.: 11−12934−KG

NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION

A transcript of the proceeding held on 07/31/2013 was filed on 8/14/2013 . The following deadlines apply:

The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 9/4/2013 .

If a request for redaction is filed, the redacted transcript is due 9/16/2013 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 11/12/2013 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.

Clerk of Court

Date: 8/14/13

(ntc)

Notice Recipients

District/Off: 0311−1	User: GingerM	Date Created: 8/14/2013
Case: 11−12934−KG	Form ID: ntcBK	Total: 7

Recipients of Notice of Electronic Filing:

ust	United States Trustee	USTPREGION03.WL.ECF@USDOJ.GOV
aty	John Henry Schanne, II	schannej@pepperlaw.com
aty	Regina S. Kelbon	kelbon@blankrome.com
aty	Victoria A. Guilfoyle	guilfoyle@blankrome.com
aty	Victoria A. Guilfoyle	guilfoyle@blankrome.com

TOTAL: 5

Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	Nassau Broadcasting Partners, L.P., et al.	619 Alexander Road, Third Floor		Princeton, NJ 08540	
aty	Leon R Barson	Blank Rome LLP	One Logan Square	130 North 18th Street	Philadelphia, PA 19103−6998

TOTAL: 2

Exhibit C

Investment Advisory Agreement

EX-99.(G)(1) 2 d305269dex99g1.htm INVESTMENT ADVISORY AGREEMENT

Exhibit (g)(1)

EXECUTION VERSION

INVESTMENT ADVISORY AGREEMENT

BETWEEN

SIERRA INCOME CORPORATION.

AND

SIC ADVISORS LLC

This Investment Advisory Agreement (the "**Agreement**") is made as of April 5, 2012, by and between SIERRA INCOME CORPORATION, a Maryland corporation (the "**Company**"), and SIC ADVISORS LLC, a Delaware limited liability company (the "**Adviser**").

WHEREAS, the Company is a newly organized non-diversified, closed-end management investment company that intends to elect to be treated as a business development company ("**BDC**") under the Investment Company Act of 1940, as amended (together with the rules promulgated thereunder, the "**1940 Act**");

WHEREAS, the Adviser is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (together with the rules promulgated thereunder, the "**Advisers Act**");

WHEREAS, the Company desires to retain the Adviser to provide investment advisory services to the Company in the manner and on the terms and conditions hereinafter set forth; and

WHEREAS, the Adviser is willing to provide investment advisory services to the Company in the manner and on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the covenants hereinafter contained and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Company and the Adviser hereby agree as follows:

1. Duties of the Adviser.

(a) Retention of Adviser. The Company hereby appoints the Adviser to act as the investment adviser to the Company and to manage the investment and reinvestment of the assets of the Company, subject to the supervision of the board of directors of the Company (the "**Board of Directors**"), for the period and upon the terms herein set forth in accordance with:

(i) the investment objective, policies and restrictions that are set forth in the Company's Registration Statement on Form N-2 as declared effective by the Securities and Exchange Commission (the "**SEC**"), as supplemented, amended or superseded from time to time (the "**Registration Statement**");

(ii) during the term of this Agreement, all other applicable federal and state laws, rules and regulations, and the Company's articles of incorporation, as further amended from time to time ("**Articles of Incorporation**");

(iii) such investment policies, directives, regulatory restrictions as the Company may from time to time establish or issue and communicate to the Adviser in writing; and

(iv) the Company's compliance policies and procedures as applicable to the Company's adviser and as administered by the Company's chief compliance officer.

(b) Responsibilities of Adviser. Without limiting the generality of the foregoing, the Adviser shall, during the term and subject to the provisions of this Agreement:

(i) determine the composition and allocation of the Company's investment portfolio, the nature and timing of any changes therein and the manner of implementing such changes;

(ii) identify, evaluate and negotiate the structure of the investments made by the Company;

(iii) perform due diligence on prospective portfolio companies;

(iv) execute, close, service and monitor the Company's investments;

(v) determine the securities and other assets that the Company shall purchase, retain, or sell;

(vi) provide the Company with such other investment advisory, research and related services as the Company may, from time to time, reasonably require for the investment of its funds; and

(vii) to the extent permitted under the 1940 Act and the Advisers Act, on the Company's behalf, and in coordination with any Sub-Adviser (as defined below) and administrator, provide significant managerial assistance to those portfolio companies to which the Company is required to provide such assistance under the 1940 Act, including utilizing appropriate personnel of the Adviser to, among other things, monitor the operations of the Company's portfolio companies, participate in board and management meetings, consult with and advise officers of portfolio companies and provide other organizational and financial consultation.

(c) Power and Authority. To facilitate the Adviser's performance of these undertakings, but subject to the restrictions contained herein, the Company hereby delegates to the Adviser, and the Adviser hereby accepts, the power and authority to act on behalf of the Company to effectuate investment decisions for the Company, including the execution and delivery of all documents relating to the Company's investments and the placing of orders for other purchase or sale transactions on behalf of the Company. In the event that the Company determines to acquire debt financing, the Adviser shall use commercially reasonable efforts to arrange for such financing on the Company's behalf, subject to the oversight and approval of the Board of Directors. If it is necessary for the Adviser to make investments on behalf of the Company through a special purpose vehicle, the Adviser shall have authority to create, or arrange for the creation of, such special purpose vehicle and to make investments through such special purpose vehicle in accordance with applicable law. The Company also grants to the Adviser power and authority to engage in all activities and transactions (and anything incidental thereto) that the Adviser deems, in its sole discretion, appropriate, necessary or advisable to carry out its duties pursuant to this Agreement.

(d) Acceptance of Appointment. The Adviser hereby accepts such appointment and agrees during the term hereof to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

(e) Sub-Advisers. The Adviser is hereby authorized to enter into one or more sub-advisory agreements (each a "**Sub-Advisory Agreement**") with other investment advisers (each a "**Sub-Adviser**") pursuant to which the Adviser may obtain the services of the Sub-Adviser(s) to assist the Adviser in fulfilling its responsibilities hereunder, subject to the oversight of the Adviser and/or the Company, with the scope of such services and oversight to be set forth in each Sub-Advisory Agreement.

(i) The Adviser and not the Company shall be responsible for any compensation payable to any Sub-Adviser; provided, however, that the Adviser shall have the right to direct the Company to pay directly any Sub-Adviser but only with respect to the amounts due and payable to such Sub-Adviser from the fees and expenses payable to the Adviser under this Agreement.

(ii) Any Sub-Advisory Agreement entered into by the Adviser shall be in accordance with the requirements of the 1940 Act and the Advisers Act, including without limitation, the requirements of the 1940 Act relating to Board of Directors and Company stockholder approval thereunder, and other applicable federal and state law.

(iii) Any Sub-Adviser shall be subject to the same fiduciary duties as are imposed on the Adviser pursuant to this Agreement, the 1940 Act and the Advisers Act, as well as other applicable federal and state law.

(f) Independent Contractor Status. The Adviser shall, for all purposes herein provided, be deemed to be an independent contractor and, except as expressly provided or authorized herein, shall have no authority to act for or represent the Company in any way or otherwise be deemed an agent of the Company.

(g) Record Retention. Subject to review by and the overall control of the Board of Directors, the Adviser shall maintain and keep all books, accounts and other records of the Adviser that relate to activities performed by the Adviser hereunder as required under the 1940 Act and the Advisers Act. The Adviser agrees that all records that it maintains and keeps for the Company shall at all times remain the property of the Company, shall be readily accessible during normal business hours, and shall be promptly surrendered to the Company upon the termination of this Agreement or otherwise on written request by the Company. The Adviser further agrees that the records that it maintains and keeps for the Company shall be preserved in the manner and for the periods prescribed by the 1940

Act, unless any such records are earlier surrendered as provided above. The Adviser shall have the right to retain copies, or originals where required by Rule 204-2 promulgated under the Advisers Act, of such records to the extent required by applicable law, subject to observance of its confidentiality obligations under this Agreement. The Adviser shall maintain records of the locations where books, accounts and records are maintained among the persons and entities providing services directly or indirectly to the Adviser or the Company.

(h) State Administrator. The Adviser shall, upon by request by an official or agency administering the securities laws of a state, province, or commonwealth (a "**State Administrator**"), submit to such State Administrator the reports and statements required to be distributed to Company stockholders pursuant to this Agreement, the Registration Statement and applicable federal and state law.

(i) Fiduciary Duty: It is acknowledged that the Adviser shall have a fiduciary responsibility for the safekeeping and use of all funds and assets of the Company, whether or not in the Adviser's immediate possession or control. The Adviser shall not employ, or permit another to employ, such funds or assets in any manner except for the exclusive benefit of the Company. The Adviser shall not, by entry into an agreement with any stockholder of the Company or otherwise, contract away the fiduciary obligation owed to the Company and the Company's stockholders under common law or otherwise.

2. Expenses Payable by the Company.

(a) Adviser Personnel. All investment personnel of the Adviser, when and to the extent engaged in providing investment advisory services and managerial assistance hereunder, and the compensation and routine overhead expenses of such personnel allocable to such services, shall be provided and paid for by the Adviser and not by the Company.

(b) Costs. Subject to the limitations on expense reimbursement of the Adviser as set forth in Section 2(c), the Company, either directly or through reimbursement to the Adviser, shall bear all costs and expenses of its investment operations and its investment transactions, including, without limitation, costs and expenses relating to: expenses deemed to be "organizational and offering expenses" of the Company for purposes of Conduct Rule 2310(a)(12) of the Financial Industry Regulatory Authority (for purposes of this Agreement, such expenses, exclusive of commissions, the dealer manager fee and any discounts, are hereinafter referred to as "**Organizational and Offering Expenses**"); corporate and organizational expenses relating to offerings of shares of the Company's common stock, subject to limitations included in the Agreement; the cost of calculating the Company's net asset value, including the cost of any third-party valuation firms; the cost of effecting sales and repurchases of shares of the Company's common stock and other securities; fees payable to third parties relating to, or associated with, making investments and valuing investments, including fees and expenses associated with performing due diligence reviews of prospective investments; transfer agent and custodial fees, fees and expenses associated with marketing efforts (including attendance at investment conferences and similar events); federal and state registration fees; federal, state and local taxes; independent directors' fees and expenses; brokerage commissions for the Company's investments; costs of proxy statements, stockholders' reports and notices; fidelity bond, directors and officers errors and omissions liability insurance and other insurance premiums; direct costs such as printing, mailing, long distance telephone and staff costs associated with the Company's reporting and compliance obligations under the 1940 Act and applicable federal and state securities laws, including compliance with the Sarbanes-Oxley Act of 2002; fees and expenses associated with accounting, independent audits and outside legal costs; and all other expenses incurred by the Company's Adviser, any Sub-Adviser or the Company in connection with administering the Company's business, including expenses incurred by the Company's administrator in performing administrative services for the Company, and the reimbursement of the compensation of the Company's chief financial officer and chief compliance officer paid by the Company's administrator.

Prior to the effective date of this Agreement, the Adviser will bear Organizational and Offering Expenses on behalf of the Company. Upon the earlier of (a) the end of the offering period, or (b) such time that the Company has raised $300,000,000 in gross proceeds in connection with the sale of shares of its common stock pursuant to the Registration Statement or in one or more private offerings (such time being referred to herein as the "***O&O Expense Cut-Off Date***"), the Adviser shall no longer be obligated to bear, pay or otherwise be responsible for Organizational and Offering Expenses on behalf of the Company and the Company will be responsible for paying or otherwise incurring all such Organizational and Offering Expenses. At such time that this Agreement becomes effective pursuant to Section 11(a), the Adviser will be entitled to receive reimbursement from the Company of

Organizational and Offering Expenses it has paid on behalf of the Company to the extent that such reimbursements do not exceed 1.25% of the aggregate gross proceeds of the offering of shares of the Company's common stock pursuant to the Registration Statement or in one or more private offerings, until the earlier of (a) the end of the offering period, or (b) such time that the Adviser has been repaid in full. The Company will not be liable for any unreimbursed Organizational and Offering Expenses to the extent that such amounts have not been reimbursed to the Adviser by the end of the offering period. Notwithstanding the foregoing, any such reimbursements will not exceed actual expenses incurred by SIC Advisors. SIC Advisors is responsible for the payment of our cumulative Organizational and Offering Expenses to the extent they exceed 5.25%, and will reimburse any Organizational and Offering Expenses, together with commissions, the dealer manager fee and any discount paid to members of the Financial Industry Regulatory Authority, that exceed 15%, of the gross proceeds from the sale of shares of the Company's common stock pursuant to the Registration Statement or one or more private offerings at the time of the completion of the offering contemplated by the Registration Statement, then the Adviser shall be required to pay or, if already paid by the Company, reimburse the Company for amounts exceeding such 5.25% and 15% limit, as appropriate.

(c) Limitations on Reimbursement of Expenses.

(i) In addition to the compensation paid to the Adviser pursuant to Section 3, the Company shall reimburse the Adviser for all expenses of the Company incurred by the Adviser as well as the actual cost of goods and services used for or by the Company and obtained from entities not affiliated with the Adviser. The Adviser may be reimbursed for the administrative services performed by it on behalf of the Company; provided, however, the reimbursement shall be an amount equal to the lower of the Adviser's actual cost or the amount the Company would be required to pay third parties for the provision of comparable administrative services in the same geographic location; and provided, further, that such costs are reasonably allocated to the Company on the basis of assets, revenues, time records or other method conforming with generally accepted accounting principles. No reimbursement shall be permitted for services for which the Adviser is entitled to compensation by way of a separate fee. Excluded from the allowable reimbursement shall be:

(A) rent or depreciation, utilities, capital equipment, and other administrative items of the Adviser; and

(B) salaries, fringe benefits, travel expenses and other administrative items incurred or allocated to any executive officer or board member of the Adviser (or any individual performing such services) or a holder of 10% or greater equity interest in the Adviser (or any person having the power to direct or cause the direction of the Adviser, whether by ownership of voting securities, by contract or otherwise).

(d) Periodic Reimbursement.

Expenses incurred by the Adviser on behalf of the Company and payable pursuant to this section shall be reimbursed no less than monthly to the Adviser. The Adviser shall prepare a statement documenting the expenses of the Company and the calculation of the reimbursement and shall deliver such statement to the Company prior to full reimbursement.

3. Compensation of the Adviser.

The Company agrees to pay, and the Adviser agrees to accept, as compensation for the services provided by the Adviser hereunder, a base management fee ("**Base Management Fee**") and an incentive fee ("**Incentive Fee**") as hereinafter set forth. The Adviser may, in its sole discretion, elect or agree to temporarily or permanently waive, defer, reduce or modify, in whole or in part, the Base Management Fee and/or the Incentive Fee. Any of the fees payable to the Adviser under this Agreement for any partial month or calendar quarter shall be appropriately prorated. The fees payable to the Adviser as set forth in this Agreement shall be calculated using a detailed calculation policy and procedures approved by the Adviser and the Board of Directors, including a majority of the Independent Directors (as defined below), and shall be consistent with the calculation of such fees as set forth in this Section. See Appendix A for examples of how these fees are calculated.

(a) Base Management Fee. The Base Management Fee will be calculated at an annual rate of 1.75% of gross assets payable quarterly in arrears. For purposes of calculating the Base Management Fee, the term "gross assets" includes any assets acquired with the proceeds of leverage. For the first quarter of the Company's operations, the Base Management Fee will be calculated based on the initial value of the Company's gross assets. Subsequently, the Base Management Fee will be calculated based on the Company's gross assets at the end of each completed calendar quarter. Base Management Fees for any partial quarter will be appropriately prorated.

(b) Incentive Fee.

The Incentive Fee will be divided into two parts: (1) a subordinated incentive fee on income, and (2) an incentive fee on capital gains. Each part of the Incentive Fee is outlined below.

The subordinated incentive fee on income is earned on pre-incentive fee net investment income and shall be determined and payable in arrears as of the end of each calendar quarter during which the Investment Advisory Agreement is in effect. If this Agreement is terminated, the fee will also become payable as of the effective date of such termination.

The subordinated incentive fee on income for each quarter will be calculated as follows:

- No subordinated incentive fee on income will be payable in any calendar quarter in which the pre-incentive fee net investment income does not exceed a quarterly return to stockholders of 1.75% per quarter on our net assets at the end of the immediately preceding fiscal quarter (the "quarterly preferred return.")
- For any quarter in which pre-incentive fee net investment income exceeds the quarterly preferred return, but is less than or equal to 2.1875% of our net assets at the end of the immediately preceding fiscal quarter (the "**catch up**"), the subordinated incentive fee on income shall equal 100% of pre-incentive fee net investment income.
- For any quarter in which pre-incentive fee net investment income exceeds 2.1875% of our net assets at the end of the immediately preceding fiscal quarter, the subordinated incentive fee on income shall equal 20% of pre-incentive fee net investment income.
- "Pre-incentive fee net investment income" is defined as interest income, dividend income and any other income accrued during the calendar quarter, minus operating expenses for the quarter, including the Base Management Fee, expenses payable to the Company's administrator, any interest expense and dividends paid on any issued and outstanding preferred stock, but excluding the Incentive Fee. Pre-incentive fee net investment income does not include any realized capital gains, realized capital losses or unrealized capital appreciation or depreciation.

The incentive fee on capital gains will be earned on investments sold and shall be determined and payable in arrears as of the end of each calendar year during which this Agreement is in effect. If this Agreement is terminated, the fee will also become payable as of the effective date of such termination. The fee is equal to 20% of realized capital gains, less the aggregate amount of any previously paid incentive fee on capital gains. Incentive fee on capital gains is equal to realized capital gains on a cumulative basis from inception, computed net of all realized capital losses and unrealized capital depreciation on a cumulative basis. In order to provide an incentive for the Adviser to successfully execute a merger transaction involving the Company that is financially accretive and/or otherwise beneficial to its stockholders even if the Adviser will not act as an investment adviser to the surviving entity in the merger, we may seek exemptive relief from the SEC to allow us to pay the Adviser an incentive fee on capital gains in connection with the Company's merger with and into another entity. Absent the receipt of such relief, the Adviser will not be entitled to an incentive fee on capital gains or any other incentive fee in connection with any such merger transaction.

(c) Waiver or Deferral of Fees.

The Adviser shall have the right to elect to waive or defer all or a portion of the Base Management Fee and/or Incentive Fee that would otherwise be paid to it. Prior to the payment of any fee to the Adviser, the Company shall obtain written instructions from the Adviser with respect to any waiver or deferral of any portion of such fees. Any portion of a deferred fee payable to the Adviser and not paid over to the Adviser with respect to any month, calendar quarter or year shall be deferred without interest and may be paid over in any such other month prior to the occurrence of the termination of this Agreement, as the Adviser may determine upon written notice to the Company.

4. Covenant of the Adviser.

(a) Registration of Adviser

The Adviser covenants that it is or will be registered as an investment adviser under the Advisers Act on the effective date of this Agreement as set forth in Section 11 herein, and shall maintain such registration until the expiration or termination of this Agreement. The Adviser agrees that its activities shall at all times comply in all material respects with all applicable federal and state laws governing its operations and investments. The Adviser agrees to observe and comply with applicable provisions of the code of ethics adopted by the Company pursuant to Rule 17j-1 under the 1940 Act, as such code of ethics may be amended from time to time.

(b) Reports to Stockholders.

The Adviser shall prepare or shall cause to be prepared and distributed to stockholders during each year the following reports of the Company (either included in a periodic report filed with the SEC or distributed in a separate report):

(i) Quarterly Reports. Within 60 days of the end of each quarter, a report containing the same financial information contained in the Company's Quarterly Report on Form 10-Q filed by the Company under the Securities Exchange Act of 1934, as amended.

(ii) Annual Report. Within 120 days after the end of the Company's fiscal year, an annual report containing:

(A) A balance sheet as of the end of each fiscal year and statements of income, equity, and cash flow, for the year then ended, all of which shall be prepared in accordance with generally accepted accounting principals and accompanied by an auditor's report containing an opinion of an independent certified public accountant;

(B) A report of the activities of the Company during the period covered by the report;

(C) Where forecasts have been provided to the Company's shareholders, a table comparing the forecasts previously provided with the actual results during the period covered by the report;

(D) A report setting forth distributions by the Company for the period covered thereby and separately identifying distributions from (i) cash flow from operations during the period; (ii) cash flow from operations during a prior period which have been held as reserves; and (iii) proceeds from disposition of Company assets.

(iii) Previous Reimbursement Reports. The Adviser shall prepare or shall cause to be prepared a report, prepared in accordance with the American Institute of Certified Public Accountants United States Auditing Standards relating to special reports, and distributed to stockholders not less than annually, containing an itemized list of the costs reimbursed to the Adviser for the previous fiscal year. The special report shall at a minimum provide:

(A) A review of the time records of individual employees, the costs of whose services were reimbursed; and

(B) A review of the specific nature of the work performed by each such employee.

(iv) Proposed Reimbursement Reports. The Adviser shall prepare or shall cause to be prepared a report containing an itemized estimate of all proposed expenses for which it shall receive reimbursements pursuant to Section 2(c) of this Agreement for the next fiscal year, together with a breakdown by year of such expenses reimbursed in each of the last five public programs formed by the Adviser.

(c) Reports to State Administrators.

The Adviser shall, upon written request of any State Administrator, submit any of the reports and statements to be prepared and distributed by it to such State Administrator.

(d) Reserves.

In performing its duties hereunder, the Adviser shall cause the Company to provide for adequate reserves for normal replacements and contingencies (but not for payment of fees payable to the Adviser hereunder) by causing the Company to retain a reasonable percentage of proceeds from offerings and revenues.

(e) Recommendations Regarding Reviews.

From time to time and not less than quarterly, the Adviser must review the Company's accounts to determine whether cash distributions are appropriate. The Company may, subject to authorization by the Board of Directors, distribute pro rata to the stockholders funds received by the Company which the Adviser deems unnecessary to retain in the Company.

(f) Temporary Investments.

The Adviser shall, in its sole discretion, temporarily place proceeds from offerings by the Company into short term, highly liquid investments which, in its reasonable judgment, afford appropriate safety of principal during such time as it is determining the composition and allocation of the portfolio of the Company and the nature, timing and implementation of any changes thereto pursuant to Section 1(b); provided however, that the Adviser shall be under no fiduciary obligation to select any such short-term, highly liquid investment based solely on any yield or return of such investment. The Adviser shall cause any proceeds of the offering of Company securities not committed for investment within the later of two years from the date of effectiveness of the Registration Statement or one year from termination of the offering, unless a longer period is permitted by the applicable State Administrator, to be paid as a distribution to the stockholders of the Company as a return of capital without deduction of Front End Fees (as defined below).

5. Brokerage Commissions.

(a) The Adviser is hereby authorized, to the fullest extent now or hereafter permitted by law, to cause the Company to pay a member of a national securities exchange, broker or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of such exchange, broker or dealer would have charged for effecting that transaction, if the Adviser determines in good faith, taking into account factors, including without limitation, price (including the applicable brokerage commission or dealer spread), size of order, difficulty of execution, and operational facilities of the firm and the firm's risk and skill in positioning blocks of securities, that such amount of commission is reasonable in relation to the value of the brokerage and/or research services provided by such member, broker or dealer, viewed in terms of either that particular transaction or its overall responsibilities with respect to the Company's portfolio, and is consistent with the Adviser's duty to seek the best execution on behalf of the Company. Notwithstanding the foregoing, with regard to transactions with or for the benefit of the Company, the Adviser may not pay any commission or receive any rebates or give-ups, nor participate in any business arrangements which would circumvent this restriction.

(b) Limitations. Notwithstanding anything herein to the contrary:

(i) All fees and expenses paid by any party for any services rendered to organize the Company and to acquire assets for the Company ("Front End Fees") shall be reasonable and shall not exceed 18% of the gross offering proceeds, regardless of the source of payment. Any reimbursement to the Advisor or any other person for deferred Organizational and Offering Expenses, including any interest thereon, if any, will be included within this 18% limitation.

(ii) The Advisor shall commit at least eighty-two percent (82%) of the gross offering proceeds towards the investment or reinvestment of assets and reserves as set forth in Section 4(d) above on behalf of the Company. The remaining proceeds may be used to pay Front End Fees.

6. Other Activities of the Adviser.

The services of the Adviser to the Company are not exclusive, and the Adviser may engage in any other business or render similar or different services to others including, without limitation, the direct or indirect sponsorship or management of other investment-based accounts or commingled pools of capital, however structured, having investment objectives similar to or different from those of the Company, and nothing in this Agreement shall limit or restrict the right of any officer, director, stockholder (and their stockholders or members, including the owners of their stockholders or members), officer or employee of the Adviser to engage in any other business or to devote his or her time and attention in part to any other business, whether of a similar or dissimilar nature, or to receive any fees or compensation in connection therewith (including fees for serving as a director of, or providing consulting services to, one or more of the Company's portfolio companies, subject to applicable law). The Adviser assumes no responsibility under this Agreement other than to render the services set forth herein. It is understood that directors, officers, employees and stockholders of the Company are or may become interested in the Adviser

and its affiliates, as directors, officers, employees, partners, stockholders, members, managers or otherwise, and that the Adviser and directors, officers, employees, partners, stockholders, members and managers of the Adviser and its affiliates are or may become similarly interested in the Company as stockholders or otherwise.

7. Responsibility of Dual Directors, Officers and/or Employees.

If any person who is a director, officer, stockholder or employee of the Adviser is or becomes a director, officer, stockholder and/or employee of the Company and acts as such in any business of the Company, then such director, officer, stockholder and/or employee of the Adviser shall be deemed to be acting in such capacity solely for the Company, and not as a director, officer, stockholder or employee of the Adviser or under the control or direction of the Adviser, even if paid by the Adviser.

8. Indemnification.

(a) Indemnification. Subject to Section 9, the Adviser, any Sub-Adviser, each of their directors, officers, stockholders or members (and their stockholders or members, including the owners of their stockholders or members), agents, employees, controlling persons (as determined under the 1940 Act ("**Controlling Persons**")) and any other person or entity affiliated with, or acting on behalf of, the Adviser or any Sub-Adviser (each an "**Indemnified Party**" and, collectively, the "**Indemnified Parties**") shall not be liable to the Company for any action taken or omitted to be taken by the Adviser or any Sub-Adviser in connection with the performance of any of their duties or obligations under this Agreement or otherwise as an investment adviser of the Company (except to the extent specified in Section 36(b) of the 1940 Act concerning loss resulting from a breach of fiduciary duty with respect to the receipt of compensation for services), and the Company shall indemnify, defend and protect the Indemnified Parties (each of whom shall be deemed a third party beneficiary hereof) and hold them harmless from and against all losses, damages, liabilities, costs and expenses (including reasonable attorneys' fees and amounts reasonably paid in settlement) ("**Losses**") incurred by the Indemnified Parties in or by reason of any pending, threatened or completed action, suit, investigation or other proceeding (including an action or suit by or in the right of the Company or its security holders) arising out of or otherwise based upon the performance of any of the Indemnified Parties' duties or obligations under this Agreement, any Sub-Advisory Agreement, or otherwise as an investment adviser of the Company to the extent such Losses are not fully reimbursed by insurance and otherwise to the fullest extent such indemnification would not be inconsistent with the Articles of Incorporation, the 1940 Act, the laws of the State of Maryland law or the provisions of Section II.G of the Omnibus Guidelines published by the North American Securities Administrators Association on March 29, 1992, as it may be amended from time to time.

(b) Advancement of Funds. The Company shall be permitted to advance funds to the Indemnified Parties for legal expenses and other costs incurred as a result of any legal action for which indemnification is being sought only if all of the following conditions are met:

(i) The legal action relates to acts or omissions with respect to the performance of duties or services on behalf of the Company;

(ii) the Indemnified Party provides the Company with written affirmation of the Indemnified Party's good faith belief that the Indemnified Party has met the standard of conduct necessary for indemnification by the Company;

(iii) The legal action is initiated by a third party who is not a Company stockholder, or the legal action is initiated by a Company stockholder and a court of competent jurisdiction specifically approves such advancement; and

(iv) The Indemnified Party provides the Company with a written agreement to repay the advanced funds to the Company, allocated as advanced, together with the applicable legal rate of interest thereon, in cases in which the Indemnified Party is not found to be entitled to indemnification pursuant to a final, non-appealable decision of a court of competent jurisdiction.

(c) The Adviser shall indemnify the Company, and its affiliates and Controlling Persons, for any Losses that the Company or its Affiliates and Controlling Persons may sustain as a result of the Adviser's willful misfeasance, bad faith, gross negligence, reckless disregard of its duties hereunder or violation of applicable law, including, without limitation, the federal and state securities laws.

9. Limitation on Indemnification.

Notwithstanding Section 8(a) to the contrary, the Company shall not provide for indemnification of the Indemnified Parties for any liability or loss suffered by the Indemnified Parties, nor shall the Company provide that any of the Indemnified Parties be held harmless for any loss or liability suffered by the Company, unless all of the following conditions are met:

(i) the Indemnified Party has determined, in good faith, that the course of conduct which caused the loss or liability was in the best interests of the Company;

(ii) the Indemnified Party was acting on behalf of or performing services for the Company;

(iii) such liability or loss was not the result of willful misfeasance, bad faith or gross negligence by the Indemnified Party; and

(iv) such indemnification or agreement to hold harmless is recoverable only out of the Company's net assets and not from stockholders.

Furthermore, the Indemnified Party shall not be indemnified for any losses, liabilities or expenses arising from or out of an alleged violation of federal or state securities laws unless one or more of the following conditions are met:

(i) there has been a successful adjudication on the merits of each count involving alleged material securities law violations;

(ii) such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction; or

(iii) a court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and related costs should be made, and the court of law considering the request for indemnification has been advised of the position of the SEC and the published position of any state securities regulatory authority in which securities of the Company were offered or sold as to indemnification for violations of securities laws.

10. Conflicts of Interests and Prohibited Activities.

The following provisions in this Section 10 shall apply for only so long as the shares of common stock (the "shares") of the Company are not listed on a national securities exchange.

(a) No Exclusive Agreement. The Adviser is not hereby granted or entitled to an exclusive right to sell or exclusive employment to sell assets for the Company.

(b) Rebates, Kickbacks and Reciprocal Arrangements.

(i) The Adviser agrees that it shall not (A) receive or accept any rebate, give-up or similar arrangement that is prohibited under applicable federal or state securities laws, (B) participate in any reciprocal business arrangement that would circumvent provisions of applicable federal or state securities laws governing conflicts of interest or investment restrictions, or (C) enter into any agreement, arrangement or understanding that would circumvent the restrictions against dealing with affiliates or promoters under applicable federal or state securities laws.

(ii) The Adviser agrees that it shall not directly or indirectly pay or award any fees or commissions or other compensation to any person or entity engaged to sell the Company's shares or give investment advice to a potential shareholder; provided, however, that this subsection shall not prohibit the payment to a registered broker-dealer or other properly licensed agent of sales commissions for selling or distributing the Company's shares.

(c) Commingling. The Adviser covenants that it shall not permit or cause to be permitted the Company's funds to be commingled with the funds of any other entity. Nothing in this Subsection 10(c) shall prohibit the Adviser from establishing a master fiduciary account pursuant to which separate sub accounts are established for the benefit of affiliated programs, provided that the Company's funds are protected from the claims of other programs and creditors of such programs.

11. Effectiveness, Duration and Termination of Agreement.

(a) Term and Effectiveness. This Agreement shall become effective as of the date that the Company meets the minimum offering requirement, as such term is defined in the prospectus contained in the Company's Registration Statement as declared effective by the SEC. Once effective, this Agreement shall remain in effect for two years, and thereafter shall continue automatically for successive one-year periods, provided that such continuance is specifically approved at least annually by: (i) the vote of the Board of Directors, or by the vote of a majority of the outstanding voting securities of the Company and (ii) the vote of a majority of the Company's directors who are not parties to this Agreement or "interested persons" (as such term is defined in Section 2(a)(19) of the 1940 Act) of any such party ("**Independent Directors**"), in accordance with the requirements of the 1940 Act.

(b) Termination. This Agreement may be terminated at any time, without the payment of any penalty: (i) by the Company upon 60 days' prior written notice to the Adviser: (A) upon the vote of a majority of the outstanding voting securities of the Company (as defined in Section 2(a)(42) of the 1940 Act) or (B) by the vote of the Company's Independent Directors; or (ii) by the Adviser upon not less than 120 days' prior written notice to the Company. This Agreement shall automatically terminate in the event of its "assignment" (as such term is defined for purposes of construing Section 15(a)(4) of the 1940 Act). The provisions of Sections 8 and 9 of this Agreement shall remain in full force and effect, and the Adviser shall remain entitled to the benefits thereof, notwithstanding any termination of this Agreement.

(c) Payments to and Duties of Adviser Upon Termination.

(i) After the termination of this Agreement, the Adviser shall not be entitled to compensation for further services provided hereunder except that it shall be entitled to receive from the Company within 30 days after the effective date of such termination all unpaid reimbursements and all earned but unpaid fees payable to the Adviser prior to termination of this Agreement, including any deferred fees.

(ii) The Adviser shall promptly upon termination:

(a) deliver to the Board of Directors a full accounting, including a statement showing all payments collected by it and a statement of all money held by it, covering the period following the date of the last accounting furnished to the Board of Directors;

(b) deliver to the Board of Directors all assets and documents of the Company then in custody of the Adviser; and

(c) cooperate with the Company to provide an orderly transition of services.

The following provision in this Section 11 shall apply for only so long as the shares of the Company are not listed on a national securities exchange.

(d) Stockholder Voting Rights. Without the approval of holders of a majority of the shares entitled to vote on the matter, the Adviser shall not: (i) amend this Agreement except for amendments that do not adversely affect the interests of the stockholders; (ii) voluntarily withdraw as the Adviser unless such withdrawal would not affect the tax status of the Company and would not materially adversely affect the stockholders; (iii) appoint a new Adviser; (iv) sell all or substantially all of the Company's assets other than in the ordinary course of the Company's business; or (v) cause the merger or other reorganization of the Company.

(e) Other Matters. Upon termination of this Agreement, the Company may terminate the Adviser's interest in the Company's revenues, expenses, income, losses, distributions and capital by payment of an amount equal to the then present fair market value of the terminated Adviser's interest, determined by agreement of the terminated Adviser, any Sub-Adviser and the Company. If the Company, any Sub-Adviser and the Adviser cannot agree upon such amount, then such amount will be determined in accordance with the then current rules of the American Arbitration Association. The expenses of such arbitration shall be borne equally by the terminated Adviser and the Company. The method of payment to the terminated Adviser shall be fair and shall protect the solvency and liquidity of the Company.

12. Notices.

Any notice under this Agreement shall be given in writing, addressed and delivered or mailed, postage prepaid, to the other party at the address listed below or at such other address for a party as shall be specified in a notice given in accordance with this Section.

13. Amendments.

This Agreement may be amended by mutual written consent of the parties, subject to the provisions of the 1940 Act.

14. Counterparts.

This Agreement may be executed in counterparts, each of which shall be deemed to be an original copy and all of which together shall constitute one and the same instrument binding on all parties hereto, notwithstanding that all parties shall not have signed the same counterpart.

15. Governing Law.

Notwithstanding the place where this Agreement may be executed by any of the parties hereto and the provisions of Section 8, this Agreement shall be construed in accordance with the laws of the State of New York. For so long as the Company is regulated as a BDC under the 1940 Act, this Agreement shall also be construed in accordance with the applicable provisions of the 1940 Act and the Advisers Act. In such case, to the extent the applicable laws of the State of New York or any of the provisions herein conflict with the provisions of the 1940 Act or the Advisers Act, the latter shall control. Any reference in this Agreement to a statute or provision of the 1940 Act shall be construed to include any successor statute or provision to such statute or provision and any reference to any rule promulgated under the Advisers Act shall be construed to include any successor promulgated rule.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on the date above written.

SIERRA INCOME CORPORATION,
a Maryland corporation

By: /s/
Name: Seth Taube
Title: Chief Executive Officer

SIC ADVISORS LLC,
a Delaware limited liability company

By: /s/
Name:
Title:

EXECUTION VERSION

Appendix A

Below are examples of the two-part incentive fee:

Example — Subordinated Incentive Fee on Income, Determined on a Quarterly Basis

Assumptions

First Quarter: Pre-incentive fee net investment income equals 0.5500%.

Second Quarter: Pre-incentive fee net investment income equals 1.9500%.

Third Quarter: Pre-incentive fee net investment income equals 2.800%.

The subordinated incentive fee on income in this example would be:

First Quarter: Pre-incentive fee net investment income does not exceed the 1.75% preferred return rate, therefore there is no catch up or split incentive fee on pre-incentive fee net investment income.

Second Quarter: Pre-incentive fee net investment income falls between the 1.75% preferred return rate and the catch up of 2.1875%, therefore the incentive fee on pre-incentive fee net investment income is 100% of the pre-incentive fee above the 1.75% preferred return of 1.95%.

Third Quarter: Pre-incentive fee net investment income exceeds the 1.75% preferred return and the 2.1875% catch up provision. Therefore the catch up provision is fully satisfied by the 2.8% of pre-incentive fee net investment income above the 1.75% preferred return rate and there is a 20% incentive fee on pre-incentive fee net investment income above the 2.1875% "catch up."

Example — Incentive Fee on Capital Gains (Millions)

Alternative 1 — Assumptions

Year 1: $20 million investment made in company A ("Investment A"), and $30 million investment made in company B ("Investment B")

Year 2: Investment A sold for $50 million and fair market value, or FMV, of Investment B determined to be $32 million

Year 3: FMV of Investment B determined to be $25 million

Year 4: Investment B sold for $31 million

The capital gains portion of the incentive fee would be:

Year 1: None, because no investments were sold

Year 2: Capital gains incentive fee of $6 million ($30 million realized capital gains on sale of Investment A multiplied by 20%)

Year 3: None, because no investments were sold

Year 4: Capital gains incentive fee of $200,000 ($6.2 million ($31 million cumulative realized capital gains multiplied by 20%) less $6 million (capital gains fee taken in Year 2)

Alternative 2 — Assumptions

Year 1: $20 million investment made in Company A ("Investment A"), $30 million investment made in Company B ("Investment B"), $25 million investment made in Company C ("Investment C") and the cost basis of Other Portfolio Investments is $25 million

Year 2: Investment A sold for $50 million ($20 million cost basis to be reinvested into Other Portfolio Investments and the $30 million capital gain is available for distribution), fair market value, or FMV, of Investment B determined to be $25 million (creates $5 million in unrealized capital depreciation), the FMV of Investment C determined to be $25 million and FMV of Other Portfolio Investments determined to be $25 million

Year 3: FMV of Investment B determined to be $27 million (creates $3 million in unrealized capital depreciation), Investment C sold for $30 million ($25 million cost basis to be reinvested into Other Portfolio Investments and the $5 million capital gain is available for distribution) and FMV of Other Portfolio Investments determined to be $45 million

Year 4: FMV of Investment B determined to be $30 million and FMV of Other Portfolio Investments determined to be $45 million

Year 5: Investment B sold for $20 million ($20 million cost basis to be reinvested into Other Portfolio Investments and $10 million capital loss) and FMV of Other Portfolio Investments determined to be $45 million

Year 6: Total Portfolio is sold for $80 million ($15 million capital gain computed based on a cumulative cost basis in Other Portfolio Investments of $65 million)

The incentive fee on capital gains in this example would be:

Year 1: None, because no investments were sold

Year 2: $5 million incentive fee on capital gains (20% multiplied by $25 million ($30 million realized capital gains on Investment A less unrealized capital depreciation on Investment B))

Year 3: $1.4 million incentive fee on capital gains ($6.4 million (20% multiplied by $32 million ($35 million cumulative realized capital gains less $3 million unrealized capital depreciation))) less $5 million incentive fee on capital gains received in Year 2

Year 4: None, because capital gains incentive fees are paid on realized capital gains only

Year 5: None, because $5 million (20% multiplied by $25 million (cumulative realized capital gains of $35 million less realized capital losses of $10 million)) is less than $6.4 million cumulative incentive fee on capital gains paid in prior years

Year 6: $1.6 million incentive fee on capital gains (20% multiplied by $40 million ($25 million cumulative realized capital gains plus $15 million realized capital gains)) less $6.4 million cumulative incentive fee on capital gains received in prior years

Exhibit D

Services and Licensing Agreement

SERVICES AND LICENSING AGREEMENT

This Services and Licensing Agreement (the "Agreement"), dated December 12, 2017, and effective as of January 1, 2017 (the "Effective Date"), is by and between Medley LLC and Medley Capital LLC (together with Medley LLC, "Medley"), on the one hand, and each affiliated investment adviser that executes and delivers a counterpart signature page of this Agreement (collectively, the "Advisers"), on the other hand.

WHEREAS, Medley is an investment adviser registered with the U.S. Securities and Exchange Commission (the "SEC"), but does not currently provide investment advisory services to clients;

WHEREAS, each Adviser is an investment adviser registered with the SEC (either as a registrant or a relying adviser) and provides investment advisory services to separately managed accounts, business development companies, registered investments funds and/or private investment funds (collectively, the "Clients");

WHEREAS, the Advisers desire Medley to (i) provide certain administrative, bookkeeping, operational, investor-relations and document preparation/filing services for the Advisers, (ii) allow certain of its employees to perform services for the Advisers, including without limitation, investment-related research and analysis, (iii) permit the Advisers to use certain of Medley's facilities, (iv) cover certain expenses incurred by the Advisers, (v) enter into certain agreements for and on behalf of the Advisers, and (vi) permit the Advisers to use one or more of Medley's intellectual property; and

WHEREAS, Medley is willing to provide the foregoing to the Advisers pursuant to the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties hereto agree as follows:

1. Engagement of Medley. The Advisers hereby engage Medley to provide the Advisers with the Medley Services, as defined in Section 3, and the License, as defined in Section 8, on the terms and subject to the conditions set forth herein, and Medley hereby accepts such engagement and agrees to provide the Medley Services and the License during the Term, as defined below.

2. Term. The term of this Agreement (the "Term") shall commence on the Effective Date and continue in full force and effect for a term of one (1) year from the Effective Date and shall automatically renew for successive periods of one (1) year, unless this Agreement is terminated by Medley or all of the Advisers upon not less than 30 days' prior written notice to the other parties, provided, however, that Medley shall remain entitled to payment of any accrued and unpaid Reimbursements due to it pursuant to Section 7. Notwithstanding the foregoing, any Adviser may terminate its participation as a party to this Agreement by providing at least 30 days' prior written notice of such termination to Medley. On or before the effective date of an Adviser's termination as a party to this Agreement, Medley shall amend this Agreement to remove such Adviser as a party to this Agreement. Any terms applicable to the Advisers upon the termination of this Agreement, including the payment of any accrued and unpaid Reimbursements due to Medley pursuant to Section7, shall also apply to any Adviser who ceases to be a party to this Agreement.

3. Services.

a. Medley hereby agrees to provide the services for the Advisers that are set forth on Exhibit A, as amended from time to time, including administrative, bookkeeping, operational, client relations and document preparation/filing services (collectively, the "Medley Services"). All fees, costs and expenses related to the Medley Services shall be borne solely by Medley.

b. To the extent that Medley retains the services of any third party ("Third Party Services") pursuant to Section 6, including attorneys, accountants, consultants and other third party service providers (each, a "Service Provider"), for and on behalf of one or more of the Advisers, Medley shall instruct each Adviser availing itself of such Third Party Services to pay (or, if there is more than one Adviser availing itself of such Third Party Services, to pay its pro rata share of) the fees, costs and expenses of such Third Party Services ("Third Party Expenses") pursuant to Section 7(b).

c. In lieu of utilizing some or all of the Medley Services or Third Party Services, an Adviser may, in its sole discretion, elect to retain the services of one or more other third party service providers, provided that such Adviser shall be solely responsible for bearing any fees, costs and expenses incurred in connection with the use of any other third party service provider, without reimbursement from Medley. To the extent an Adviser retains the services of any other third party service provider in lieu of utilizing some or all of the Medley Services and/or Third Party Services, such Adviser shall promptly notify Medley in writing of what Medley Service(s) and/or Third Party Service(s) it will not be utilizing and, as of the date on which such notice is received by Medley pursuant to Section 11(c), such Adviser shall not be required to reimburse Medley for any fees, costs and expenses related to such Medley Services pursuant to Section 7(a) or be allocated any portion of the fees, costs and expenses related to such Third Party Service(s) pursuant to Section 7(b).

4. Dual-Hatted Employees.

a. Medley shall make its employees available to the Advisers (the "Dual-Hatted Employees"). The Dual-Hatted Employees shall perform certain services for both Medley and the Advisers entities, as needed and/or requested, and shall devote such portion of their respective business time and attention to Medley and the Advisers as they deem appropriate in their sole discretion. The Dual-Hatted Employees are employees of Medley and shall not be deemed to be employees of any of the Advisers.

b. The Dual-Hatted Employees shall receive all of their compensation, including salary, bonuses and benefits, solely from Medley.

c. Medley and the Advisers shall both be responsible for training and supervising all Dual-Hatted Employees in the performance of activities they conduct for and on behalf of Medley and the Advisers. Dual-Hatted Employees will be subject to Medley's and the Advisers' respective Compliance Manuals and Codes of Ethics. Books and records generated by Dual-Hatted Employees for and on behalf of any Adviser shall at all times be the property of such Adviser. Medley agrees to permit the Advisers, and relevant governmental agencies, access to such Dual-Hatted Employees, so that each Adviser is able to comply with its obligations under all applicable law, including the U.S. Investment Advisers Act of 1940, as amended.

d. Dual-Hatted Employees with signatory authority with respect to an Adviser, may execute and deliver such agreements and other documentation, and to do and perform such acts and things, for and on behalf of such Adviser, as they, or any one of them, consider necessary, appropriate or desirable to carry out the purpose and intent of such

Adviser. A Dual-Hatted Employee's signatory authority with respect to an Adviser is subject to Medley's signatory policy.

5. Facilities. Medley hereby agrees to permit the Advisers to use the facilities specified in Exhibit B, as amended from time to time (collectively, the "Facilities"). All fees, costs and expenses related to the Facilities, including rent, utilities, insurance, office equipment and supplies, shall be borne solely by Medley.

6. Authority to Contract. The Advisers hereby grant Medley the authority to enter into written agreements for and on behalf of the Advisers, including agreements with Service Providers. Medley will not be required to notify, or to obtain consent from, an Adviser prior to entering into an agreement for and on behalf of the Advisers, unless entering into such agreement would require the consent of the investors in the Client(s) managed by such Adviser.

7. Expense Reimbursement; Payment to Third Parties.

a. As noted above, Medley shall bear all of the fees, costs and expenses related to providing the Advisers with the Medley Services, the Dual-Hatted Employees and the Facilities (the "Medley Expenses"). Each Adviser hereby acknowledges and consents to Medley incurring the Medley Expenses on its behalf and agrees to promptly reimburse Medley for (i) all amounts attributable solely to such Adviser and (ii) its pro rata share (based on fee-earning assets under management, as of the date(s) on which such Medley Expenses were incurred) of all amounts attributable to two or more Advisers (collectively, the "Reimbursement"). Subject to the immediately preceding sentence, Medley shall determine, in its sole discretion, if, and to the extent that, any Medley Expenses are attributable to a particular Adviser. Medley will send each Adviser a quarterly invoice setting forth the Medley Expenses attributable to such Adviser during the prior quarter. The invoice will include a detailed accounting of the Medley Expenses attributable to such Adviser. Each Adviser shall remit payment of the Reimbursement to Medley within 90 days' of its receipt of the invoice.

b. Each Adviser hereby acknowledges and consents to Medley obtaining Third Party Services for and on behalf of the Advisers and agrees to promptly pay each Service Provider providing Third Party Services (or reimburse Medley to the extent Medley pays a Service Provider directly) (i) all amounts attributable solely to such Adviser and/or (ii) its pro rata share (based on fee-earning assets under management, as of the date(s) on which such Third Party Expenses were incurred) of all amounts attributable to two or more Advisers. Subject to the immediately preceding sentence, Medley shall determine, in its sole discretion, if, and to the extent that, any Third Party Expenses are attributable to a particular Adviser. Medley shall provide each Adviser attributed some or all of any Third Party Expense a written statement or invoice indicating the amount of Service Provider Expense attributable to such Adviser (the "Service Provider Statement"). Each Adviser shall pay the relevant Service Provider (or reimburse Medley to the extent Medley pays a Service Provider directly) the Third Party Expenses that are attributable to such Adviser, within 30 days of receipt of the Service Provider Statement.

c. If an Adviser independently retains the services of any other third party service provider in lieu of utilizing some or all of the Medley Services and/or Third Party Services pursuant to Section 3(c), Medley shall not attribute to such Adviser any Medley Expense or Third Party Expense (or pro rata share of any Medley Expense or Third Party Expense), as applicable, incurred in connection with the Medley Service(s) and/or Third Party Service(s) not utilized by such Adviser. Subject to the immediately preceding sentence, Medley shall determine, in its sole discretion, if, and to the extent that, any Medley Expenses and/or Third Party Expenses are not attributable to a particular Adviser

and shall not require such Adviser to reimburse Medley for such Medley Expenses or to pay a Service Provider for such Third Party Expenses.

d. To the extent any Expenses attributable to an Adviser may be borne, or is reimbursable to such Adviser, by any of its Client(s) and/or affiliate(s), such Adviser shall cause its Client(s) and/or affiliate(s), as applicable, to pay or reimburse such Adviser for the Expenses and remit the proceeds to Medley to satisfy its Reimbursement obligation. If such Expenses are not borne, or reimbursed, by a Client, the Adviser shall satisfy its Reimbursement obligation from such Adviser's advisory or management fees. For tax reporting purposes, any Reimbursement to Medley from an Adviser's advisory or management fees (and for which such Adviser is not otherwise reimbursed by any Client(s)) shall be treated as a cost borne by such Adviser and such Adviser shall be entitled to a corresponding tax deduction, to the extent available.

8. License to use Intellectual Property. Medley is the owner of the trademark "MEDLEY" (the "Licensed Mark") and has entered into an Amended and Restated License Agreement with certain Advisers and other Medley affiliates, dated July 11, 2016 (the "License Agreement"). With respect to the Advisers who are party to the License Agreement, such Advisers and Medley agree that such License Agreement is hereby replaced in its entirety by the licensing terms contained herein. Medley will license the Licensed Mark to each Adviser under the terms attached at Exhibit C, as amended from time to time, and this Agreement, effective as of the Effective Date, as applicable.

9. Representations and Warranties of the Advisers. The Advisers represent and warrant to, and agree with, Medley that:

a. Each Adviser has all necessary corporate power and authority to enter into, execute and deliver this Agreement and to carry out its obligations hereunder. The execution and delivery of this Agreement, and the performance by each Adviser of its obligations hereunder, have been duly and validly authorized by all necessary corporate action. Each Adviser further represents that it is not violating any laws, rules or regulations by entering into this agreement or carrying out its obligations hereunder.

b. Each Adviser has duly and validly executed and delivered this Agreement and (assuming due execution and delivery by, and binding effect on, Medley) this Agreement constitutes a valid and binding obligation of each Adviser in accordance with its terms, subject to applicable bankruptcy, insolvency, moratorium and similar laws affecting creditors' rights generally and subject, as to enforceability, to general principles of equity.

c. No Adviser is a party to, bound by or subject to, any indenture, agreement, instrument, charter or by-law provision, statute, regulation, judgment or decree which would be violated, contravened or breached by, or under which a default would occur as a result of, the execution and delivery of this Agreement or the performance of its obligations hereunder. Such execution, delivery and performance do not require any consent, approval, authorization, registration, declaration, filing or recording to be made or obtained on the part of each Adviser under any Applicable Law which has not been so made or obtained.

10. Representations and Warranties of Medley. Medley represents and warrants to, and agrees with, the Advisers that:

a. Medley has all necessary corporate power and authority to enter into, execute and deliver this Agreement and to carry out its obligations hereunder. The execution and delivery of this Agreement, the performance by Medley of its obligations hereunder, have been duly and validly authorized by all necessary corporate action. Medley further

represents that it is not violating any laws, rules or regulations by entering into this agreement or carrying out its obligations hereunder.

b. Medley has duly and validly executed and delivered this Agreement and (assuming due execution and delivery by, and binding effect on, the Advisers) this Agreement constitutes a valid and binding obligation of Medley in accordance with its terms, subject to applicable bankruptcy, insolvency, moratorium and similar laws affecting creditors' rights generally and subject, as to enforceability, to general principles of equity.

c. Medley is not a party to, bound by or subject to, any indenture, agreement, instrument, charter or by-law provision, statute, regulation, judgment or decree which would be violated, contravened or breached by, or under which a default would occur as a result of, the execution and delivery of this Agreement, the performance of its obligations hereunder. Such execution, delivery, performance and retention do not require any consent, approval, authorization, registration, declaration, filing or recording to be made or obtained by Medley under any Applicable Law which has not been so made or obtained.

11. Miscellaneous.

a. *Implementation of this Agreement*. Nothing in this Agreement will cause the relationship among any of the parties to be deemed to constitute a partnership or joint venture. Except as otherwise provided herein, no party will have any authority, express or implied, to bind, commit or act as agent for any other party. Each party will conduct the activities contemplated herein in compliance with all applicable law. This Agreement supersedes and replaces all previous agreements among the parties related to the subject matter described herein.

b. *Ratification*. The parties agree that any and all action taken by Medley, the Advisers and the Dual-Hatted Employees, or any of them, that are within the scope of this Agreement but taken prior to the Effective Date be, and each hereby is, adopted, ratified and approved.

c. *Notice*. Any notice or other writing required or permitted to be given hereunder or for the purposes hereof (each a "Notice") will be sufficiently given if in writing and delivered (whether by electronic mail or otherwise):

in the case of a Notice to any of the Advisers, addressed as follows:

MCC Advisors LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

MOF III Management LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

MCOF Management LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

SIC Advisors LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

Medley (Aspect) Managment LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

SOF Advisors LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

Medley SMA Advisors LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

STRF Advisors LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

MOF II Management LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

and in the case of a Notice to Medley, addressed as follows:

Medley Capital LLC
280 Park Avenue, 6th Floor East
New York, New York 10017
Attn: Compliance Department

or, in each case, at such other address as the party to which such Notice is to be given shall have last notified the party giving the same in the manner provided in this Section 11.c. Any Notice will be deemed to have been given on the day it is received by the recipient.

d. *Exculpation and Indemnification.*

(i) So long as Medley and any of its affiliates, agents, officers, directors, employees (each an "Indemnified Person") shall have acted in good faith consistent with applicable law and the provisions of this Agreement and shall not have been guilty of gross negligence, a willful violation of law or reckless disregard of its duties hereunder, no Indemnified Person shall be liable to any Adviser in connection with any of the transactions contemplated by this Agreement (i) for any mistake in judgment, (ii) for any action or inaction taken or omitted or (iii) for any loss due to the mistake, action, inaction or negligence of any third party or other agent, or the dishonesty, fraud or bad faith of any third party or other agent selected and monitored in good faith by an Indemnified Person. Subject to the foregoing, any Indemnified Person may consult with Medley's legal counsel and accountants in respect of the affairs of the Advisers and, except in respect of matters in which there is an alleged conflict of interest, shall be fully protected and justified in taking or refraining from any action in good faith, in reliance upon and in accordance with the opinion or advice of such counsel or accountants, provided that such counsel or accountants shall have been selected in good faith and with reasonable care by an Indemnified Person.

(ii) If an Indemnified Person (or any of its successors or assigns) was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of any actions or omissions or alleged acts or omissions arising out of the Medley Services, Third Party Services and/or by the Dual-Hatted Employees and/or related to the Facilities, the Advisers and their Client(s) (pursuant to each Adviser's advisory agreement with such Client(s)) shall, to the fullest extent permitted by law, indemnify such Indemnified Person and hold such Indemnified Person harmless against losses, damages or expenses for which such Indemnified Person has not otherwise been reimbursed (including attorneys' fees, judgments, fines and amounts paid in settlement and costs to investigate any claims) actually and reasonably incurred by such Indemnified Person in connection with such action, suit or proceeding; provided that such Indemnified Person (i) was not guilty of gross negligence, a willful violation of law or reckless disregard of its duties hereunder and (ii) in respect of any criminal action or proceeding, had no reasonable cause to believe that his or her conduct was unlawful.

e. *Joinder*. Entities related to Medley may obtain rights under this Agreement as a party hereto by agreeing in writing to be bound by the terms of this Agreement by executing a written joinder agreement substantially in the form attached hereto as Exhibit D, subject to execution of the same by Medley.

f. *Governing Law*. This Agreement will be governed by and construed in accordance with the laws of the State of Delaware.

g. *Assignment*. Neither this Agreement nor the rights or obligations hereunder are assignable by any party hereto without the prior written consent of the other parties hereto.

h. *Binding Effect*. The covenants and agreements contained herein shall be binding upon and inure to the benefit of the successors and permitted assigns of the parties hereto. Except as otherwise provided, no third party is intended to be, or will be deemed to be, a beneficiary of any provision of this Agreement.

i. *Amendment*. This Agreement (including the Exhibits hereto) may only be amended with the written consent of the parties, provided, however, that Medley may, without the consent of any other party, amend this Agreement to add or remove Advisers from time to time.

j. *Severability*. If any provision of this Agreement shall be held to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby.

k. *Counterparts*. This Agreement may be executed by the parties hereto in one or more counterparts, each of which when so executed and delivered will be an original, but all such counterparts will together constitute one and the same instrument.

[Signatures on following page]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed and delivered the Effective Date.

MEDLEY LLC

By: Medley Management Inc.
its Managing Member

By: _____
Name: Richard T. Allorto
Title: Chief Financial Officer

MEDLEY CAPITAL LLC
a Delaware limited liability company

By: _____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

MCC ADVISORS LLC
a Delaware limited liability company

By: _____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

MCOF MANAGEMENT LLC
a Delaware limited liability company

By: _____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

MEDLEY (ASPECT) MANAGMENT LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

MEDLEY SMA ADVISORS LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

MOF II MANAGEMENT LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

MOF III MANAGEMENT LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

SIC ADVISORS LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

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SOF ADVISORS LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

STRF ADVISORS LLC
a Delaware limited liability company

By:_____
Name: Richard T. Allorto, Jr.
Title: Chief Financial Officer

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Exhibit A

Services

A. Assist Adviser in the day-to-day operation of the Adviser and the administration of its business, including information systems, bookkeeping, record keeping and clerical services;

B. Furnish to Adviser, to the extent required, office equipment and supplies;

C. Assist Adviser in its compliance with reporting and other administrative obligations imposed by statute, regulations or associations of which Adviser is a member;

D. Provide marketing and sales services as may be requested by Adviser;

E. Obtain for Adviser investment-related research, analysis and informational services as may be requested in connection with its businesses as a registered or relying adviser;

F. Arrange for and monitor legal, accounting and other professional services which may be required by Adviser.

G. Provide payroll processing and processing and payment of third party invoices.

H. Provide and maintain employee benefit plans and other human resource compliance requirements.

I. Provide Adviser with appropriate levels of insurance including Directors and Officers insurance and Professional Liability insurance.

J. Complete all required income and other required tax filings.

K. Such other services as may be agreed to by the Parties.

Exhibit B

Medley Facilities

1. 280 Park Avenue
   6th Floor East
   New York, NY 10017

2. 600 Montgomery Street
   35th Floor
   San Francisco, CA 94111

Exhibit C

License Agreement

Date: **[insert date]**

1. Grant of License. Subject to the terms and conditions of the Agreement including this Exhibit C, and for good and valuable consideration, the receipt of which is hereby acknowledged, Medley ("Licensor") hereby grants to each Adviser (as defined in that certain Services and Licensing Agreement, dated December 12, 2017 and effective as of January 1, 2017, each, a "Licensee"), and each Licensee hereby accepts from Licensor, a royalty-free, non-exclusive license to use the Licensed Mark in connection with lending, investment and related services, including without limitation uses relating to the operation of collective investment vehicles, (collectively, the "Services") and the advertising and promotion thereof (with respect to each Licensee, the "License"). The License granted hereby may not be sublicensed, assigned or transferred without Licensor's prior written consent, which consent may be withheld or conditioned in Licensor's sole and absolute discretion. Notwithstanding the foregoing, subject to the provisions of (and Licensor's termination rights under) Section 8 below, Licensor hereby consents to the assignment and transfer of the License by any Licensee hereunder in connection with the public issuance of stock or other equity securities in such Licensee or a successor to such Licensee to be formed in connection with the formation of a business development company or other pooled investment vehicle pursuant to the Investment Company Act of 1940, provided that an Affiliate (as defined below) of Licensor is the investment adviser to such business development company. Entities related to Licensor may obtain rights under this License Agreement as individual licensees by agreeing in writing to be bound by the terms of the Agreement and this Exhibit C by executing a written joinder agreement substantially in the form attached hereto as Annex 1 subject to execution of the same by Licensor.

2. Territory. Subject to the other terms and conditions hereof, Licensees may use the Licensed Mark solely in the following geographical territory (the "Territory"): worldwide.

3. Ownership. Licensees acknowledge the ownership of the Licensed Mark by Licensor, agree that they will do nothing inconsistent with such ownership and that all use of the Licensed Mark by Licensees shall inure to the benefit of and be on behalf of Licensor, and agree to assist Licensor in recording this License Agreement with appropriate government authorities if necessary in Licensor's discretion. Licensees shall not attack the title of Licensor to the Licensed Mark or the validity of this license.

4. Quality Standards. Licensees agree that the nature and quality of all the Services marketed sold or otherwise provided by Licensees in connection with the Licensed Mark shall conform to the quality of the goods and/or services as provided by Licensor, and any other standards set by Licensor from time to time in Licensor's sole discretion. Licensees shall cooperate with Licensor in facilitating Licensor's control of such nature and quality, permit reasonable inspection of Licensees' operations, and supply Licensor with specimens of use of the Licensed Mark upon request. Licensees shall comply with all applicable laws, rules and regulations and obtain all appropriate government licenses, consents and approvals pertaining to the sale, provisions, distribution, and

advertising of the Services covered by this license.

5. Form of Use. Licensees shall use the Licensed Mark only in the form and manner and with appropriate legends as prescribed from time to time by Licensor, and shall not use any other trademark or service mark in combination the Licensed Mark without prior written approval of Licensor.

6. Infringement Proceedings. A Licensee shall notify Licensor of any unauthorized use of the Licensed Mark by others promptly as such unauthorized use comes to a Licensee's attention. Licensor shall have the sole right and discretion to bring infringement or unfair competition proceedings involving the Licensed Mark.

7. Term. Unless terminated pursuant to Section 8, the License and this Exhibit C shall be in force as between Licensor and each individual Licensee for a term of one (1) year from the date which Licensor and such Licensee executed the Agreement and Annex 1 hereto, and shall automatically renew for successive periods of one (1) year unless such Licensee gives notice of its election not to renew. For the avoidance of doubt, upon such notice, the License and this Exhibit C shall only terminate with respect to the Licensee giving notice of election not to renew and shall continue in force between the Licensor and the other Licensees.

8. Termination.

8.1 The License granted to any individual Licensee shall automatically terminate (a) if the investment adviser to such Licensee or its successor in interest is not the Licensor or an Affiliate (as defined below) of Licensor or (b) upon termination of the Agreement with respect to such Licensee.

8.2 Licensor shall have the right to terminate the License and this Exhibit C with respect to an individual Licensee for any reason on giving such Licensee not less than 30 days' written notice. Licensor shall have the right to terminate the License and this Exhibit C immediately with respect to an individual Licensee in the event of the occurrence of any of the following with respect to such Licensee: (a) a Change in Control (as defined below) of such Licensee; (b) such Licensee's failure to cure its material breach of any of the provisions of the Agreement or this Exhibit C within 30 days after written notice; (c) three material breaches of any of the provisions of the Agreement or this Exhibit C, regardless of whether any or all are cured; (d) such Licensee's material breach of a provision of the Agreement or this Exhibit C which by its nature is incurable; or (e) such Licensee challenges the validity or Licensor's ownership of the Licensed Mark.

8.3 "Change in Control" means (i) any acquisition, in one transaction or a series of transactions, of an entity by means of merger or other form of corporate reorganization in which outstanding securities of the entity are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring person or entity or Affiliate; (ii) the transfer (whether by merger, consolidation or otherwise), in one transaction or a series of transactions, to a person or group of affiliated persons of the entity's securities if the holders of the outstanding securities of the entity prior to such transfer would hold 50% or less of the outstanding voting securities of the entity (or the surviving or acquiring entity) thereafter; (iii) a sale, exclusive license or transfer of all or substantially all of the assets of the entity pertaining to the subject matter hereof to any person; or (iv) any similar transaction resulting in the change of legal or business ownership or control of an entity or person. Notwithstanding anything to the contrary herein, a Change in Control shall not include a transfer pursuant to the public issuance of stock or

other equity securities in a Licensee or a successor entity to a Licensee to be formed in connection with the formation of a business development company pursuant to the Investment Company Act of 1940, provided that Licensor or an Affiliate of Licensor is the investment adviser to such business development company.

8.4 "Affiliate" means, with respect to a party, any other Person that, directly or indirectly, controls, is under common control with, or is controlled by, such specified Person. A Person shall be deemed to control another Person if its owns more than 66% of the capital stock or other equity interests of such other Person or possesses, directly or indirectly, the power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise) of such other Person. "Person" means an individual, partnership, limited partnership, corporation, limited liability company, joint stock company, unincorporated organization or association, trust or joint venture, or any other similar entity as the context reasonably permits.

9. Effect of Termination.

9.1 Upon termination of this License and this Exhibit C or the Agreement, a Licensee shall immediately discontinue all use of the Licensed Mark and any terms confusingly similar thereto, cooperate with Licensor or its appointed agent to apply to the appropriate authorities to cancel recording of this License Agreement from all government records, if any, and destroy all printed materials bearing the Licensed Mark. All rights in the Licensed Mark and the goodwill associated therewith, whether arising out of Licensee's use of the Licensed Mark or otherwise, shall inure to the benefit of and remain the property of Licensor.

9.2 Any rights or obligations of the parties in this Exhibit C which, by their nature, should survive termination or expiration of this License Agreement will survive any such termination or expiration, including the rights and obligation set forth in this Section 9.2, Section 3, and Section 10.

10. Miscellaneous.

(a) Neither this Exhibit C nor the Agreement creates in any way the relationship of principal and agent, franchise, joint venture, or partnership. None of the parties shall act or attempt to act, or represent themselves to others, as agent of the other parties or in any manner assume or create any obligation on behalf of or in the name of the other parties, pursuant to this License Agreement. None of the parties shall be liable for any debts or obligations of the other parties unless expressly assumed in writing.

(b) All rights and remedies conferred under the Agreement and/or this Exhibit C and by law shall be cumulative.

(c) No waiver of a default by a party shall be construed as a waiver of any other provision, performance, or default.

(d) If any provision is held to be unenforceable, the balance of the Agreement and this Exhibit C shall continue in full force and effect; provided however that if the provision so held to be invalid or unenforceable granted a party a material and fundamental right, then such party may elect to terminate the Agreement and/or this Exhibit C and the License, respectively, immediately.

(e) The Agreement, including all Exhibits, Annexes, Schedules and Appendixes thereto, constitutes the entire agreement of the parties with respect to the subject matter thereof, superseding all prior or contemporaneous written or oral agreements.

(f) This License Agreement shall inure to the benefit of and be binding upon each of the parties hereto, and their heirs, successors and permitted assigns. This License Agreement may not be assigned by a Licensee without the prior written consent of Licensor, which consent Licensor may withhold in its sole discretion. Notwithstanding the foregoing, subject to the terms and conditions set forth in Section 8, above, a Licensee may assign this License Agreement to an Affiliate of Licensee or a successor in interest to all or substantially all of a Licensee's assets.

(g) This Exhibit C, the License and the Agreement, including all matters relating to the validity, construction, performance, and enforcement hereof and thereof, shall be governed by the laws of the State of Delaware without regard to its conflicts of law rules, and all disputes shall be resolved in courts located in the State of Delaware, to whose jurisdiction the parties hereby consent.

Annex 1 to Exhibit C

The undersigned does hereby represent and warrant and agree that the undersigned, as a condition to becoming a Licensee, has received a copy of the License Agreement, Exhibit C to the Services and Licensing Agreement dated December 12, 2017, and effective as of January 1, 2017, and, if applicable, any and all amendments thereto (together, the "License Agreement"), and does hereby agree that, along with the other parties to the License Agreement, the undersigned shall be a Licensee under the License Agreement and shall be subject to and comply with all terms and conditions of the License Agreement in all respects as if the undersigned had executed the License Agreement on the original date thereof, and that the undersigned is and shall be bound by all of the provisions of the License Agreement from and after the date of execution hereof.

Name of Entity:
as Licensee

By: _____

Name:

Title:

Date:

Agreed and accepted as of the date specified above:

Medley Capital LLC,
as Licensor

By: _____

Name:

Title:

Exhibit D

Form of Joinder

The undersigned does hereby represent, warrant and agree that the undersigned, as a condition to becoming a party to that certain Services and Licensing Agreement dated December 12, 2017, and effective as of January 1, 2017, and, if applicable, any and all amendments thereto (together, the "License Agreement"), has received a copy of the Agreement, and does hereby agree that, along with the other parties to the Agreement, the undersigned shall be a party under the Agreement and shall be subject to and comply with all terms and conditions of the Agreement in all respects as if the undersigned had executed the Agreement on the original date thereof, and that the undersigned is and shall be bound by all of the provisions of the Agreement from and after the date of execution hereof.

Name of Entity:

By: _____

Name:

Title:

Date:

Agreed and accepted as of the date specified above:

MEDLEY LLC

BY: Medley Management Inc.
its Managing Member

By: _____
Name:
Title:

Exhibit E

SIC Advisors LLC Agreement

EXECUTION VERSION

LIMITED LIABILITY COMPANY AGREEMENT OF SIC ADVISORS LLC

THIS LIMITED LIABILITY COMPANY AGREEMENT ("Agreement") is made and entered into as of this 31st day of January, 2012, by and between MEDLEY LLC, a Delaware limited liability company ("Medley"), and STRATEGIC CAPITAL ADVISORY SERVICES, LLC, a Delaware limited liability company ("SCAS").

FACTUAL BACKGROUND

Medley intends to sponsor a publicly registered, non-listed business development company named Sierra Income Corporation (the "BDC") to be offered through the broker-dealer distribution channel and the registered investment adviser distribution channel. The Company will serve as an external investment advisor to the BDC. SCAS is experienced in providing non-investment advisory services in connection with the formation, organization, registration and operation of entities similar to the BDC. Medley and SCAS desire to enter into this Agreement to set forth their agreement as to the ownership and operation of the Company and their respective rights and obligations with respect to the Company and each other.

ARTICLE 1 DEFINITIONS

The following terms used in this Agreement have the following meanings:

"Act" means the Delaware Limited Liability Company Act, as the same may be amended from time to time.

"Adjusted Capital Account Deficit" means, with respect to each Member, the deficit balance, if any, in such Member's Capital Account as of the end of the applicable Fiscal Year or other period, after giving effect to the following adjustments:

(a) Credit to such Capital Account any amounts such Member is obligated to restore pursuant to any provisions of this Agreement or is deemed to be obligated to restore pursuant to the penultimate sentences of Sections 1.704-2(g)(1) and 1.704-2(i)(5) of the Regulations; and

(b) Debit to such Capital Account the items described in paragraphs (4), (5) and (6) of Section 1.704-1(b)(2)(ii)(d) of the Regulations.

"Advisory Agreement" means the investment advisory agreement to be entered into between the Company and the BDC.

"Affiliate" of a Person means: (i) in the case of an individual, any relative of such Person; (ii) any officer, director, trustee, partner, member, manager or holder of ten percent (10%) or more of any class of the voting securities of or equity interest in such Person; (iii) any corporation, partnership, limited liability company, trust or other entity controlling, controlled by or under common control with such Person; or (iv) any officer, director, trustee, partner, member, manager or

EXHIBIT 5

holder of ten percent (10%) or more of the outstanding voting securities of any corporation, partnership, limited liability company, trust or other entity controlling, controlled by or under common control with such Person. For purposes of this definition, the term "controlling," "controlled by," or "under common control with" mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person or entity, whether through the ownership of voting securities, by contract, or otherwise.

"Agreement" means this Limited Liability Company Agreement of SIC Advisors LLC, as originally executed and as amended and restated from time to time hereafter.

"Book Basis" means, with respect to any asset of the Company, the adjusted basis of such asset for federal income tax purposes. If any asset is contributed to the Company, the initial Book Basis of such asset will equal its fair market value on the date of contribution. If the Book Basis of a Company asset is adjusted pursuant to Section 1.704-1(b) of the Regulations to reflect the fair market value of such asset, the Book Basis of such asset will be adjusted to equal its respective fair market value as of the time of such adjustment. The Book Basis of all such assets of the Company will thereafter be adjusted by depreciation as provided in Section 1.704-1(b)(2)(iv)(g) of the Regulations and any other adjustments to the basis of such assets other than depreciation or amortization.

"Business" has the meaning specified in Article 3 of this Agreement.

"Capital Account" means an account for each Member to be determined in all events solely in accordance with the rules set forth in Section 1.704-l(b)(2)(iv) of the Regulations; and, in the event that the treatment called for in such regulation is inconsistent with the provisions of this Agreement, the rules of such Regulation control. Any reference in any section of this Agreement to the Capital Account of a Member shall be deemed to refer to such Capital Account as the same may be credited or debited from time to time as so provided.

"Capital Contribution" means the amount of money or the fair market value of other property (net of liabilities secured by such property that the Company is considered to assume or take subject to under Section 752 of the Code) actually contributed to the Company by a Member.

"Certificate" means the Company's Certificate of Formation, as the same may be amended from time to time.

"Change of Control" means the occurrence of any transaction where the Members as of the date of this Agreement own less than 50% of the Interests of the Company.

"Code" means the Internal Revenue Code of 1986, as amended.

"Company" means SIC Advisors LLC, a Delaware limited liability company.

"Company Minimum Gain" has the meaning given to "partnership minimum gain" set forth in Section 1.704-2(d) of the Regulations.

"Distributable Cash" means an amount equal to all fees or other amounts received by the Company from the BDC pursuant to the Advisory Agreement other than any amounts referenced in Section 9.6.

"Economic Interest" means a Member's or Economic Interest Owner's share of one or more of the Company's Net Profits, Net Losses and rights to distributions of the Company's assets pursuant to this Agreement and the Act, but shall not include any right to vote on, consent to or otherwise participate in any decision of the Members.

"Economic Interest Owners" means transferees of Interests who have not been admitted to the Company as Members.

"Event of Dissociation" has the meaning specified in Section 13.1.

"FINRA" means the Financial Industry Regulatory Authority or any successor organization.

"Fiscal Year" means the accounting period adopted by the Company as its annual year which is the calendar year.

"Formation Services" has the meaning specified in Section 6.5.

"Gross Advisory Fees" means the gross proceeds received by the Company from the BDC pursuant to the Advisory Agreement, including without limitation, from the base management fee, subordinated incentive fees on income, incentive fees on capital gains and any other subordinated incentive fees set forth in the Advisory Agreement.

"Interest" means a Member's entire interest in the Company and includes both such Member's Economic Interest and any right of such Member to vote upon, consent to, or direct the management of the Company.

"Liquidators" has the meaning specified in Section 13.3.

"Manager" means a Person designated as a manager of the Company pursuant to this Agreement.

"Member" means, collectively, Medley, SCAS, and any other Person subsequently admitted to the Company as a Member in accordance with this Agreement.

"Member Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability.

"Member Nonrecourse Debt" has the meaning given to "partner nonrecourse debt" set forth in Section 1.704-2(b)(4) of the Regulations.

"Member Nonrecourse Deductions" has the meaning given to "partner nonrecourse deductions" set forth in Section 1.704-2(i) of the Regulations.

"Net Profits" and "Net Losses" means, for each Fiscal Year or other period, an amount equal to the Company's taxable loss or income, respectively, for such year or period, determined in accordance with Section 703(a) of the Code (and for this purpose, all items of income, gain, loss, or reduction required to be stated separately pursuant to Section 703(a)(1) of the Code shall be included in taxable income or loss), with the following adjustments:

(a) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Net Profits or Net Losses shall be added to such taxable income or loss;

(b) Any expenditures of the Company described in Section 705(a)(2)(B) of the Code or treated as 705(a)(2)(B) expenditures pursuant to Section 1.704-1(b)(2)(iv)(i) of the Regulations, and not otherwise taken into account in computing Net Profits or Net Losses shall be subtracted from such taxable income or loss;

(c) In the event the Book Basis of any Company asset is adjusted in compliance with Section 1.704-1(b) of the Regulations, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Net Profits or Net Losses;

(d) Gain or loss resulting from any disposition of Company property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Book Basis of the property disposed of notwithstanding that the adjusted tax basis of such property differs from its Book Basis;

(e) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, whenever the Book Basis of an asset differs from its adjusted basis for federal income tax purposes at the beginning of a Fiscal Year, depreciation, amortization or other cost recovery deductions allowable with respect to an asset shall be an amount that bears the same ratio to such beginning Book Basis as the federal income tax depreciation, amortization or other cost recovery deduction for such year bears to such beginning adjusted tax basis; provided, however, that if the adjusted basis for federal income taxes of an asset at the beginning of a year is zero, depreciation, amortization or other cost recovery deductions shall be determined by reference to the beginning Book Basis of such asset using any reasonable method selected by the Manager; and

(f) Any amount allocated pursuant to Section 10.4 shall not be included in Net Profits or Net Losses.

"Nonrecourse Deductions" has the meaning set forth in Sections 1.704-2(b)(1) and 1.704-2(c) of the Regulations.

"Nonrecourse Liability" has the meaning set forth in Section 1.704-2(b)(3) of the Regulations.

"Ownership Percentage" means the total percentage of the Interests owned by a Member, as initially set forth on Exhibit A to this Agreement and as may be amended from time to time.

"Permitted Disposition" means a disposition by an assignment of an Economic Interest in the Company (evidenced by the Interest to be assigned):

(a) to an existing Member effected pursuant to the provisions of this Agreement; or

(b) to a member of such Member's immediate family, as defined in the regulations promulgated under Section 16 of the Securities Exchange Act of 1934, or to any trust for his or their benefit, or to the personal representative of the estate of a deceased Member.

The foregoing notwithstanding, no Permitted Disposition entitles the transferee to the rights and benefits of a Member (but, rather, those of an Economic Interest Owner only), unless and until such transferee agrees in writing that such transferee will be bound by, and the Interest proposed to be transferred will be subject to, the restrictions on transfer in Article 12 of this Agreement and the transferee is admitted to the Company as a Member in the manner described in Article 12 hereof.

"Person" means an individual, corporation, partnership, association, limited liability company, joint stock company, trust or unincorporated organization.

"Regulations" means regulations (including temporary regulations) promulgated by the Department of Treasury of the United States in respect of the Code.

"Registration Statement" means the registration statement on Form N-2 (File No. 333-175624) filed with the U.S. Securities and Exchange Commission registering the initial public offering of shares of the BDC, as such registration statement may be amended from time to time.

"Reserves" means funds set aside and amounts allocated to reserves in amounts determined by the Manager (in its sole and absolute discretion) for working capital and to pay taxes, insurance, debt service or other costs or expenses (fixed or contingent) incident to the ownership or operation of the Company's Business.

"SC Distributors" means SC Distributors, LLC, a Delaware limited liability company.

"Subsidiary" means any corporation, limited liability company, partnership or other entity, other than the BDC, as to which the Company owns any shares, interests or other equity.

"SEC" has the meaning specified in Section 9.6(c).

"Tag Interests" has the meaning specified in Section 12.6.

"Tag Transferor Member" has the meaning specified in Section 12.6.

"Target Amount" has the meaning specified in Section 10.1(c).

"Tax Payment Loan" has the meaning specified in Section 9.5.

"Third Party Transferee" has the meaning specified in Section 12.6.

"Transaction Expenses" means the reasonable fees and costs relating to a merger or other business combination, including without limitation, internalization of the Company with the BDC, that are payable by the Company or any of its Subsidiaries to any financial advisor, broker or finder, or to any attorney, accountant, consultant, or other professional advisor.

"Withdrawing Member" shall have the meaning specified in Section 13.1.

"Withholding Tax Act" shall have the meaning specified in Section 9.5.

ARTICLE 2
FORMATION OF COMPANY

2.1 Formation. Seth Taube, as an "authorized person" within the meaning of the Act, executed, delivered and filed the Certificate with the Secretary of State of the State of Delaware on July 14, 2011. Upon the filing of the Certificate with the Secretary of State of the State of Delaware, Seth Taube's powers as an "authorized person" ceased, and the Manager thereupon became the designated "authorized person." The Manager shall execute, deliver and file any other certificates (and any amendments and/or restatements thereof) necessary for the Company to qualify to do business in any other jurisdiction in which the Company may wish to conduct business.

2.2 Name. The name of the Company is "SIC ADVISORS LLC".

2.3 Principal Place of Business. The principal place of business of the Company is 375 Park Avenue 33rd Floor, New York, New York 10152. The Company may locate its places of business and registered office at any other place or places as the Manager may from time to time deem advisable. The Manager shall provide prompt notice to each of the Members of any changes in the principal place of business or registered office of the Company.

2.4 Registered Office and Registered Agent. The Company's initial registered office in the State of Delaware is 2711 Centerville Road, Wilmington, Delaware 19808. The Company's initial registered agent is Corporation Service Company. The registered office and registered agent may be changed from time to time pursuant to the Act and the applicable rules promulgated thereunder. The Manager shall cause the Company to qualify to do business and appoint registered agents in other states as required.

2.5 Term. The term of the Company commenced on the date the Certificate was filed with the Secretary of State of Delaware and shall continue until the Company is dissolved and its affairs wound up in accordance with the provisions of this Agreement.

ARTICLE 3
BUSINESS OF COMPANY

The business of the Company (the "Business") is to act as the external advisor to the BDC, to receive compensation as the external investment advisor to the BDC (including, without limitation, any amounts that may be payable in connection with any internalization of the Company with the BDC), to hold a direct or indirect interest in the BDC and to ultimately sell or otherwise dispose of its direct or indirect interest in the BDC. In furtherance of the foregoing, the Company may exercise

all powers which may be legally exercised by limited liability companies under the Act, and may engage in all activities necessary, customary, convenient, or incident to any of the foregoing.

ARTICLE 4
NAMES AND ADDRESSES OF MEMBERS

The names and addresses of the Members are specified on Exhibit A.

ARTICLE 5
RIGHTS AND DUTIES OF THE MANAGER

5.1 Management. The Company shall be managed by one Manager. The initial Manager shall be Medley. Subject to any actions or decisions that this Agreement expressly requires the approval of the Members or any nonwaivable provisions of applicable law, the Manager shall have the complete power and authority to take any action and to make any decision on behalf of the Company without any further authorization or consent from any Member. The Manager may from time to time delegate certain of its management rights and powers to officers of the Company appointed by the Manager. Medley may not be removed as Manager unless it either suffers an Event of Dissociation or provides its prior written consent. Moreover, so long as Medley serves as Manager, no other Manager shall be appointed or elected by the Members without Medley's prior written consent.

5.2 Liability for Certain Acts. No Manager has guaranteed or will have any obligation with respect to the return of a Member's Capital Contributions or profits from the operation of the Company. Notwithstanding anything to the contrary contained in the Act, no Manager shall be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member except loss or damage resulting from fraud, intentional misconduct, misappropriation, gross negligence or knowing violation of law or a transaction for which such Manager received a personal benefit in violation or breach of the material provisions of this Agreement.

5.3 Managers Have No Exclusive Duty to Company. A Manager is not required to manage the Company as the Manager's sole and exclusive function, and may have other business interests and may engage in other activities in addition to those relating to the Company, even if competitive with the business of the Company. Neither the Company nor any Member shall have any right, by virtue of this Agreement, to share or participate in other investments or activities of a Manager or to the income or proceeds derived therefrom, other than as set forth herein. No Manager or any of their Affiliates shall incur any liability to the Company or to any of the Members as a result of engaging in any other business or ventures.

5.4 Indemnity of the Manager, Members, Employees and Other Agents. To the fullest extent permitted by the Act, the Company shall indemnify each Manager and Member and make advances for expenses to each Manager and Member arising from any loss, cost, expense, damage, claim or demand, in connection with the Company, the Manager's or Member's status as a Manager or Member of the Company, the Manager's or Member's participation in the management, business and affairs of the Company or such Manager's or Member's activities on behalf of the Company. To the fullest extent permitted by the Act, the Company shall also indemnify its Officers, employees and other agents who are not a Manager or Member and each Manager's and Members' officers,

employees and other agents arising from any loss, cost, expense, damage, claim or demand in connection with the Company, any such Person's participation in the business and affairs of the Company or such Person's activities on behalf of the Company. Notwithstanding anything to the contrary contained herein, no Person is entitled to be indemnified by the Company pursuant to this Section 5.4 for any loss or damage resulting from fraud, intentional misconduct, misappropriation, gross negligence or knowing violation of law or a transaction for which such Person received a personal benefit in violation or breach of this Agreement. If the Company advances expenses to any Manager, Member or other Person in accordance with this Section 5.4, such Person will furnish the Company with (a) such Person's written affirmation of a good faith belief that it is entitled to indemnification under the standards set forth in this Agreement and (b) a written agreement to repay such advance if it is ultimately determined that such Person was not entitled to indemnification under the standards set forth in this Agreement.

5.5 Officers.

(a) The Manager may, but is not be required to, create such offices as it deems appropriate, including, but not limited to, Chief Executive Officer, President, Executive Vice President, Senior Vice President(s), Vice President(s), Secretary and Treasurer. The individuals designated as officers shall be referred to as "Officers" and have such duties as are assigned to them by the Manager from time to time. All officers shall serve at the pleasure of the Manager, and the Manager may remove any officer from office without cause. Any officer may resign at any time.

(b) As of the date of this Agreement, the following individuals each are appointed to the office set forth opposite his name below, to serve in such office until the earlier of his death, resignation or removal by the Manager:

Seth Taube – Chief Executive Officer

Richard Allorto – Chief Financial Officer

Brook Taube – Executive Vice President

Patrick J. Miller – Executive Vice President

Kenneth Jaffe – Executive Vice President

ARTICLE 6
RIGHTS AND OBLIGATIONS OF MEMBERS

6.1 Limitation on Liability. Each Member's liability is limited as set forth in the Act.

6.2 No Liability for Company Obligations. No Member will have any personal liability for any debts, obligations or losses of the Company (other than debts for which the Member specifically agreed to be personally liable) solely by reason of being a Member of the Company.

6.3 List of Members. Upon written request of any Member, the Company shall provide a list showing the names, addresses and Economic Interest of all Members and the other information required by the Act and maintained pursuant to Section 11.2.

6.4 Approvals of Members. Subject to this Section 6.4 and Section 14.14 of this Agreement, the Members have no right to approve any actions of the Manager or the Company. Without the consent of SCAS, the Company may not, and the Manager and Medley may each not, cause the Company to recommend that the BDC amend the Advisory Agreement to materially change the Gross Advisory Fees payable by the BDC to the Company.

6.5 Further Capital Contributions. SCAS agrees to perform the services set forth in Exhibit B to this Agreement (the "Formation Services") and Medley agrees to make the Capital Contributions set forth in Section 8.2(a) herein.

6.6 Advisory Services. SCAS agrees to perform the non-investment advisory services set forth in Exhibit C to this Agreement for the Company pursuant to the Company's obligations to the BDC in accordance with the Advisory Agreement.

ARTICLE 7
MEETINGS OF MEMBERS

7.1 Meetings. Meetings of the Members, for any purpose or purposes, may be called by any Member acting through such Member's authorized agent.

7.2 Place of Meetings. The Member calling a meeting may designate any place within New York County, New York as the place of meeting for any meeting. In lieu of any procedures contained in the Act, Members may also meet by conference telephone call or other means of electronic communication if all Members can hear one another on such call and the requisite notice is given or waived. If no designation is made for a place of meeting it shall be at the principal executive offices of the Company.

7.3 Notice of Meetings. Notice of meetings may be given in writing or orally. Any notice must be not less than 48 hours in advance of the proposed meeting and must state the place, day and hour of any meeting of the Members, as determined by the Manager. Notices can be delivered either personally, by reputable overnight delivery company or by mail. If mailed, a notice will be deemed to be delivered effective two (2) days after mailing. Any notice provided in accordance with this Section shall be effective notwithstanding anything in the Act to the contrary.

7.4 Meeting of all Members. If all of the Members meet at any time and place and consent to the holding of a meeting at such time and place, such meeting shall be valid without call or notice, and at such meeting any lawful action may be taken.

7.5 Manner of Acting. Except as otherwise provided in this Agreement, all matters on which the Members are entitled to vote must act by unanimous vote. Except as otherwise provided herein, Members who have an interest (economic or otherwise) in the outcome of any particular matter upon which the Members vote or consent may vote or consent upon any such matter and their

vote or consent, as the case may be, is to be counted in the determination of whether the requisite matter was approved by the Members.

7.6 Proxies. A Member may vote its Interests in person or by proxy executed in writing by the Member or by a duly authorized attorney-in-fact. Such written proxy shall be delivered to the Company.

7.7 Action by Members Without a Meeting. Action required or permitted to be taken by the Members at a meeting may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken, signed by the Members required to approve such action have signed the consent, unless the consent specifies a different effective date. The Manager shall provide prompt notice of the taking of such action to each Member that did not sign such consent. The record date for determining Members entitled to take action without a meeting shall be the date the first Member signs a written consent.

7.8 Waiver of Notice. In lieu of any procedures contained in the Act, when any notice is required to be given to any Member, a waiver of such notice in writing signed by the Person entitled to such notice, whether before, at, or after the time stated therein, is the equivalent to the giving of such notice.

ARTICLE 8
CONTRIBUTIONS OF CAPITAL TO THE COMPANY AND CAPITAL ACCOUNTS

8.1 Members' Initial Capital Contributions. Simultaneously with the execution of this Agreement, (a) Medley has contributed to the Company, as its initial Capital Contribution cash or other immediately available funds in the amount of One Hundred Sixty Thousand Dollars ($160,000), and (b) SCAS has contributed to the Company, as its initial Capital Contribution, cash or other immediately available funds in the amount of Forty Thousand Dollars ($40,000).

8.2 Further Capital Contributions by Medley. Medley shall make Capital Contributions to the Company, by wire transfer to an account of the Company designated by the Company, in a timely fashion so as to enable the Company to fund the following obligations in the ordinary course:

(a) At the time specified, and subject to achievement or satisfaction of any matter specified in Section 9.6(c) hereof, all amounts necessary for the Company to make distributions in accordance with Section 9.6(c);

(b) All amounts necessary to fund payment of expenses incurred in connection with the BDC; and

(c) Medley shall contribute all further Capital Contributions reasonably necessary for the successful operation of the Business.

8.3 Failure of Medley to Fund Capital Contributions. If Medley fails to fund any Capital Contribution as provided in Section 8.2 at such times as set forth herein, and such failure continues

for thirty (30) days after written notice SCAS may exercise any of the rights and remedies it has under this Agreement or that are available to it under applicable law.

ARTICLE 9
DISTRIBUTIONS TO MEMBERS

9.1 Distributions of Distributable Cash. The Company shall distribute, from time to time, Distributable Cash to the Members in accordance with their Ownership Percentages.

9.2 Limitation Upon Distributions. No distribution shall be made to the Members if prohibited by the Act.

9.3 Interest On and Return of Capital Contributions. No Member shall be entitled to interest on such Member's Capital Contribution or to a return of its Capital Contributions, except as otherwise specifically provided for herein.

9.4 Priority and Return of Capital. No Member shall have priority over any other Member, either as to the return of Capital Contributions or as to Net Profits, Net Losses or distributions, except as otherwise specifically provided for herein. This Section shall not apply to loans (as distinguished from Capital Contributions) a Member has made to the Company.

9.5 Tax Withholding. Unless treated as a Tax Payment Loan, any amount paid by the Company for or with respect to any Member or Economic Interest Owner on account of any withholding tax or other tax payable with respect to the income, profits or distributions of the Company pursuant to the Code, the Treasury Regulations, or any state or local statute, regulation or ordinance requiring such payment (a "Withholding Tax Act") will be treated as a distribution to such Member or Economic Interest Owner for all purposes of this Agreement, consistent with the character or source of the income, profits or cash which gave rise to the payment or withholding obligation. To the extent that the amount required to be remitted by the Company under the Withholding Tax Act exceeds the amount then otherwise distributable to such Member or Economic Interest Owner, the excess will constitute a loan from the Company to such Member or Economic Interest Owner (a "Tax Payment Loan") which is payable upon demand by the Company and bears interest, from the date that the Company makes the payment to the relevant taxing authority, at the rate of 12% per annum, compounded monthly. So long as any Tax Payment Loan or the interest on such loan remains unpaid, the Company shall make future distributions due to such Member or Economic Interest Owner under this Agreement by applying the amount of any such distribution first to the payment of any unpaid interest on all Tax Payment Loans of such Member or Economic Interest Owner and then to the repayment of the principal of all Tax Payment Loans of such Member or Economic Interest Owner. The Manager may take all actions necessary to enable the Company to comply with the provisions of any Withholding Tax Act applicable to the Company and to carry out the provisions of this Section. Nothing in this Section creates any obligation on the Manager to borrow funds from third parties in order to make any payments on account of any liability of the Company under a Withholding Tax Act.

9.6 Special Distributions.

(a) All amounts that are paid to the Company from the BDC as (A) a reimbursement of (i) any organization and offering expenses of the BDC, (ii) general and administrative expenses incurred or funded by the Company, or (iii) any other amounts advanced or funded by the Company to the BDC, or (B) contributed to the Company by Medley pursuant to Sections 8.2(b) and (c) herein, including any gains related thereto, shall be distributed to Medley.

(b) Notwithstanding Section 9.6(a), upon a sale of all or substantially all of the assets of the Company, a transaction involving the merger, sale or consolidation of the Company or the dissolution of the Company, the gross proceeds less Transaction Expenses paid by the Company from such sale, merger, consolidation or dissolution shall be distributed to the Members in accordance with their Ownership Percentages. Moreover, any amounts received by the Company from its direct or indirect ownership of any equity interest in the BDC shall be distributed in accordance with their Ownership Percentages.

(c) Notwithstanding Section 9.6(a), within ten (10) days after (i) the U.S. Securities and Exchange Commission (the "SEC") has notified the Company, the BDC or the Company's or the BDC's counsel, whether orally or in writing, that it has no further comments to the Registration Statement and that the BDC is permitted to request acceleration of effectiveness of the Registration Statement and (ii) FINRA has notified the Company, SC Distributors or the Company's or SC Distributor's counsel, whether orally or in writing, that it is prepared to issue a "no objections" letter. The Company shall distribute Five Hundred Thousand Dollars ($500,000) in cash or other immediately available funds to SCAS.

(d) Notwithstanding Section 9.6(a), twenty percent (20%) of the Gross Advisory Fees shall be distributed to SCAS and 80% of the Gross Advisory Fees shall be distributed to Medley.

(e) Notwithstanding any provisions in, and prior to any distributions in accordance with, Sections 9.6(a) and (b) herein, in the event of a failure of Medley to fund any amount required to be funded under Section 8.2(a) and such failure continues for thirty (30) days after Medley's receipt of written notice from SCAS that sets forth such failure, then any amount distributable to SCAS under Section 9.6(c) and Section 9.6(d), as applicable, shall be distributed to SCAS prior to any other distributions under this Section 9.6 or under Section 9.1.

ARTICLE 10
ALLOCATIONS OF NET PROFITS AND NET LOSSES

10.1 Allocation of Net Profits and Net Losses. The Company's Net Profit and Net Loss attributable to each Fiscal Year shall be determined as though the books of the Company were closed as of the end of such Fiscal Year. The rules of this Section 10.1 shall apply except as provided in Section 10.4.

(a) For each Fiscal Year, after all allocations have been made pursuant to Section 10.4, items comprising Net Profit or Net Loss shall be allocated so as to make, as nearly as possible, each Member's Capital Account balance equal to the result (be it positive, negative or zero) of subtracting (i) the sum of (x) such Member's share of Company Minimum Gain and (y) such

Member's share of Member Minimum Gain, from (ii) such Member's Target Amount (as defined below) at the end of such Fiscal Year.

(b) Except to the extent otherwise required by applicable law: (i) in applying subsection (a), to the extent possible each item comprising Net Profit or Net Loss shall be allocated among the Members in the same proportions as each other such item, and, to the extent permitted by law, each item of credit shall be allocated in such proportions; and (ii) to the extent necessary to produce the result prescribed by subsection (a), items of income and gain shall be allocated separately from items of loss and deduction, in which event the proportions applicable to items of income and gain shall (to the extent permitted by law) be applicable to items of credit.

(c) For these purposes, the "Target Amount" of a Member at the end of any Fiscal Year means the amount which such Member would then be entitled to receive if, immediately following such Fiscal Year: (i) all of the assets of the Company were sold for cash equal to their respective Book Basis (or in the case of assets subject to a Nonrecourse Liability or a "partner nonrecourse debt liability" as defined in Section 1.704-2 of the Regulations, the amount of such liabilities if greater than the aggregate book values of such assets); and (ii) the proceeds of such sale were applied to pay all debts of the Company with the balance distributed as provided in Sections 9.1 and 9.6, provided, however, that if the sale described in clause (i) would not generate proceeds sufficient to pay all debts of the Company, the Members shall be considered entitled in the aggregate (and as among them in proportion to their respective Ownership Percentages) to receive, pursuant to Sections 9.1 and 9.6, a negative amount equal to the excess of such debts over such proceeds.

10.2 Limitation on Loss Allocations. Notwithstanding anything in this Agreement to the contrary, no loss or item of deduction shall be allocated to a Member if such allocation would cause such Member to have an Adjusted Capital Account Deficit as of the last day of the Fiscal Year or other period to which such allocation relates. Any amounts not allocated to a Member pursuant to the limitations set forth in this paragraph shall be allocated to the other Members to the extent possible without violating the limitations set forth in this paragraph, and any amounts remaining to be allocated shall be allocated among the Members in accordance with the provisions of Section 10.1.

10.3 Intention and Construction of Allocations. It is the intention of the Members to allocate Net Profits and Net Losses in such a manner as to cause each Member's Capital Account to always equal the amount of cash such Member would be entitled to receive if the Company sold its assets for their Book Basis and, after satisfying all Company liabilities, the proceeds from such sale, as well as all other funds of the Company, were then distributed to the Members pursuant to Sections 9.1 and 9.6. These provisions shall be so interpreted as necessary to accomplish such result.

10.4 Special Allocations. The following special allocations shall be made in the following order:

(a) Minimum Gain Chargeback. Except as otherwise provided in Section 1.704-2(f) of the Regulations, in the event there is a net decrease in Company Minimum Gain during a Fiscal Year, each Member shall be allocated (before any other allocation is made pursuant to this Article 10) items of income and gain for such year (and, if necessary, for subsequent years) equal to that Member's share of the net decrease in Company Minimum Gain.

(i) The determination of a Member's share of the net decrease in Company Minimum Gain shall be determined in accordance with Regulations Section 1.704-2(g).

(ii) The items to be specially allocated to the Members in accordance with this Section 10.4(a) shall be determined in accordance with Regulation Section 1.704-2(f)(6).

(iii) This Section 10.4(a) is intended to comply with the Minimum Gain chargeback requirement set forth in Section 1.704-2(f) of the Treasury Regulations and shall be interpreted consistently therewith.

(b) Member Minimum Gain Chargeback.

(i) Except as otherwise provided in Section 1.704-2(i)(4), in the event there is a net decrease in Member Minimum Gain during a Fiscal Year, each Member who has a share of that Member Minimum Gain as of the beginning of the year, to the extent required by Regulation Section 1.704-2(i)(4) shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) equal to that Member's share of the net decrease in Member Minimum Gain.

(ii) Allocations pursuant to this subparagraph (b) shall be made in accordance with Regulation Section 1.704-2(i)(4). This subsection 10.4(b) is intended to comply with the requirement set forth in Regulation Section 1.704-2(i)(4) and shall be interpreted consistently therewith.

(c) Qualified Income Offset Allocation. In the event any Member unexpectedly receives any adjustments, allocations or distributions described in Regulation Sections 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), or 1.704-1(b)(2)(ii)(d)(6) which would cause such Member to have an Adjusted Capital Account Deficit, items of Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate such Adjusted Capital Account Deficit as quickly as possible. This Section 10.4(c) is intended to constitute a "qualified income offset" in satisfaction of the alternate test for economic effect set forth in Regulation Section 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

(d) Gross Income Allocation. In the event any Member has a deficit Capital Account at the end of any Fiscal Year which is in excess of the sum of (i) any amounts such Member is obligated to restore pursuant to this Agreement, plus (ii) such Member's distributive share of Company Minimum Gain as of such date, plus (iii) such Member's share of Member Minimum Gain determined pursuant to Regulation Section 1.704-2(i)(5), each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 10.4(d) shall be made only if and to the extent that such Member would have a deficit Capital Account in excess of such sum after all other allocations provided for in this Article 10 have been made, except assuming that Section 10.4(c), and this Section 10.4(d) were not contained in this Agreement.

(e) Allocation of Nonrecourse Deductions. Nonrecourse Deductions shall be allocated to the Members in accordance with their Ownership Percentages.

(f) Allocation of Member Nonrecourse Deductions. Member Nonrecourse Deductions shall be allocated as prescribed by the Regulations.

10.5 Built-In Gain or Loss/Section 704(c) Tax Allocations. In the event that the Capital Account of any Member is credited with or adjusted to reflect the fair market value of a Company property or properties, the Members' distributive shares of depreciation, depletion, amortization, and gain or loss, as computed for tax purposes, with respect to such property, shall be determined pursuant to Section 704(c) of the Code and the Regulations thereunder, so as to take account of the variation between the adjusted tax basis and book value of such property. Any deductions, income, gain or loss specially allocated pursuant to this Section 10.5 shall not be taken into account for purposes of determining Net Profits or Net Losses or for purposes of adjusting a Member's Capital Account.

10.6 Recapture. Ordinary taxable income arising from the recapture of depreciation and/or investment tax credit shall be allocated to the Members in the same manner as such depreciation and/or investment tax credit was allocated to them.

10.7 Prohibition Against Retroactive Allocations. Notwithstanding anything in this Agreement to the contrary, no Member shall be allocated any loss, credit or income attributable to a period prior to his admission to the Company. In the event that a Member transfers all or a portion of his Interest, or if there is a reduction in a Member's Interest due to the admission of new Members or otherwise, each Member's distributive share of Company items of income, loss, credit, etc., shall be determined by taking into account each Member's varying interests in the Company during the Company's taxable year. For this purpose, unless the Manager, in its sole discretion, elects to provide for an interim closing of the Company's books, each Member's distributive share shall be estimated by taking the pro rata portion of the distributive share such Member would have included in his taxable income had he maintained his Interest throughout the Company year. Such proration shall be based upon the portion of the year during which such Member held the Interest, except that extraordinary, non-recurring items shall be allocated to the persons holding Company interests at the time such extraordinary items occur.

10.8 Allocation of Nonrecourse Liabilities. The "excess nonrecourse liabilities" of the Company (within the meaning of Section 1.752-3(a)(3) of the Regulations) shall be shared by the Members in accordance with their respective Ownership Percentages.

10.9 Alternative Allocations. It is the Members' intention that each Member's distributive share of income, gain, loss, deduction, credit (or item thereof) be determined and allocated consistently with the provisions of the Code, including Sections 704(b) and 704(c) of the Code. If the Manager deems it necessary in order to comply with the Code, the Manager may allocate income, gain, loss, deduction or credit (or items thereof) arising in any year differently than as provided for in this Article 10 if, and to the extent, (a) allocating income, gain, loss, deduction or credit (or item thereof) would cause the determinations and allocations of each Member's distributive share of income, gain, loss, deduction or credit (or item thereof) not to be permitted by the Code and any applicable Regulations or (b) such allocation would be inconsistent with a Member's interest in the Company taking into consideration all facts and circumstances. Any allocation made pursuant to this Section 10.9 will be a complete substitute for any allocation otherwise provided for in this Agreement, and no further amendment of this Agreement or approval

by any Member is necessary to effectuate such allocation. In making any such allocations under this Section 10.9 ("New Allocations") the Manager may act in reliance upon advice of counsel to the Company or the Company's regular accountants that, in either case, in their respective opinions after examining the relevant provisions of the Code and any current or future proposed or final Regulations, the New Allocations are necessary in order to ensure that, in either the then-current year or in any preceding year, each Member's distributive share of income, gain, loss, deduction or credit (or items thereof) is determined and allocated in accordance with the Code and such Member's interest in the Company. New Allocations made by the Manager in reliance upon the advice of counsel or accountants as described in this section will be deemed to be made in the best interests of the Company and all of the Members consistent with the duties of the Manager under this Agreement and any such New Allocations will not give rise to any claim or cause of action by any Member against the Company or any Manager.

ARTICLE 11
BOOKS AND RECORDS; REPORTS

11.1 Accounting Period. The Company's accounting period is the Fiscal Year.

11.2 Records and Reports. The Company must maintain records and accounts of all operations and expenditures of the Company pursuant to such reasonable method of accounting selected by the Manager. The Company shall keep at its principal place of business the following records:

(a) A current list of the full name and last known address of the Manager and each Member and Economic Interest Owner;

(b) Copies of records to enable a Member to determine the relative voting rights, if any, of the Members;

(c) A copy of the Certificate and all amendments thereto;

(d) Copies of the Company's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(e) Copies of this Agreement, together with any amendments thereto; and

(f) Copies of any financial statements of the Company for the three most recent years.

All books and records, in addition to those described in (a) through (f) above, shall at all times be maintained at the principal office of the Company and shall be open to the inspection, examination and copying of and by the Members, Economic Interest Owners, or their duly authorized representatives during reasonable business hours.

11.3 Tax Returns. At the expense of the Company, the Manager shall cause the preparation and timely filing of all tax returns required to be filed by the Company pursuant to the Code and all other tax returns deemed necessary and required in each jurisdiction in which the

Company does business. Copies of such returns or pertinent information therefrom, shall be furnished to the Members within a reasonable time after the end of the Fiscal Year.

11.4 Reports to Members.

(a) Within 90 days after the close of each Fiscal Year, the Manager shall provide to the Members financial statements of the Company for such Fiscal Year. Such financial statements shall be prepared in accordance with such reasonable method of accounting selected by the Manager and shall include an income and expense statement which shall reflect the results of the operations of the Company for such Fiscal Year, a balance sheet and a statement of Members' equity showing each Member's Capital Account balance on all obligations of the Company.

(b) The Manager shall have prepared and delivered to the Members, within 45 days after the end of each quarter of the Fiscal Year other than the fourth quarter of the Fiscal Year, an unaudited income and expense statement, balance sheet and statement of Member's equity showing each Member's Capital Account balance.

ARTICLE 12
ADDITIONAL INTERESTS; TRANSFERABILITY

12.1 Issuance of Additional Interests. Any Person approved by the Manager may become a Member or Economic Interest Owner by the issuance by the Company of Interests or Economic Interests for such consideration as the Manager shall determine, provided such issuance would not result in a Change of Control.

12.2 General Prohibition on Transfer. Except for Permitted Dispositions or except as otherwise provided in this Article 12, no Member or Economic Interest Owner may assign, convey, sell, transfer, liquidate, encumber, or in any way alienate (collectively a "Transfer") all or any part of its Interest without the prior written consent of the Manager. Any attempted Transfer of all or any portion of an Interest without the necessary consent, or as otherwise permitted under this Agreement, shall be null and void and shall have no force and effect whatsoever. In addition, no Member shall permit any Transfer of any interest in such Member except for Transfers that would be Permitted Dispositions if such Transfers were effected with respect to the Company.

12.3 Conditions of Admission Following Transfer. Except as otherwise provided in this Article, a transferee of an Interest will become a Member only if the Manager consents in writing thereto and, unless waived by the Manager, the following conditions have been satisfied:

(a) the transferor, its legal representative or authorized agent must have executed a written instrument of transfer of such Interest in form and substance reasonably satisfactory to the Manager;

(b) the transferee must have executed a written agreement, in form and substance reasonably satisfactory to the Manager, to assume all of the duties and obligations of the transferor under this Agreement with respect to the transferred Interest and to be bound by and subject to all of the terms and conditions of this Agreement;

(c) the transferor, its legal representative or authorized agent, and the transferee must have executed a written agreement, in form and substance reasonably satisfactory to the Manager, to indemnify and hold the Company, the Manager and the other Members harmless from and against any loss or liability arising out of the Transfer;

(d) the transferee must have executed such other documents and instruments as the Manager may deem reasonably necessary to effect the admission of the transferee as a Member; and

(e) the transferee or the transferor must have paid the expenses incurred by the Company in connection with the admission of the transferee to the Company.

A permitted transferee of an Economic Interest who does not become a Member will be an Economic Interest Owner only and will be entitled only to the transferor's Economic Interest to the extent assigned. Such transferee will not be entitled to vote on any question regarding the Company, and will have no right to vote with respect to any matter requiring the approval of the Members.

12.4 Successors as to Economic Rights and Obligations. References in this Agreement to Members also constitute a reference to Economic Interest Owners where the provision relates to economic rights and obligations. By way of illustration and not limitation, such provisions would include those regarding Capital Accounts, distributions, allocations, and contributions. A transferee succeeds to the transferor's Capital Account, to the extent related to the Economic Interest transferred, regardless of whether such transferee becomes a Member.

12.5 Call Rights.

(a) Medley shall have the option to purchase the Interests held by SCAS, its Affiliates or any transferees thereof during the thirty (30) calendar day period beginning on the date the Company has actual knowledge, which includes written or oral notice, of the occurrence of any of the following events, which event is not cured within ten (10) calendar days of such occurrence, for an aggregate purchase price equal to the Fair Market Value of such Interests (and, if Medley exercises such option, SCAS, its Affiliates and any transferees thereof shall be obligated to sell the Interests to Medley).

(i) SC Distributors is no longer licensed as a broker-dealer with each of the SEC, FINRA and all state regulatory agencies in which securities of the BDC are registered pursuant to the laws of the state thereof;

(ii) SCAS or its Affiliates materially breach material terms of this Agreement or the Dealer Manager Agreement, as applicable; or

(iii) SC Distributors fails to sell an aggregate of $50 million of securities of the BDC pursuant to the Registration Statement during the initial 18-month period following the date that the Registration Statement is declared effective by the SEC.

(b) (i) For purposes of this Agreement, "Fair Market Value" shall mean the fair market value of the Interests to be purchased pursuant to Section 12.5(a) on the date of the event triggering such purchase right and shall be determined as set forth in this Section 12.5(b). Each

party to the applicable transaction shall, within fifteen (15) business days of the receipt of notice of the exercise of the purchase right in accordance with Section 12(a) , select and notify the other party in writing of the identity of such party's independent appraiser. If after delivery of the applicable notice a party fails to notify the other party of the identity of its appraiser, the determination of the Fair Market Value and price for such Interests shall be as determined by the party that identified its appraiser to the other party.

(ii) If each party selects an appraiser within the time provided herein, the two appraisers shall each consult and determine their opinion as to the Fair Market Value, in each case within thirty (30) days of the designation of the latter of the two appraisers to be designated. If the two appraisers agree upon the Fair Market Value, they shall jointly render a single written opinion thereon and such valuation shall be the Fair Market Value. If the two appraisers do not agree upon the Fair Market Value, they shall each render a separate written report with a separate statement and calculation in reasonable detail as to their respective opinion of the Fair Market Value and they shall, within forty (40) days following designation of the latter of the two appraisers select a third appraiser who shall be required to designate as most reasonable and applicable the determination of valuation of one or the other of the first two appraisers without any adjustment, averaging or alternative valuation. The valuation so selected by the third independent appraiser shall be the Fair Market Value and the basis for the computation of the purchase price of the Interests.

(iii) In the event that the two appraisers initially selected should fail to select a third appraiser, then the resolution of the Fair Market Value shall be determined by arbitration in accordance with the rules then in effect of the American Arbitration Association as provided in Section 14.16 with the exception that in making the final determination, the arbitrator shall select one or the other of the alternative valuations proposed by the two appraisers for purposes of computing the purchase price of the Interests without any adjustment, averaging or alternative valuation.

(iv) Each appraiser selected shall be an independent appraiser, shall be experienced in investment banking and finance and have at least five (5) years experience in valuing companies such as the Company. The fees and costs of each appraiser shall be borne by the party selecting such appraiser, and the fees and costs of the third appraiser shall be borne by the party whose valuation is not selected by either the third appraiser or through arbitration, as applicable.

12.6 Tag Rights. Notwithstanding anything to the contrary herein, and in addition to the other provisions of this Article 12, upon the Transfer by a Member (the "Tag Transferor Member") of all or a majority of its Interests, measured from the date of this Agreement, in one or more transactions to a third party other than an Affiliate of the Tag Transferor Member ("Third Party Transferee"), SCAS shall have the right to sell the same proportion of its Interests (the "Tag Interests") to the Third Party Transferee, and on the same terms, as the Tag Transferor Member is selling its Interests to the Third Party Transferee. The Tag Transferor Member shall use its best efforts to cause the Third Party Transferee to purchase the Tag Interests offered to the Third Party Transferee. The Tag Transferor Member shall not be entitled to sell its Interests unless the Third Party Transferee purchases all of the Tag Interests offered for sale.

ARTICLE 13
DISSOLUTION AND TERMINATION

13.1 Dissolution.

(a) The Company shall be dissolved upon the date on which the Manager agrees to dissolve the Company.

(b) The Company shall not be dissolved upon the sale of all or substantially all of the Company's assets and the collection of all proceeds therefrom, or the occurrence of any of the following events (each, an "Event of Dissociation"):

(i) With respect to any Member, upon the Transfer of all of such Member's Interest;

(ii) With respect to any Member, upon the voluntary withdrawal, retirement or resignation of the Member by notice to the Company;

(iii) With respect to any Member that is an entity, the filing of articles of dissolution or the dissolution and liquidation of such entity (but not solely by reason of a technical termination under Section 708(b)(1)(B) of the Code);

(iv) With respect to any Member that is a trust, upon termination of the trust;

(v) With respect to any Member, the bankruptcy of the Member; or

(vi) Any other event that terminates the continued membership of a Member in the Company.

(c) Within 10 days following the happening of any Event of Dissociation with respect to a Member, such Member must give notice of the date and the nature of such event to the Company and each other Member.

(d) Any successor in interest of a Member as to whom an Event of Dissociation occurred shall become an Economic Interest Owner but shall not be admitted as a Member except in accordance with Article 12 hereof.

(e) A Member shall not voluntarily withdraw from the Company or take any other voluntary action that causes an Event of Dissociation.

(f) Unless otherwise approved by all of the Members or otherwise provided herein, a Member who suffers or incurs an Event of Dissociation or whose status as a Member is otherwise terminated (a "Withdrawing Member"), regardless of whether such termination was the result of a voluntary act by such Withdrawing Member, shall not be entitled to receive the fair value of its Interest, and such Withdrawing Member shall become an Economic Interest Owner.

(g) Any damages for breach of Section 14.1(b)(ii) may be offset against distributions by the Company to which the Withdrawing Member would otherwise be entitled.

13.2 Effect of Dissolution. Upon dissolution, the Company shall cease to carry on the Business, except as permitted by the Act, and the Liquidators (defined below) shall proceed to wind-up the Business in accordance with this Agreement.

13.3 Winding Up, Liquidation and Distribution of Assets.

(a) Upon dissolution, an accounting shall be made by the Company's accountants of the accounts of the Company and of the Company's assets, liabilities and operations, from the date of the last previous accounting until the date of dissolution. The Manager, or if none, the Person or Persons selected by all of the Members (the "Liquidators") shall immediately proceed to wind up the affairs of the Company.

(b) If the Company is dissolved and its affairs are to be wound up, the Liquidators shall:

(i) Sell or otherwise liquidate all of the Company's assets as promptly as practicable (except to the extent the Liquidators may determine to distribute any assets to the Members in kind if agreed upon by all of the Members);

(ii) Allocate any items of income and gain, including items comprising Net Profit and Net Loss resulting from such sales and otherwise for transactions up to the date of any distribution pursuant to clause (b)(iv) below, to the Members and Economic Interest Owners in accordance with Article 10 hereof;

(iii) Discharge all liabilities of the Company, including liabilities to Members and Economic Interest Owners who are creditors, to the extent otherwise permitted by law, other than liabilities to Members and Economic Interest Owners for distributions, and establish such Reserves as may be reasonably necessary to provide for contingencies or liabilities of the Company;

(iv) Distribute the remaining assets to the Members, either in cash or in kind (if approved by all of the Members), in accordance with Sections 9.1 and 9.6 of this Agreement as applicable.

If any assets of the Company are to be distributed in kind, the net fair market value of such assets shall be determined by independent appraisal or by agreement of the Members. Such assets shall be deemed to have been sold as of the date of dissolution for their fair market value, and the Capital Accounts of the Members and Economic Interest Owners shall be adjusted pursuant to the provisions of this Agreement to reflect such deemed sale.

(c) Notwithstanding anything to the contrary in this Agreement, upon a liquidation within the meaning of Section 1.704-1(b)(2)(ii)(g) of the Regulations, if any Member has a deficit Capital Account (after giving effect to all contributions, distributions, allocations and other Capital Account adjustments for all taxable years, including the year during which such liquidation

occurs), such Member shall have no obligation to make any Capital Contribution to reduce or eliminate the negative balance of such Member's Capital Account.

(d) Upon completion of the winding up, liquidation and distribution of the assets, the Company shall be deemed terminated.

13.4 Certificate of Cancellation. When all debts, liabilities and obligations have been paid and discharged or adequate provisions have been made therefor and all of the remaining property and assets have been distributed to the Members, a certificate of cancellation will be executed and filed with the Secretary of State of Delaware in accordance with the Act.

13.5 Return of Contribution Nonrecourse to Other Members. Except as provided by law or as expressly provided in this Agreement, upon dissolution, each Member shall look solely to the assets of the Company for the return of the Member's Capital Account. If the Company property remaining after the payment or discharge of the debts and liabilities of the Company is insufficient to return the Capital Account of one or more Members, including, without limitation, all or any part of that Capital Account attributable to Capital Contributions, then such Member or Members shall have no recourse against any other Member and the Members will be entitled to any amount that are distributable to them pursuant to Section 14.3(b)(iv).

ARTICLE 14
MISCELLANEOUS PROVISIONS

14.1 Application of Delaware Law. This Agreement, and the application or interpretation hereof, shall be governed exclusively by its terms and by the Act, excluding any conflict-of-laws rule or principle that might refer the governance or the construction of this Agreement to the law of another jurisdiction.

14.2 No Action for Partition. No Member has any right to maintain any action for partition with respect to the property of the Company.

14.3 Execution of Additional Instruments. Each Member hereby agrees to execute such other and further statements of interest and holdings, designations, powers of attorney and other instruments necessary to comply with any laws, rules or regulations.

14.4 Construction. Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural and vice versa, and the masculine gender shall include the feminine and neuter genders and vice versa.

14.5 Headings. The headings in this Agreement are inserted for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Agreement or any provision hereof.

14.6 Waivers. The failure of any party to seek redress for violation of or to insist upon the strict performance of any covenant or condition of this Agreement shall not prevent a subsequent act, which would have originally constituted a violation, from having the effect of an original violation.

14.7 Rights and Remedies Cumulative. Except as expressly provided in this Agreement, the rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive the right to use any or all other remedies. Such rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

14.8 Exhibits. All exhibits referred to in this Agreement and attached hereto are incorporated herein by this reference.

14.9 Heirs, Successors and Assigns. Each and all of the covenants, terms, provisions and agreements herein contained shall be binding upon and inure solely to the benefit of the parties hereto and, to the extent permitted by this Agreement, their respective heirs, legal representatives, successors and assigns, and except as provided in Section 5.4, no other Person will be entitled to any of the benefits conferred by this Agreement.

14.10 No Third Party Rights. Except as provided in Section 5.4, none of the provisions of this Agreement shall be construed to create any rights or benefits in any Person other than the Members, and their respective legal representatives, transferees, successors, and assigns, subject to the limitations on transfer contained herein. For the avoidance of doubt, none of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor.

14.11 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument.

14.12 Federal Income Tax Elections; Tax Matters Partner. All elections required or permitted to be made by the Company under the Code shall be made by the Manager. For all purposes permitted or required by the Code, Medley will be the "Tax Matters Partner" as defined in Section 6231 of the Code. Notwithstanding the foregoing, the Tax Matters Partner shall keep all Members informed of any administrative proceedings with the Internal Revenue Service (the "IRS"), shall provide copies of all correspondence with the IRS to all Members, and shall not take any of the following actions without the consent of all Members: enter into any settlement agreement with the IRS; extend the statute of limitations of the Company; or commence any judicial proceeding. The provisions on limitations of liability of the Manager and Members and indemnification set forth in Article V hereof shall be fully applicable to the Tax Matters Partner in his or her capacity as such. The Tax Matters Partner may resign at any time by giving written notice to the Company and each of the other Members. Upon the resignation of the Tax Matters Partner, a new Tax Matters Partner may be elected by a majority of the Interests held by the Members.

14.13 Notices. Any and all notices, offers, demands, or elections required or permitted to be made under this Agreement ("Notices") shall be in writing, signed by the party giving such Notice, and shall be deemed given and effective (a) when hand-delivered (either in person by the party giving such notice, or by its designated agent, or by commercial courier), (b) on the next business day after deposit with a nationally-recognized overnight courier service, or (c) on the third business day (which term means a day when the United States Postal Service, or its legal successor ("Postal Service") is making regular deliveries of mail on all of its regularly appointed week-day rounds in Atlanta, Georgia) following the day (as evidenced by proof of mailing) upon which such notice is deposited, postage pre-paid, certified mail, return receipt requested, with the Postal Service,

and addressed to the other party at such party's respective address as set forth on Exhibit A, or at such other address as the other party may hereafter designate by Notice.

14.14 Amendments. The Manager may amend any of the terms of this Agreement without obtaining approval from the Members; provided, however, in the event that a proposed amendment would adversely affect a Member, including, but not limited to, amendments that would reduce the distributions payable to SCAS pursuant to this Agreement, then this Agreement may not be amended without the prior written consent of such Member.

14.15 Invalidity. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and the Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted. If any particular provision herein is construed to be in conflict with the provisions of the Act, the provisions of this Agreement shall control to the fullest extent permitted by applicable law. Any provision found to be invalid or unenforceable shall not affect or invalidate the other provisions hereof, and this Agreement shall be construed in all respects as if such conflicting provision were omitted.

14.16 Arbitration. Any dispute, controversy, or claim arising out of or in connection with this Agreement shall be submitted to, and resolved by, arbitration in Orange County, California, pursuant to the commercial arbitration rules then in effect of the American Arbitration Association (or at any time or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, except that

(i) each party shall pay for and bear the cost of its own experts, evidence and counsel's fees, and

(ii) (in the discretion of the arbitrator, any award may include the cost of a party's counsel if the arbitrator determines that the party against whom such award is entered has caused the dispute, controversy or claim to be submitted to arbitration as a dilatory tactic.

14.17 Determination of Matters Not Provided For In This Agreement. The Manager shall decide any questions arising with respect to the Company and this Agreement which are not specifically or expressly provided for in this Agreement.

14.18 Further Assurances. The Members each agree to cooperate, and to execute and deliver in a timely fashion any and all additional documents necessary to effectuate the purposes of the Company and this Agreement.

14.19 No Partnership Intended for Non-Tax Purposes. The Members have formed the Company under the Act, and expressly disavow any intention to form a partnership under any partnership act or laws of any state. The Members do not intend to be partners one to another or partners as to any third party. To the extent any Member, by word or action, represents to another Person that any other Member is a partner or that the Company is a partnership, the Member making such wrongful representation shall be liable to any other Member who incurs personal liability by reason of such wrongful representation.

14.20 Certification of Non-Foreign Status. In order to comply with Section 1445 of the Code and the applicable Regulations thereunder, in the event of the disposition by the Company of a United States real property interest as defined in the Code and Regulations, each Member shall provide to the Company an affidavit stating, under penalties of perjury, (a) the Member's address, (b) United States taxpayer identification number, (c) that the Member is not a foreign person as that term is defined in the Code and Regulations and (d) that the Member is not a disregarded entity as defined in Section 1.1445-2(b)(2)(iii) of the Regulations. Failure by any Member to provide such affidavit by the date of such disposition shall authorize the Manager to withhold 10% of each such Member's distributive share of the amount realized by the Company on the disposition.

14.21 Entire Agreement. This Agreement and any other documents, instruments or agreements to be executed by the parties in connection with the transactions contemplated by this Agreement set forth the entire agreement between the parties relating to the subject matter hereof.

14.22 Covenants.

(a) Medley and SCAS shall take all commercially reasonable actions to satisfy all obligations herein, including without limitation, the filings and receipts as set forth herein, in a timely manner.

(b) Medley hereby provides SCAS a right of first refusal to provide similar services as set forth herein for any other investment products sponsored by Medley or its Affiliates upon similar terms and conditions, or such other terms as may be mutually agreed upon.

(c) Medley agrees that it will not sponsor for distribution in the U.S. retail investor market another fund, business development company, limited liability company or partnership or other investment vehicle that primarily targets originating secured loans to middle market U.S. companies during the period of time SC Distributors is distributing securities of the BDC. Medley will work exclusively with SCAS and SC Distributors to distribute and sell securities of the BDC or any follow-on offering of securities of the BDC (the "BDC Exclusivity"). Medley may terminate the BDC Exclusivity if:

(i) SC Distributors is prohibited from selling BDC securities for regulatory or other reasons; or

(ii) SCAS or any of its Affiliates, commits fraud, bad acts, or otherwise breaches any material terms of this Agreement or the Dealer Manager Agreement.

(d) To the extent not already accepted by FINRA, no later than nine months following the initial FINRA filing of the Registration Statement, the parties hereto shall mutually determine in good faith whether they believe the proposed structure and transactions set forth herein will ultimately be accepted by FINRA. If not and to the extent commercially reasonable, each party will revise and amend the terms of this Agreement to conform to FINRA requirements in a manner that retains the economic position of each party, so long as such amendment would not be expected to unreasonably delay the commencement of the public offering of the BDC's securities.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first above written.

MEMBERS:

MEDLEY LLC, a Delaware limited liability company

By:_____
Its:_____

[Signatures Continue on Following Page]

[Signatures Continued from Previous Page]

STRATEGIC CAPITAL ADVISORY SERVICES, LLC, a Delaware limited liability company

By:_____
Its:_____

EXHIBIT "A"

Members

Member:	Address:	Interests:
Medley LLC	375 Park Avenue 33rd Floor New York, NY 10152 c/o Seth Taube	80%
Strategic Capital Advisory Services, LLC	610 Newport Center Drive, Suite 350 Newport Beach, CA 92660 c/o Mr. Kenneth Jaffe	20%

EXHIBIT "B"

Formation Services

(i) financial and strategic planning advice and analysis regarding the structure of Sierra Income Corporation and the Advisor, a business plan for Sierra Income Corporation and the Advisor and the terms of Sierra Income Corporation offering;

(ii) assistance in selecting and retaining professional advisors to Sierra Income Corporation and the Advisor;

(iii) assistance in preparing the registration statement and related documents for Sierra Income Corporation offering;

(iv) management, subject to Medley's approval, of the due diligence process from commencement through completion, including assistance in obtaining due diligence reports required by broker-dealers selected to participate in Sierra Income Corporation offering;

(v) initial installation of Sierra Income Corporation onto SCAS's reporting platform and SCAS new business processing platform, as well as training of SCAS's new business processing personnel;

(vi) assistance in selecting and initial negotiation of terms of engagements with third-party escrow agent, transfer agent, financial printer and fulfillment vendor;

(vii) creation of a branding and marketing strategy for Sierra Income Corporation, including the development of a corporate website for Sierra Income Corporation, and the preparation of all marketing, logos and branding materials to be used in connection with Sierra Income Corporation's offering, subject to approvals by Medley; and

(viii) any additional services mutually agreed upon by the parties hereto relating to the formation of Sierra Income Corporation and the Advisor and the preparation for the commencement of Sierra Income Corporation's offering.

EXHIBIT "C"

Advisory Services
Non-Investment

(a) the sourcing (without quantitative or qualitative analysis) of prospective acquisitions and dispositions;

(b) the sourcing and review of the terms of asset and entity financing;

(c) such other services as are agreed to by Medley and SCAS;

(d) establish operational and administrative processes for Sierra Income Corporation, including engaging and negotiating with vendors the terms of transfer agent services, escrow services, call center and investor relations services, distribution payment processing, tax reporting, proxy voting, information technology requirements, sales and reporting to participating broker-dealers;

(e) provide recommendations for the development of marketing materials and on-going communications with investors, including but not limited to copy writing, creative management, project management, and print production management;

(f) assist in permissible public relations activities relating to Sierra Income Corporation and/or the Advisor including but not limited to the development and administration of press releases, media relations, media coverage and by-lined articles, and the development of websites to provide access for investors to financial reporting, financial advisor access to sales materials, and general information relating to Sierra Income Corporation such as government filings and informational presentations;

(g) assist in the administration of distribution reinvestment plans, transfers, redemptions and all exception requests; and

(h) arrange for the provision of data and customary information resources to interested parties such as custodians, trust departments, third-party reporting services and RIA platforms.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first above written.

MEMBERS:

MEDLEY LLC, a Delaware limited liability company

By: _____
Its: Authorized Signatory

[Signatures Continue on Following Page]

[Signatures Continued from Previous Page]

STRATEGIC CAPITAL ADVISORY SERVICES, LLC, a Delaware limited liability company

By: _____
Its: President

Signature Page to Limited Liability Company Agreement of
SIC Advisors LLC

163981333

3082395 v07

Exhibit F

Transcript of Hearing
In re Southeastern Grocers, LLC, Case No. 18-10700 (MFW) (Bankr. D. Del. May 14, 2018)

In The Matter Of:

Southeastern Grocers, LLC, et al.,

Transcript of an Electronic Recording
May 14, 2018

Wilcox & Fetzer, Ltd.
1330 King Street
Wilmington, DE 19801
email: depos@wilfet.com, web: www.wilfet.com
phone: 302-655-0477, fax: 302-655-0497

Original File Southeastern Grocers 05-14-18 Transcript of Electronic Recording.txt
Min-U-Script® with Word Index

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
SOUTHEASTERN GROCERS, LLC, et al.,	)	Case No. 18-10700 (MFW)
	)	
Debtors.	)	(Jointly Administered)

Wilmington, Delaware
May 14, 2018
10:30 a.m.

TRANSCRIPT OF AN ELECTRONIC RECORDING
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

OMNIBUS/CONFIRMATION

APPEARANCES:

For the Debtors	DANIEL J. DeFRANCESCHI, ESQ. BRETT M. HAYWOOD, ESQ. RICHARDS LAYTON & FINGER, P.A. -and- RAY C. SCHROCK, ESQ. SUNNY SINGH, ESQ. ANDRIANA GEORGALLAS, ESQ. WEIL GOTSHAL & MANGES
For The Ad Hoc Committee	ROBERT K. MALONE, ESQ. PATRICK A. JACKSON, ESQ. DRINKER BIDDLE & REATH LLP
FOR Deutsche Bank AG New York Branch	MARGARET MANNING, ESQ. FOX ROTHSCHILD, LLP -and- ANDREW C. AMBRUOSO, ESQ. WHITE & CASE LLP
For Sun Trust Bank	IAN J. SILVERBRAND, ESQ. WHITE & CASE LLP
For the Ad Hoc Group Of Noteholders	DENNIS L. JENKINS, ESQ. MORRISON & FOERSTER LLP

(Appearances Cont'd:)

For Ahold U.S.A., Inc.	DANIEL N. BROGAN, ESQ. BAYARD P.A.
For WSFS, as Trustee/ Agent	ERIC J. MONZO, ESQ. MORRIS JAMES -and- SETH H. LIEBERMAN, ESQ. MATTHEW W. SILVERMAN, ESQ. PRYOR CASHMAN LLP
For Wells Fargo	MORGAN L. PATTERSON, ESQ. WOMBLE BOND & DICKINSON (US) LLP
For Wells Fargo, As Indenture Trustee	BENJAMIN D. FEDER, ESQ. KELLEY DRYE & WARREN LLP
For Aston Properties, Inc., et al.	SCOTT L. FLEISCHER, ESQ. KELLEY DRYE & WARREN LLP
For C&S Wholesale Grocers, Inc.	KERRI K. MUMFORD, ESQ. LANDIS RATH & COBB LLP
For Lone Star Parties	WILLIAM E. CHIPMAN, JR., ESQ. CHIPMAN BROWN CICERO & COLE LLP -and- AUSTIN W. JOWERS, ESQ. KING & SPALDING
For Aronov Realty, et al.	LAUREL D. ROGLEN, ESQ. BALLARD SPAHR LLP
For CenterPoint Properties	STUART BROWN, ESQ. JADE WILLIAMS, ESQ. DLA PIPER US, LLP
For Commodore Realty, Inc.	JOYCE A. KUHNS, ESQ. FRANK E. NOYES, II, ESQ.
For Nature's Hope LLC	THEODORE J. TACCONELLI, ESQ. FERRY JOSEPH, P.A.
For Kathy Chaves, et al.	STEPHEN B. GERALD, ESQ. WHITEFORD TAYLOR & PRESTON
For H&R Entities	AARON H. STULMAN, ESQ. WHITEFORD TAYLOR & PRESTON

(APPEARANCES CONT'D:)

For JEM Investments, LLC	CORY P. STEPHENSON, ESQ. BIELLI & KLAUDER, LLC
For The Chubb Companies	RICHARD W. RILEY, ESQ. DUANE MORRIS
For Hudson Crossing Ipanema Smokey Park	ELIHU E. ALLINSON, III, ESQ. SULLIVAN HAZELTINE ALLINSON
For U.S. Securities And Exchange Commission	THERESE SCHEUER, ESQ.
For 600 Realty, LLC	JULIA B. KLEIN, ESQ. KLEIN, LLC
For Gibbs & Hensley	MONIQUE B. DiSABATINO, ESQ. SAUL EWING ARNSTEIN & LEHR, LLP
For The Office of the U.S. Trustee	BENJAMIN HACKMAN, ESQ. ASSISTANT U.S. TRUSTEE
AUDIO OPERATOR:	BRANDON McCARTHY
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THE COURT: Good morning.

MR. SCHROCK: Good morning, Your Honor. Your Honor, Ray Schrock of Weil Gotshal & Manges on behalf of the debtors. I'm here today with my colleagues, Sunny Singh, Adriana Georgallas and Gaby Smith.

Your Honor, we put a lot of paper in front of you --

THE COURT: Yes.

MR. SCHROCK: -- as I'm, as I'm sure you've seen. Happy belated Mother's Day.

We -- I do have, if you'd like it, Judge -- may I approach? I have a blackline of the plan if you need it. We did upload it.

THE COURT: All right.

MR. SCHROCK: But if you'd like a hard copy, I have a blackline of the plan and the confirmation order.

THE COURT: All right, go ahead and hand that up.

MR. SCHROCK: Okay.

THE COURT: All right. Thank you.

MR. SCHROCK: Your Honor, we have a few people present here in the courtroom with us today on behalf of the debtors. We have Mr. Anthony Hucker, who is the chief executive officer of the company; Brian Carney, chief financial officer of the company; Tim McDonagh, the senior managing director at FTI.

THE COURT: Good morning.

MR. SCHROCK: And Christina Pullo, vice president, and solicitation of public securities at Prime Clerk, the debtors' claims and noticing agent.

THE COURT: Okay.

MR. SCHROCK: Your Honor, we have filed an amended agenda for today's hearing on this past Friday. It's at

Docket No. 475. In terms of a roadmap, Judge, what I'd like to do is just go through the non-confirmation issues in the order in which they're presented in the agenda, give you a brief update on confirmation objections, a plan summary, move the declarations into evidence, and then I was planning to handle the U.S. Trustee's objection, and I'll be arguing that piece. Mr. Singh has -- will be handling the, the open landlord issues --

THE COURT: Okay.

MR. SCHROCK: -- which I believe we have six objections to the plan that are remaining, I'll take you through that, from landlords plus U.S. Trustee. And then, you know, following that we'd like to just take you through the changes to the order.

THE COURT: Okay.

MR. SCHROCK: But if that would be an acceptable order, I'll proceed.

THE COURT: That's fine.

MR. SCHROCK: Thank you.

Your Honor, one, one housekeeping item. There's -- I wanted to bring to your attention the stipulation that was filed yesterday at Docket No. 483. The stipulation was filed under certification of counsel and addresses the objection filed by Clermont 99-FL, LLC, which is the landlord for store No. 2334. The basis for Clermont's objection was that its

lease was terminated by virtue of a prepetition termination agreement, and that such termination was effective as of March 31, 2018, and that the lease was therefore not assumable.

The debtors agreed that the letter -- lease was terminated as of March 31, 2018. However, the debtors included Clermont's lease on its assumption list as the lease had not yet been terminated as of the petition date. For the avoidance of doubt, Clermont requested a stipulation with the debtors confirming that the lease was indeed terminated, and unless Your Honor has any questions, we'll move to the other items.

THE COURT: That's fine.

MR. SCHROCK: Okay. Your Honor, the first three items on the agenda have been resolved.

Item number 4 on the agenda is the motion of Winn-Dixie Warehouse Leasing, LLC, to extend the time to reject two unexpired warehouse distribution center leases.

Just to give Your Honor a little background, as we said in the motion, this is -- we have two warehouse distribution centers where we're not going to be able to get out of the warehouses until, you know, a few months from now, likely September, October. We were working, to be perfectly frank, with a, with a REIT, who is our landlord, and it's tough to break through, just trying to get, frankly, someone to be responsive on the other side. We end up having -- so,

you know, we said we can just consent and we'll stay in the leases. We didn't get a response, so we had to file the 365(d)(4) motion.

That's the reason that the plan for Warehouse -- or for Winn-Dixie distribution centers is being pushed out to October. It's consensual that the REIT did agree to the relief. It's just a -- it's a special-purpose entity that holds those two leases, among a couple of others that we'll go through in the context of confirmation.

We did file a certification -- a certificate of no objection at Docket No. 454, and Your Honor entered an order granting the relief requested in the motion at Docket No. 464. But I did want to provide that context for the Court --

THE COURT: Okay.

MR. SCHROCK: -- and parties of interest. That is why we requested the adjournment of that particular confirmation hearing.

Item number 5 on the agenda is the application of the debtors for authority to retain E & Y as tax advisors. We received informal comments from the U.S. Trustee, and on May 11th the debtor submitted a revised form of order under certificate of -- certification of counsel at Docket No. 472.

THE COURT: I did sign that this -- or approve that this morning, so it should be docketed shortly.

MR. SCHROCK: Excellent. Thank you, Your Honor.

Your Honor, item number 6 on the agenda is the motion of Winn-Dixie Warehousing, LLC, for authority to assume and assign certain unexpired leases of nonresidential real property. That was filed on April 23rd, 2018 at Docket No. 363. CenterPoint Properties Trust filed an objection and a reservation of rights at Docket No. 443. And the debtor, Winn-Dixie Warehouse Leasing, LLC, filed a reply at Docket No. 463.

We've conferred with counsel for CenterPoint Properties Trust, and the parties have agreed to present the lease termination issue before Your Honor pursuant to a scheduling order that will be agreed upon and submitted by the parties. Until Your Honor issues an evidentiary ruling resolving the matter, the lease for the Miami distribution center, which is the subject of the dispute, will remain with Winn-Dixie Warehouse Leasing, LLC.

As Your Honor is aware, the confirmation hearing has been adjourned. The notice of adjournment was filed on May 10, 2018.

Your Honor, we have withdrawn item number 7, which is the application of the debtors for authority to retain and employ Hilco Real Estate. We withdrew the application on May 11, 2018. Upon request from the U.S. Trustee, Hilco has agreed to be carved out of the exculpation provision in the plan since it is no longer seeking to be retained as a debtor

Page 9

professional.
Their services were provided prepetition and, you know, we've, we've worked out with them since, you know, we're paying claims in full effectively, we're just not going to retain them. They're not going to be -- I don't believe there will be payments for post-petition services.
And item number 8 is the confirmation of the debtors' amended joint prepackaged plan, other than for Winn-Dixie Warehouse Leasing, LLC.
As I previewed at the beginning of my comments, we're pleased to report that of the 21 objections filed for confirmation of the debtors' plan, only six objections, I believe, remain outstanding. There is a number of resolutions we'll have to note in the order when we go through there, but the outstanding objections are the Office of the United States Trustee, Commodore Realty, Inc., JEM Investments Limited, Ipanema -- Ipanema -- Ipanema, okay, Ipanema Smokey Park, LLC, Hudson Crossing, LLC, and Nature's Hope, LLC.
As I noted, I will be addressing the objections raised by the U.S. Trustee, and Sunny Singh will address the remaining objections.
Very briefly, Your Honor, quick update on, on our, our efforts. This, this was an extraordinary prepack to be able to put together -- put together a, a plan where you're treating 502(b)(6) claims, paying them in full, closing, you

Page 10

know, you know, almost -- or selling almost 100 locations, and being able to pay all operating company creditors in full, where the only classes of impaired creditors of the unsecured noteholders in Class 5 and the existing SEG equity interest in Class 8 was really literally a year in the planning.
The holders of the unsecured notes claims who voted collectively hold more than 475 million of the 497 million in outstanding principal amount of the unsecured notes. This represents 96 percent of the total outstanding principal amount as of the voting record date. All claims that voted, voted in favor of the plan.
The existing SEG equity interest, which represent the company's prepetition sponsors, have also voted to unanimously accept the plan.
As described in our memorandum of law, not a single creditor has voted to reject the plan. The plan provides for a reorganization transaction, pursuant to which, in exchange for cancellation of the unsecured notes, the unsecured noteholders will receive 100 percent of the new equity in reorganized SEG.
The company's prepetition sponsors receive a five-year warrant entitling them to 5 percent of the new percent -- new common stock. Your Honor, the support by virtually every single creditor entitled to vote on the plan speaks volumes, as do the plan's fairness, good-faith efforts and compliance

Page 11

with the Bankruptcy Code. The plan provides the company with substantial reduction of its debt, equal to approximately $522 million, plus a reduction of approximately $40 million in annual debt service.
In connection with confirmation of the plan, we filed various pleadings that are noted in the agenda. And at this time I would like to offer into evidence the two declarations filed with the Court to form the basis of the evidentiary record and factual record for support for the confirmation hearing.
First, Your Honor, I would like to offer the declaration of Brian P. Carney, which is at Docket No. 457, as the direct testimony of Mr. Carney he would give if called to testify, and of course Mr. Carney is in the courtroom and available for questions or cross-examination.
THE COURT: Does anybody object?
All right, it will be admitted.
MR. SCHROCK: Your Honor, the debtors also move for the declaration of Christina Pullo regarding solicitation of votes and tabulation of ballots cast on the plan to be entered into evidence. That's at Docket No. 222. Ms. Pullo is also in the courtroom today and available for questions or cross-examination.
THE COURT: Any objection?
It will be admitted.

Page 12

MR. SCHROCK: Thank you, Your Honor.
And before we proceed to the objections, Your Honor, we would respectfully request that Your Honor enter a proposed order for the debtors' motion for leave to exceed the pay limit in case you haven't --
THE COURT: I have to note, you filed 98 pages?
MR. SCHROCK: Yes. Yes.
THE COURT: Some of it was duplicative of Mr. Carney's declaration, I will point out. But I did read it. I'll, I'll grant the motion.
MR. SCHROCK: Thanks, thank you, Your Honor.
THE COURT: But, please --
MR. SCHROCK: We'll work on it being much more concise.
THE COURT: -- in the future.
MR. SCHROCK: We will definitely work on that. So noted. And thank you.
So, Your Honor, I think that in terms of 1129 of the Bankruptcy Code, I should also note that 1129(a)(5), we did file the plan supplement at Docket No. 317 and 355. And in response to a request by the U.S. Trustee, we'd just like to address that, that the disclosure of the identity and nature of any compensation to the insiders, the only insiders that will be retained by the reorganized debtors are Anthony Hucker, the company's current CEO, and Brian Carney, the

Page 13

company's current CFO. Mr. Hucker's annual salary is 1 million. Mr. Carney's annual salary is 700,000. We are required to disclose that in connection with 1129(a)(5).

THE COURT: Okay.

MR. SCHROCK: Your Honor, as to the -- I'll next turn to the U.S. Trustee objection. And the U.S. Trustee has really argued a few objections, you know, relating to: 1, allowance of the general unsecured claims under the plan; 2, the payment of restructuring expenses and unsecured notes, of the unsecured -- and unsecured notes trustee expenses without showing substantial contribution, and contribution under 503(b), and the propriety of the third-party releases under the plan.

Your Honor, as to the first item, the U.S. Trustee contends the plan does not adequately provide for the allowance of general unsecured claims, in light of the fact that the debtors have not filed the schedules of assets and liabilities or SOFAs. However, Your Honor, the plan makes clear that general unsecured claims are, quote, allowed pursuant to the mechanics set forth in the definition of "allowed" in Section 110 of the plan. In the ordinary course of business invoices will be presented to the debtors for payment. If the debtors agree with the amount asserted, the amount will be paid as an allowed general unsecured claim. And to the extent objection or dispute arises, the underlying

Page 14

claim becomes an allowed claim upon the resolution by the parties.

Finally, if the parties aren't able to reach a resolution, the claim becomes an allowed claim when the objection or dispute is determined in favor of the holder of the claim by a final order.

This mechanic and treatment of general unsecured claims is consistent with, to our knowledge, you know, virtually every single prepackaged Chapter 11 case that we prosecuted or read about. But not a single holder of the general unsecured claims has raised this issue.

As to the second issue, the U.S. Trustee argues the debtors may not pay the restructuring payments, restructuring expenses or unsecured notes trustee expenses, quote, unless a payment of the expenses is predicated on a showing of a substantial contribution under Section 503(b)(d) of the Bankruptcy Code.

The restructuring expenses implicated by the U.S. Trustee's objection include payments of all reasonable and documented out-of-pocket expenses incurred by any of the initial consenting noteholders relating to the restructuring, subject to an aggregate cap not to exceed $100,000, plus all reasonable and documented fees and expenses of the consenting party professionals incurred in their representation of the ad hoc group of unaffiliated noteholders can -- that comprise the

Page 15

initial consenting noteholders, as well as certain holders of secured notes, or the consenting Lone Star Parties as applicable.

Your Honor, the payment of these restructuring expenses was an integral component of the global settlement. We did file -- we did sign fee letters, of course, coming into the case. You know, unsecured claims are being treated and are rendered unimpaired under the plan. But that global settlement could not have been reached and embodied in the restructuring support agreement of the plan had the debtors not agreed to pay the restructuring expenses.

We rely on the, you know, the evidentiary support set forth in the Carney affidavit, but we believe that approval of the restructuring expenses should be analyzed not by reference to the substantial contribution standard, but under the Martin factors, and in the context of the global settlement.

And as discussed more fully in our memo of law, the Martin factors are met with respect to the global settlement, because as set forth in the Carney declaration, which is undisputed, the outcome of litigating the valuation dispute and Lone Star claims is -- that's speculative. While the global settlement provides for definite and substantial certainty to the debtors and their stakeholders, litigating the valuation dispute and the Lone Star claims will likely be extremely expensive and can jeopardize the debtors' financing

Page 16

of the exit facility and delay the payment of claims. And the debtors' major stakeholders support the global settlement, as evidenced by the unanimous votes in favor.

The global -- the global settlement was negotiated with the support and guidance of the competent, experienced counsel representing each of the parties, overseen by an independent committee comprised of Mr. Neal Goldman that approved it on behalf of the company. The global settlement is undoubtedly the product of the months of arm's length negotiations.

And moreover, Your Honor, prior to the petition date, as was the case in many other prepackaged and prenegotiated cases, the debtors entered into fee arrangements, as I mentioned earlier.

We're also required to pay the restructuring expenses to these parties as part of the restructuring support agreement. And given that the debtors are assuming the fee arrangements, we're obligated to pay these claims.

Alternatively, even if the fee arrangements and restructuring in support of the agreement were not executory contracts to be assumed under the plan, which of course they are, the debtors would nevertheless be required to pay the restructuring expenses under the fee agreements and the RSA, because the nonpayment of these fees would result in a contractual breach. If the debtors breach the fee

agreements and the RSA, the debtors would be required to pay any, any damages in full pursuant to the treatment of such claims under the plan. See Section 4.6(b) of the plan.

The U.S. Trustee cites to Davis vs. Elliott Management from the Lehman Brothers case -- it's at 508 BR 283-291, Southern District of New York, 2014 -- for the proposition that the allowance of professionals' fees of a creditor and ad hoc committee is specifically provided for in Section 503(b) of the Bankruptcy Code.

However, respectfully, we think the U.S. Trustee's reliance on Lehman is misplaced. We're quite familiar with that case as debtors' counsel, and the holding in Lehman is limited, as it merely construes a plan provision permitting members of the creditors' committee to be reimbursed for professional fees by virtue of their membership on a committee pursuant to 1123(b)(6).

The payments at issue in Lehman, which was far from a prepackaged case, probably as far as you can get, were expressly prohibited by the Bankruptcy Code and were not required to be paid by the Lehman debtors pursuant to prepetition contractual arrangements that were being assumed.

U.S. Trustee also contends that the payment of the unsecured notes expenses should be subject to review by the Court for reasonableness pursuant to 1129(a)(4). Your Honor, but the U.S. Trustee -- unsecured notes trustee expenses are

payable pursuant to Section 4.5 of the plan as unsecured notes claims. And allowance of unsecured notes claims expressly include any fees, charges and other amounts due but unpaid under the unsecured notes indenture. The unsecured notes indenture requires the payment of such fees.

Your Honor, moreover, courts have recognized that the Trust Indenture Act reflects Congressional concern for the significant economic considerations faced by indenture trustees, and as such, the unsecured notes indenture trustee is entitled to what is commonly called the charging lien and to be able to deduct its unpaid fees and expenses.

The plan expressly preserves for the important state law rights of the unsecured notes trustee to exercise its charging lien in the chapter 11 case.

In light of the above, and the overwhelming support for the plan, we believe that payment of the restructuring expenses and unsecured notes trustee expenses, without requiring 503(b) application, is appropriate.

Your Honor, third, the U.S. Trustee objects to the propriety of the third-party releases, specifically as to creditors who abstained from voting and did not opt out of the releases, and unimpaired creditors who did not formally object to the releases.

Now, we have agreed to strike Section 10.6(b)(1) from the plan, that such creditors who abstained from voting and

did not opt out of the third-party releases will no longer be deemed to have granted third-party releases. Now, Your Honor, the third-party releases from unimpaired creditors are releases of non-derivative claims held by third parties against the released parties.

These releases are being sought on a consensual basis because the parties had the option to file a timely objection with the Court and carve themselves out of the third-party releases. And the standard for approval in this Court is whether the releasing parties have consented. As explained in more detail in the debtors' memorandum of law, the debtors provided clear notice of the release exculpation injunction, and indicated that unimpaired creditors would be deemed to grant the third-party releases if they did not opt out by timely filing an objection of the plan.

The combined notice, which was served on all the debtors' known creditors and equity interest holders, and the publication notice each provided that holders of unimpaired claims or interest who did not timely object to the third-party releases would be deemed to have granted the releases. Courts in this district have upheld the deemed consent of unimpaired creditors who are presumed to accept the plan because creditors are being paid in full and have received substantial consideration for the releases. See Indianapolis Downs, among other cases.

Your Honor, here the debtors went a step further and provided unimpaired creditors with the opportunity to carve themselves out of third-party releases in the plan by filing a written objection. And in fact, the debtors received approximately 14 objections or joinders to objections to the third-party releases, and as a result, such creditors have been carved out of the third-party releases in the proposed confirmation order.

The objections demonstrate that the unimpaired creditors understood that they could avail themselves of that right and easily carve themselves out of the third-party releases by filing a timely objection.

We also note that Your Honor did find similar facts under a recent case in Homer City. We think that Homer City is analogous. And when I look at, you know, the fact that we have a hundred percent consensual plan, you know, I do think, you know, even if you put everything aside, if we had to look at the mortgage and Zenith factors, and the declaration of Brian Carney, that we would, that we would, in fact, meet that standard for the reasons set forth in the brief.

It's clear that there is an identity of interest that's -- that exists here between the debtors and the released parties. You know, we have a common goal of confirming the plan. All the released parties spent several months participating in good faith, arm's length negotiations.

Page 21

The identity of the interest established where there is indemnification from the debtor, who is present here, which is also present here. And the third-party releases, I can tell you personally, were very critical to this reorganization. It is -- you've got indemnification obligations, you've got a lot of landlord claims that are being, frankly, paid under a 502(b)(6) cap. And if, if these releases were not granted, it's -- I can certainly say that, you know, we wouldn't have reached -- we would not have reached the global, the global settlement. The certainty associated with being able to, to have the releases go into effect and be able to walk away from the company was critical and the cornerstone of the global settlement.

Your Honor, I won't go through all of the arguments we make in the brief on, on, you know, on those potential -- or on the --

THE COURT: Okay.

MR. SCHROCK: -- on the other factors. But I think instead I'll allow the U.S. Trustee to speak, and I'm happy to address any questions that you may have in the meantime, Judge.

THE COURT: Okay. Thank you.

MR. SCHROCK: Thank you.

MR. HACKMAN: Good morning, Your Honor.

THE COURT: Good morning.

Page 22

MR. HACKMAN: May it please the Court, Ben Hackman for the U.S. Trustee.

Our office filed a confirmation objection at docket item 433, and it had raised four main points: Exculpation, third-party releases, the allowance of Class 6 claims, and the payment of professional fees.

Our exculpation objection is resolved.

On the third-party release issue, Article 10.6(b) of the plan would cause various creditors to grant third-party releases, including releases by impaired creditors who abstained from voting, and unimpaired creditors who did not formally object to the releases. And based on counsel's representation that creditors who were entitled to vote but who did not return ballots will not be deemed to give releases, I think just leaves our objection as to unimpaired class, in particular Class 6.

We don't believe Class 6 creditors should be deemed to consent to the third-party releases in the plan, simply because those creditors are unimpaired. They're poised to be paid in full under the plan or to ride through based on claims they have against the debtors, but it is not evident that those creditors will receive consideration for releasing claims they have against nondebtor third parties.

We referenced the SunEdison decision in New York of the Bankruptcy Court for the Southern District of New York

Page 23

with respect to creditors who are entitled to vote but who did not return ballots, for the proposition that under New York law, silence is not consent where no duty to speak exists, and where silence is not misleading or indicative of consent. I think that the reasoning of that opinion applies to unimpaired creditors in this class -- in this case as well. The plan has a New York choice of law provision, and the fact that creditors in Class 6 who are unimpaired had the opportunity to object to the third-party releases but did not would not, by itself, transform their silence into consent.

We're also not convinced that extraordinary circumstances --

THE COURT: Well, but there are many instances where a party's required to file a response. And if the party does not, that is deemed to be consent to the request. Why is this different? There was a notice given to all unimpaireds requiring them to object if they had an objection specifically to the releases. Why is that not consent?

MR. HACKMAN: Your Honor, because the fact that they had notice and an opportunity consent did not make them duty bound to file anything. I don't believe that they were required to inform the debtors that no, we reject this part of the contract that's being proposed to us in order to prevent the debtors from asserting that your silence is allowing the contract to be formed.

Page 24

THE COURT: How is that different from a complaint being filed and, you know, you have to file an answer, or a motion being filed and if you object to the relief requested in the motion, you have to answer? How is that any different?

MR. HACKMAN: Your Honor, I think in the setting of a complaint being filed, the, the defendant's legal rights are at issue.

THE COURT: So, so are these legal rights at issue.

MR. HACKMAN: I think for Class 6 the proposal is that their legal rights are going to be unaffected. The, the plan would -- those creditors' rights -- their claims arise through the bankruptcy.

THE COURT: Except the plan does say that they're releasing third parties.

MR. HACKMAN: That's right, Your Honor. We don't believe that -- as we read the SunEdison decision, and we recognize that there are cases in this district that have reached -- that have, that have holdings that are not necessarily consistent on their face with the SunEdison decision. I think it is important in this case that the plan does have a New York choice of law provision in it. And we would submit that the holding in the SunEdison decision, the Court's review of contract law in New York --

THE COURT: So there are no Third -- Southern District of New York decisions allowing third-party releases?

Page 25

MR. HACKMAN: I -- I believe there are, and I believe the SunEdison decision had referenced I believe the DBSD decision being one of them as there being other cases in the Southern District where third-party releases had been given in that situation.

THE COURT: Okay.

MR. HACKMAN: If the Continental standard applies, Your Honor, we are not convinced that the standards in Continental would be met here. The requirements, the minimum requirements under that decision would be fairness, necessity to the reorganization, and specific factual findings to support those conclusions.

I think Your Honor wrote in the Washington Mutual decision that third-party releases are recognized in the Third Circuit as the exception and not the rule. It's not apparent to us that there are extraordinary circumstances here, such as a mass tort action or widespread claims against co-liable parties that would need to be resolved for the debtors to remain in business.

This is a big business, but I think fundamentally the plan is a balance sheet restructuring. The unsecured noteholders will become the new owners. The debtors will downsize slightly, but their business will continue on, largely as it had prepetition.

I'd also note that the Carney declaration and the

Page 26

confirmation memorandum indicate that at least with respect to the creditor released parties, and the additional Lone Star parties, the debtors are not aware of any claims against those parties that would actually be released by the third-party releases. So it is -- it doesn't appear to us that a release as to those parties is necessary.

As to the allowance of Class 6, general unsecured claims, we objected because it is not clear to us how those creditors' claims will be allowed to receive the ride-through treatment that the plan proposes for them. The plan defines "allowed" in Article 1.A.1.10, and it says a Class 6 claim -- if you apply that definition of allowed to Class 6, the Class 6 claim would become allowed if no one objects to it, or if the debtors settle it or resolve it or otherwise compromise it, or if the Court enters an order allowing the Class 6 claim. The plan does not specifically allow Class 6 claims.

We do note that the debtors have not filed schedules or statements of financial affairs in this case. There has been no bar date. And our concern is that trade creditors may not know how the debtors intend to reconcile their claims or raise disputes or object to their claims and on what timeline.

I think that deeming Class 6 claims as being allowed will not give the Class 6 trade creditors a double recovery, because the treatment of Class 6 has an exception for claims that have been paid in full before the effective date.

Page 27

There was an all trade motion that the debtors had filed at the first day, and I believe the debtors had authority before today to pay those trade claims. And to the extent they've already been paid, I don't believe that specifically allowing them under the plan would entitle those creditors to any additional recovery.

I also believe that the definition of allowed would not appear to prejudice the debtors' defenses and counterclaims to those -- to Class 6 claims because of language that's provided in the definition of allowed.

The bottom line for us, Your Honor, is that there are several hundred million dollars in trade claims here that are riding through, and we believe that the plan should give those creditors certainty that they will receive that ride-through treatment.

THE COURT: Well, how, how is their suggestion not assuring they will?

MR. HACKMAN: I mean --

THE COURT: What do you think will happen?

MR. HACKMAN: I don't -- I guess the concern, Your Honor, is that if creditors aren't sure what the status of their claim is or when the debtors might raise disputes as to it, they may be more prone to agreeing to less favorable treatment than they would otherwise be entitled to under their contracts, or that they might otherwise be entitled to outside

Page 28

of bankruptcy.

THE COURT: Well, but the language says, if they look at the language, if nobody has filed a formal objection, their claim is allowed.

MR. HACKMAN: Right, Your Honor. I believe the plan -- and I would ask counsel to correct me if I'm wrong. I believe the plan would give the debtors 180 days to file claim objections, and I think typically plans give the debtors the ability to request extensions for claim objection deadlines.

So I guess the concern is that there would be room for certain claim disputes to become very protracted if, if the trade creditors need to wait -- need to go through that gating issue before their claim is specifically allowed.

THE COURT: Okay.

MR. HACKMAN: The final issue, Your Honor, is the payment of professional fees. Articles 5.2 and 9.2(j) of the plan provide for the payment of various fees and expenses, including the professional fees and expenses of an ad hoc group. The ad hoc group consists of I believe four members, and they hold a mix of unsecured notes and secured notes.

It will also provide for the payment of the professional fees and expenses of the debtors' nondebtor parent, of the Lone Star party. Article 2.4 of the plan would propose to pay the reasonable and documented attorney fees and expenses of the unsecured notes indenture trustee.

Page 29

Our position is that for those expenses to be paid, those beneficiaries must show that they have made a substantial contribution in the case under Section 503(b)(3)(D) of the Bankruptcy Code. We believe that that provision specifically addresses the payment of professional fees and expenses of a creditor, an ad hoc committee, or a shareholder or an indenture trustee.

The plan does not overtly define those fees and expenses as administrative expenses, but we believe that it gives them substantially the same treatment that 1129(a)(9)(A) gives to allowed administrative expenses, which is payment in full, in cash, on the effective date.

I guess one difference is that the professional fees and expenses in this case would bypass the allowance process that other administrative expenses must go through, and would not be subject to Court oversight, which we believe creates an issue additionally under Section 1129(a)(4).

Under the case law in this circuit, the type of contribution that satisfies 503(b)(3)(D) is exceedingly narrow. A creditor must provide an actual and demonstrable benefit to the debtor's estate and to creditors. Extensive participation is not enough. And benefiting the estate as an incident to a creditor's protecting its own interests is not enough. The applicant's efforts must transcend self-protection. The applicant must show they provided a

Page 30

direct and material benefit to the estate, and that there is a causal connection between their activities and a contribution to the estate.

We submit respectfully that the entities whose professional fees would be paid here have not been shown to have made a substantial contribution. The parties may have worked very hard for many months to achieve what's been achieved in this case, but again, extensive participation is not enough.

Article 5.1(a) of the plan would establish a substantial contribution as having been provided by the consenting noteholders and the Lone Star related parties. But I believe the case law is clear that a plan cannot deem an entity to have made a substantial contribution.

And we also don't believe that the debtors' agreement to pay professional fees and expenses as an inducement for parties to sign a restructuring support agreement satisfies the statute. Nor do we believe that it is appropriate for a debtor that is in bankruptcy to pay for the professional fees and expenses of its parent company which is not in bankruptcy.

So in conclusion, Your Honor, we submit that Class 6 claims under the plan should be expressly allowed, that the third-party releases should not be deemed -- that Class 6 creditors who did not -- that Class 6 creditors who are unimpaired should not be deemed to consent to the third-party

Page 31

releases, and that the professional fees that would be paid to the ad hoc group, the Lone Star parent company, and the unsecured notes indenture trustee should not be approved because there is not a showing of substantial contribution.

Unless Your Honor has any questions, that's all I have.

THE COURT: No.

Let me hear any response by the debtor.

MR. HACKMAN: Thank you, Your Honor.

MR. SCHROCK: Your Honor, just briefly, again, Ray Schrock, Weil Gotshal, for the debtors.

Your Honor, this -- I guess the first thing I just noticed that, you know, the evidentiary record in this, in this case, and, you know, on these issues is undisputed. We have put in the evidence to satisfy the global settlement. We think the Carney declaration speaks to itself.

I think that on the issue of silence, that, you know, there are plenty of cases that have looked at what is -- what constitutes consent and, you know, in the -- when you're dealing with a plan here, you know, this is -- you know, Delaware law is going to apply as to what, what is deemed consent.

We think that to the extent that Your Honor had to look at the Continental factors that they are satisfied, but we really -- I personally don't think that that's -- I think

Page 32

that consent would be the right way for the Court to decide the issue.

Just to correct the U.S. Trustee on the, the mechanic for allowance, it's -- 180 days is if somebody files a proof of claim. Otherwise, these claims, the general unsecured claims are just going to be resolved in the ordinary course of business, as they always have been and will be in an ongoing relationship with the debtors. And he is correct that the abstention -- the abstained issue has been resolved as well as exculpation.

But other than that, Your Honor, subject to any questions you have, I rest on the brief.

THE COURT: Well, let me ask you a question with respect to the payment of creditors in the ordinary course. Do we have any idea how many have not been paid? How many have been disputed in the ordinary course, if you will?

MR. SCHROCK: Just a moment, Your Honor.

THE COURT: Yes.

And could the party on the phone please mute their phones? Somebody is making noise.

MR. SCHROCK: Your Honor, with, with the all trade motion having been granted in these cases, and otherwise, it's not -- as you may recall, we paid about 350 million, we had authority to pay $350 million worth of trade. It's very small, we think under 30 million. But we're just resolving,

Page 33

you know, we're just resolving those, those matters in the ordinary course. And there's -- I would say in my experience, that's the way you do it because, you know, the message to the trade and our vendors at large when we filed of course was great news, we're paying you in full, nothing has changed, you know, you're unimpaired. But it's rough -- it's a small amount.

THE COURT: Okay. All right, I didn't mean to interrupt you.

MR. SCHROCK: No, that's all right, Your Honor. I was just, I was just wrapping up, actually, Judge. Unless you have any further questions, we'd rest on our papers, and we'd ask you to overrule the U.S. Trustee's objection.

THE COURT: All right. I'm sorry, somebody else wish to be heard? Thank you.

MR. FADER: Good morning, Your Honor. Benjamin Fader of Kelley Drye & Warren on behalf of Wells Fargo Bank, as unsecured notes indenture trustee.

Just very briefly. We filed a reply to the U.S.T. objection on the point of payment of indenture trustee fees and expenses, Docket No. 467. We believe 1123(b)(6) of the Bankruptcy Code, as Judge Gerber stated in the Adelphia case, is a broad grant of authority for a debtor seeking to confirm a plan, and that 503(b) -- Section 503(b) is not the sole means by which fees and expenses of non-estate professionals

Page 34

can be paid.

The indenture trustee has the right to assert its charging lien. No one contradicts or argues against that in any way.

And in a case particularly where, as here, the plan consideration for the noteholders is entirely in new equity of the reorganized debtor, the payment of fees and expenses in cash, separate and apart, is entirely appropriate and squarely within 1123(b)(6). Otherwise, you have significant logistical and administrative burdens involved, not only in determining how much equity needs to be allocated to the U.S. Trustee, but also in order to monetize those shares.

And this is a case where there is at least immediately, according to the debtors' disclosure statement, not going to be a, a market. These shares are not immediately going to be publicly traded.

And therefore, Your Honor, it could very well be the case that the additional costs that get imposed upon the estate and the other parties, not to mention the indenture trustee, who will still be able to assert those costs as part of the charging lien, that those costs -- that those additional costs from being (Inaudible) the charging lien, could, especially in a short case like this, exceed the amount of the fees and expenses at issue in the first place.

So for that, you know, for that reason alone, I think

Page 35

in this situation 1123(b)(6) clearly provides sufficient authority for the debtors to be paying the fees and expenses of the indenture trustee separately in cash. Thank you.

THE COURT: Thank you.

Anybody else?

MR. JENKINS: Your Honor, Dennis Jenkins of Morrison & Foerster for the Ad Hoc Group of Noteholders here. I wanted to just stand up briefly first so that the case doesn't go by and I don't get the chance to stand up and introduce myself.

But second, and more importantly, I'd like to just tie a few of the threads together that counsel was weaving for us.

As has been highlighted in the, in the papers, we filed a joinder as the ad hoc group joining the pleadings of the debtors in seeking approval of this plan. And by way of background, additional background, and I know this has been stated in the papers, our group, Your Honor, holds a majority of both the secured notes and the unsecured notes. And we've been at this process for the better part of the last year, putting an enormous amount of time negotiating the terms of this settlement, this global settlement and the terms of this plan.

And while for the secured noteholders, yes, their notes are getting refinanced, there is over a billion dollars of unsecured notes here that are not getting paid that are getting equitized. And those noteholders have spent a lot of

Page 36

time thinking about this business plan, thinking about this business and how best to set it on a path going forward to success, obviously for their own pecuniary interest, but also for the many employees and the people who matter as a part of this business.

And so we -- I want to just state for the record that we do disagree with the U.S. Trustee. We are not seeking at this time to have our fees allowed under 502(b), in part because we don't think that's necessary. While we believe we could go and make that showing and compel those payments, given all the work that's been done here, as counsel has pointed out, fee letters were signed before we entered into this. It was looking at this from the front end. These noteholders knew that this would be a lot of work, a lot of cost, and before they entered on this course, wanted to know their fees would be paid. The fee letters assured them of that. The RSA assured them of that, and now the plan assured them of that. And that was the global deal they entered into and expected those fees to be paid, part and parcel of all the work that they've been going through to get this plan to confirmation for all the reasons stated in the pleading.

So with that, Your Honor, I'll rest. Thank you.

THE COURT: Thank you.

Anybody else?

All right, well let me make my ruling on the U.S.

Page 37

Trustee's objections to confirmation.
First, with respect to the third-party releases, I will overrule that objection. The unimpaired creditors were, in fact, given notice and required to object to the releases, and I deem that to be consent. The concept of being required to take an action in order to protect one's rights is not a novel concept, either in civil litigation or in the bankruptcy context. And I will note that many, in fact, did object, and have been carved out in accordance with the terms of the plan. So I think that that is sufficient in this case.
Even if they had not, I do think that the Continental and Zenith factors are met here with respect to third-party releases. There's overwhelming support of all the impaired creditors. Creditors are being paid in full, pursuant to the Bankruptcy Code, both the impaired and the unimpaired with the exception of the noteholders who have consented to taking equity.
The releases are necessary to the plan. There is an identity of interest of all the parties in reorganizing this debtor along the terms of the global settlement reached before the bankruptcy. So I think that the releases in either event are appropriate in this case.
With respect to the payment of expenses, 503(b)(3)(D) is not the only way where such expenses can be approved and paid in a case. And I think it is perfectly appropriate to

Page 38

agree prebankruptcy to the payment of those expenses without the necessity of a court having to approve them after the fact in order to get the parties to come to the table and negotiate what ultimately in this case is a very successful reorganization of this entity.
So I think that the fact that the debtors agreed to that prebankruptcy was perfectly appropriate, and that there is no necessity that I review those expenses or otherwise interfere with that agreement.
With respect to the allowance of the general unsecured, I think that the plan language is sufficient. I'm satisfied, given the fact that over 90 percent of the trade that the debtors were authorized to pay on the first day have in fact been paid, quote, in the ordinary course of business, and that there is a mechanism in place to resolve those if need be. There is a mechanism that allows the filing of proofs of claim, that allows creditors to bring this to the Court's attention if they are not in fact being paid, in their view, in the ordinary course.
So I will overrule the U.S. Trustee's objections.
MR. SINGH: Thank you, Your Honor. Sunny Singh, Weil Gotshal, on behalf of the debtors.
THE COURT: Yes.
MR. SINGH: Your Honor, so then that leaves us, and we can turn to the remaining objections to confirmation filed by

Page 39

certain landlords that are still remaining. And just for the record, Your Honor, I know Mr. Schrock reviewed them earlier, but just to be clear that we're talking about Commodore Realty, that's open, Ipanema, Hudson Crossing, JEM Investments and Nature's Hope.
With respect to the last one, Your Honor, I'm pleased to report that just this morning before the start of the hearing, Nature's Hope, we were able to resolve that objection. The period for that lease only goes till November 18, 2018, and so the parties have agreed to have discussions regarding an earlier termination, all rights reserved, of course, but we will engage in those discussions to see if we can exit the premises earlier.
So, Your Honor, with that, I believe their objection is resolved.
So, Your Honor, that leaves us with the remaining objections, as I mentioned. Before reviewing those objections, Judge, I'd like to review with you just a few of the confirmation order and plan changes that addressed a large number of landlord objections, and that we believe address most of the open points that these landlords have raised that are still outstanding and just to frame the discussion for Your Honor, if that's okay.
So, Your Honor, first, there were a number of objections where landlords and other parties complaining about

Page 40

the prohibition against their rights to setoffs, seek subrogation, et cetera. We have clarified in paragraph 32 of the proposed confirmation order, Your Honor, that nothing in the order or the plan is in any way limiting their setoff rights, to the extent they have those defenses. It's not just one way as against the debtors.
Of course they are limited by the Bankruptcy Code. So if the cap on their damages is under 502(b)(6), you know, they're subject to the cap but they have setoff rights and defenses.
THE COURT: Setoff and recoupment?
MR. SINGH: Yes, and recoupment, Your Honor.
THE COURT: Okay.
MR. SINGH: It's -- all of those are reflected in there.
THE COURT: All right.
MR. SINGH: Setoff, subrogation, or recoupment against the debtors.
THE COURT: Okay.
MR. SINGH: Your Honor, next, a number of landlords requested language to make it clear that the reorganized debtors, or SEG II here, are going to bear the benefits and burdens of any unexpired lease, and clarification that the certain provisions within the leases are not going to be affected, i.e., that they truly are unimpaired and unaffected

Page 41

by the, by the plan. We have clarified that and made it clear in probably a three-page statement, that I wish could have been shorter, on paragraph 26(B), which makes it clear that all the obligations of the leases will be honored going forward, and as specified, a number of provisions that landlords felt very near and dear to their hearts that have to be culled out expressly, so we've got that all in here.

THE COURT: Okay.

MR. SINGH: Your Honor, next, several parties requested that the debtors fix a date by which disputed and undisputed amounts under assumption and rejection, amounts would be paid, you know, sort of defining what ordinary course meant. So we've added language to make it clear that rejection claims will be paid within 10 days of resolution of the dispute, as well as cure claims, same, same timeline.

If we've got undisputed, and they're already currently due and outstanding, and again, Your Honor, as Mr. Schrock mentioned earlier to the ordinary course trade motion, most of that has been paid timely. But as they are resolved, to the extent that they are then late, they will be paid within 10 days.

THE COURT: So within 10 days of resolution --

MR. SINGH: Of resolution.

THE COURT: -- or decision?

MR. SINGH: Yes, resolution or decision, exactly. It

Page 42

can be as agreed by the parties or as determined, you know, either by Your Honor or another Court of competent jurisdiction, depending on the dispute.

THE COURT: Okay.

MR. SINGH: Next, Your Honor, several parties, including the U.S. Trustee's Office, just requested clarification that litigation claims, as well as unimpaired claims, truly are riding through, are not going to be affected by the plan injunction -- this is as against the debtors -- plan injunction and releases.

So paragraph 36 of the latest version of the order makes it clear that general unsecured claims, as well as priority non-tax claims, there is a small -- we don't think there is anybody left there, but just in case, those claims are not released under the plan or prohibited from prosecution unless and until they actually are satisfied in full. So true ride-through treatment with respect to those claims.

THE COURT: Okay.

MR. SINGH: And, Your Honor, we did cull out a number of class action litigations. There were a few motions for stay relief that had been filed to make it clear that following the effective date those litigations could continue on an unimpaired basis, and of course should they get a judgment, they would then be treated as general unsecured creditors or a settlement, however that ends up playing out.

Page 43

THE COURT: Okay.

MR. SINGH: So, Your Honor, next, the U.S. Trustee also wanted confirmation of language that the debtors -- as we originally intended, exculpated parties will be limited to estate fiduciaries, and would not include the commitment parties under the exit loan. So we provided that language in paragraph (kk) of the confirmation order in the finding there.

And similar to that, Your Honor, the SEC requested language that the exculpation is -- only goes to the fullest extent permitted by 1125(e), and so we did add that language as well I believe to paragraph 34 of the order, Your Honor, if I have my number correctly. 32, excuse me, Your Honor, 32.

THE COURT: Okay.

MR. SINGH: So, Judge, that took care of a number of repeat objections that you see throughout these papers. And so really what we're left with is, for the most part with respect to these landlords, is adequate assurance of future performance.

And just a couple of notes, Your Honor, and we will -- you know, I'll allow each of the landlords to come up and address the Court and respond. But a few observations and comments on their objections, Your Honor.

All of them allege that they are shopping centers and, therefore -- and I'm talking about all the remaining landlords -- that they're shopping centers and therefore a

Page 44

heightened burden applies with respect to the assumption or the assumption and assignment to SEG II.

Your Honor, we would note that they all bear the burden of actually proving that they are shopping centers, and none of them have actually come even close to satisfying or even trying to satisfy, other than simply allege that these are shopping centers. So we don't think that that burden would, would apply -- or has been satisfied, excuse me, and we don't think that that standard would apply.

Even if it did, what you really come down to is adequate assurance of future performance, because percentage rent, tenant mix, none of those issues are really on the table because the debtors are assuming these leases, and intend to continue to operate them as grocery stores with a reduced debt burden, or they're going to SEG II. But even in SEG II, there is the master lease agreement where the debtors are continuing to operate these stores.

There are two stores, Your Honor, remaining that are dark, and so there are no operations there. We think we've, we've gone dark in compliance with bankruptcy law, of course, and we did it pursuant to Your Honor's GOB procedures. But really what's going on there, and I can address the specifics if those landlords continue to press, is there are a few remaining terms on the lease, and I'm talking about JEM Investment and Hudson Crossing right now, where we've got less

Page 45

than a year remaining rent on those properties, remaining term.

And so rather than reject the leases today, pay a 502(b)(6) claim on the effective date, from a liquidity perspective -- and it's not a ton of dollars, Your Honor -- but from a liquidity perspective, it makes a lot more sense for the debtors to pay those lease amounts over time, even though the store has gone dark.

Your Honor, additionally, with respect to adequate assurance, we would note that it's now in the record and undisputed in the Carney declaration that the debtors, on a reorganized basis, will have approximately $217 million of cash and ABL availability, in addition to the reduced debt load and interest capacity burden that the company has to bear coming out, which is a saving of $500 million in principal amount, and then about $40 million in interest per year.

So, and finally, Your Honor, I would note that with respect to SEG II, some of the landlords, or all of the landlords, I should say, have ignored the fact that they have lease guarantees, the SEG II, I mean a lot of that structure was created because of the lease guarantees. And they have lease guarantees from Ahold Delhaize, a company who, based upon their own public filings and on their public website, has 6 billion euro of free cash as of 2018. And we do have those records here for the Court and parties in interest if they'd

Page 46

like to see them.

So, Your Honor, we think we've satisfied adequate assurance. None of the parties satisfied their burden to show that they are shopping centers. Even if they did, you really just come back down to the adequate assurance issue, which again, we think we've satisfied.

I would note that there is one party, and it's Commodore, where there is a dispute about whether or not this lease has been terminated. There's two leases as to both of those leases. As to one of them, Commodore, I believe, would like a ruling or determination today that the lease has actually been terminated. This issue has been disputed in state court. It's still ongoing, and, Your Honor, we cite it in our papers, the Orion Pictures standard from the Second Circuit, which has also been followed by courts in the Third Circuit, that assumption is a summary proceeding. It's not an opportunity or a forum for a detailed evidentiary hearing.

So, Your Honor, we would recommend and suggest that assumption be dealt with, this dispute regarding termination be dealt with in the context of a separate evidentiary hearing, sort of how we've agreed with the Miami DC landlord, that we would, you know, enter --

THE COURT: Well, do you want them to go back to state court or do you want me to decide --

MR. SINGH: No, Your Honor, both parties agreed that

Page 47

we'd like you to determine it. They have no objection, so we would say that the state court stay would continue. We'd prefer Your Honor decide the issue in the context of the assumption dispute. I'm sorry to say that, Judge. Hopefully we can resolve it. But, you know, we think that would be the right approach here. It is an assumption dispute. We think under Orion you can authorize assumption pending a later determination of whether or not the lease has been terminated. Their rights are not affected or prejudiced because if the lease turns out to have been terminated, they're right, they would be treated as a general unsecured claim and paid under 502(b)(6). If they're wrong, as we believe they are, Your Honor, then the assumption will have been approved today and you will have made a determination on the termination issue.

So, Judge, unless you have questions for me now, I will allow the landlord counsel to speak and reserve right to, to respond, if that's okay.

THE COURT: Okay.

MR. SINGH: Thank you.

MS. KUHNS: I have a lot of paper, but my remarks are all deliberate.

THE COURT: Okay.

MS. KUHNS: Joyce Kuhns, Your Honor, of Offit Kurman on behalf of Commodore Realty, the landlord for the Tavernier and Palmetto store numbers 328 and 2448 respectively.

Page 48

I agree with counsel that a number of our issues on cure and adequate assurance can be deferred to another day. Certainly with respect to the Palmetto lease there is no dispute that that is an unexpired lease subject to assumption, and, and we have -- and I certainly am willing to take them up on their offer to resolve this dispute appropriately, we believe, before Your Honor. And that that be done and specially set and that we walk away today, because in fact there is a Florida proceeding pending initiated by the debtor, a declaratory action, that we walk away today with an actual hearing date so we can advise the court in Florida of that.

Both leases were defaulted for the same primary reason: the debtors' inaccurate and incomplete recording of gross sales on which to calculate percentage rent obligation, and its related failure to then pay the percentage rent obligations due under both leases.

Both leases are longstanding. Both date back to 1977. Each have been amended a number of times. Never has there been a dispute raised, nor has there been an amendment suggested because gross rent was ambiguous. This is an issue that was raised recently, and we truly believe in the context, a tactical decision to accumulate cash.

So Tavernier is different because the lease was in fact terminated in accordance with Section 20 of the lease upon a default and after notice and passage of a 30-day cure

Page 49

period on September 30, 2017, by letter dated August 24, 2017. And, Your Honor, that letter appears at Docket No. 266, and I assume that the debtor has no objection to stipulating to that, nor to stipulating to the lease, the leases themselves, which appear at Docket No. 469, both the Tavernier and the Palmetto lease.

So we -- the August 24 default or termination letter makes clear that prior notices of this percentage rent and reporting default were previously sent, remained uncured. And essentially the August 24, 2017 letter is your last-call letter. "Debtor: If we don't get this resolved within 30 days, your lease is terminated on September 30, 2017." That is what the letter said.

What did Winn-Dixie do? Surprisingly, nothing. September passed. October passed. And then on November 20, 2017, the debtor filed a declaratory action, not in the jurisdiction where the real estate was located, but in Miami-Dade County.

Since that time the actions are being transferred to Monroe County, because what Commodore then did two days later is it served an eviction proceeding and -- in Monroe County.

Your Honor, I have the dockets here, and I can put them into evidence and you can take judicial notice of them. And what you're going to see from that is that nothing substantive has happened in Florida. This has been a transfer

Page 50

of venue skirmish from day one. You have two proceedings filed in inappropriate venues that are now being transferred to the appropriate venue in Monroe County.

THE COURT: Well, am I deciding this factually today?

MS. KUHNS: Well, Your Honor, I'm just going to point out --

THE COURT: Okay.

MS. KUHNS: -- what I was going to point out is, and what the dockets will show, is that in fact the debtors allowed termination to occur.

THE COURT: All right, well --

MS. KUHNS: The proceedings were filed in November. I believe the debtor may even stipulate to that, that its declarations were filed in November, after September 30, 2017.

MR. SINGH: Your Honor, Sunny Singh. This is being handled by local litigation counsel. I am not prepared to stipulate to anything here today. And this shows why this is not appropriate for today. We're at the confirmation hearing.

THE COURT: Yeah. I --

MR. SINGH: We should have an evidentiary hearing, tee this up, take discovery and be back.

MS. KUHNS: Well, Your Honor, the reason I believe it is appropriate today is that the debtors chose to assume this lease under Section 365, and 365 says only unexpired leases can be assumed. And Section 365(c)(3) says the trustee may

Page 51

not assume a lease if it's been terminated under applicable nonbankruptcy law. And then Section 365(d)(4) says that a lease that is not assumed or rejected of an entry of the confirmation order is deemed --

THE COURT: Well, if you're correct, and after an evidentiary hearing, then your lease will not be assumed.

MS. KUHNS: Your Honor, there is nothing in Section 365(d)(4) that allows that determination being made after entry of the confirmation order. If they're right, it's an unexpired contract, that decision has to be made on entry of the order. That's what 365(d)(4) says.

Now, this is a prepack. They chose to file a prepack. This is an expedited timeline, and that's the conundrum that they're in today. The conundrum that they're in is 365(d)(4) says that that decision must be made on the unexpired lease on entry of the order of confirmation, which I believe is going to be today or tomorrow.

So that's what's different about Tavernier. And I believe that the only thing that could be determined, and as I said, I'm happy to put the docket in so that you can see there was a termination under state law. I'm not hearing there wasn't a termination effective in accordance with this lease under state law on September the 30th. And the only thing that it seems to me that this Court could determine today is in fact the debtor has not met its burden. The debtor is

Page 52

talking about the landlord burden on shopping center. Well, the debtor has the burden to show it's an unexpired lease and is therefore assumable.

We believe the only thing this Court could find is the debtor has not met its burden to show the Tavernier lease is unexpired and assumable, and therefore in accordance with the code and the lease and state law is terminated. And that is what we're requesting the Court do today.

And I'm happy to put in the dockets, because the dockets are there. As I said, we, we have the default letter, which is part of the objection; we have the leases, which are supplements and part of the docket; and I'm happy to put in and ask the Court to take judicial notice of the dockets in Florida. I have copies of them. And that --

THE COURT: You may hand them up.

MS. KUHNS: Thank you. Yes, Your Honor, I'm only going to hand up the dockets for Tavernier. I don't need to burden the record with --

THE COURT: Thank you.

MS. KUHNS: -- anymore paper, I am sure.

THE COURT: You may hand it up to me. Thank you. The debtor wish to respond?

MR. SINGH: Yes, Your Honor. Your Honor, I just -- a couple of things, just to take a step back for a second and just reframe the dispute and the issue that we're having here.

Page 53

THE COURT: Um-hum.
MR. SINGH: The underlying dispute is really about the fact that the debtors have a below-market lease, and they've been fighting with the landlord because the landlord has been trying to find a way to bring us up to market. There have been discussions that the parties are trying to resolve this dispute.
THE COURT: No, no, I don't need any of that.
MR. SINGH: No, no, I'm not giving you --
THE COURT: What evidence do you have that the lease was not terminated, in light of the evidence that's been presented by the landlord?
MR. SINGH: Well, Your Honor, what I would say is that putting that issue -- we can get to the evidence. But our view is, and our position is that, Your Honor, you do not have to decide that issue today under the Orion Pictures standard, which they have not disputed at all. They have not refuted the fact that under the Bankruptcy Code Your Honor can make or defer an assumption decision, even if you choose to, pending a determination of whether or not the lease has been terminated. And that's why it should be a proper -- appropriately put before Your Honor.
They filed a 17-page objection that didn't attach most of what they've been referring to today, or I'm not sure attached anything. And so, Your Honor, you know, this is not

Page 54

the appropriate forum to show up and have an evidentiary hearing without having taken discovery, parties {sic} being exchanged between the parties, and a true termination dispute being decided by Your Honor. There is not enough in the record here for you to make that determination, and you're not required to make that determination under applicable law, because we're just in an assumption proceeding that's a summary proceeding. It is not --
THE COURT: Well, we're at confirmation, and you have to have decided by confirmation whether to assume or reject. And don't I have to enter an order?
MR. SINGH: Well, we have decided to assume the lease. We have made that determination. The issue is whether or not there is a dispute. And 365(d)(4) just says what happens if you don't assume a lease by the time of the confirmation hearing? It's deemed rejected. It doesn't actually say you must have a final determination by Your Honor to say yes, the lease is not deemed assumed. So we have made a decision.
And I would note, Your Honor, it's pretty typical in plan provisions, as is in our plan provision, that says if there is an assumption dispute pending, that those leases can continue towards assumption. And we've got it in Section 8.2 or 8.3 of the plan that say all leases are being assumed other than those where there is an assumption dispute pending before Your Honor, precisely for this reason. You don't have

Page 55

confirmation hearings, particularly in prepacks, where, you know, a number of these types of assumption disputes are being decided. They can be deferred. We have made our decision. We have struck the language in the plan that says we can't change our decision, right. We can no longer come back and say we will later reject the lease if X, Y or Z happens. We've taken that provision out of the plan, so we've made our decision, Your Honor.
And now all that's left is for you to decide, following an evidentiary hearing, following discovery between the parties on this very particular dispute, whether or not there has been a termination. And we think we will be able to show Your Honor in that context, after we've gotten appropriate discovery, that there has not been a termination. But again, you don't need to decide that today.
MS. KUHNS: Well, I believe the literal language of Section 365(d)(4), and as the debtor has chosen its course here, actually compels you to make that decision. Clearly at issue -- and the debtor has the burden on whether this is an unexpired lease. And, Your Honor, I didn't properly identify the Monroe eviction docket is 3A, and the declaratory docket from Miami-Dade County as 3B, but I'll do so now.
That said, this debtor had an option here. It filed a prepack plan that took a lot of effort, and I congratulate it on restructuring its balance sheet. However, on day one it

Page 56

could have moved for an expedited determination of the status of this lease in front of this Court.
THE COURT: But it doesn't have to, does it?
MS. KUHNS: It doesn't, it doesn't have --
THE COURT: It did make an unequivocal decision to assume your lease.
MS. KUHNS: I don't think it followed -- well, Your Honor, it has not actually dealt with the unexpired lease language. That's a predicate of its decision, and that is in the code for a reason.
THE COURT: It is asserting it's an unexpired lease. You dispute that.
MS. KUHNS: I understand, Your Honor. I'm just saying that determination needs to be made in order for an entry of a confirmation order, because otherwise, you will have our deemed rejection under Section 365(d)(4) automatically by virtue of the literal language of the section.
But the plan can say whatever it wants. The plan does not get to rewrite the code. The debtor does not get to rewrite the code. The code says what it says. And that's why we're asking for the relief we're asking for.
The debtor is in a prepack situation. That's why I'm suggesting --
THE COURT: But there are -- but there are many cases that say that the decision does not have to be made on

Page 57

confirmation. Do you have any cases that say the Court has to actually make a determination as to whether the lease is assumable on or before confirmation?

MS. KUHNS: Well, Your Honor, I have to admit, it may be that people hadn't squarely raised it and they allowed that to be deferred until the effective date. But my client is not willing to waive it or defer it until the effective date. There is nothing in this section that says it's conditional. It's not subject to some future event. It's only subject to entry of the confirmation order.

As I said, the debtor's created its own conundrum here. We didn't. There is a dispute now whether it's an unexpired lease. In order to not have it deemed rejected today, that determination would need to be made. Otherwise, it will be rejected on entry of the confirmation order by virtue of the literal language of the section.

MR. SINGH: Your Honor, could I briefly respond just one moment on the language of this -- of the code?

THE COURT: Yes.

MR. SINGH: If you, if you look at the -- I'll just -- Sunny Singh here, Your Honor, again for the debtors.

Just to read the language again. Subject to subparagraph -- I'm in 365(d)(4)(A). Subject to subparagraph (B), an unexpired lease of nonresidential real property under which a debtor is the lessee shall be deemed rejected, and the

Page 58

trustee shall immediately surrender that nonresidential real property to lessor if the trustee does not assume or reject the unexpired lease the trustee, i.e., the debtor has moved to assume.

There is nothing here that requires a Court order by Your Honor before that date. There is nothing here that requires Your Honor to make a determination whether or not something has been terminated by that date. We just have to provide our intent, the trustee has to assume, and that is what we've sought to do.

Your Honor, unless you have any questions, I think that's all I have on the issue.

THE COURT: Well, I agree with the debtor. There are many cases that say that the debtor just needs to unequivocally state its intention in the plan without the ability to change its mind, and that is sufficient to meet 365(d)(4).

MS. KUHNS: Thank you, Your Honor. One thing that we would need, as I said before, before we leave I think, because of what is pending in Florida, would be actually a hearing date. We can do that at the end. But I think in fairness to everybody, including the courts down there, that would be appropriate. So, thank you.

THE COURT: Yeah, I'm going to require that the parties meet and get a date.

Page 59

MR. SINGH: Yeah, Your Honor, that's fine. We'll meet and have litigation counsel and come back to Your Honor with a date.

So, Your Honor, I think there may be some other landlord objections.

THE COURT: I'm waiting for anybody else who wants to --

MR. SINGH: Okay, I'll wait to, I'll wait to respond.

THE COURT: Go ahead.

MR. ALLINSON: Thank you, Your Honor. Elihu Allinson on behalf of Ipanema Smokey Park, LLC.

I think, sort of as a, as a housekeeping matter here, my client is trying to get a read on whether its right to challenge adequate assurance of future performance is preserved for its assumption dispute, pursuant to its assumption objection timely filed, or whether that the issue of SEG II's financial wherewithal and ability to perform is being heard here today.

MR. SINGH: Your Honor, it's being, it's being heard here today. Cure disputes are reserved, but assumption is going forward, and if you'd like me to address their comments.

MR. ALLINSON: So, Your Honor, I would object procedurally. I think -- I don't think this provides appropriate due process. The, the definition of assumption dispute at 1.14 of the plan explicitly provides that it

Page 60

includes cure or adequate assurance of future performance. And the plan provides that assumption disputes can be continued until after the plan, as long as they're resolved before the effective date. And so we would request that, that that language be enforced or that the Court schedule a separate evidentiary hearing on this matter for Ipanema.

MR. SINGH: Your Honor, I may have misread. Could counsel just tell us where they're looking to see that assumption disputes other than cure can be adjourned? Or have to be adjourned?

MR. ALLINSON: It says at -- the plan provides at Section 8.2(b) that if there is an assumption dispute pertaining to assumption of an executory contract or unexpired lease, such dispute shall be heard by the Bankruptcy Court prior to such assumption being effective, provided, however, before the effective date. And then it goes on.

MR. SINGH: It goes on with respect to cure disputes.

So, Your Honor, just, just, and I'm happy to address it. But that's -- there's not a due process issue, Judge. We had provided notice -- I mean that's what this case has primarily been about is leases. People have known, we provided a number of notices, they're all in the record, of when disputes have to be asserted. They have asserted an adequate assurance dispute.

Ipanema has a lease that is being assigned to SEG II.

Page 61

It's already in the record, Your Honor, that SEG II will have from the debtors funding of $25 million, as well as -- excuse me, $21 million on the effective date, as well as an additional commitment for 25 million. And, Your Honor, not to mention, there is an Ahold guarantee with respect to this lease. The SEG II leases enjoy the benefit of an Ahold guarantee. And trust me, I mean Ahold has appeared in this case. Trust me, they are not happy about that. And the Ahold guarantee, I mean we've got information, we're happy to share it with counsel, that is publicly available that makes it clear that Ahold holds -- has access to cash -- I'm just talking about their free cash, not even assets -- of 6 billion euro as of April 2018, their most recently filed report, which guaranty, Your Honor, has been what has exactly been the document that has been providing them assurance of performance in addition to the debtors' performance.

So the debtor is going to continue to operate this property. SEG II is going to have access to $46 million with respect to all their properties. And there is no impairment or effect on the Ahold guarantee that has been provided to the landlord.

THE COURT: Okay. Anything in response by Ipanema?

MR. ALLINSON: Well, Your Honor, if, if we're, if we're joining the issue of whether the plan has established or the debtors have established that SEG II is adequately funded

Page 62

to provide adequate assurance of future performance, I would, I would respectfully disagree. I think that there is information in Mr. Carney's declaration and otherwise about what assets are going to be made available as to SEG II, as counsel just recited. But there is nothing in there about what liabilities it has.

There's also -- you know, there's 40 or so leases, there's $46 million, comes out to an average of, you know, a million dollars or so a lease. Our remaining obligation is 2.3 million. There's, there's been no financial analysis of that.

As far as SEG II itself, the plan documents show that that entity was established for the primary purpose of mitigating leases, not performing them. So where is the adequate assurance of future performance in that?

And finally, as to Ahold guarantees, that's neither here nor there. There's nothing in this plan that says that the debtors can state with certainty that Ahold is going to perform obligations that the debtors or their assignee, SEG II, may not. There's simply nothing to that effect in here.

That would be my response, Your Honor.

THE COURT: All right. Well, I'm going to hold that as to Ipanema that it can raise adequate assurance issue at the time the cure dispute is resolved.

MR. SINGH: Very well, Your Honor. Thank you.

Page 63

THE COURT: Anybody else?

MR. ALLINSON: Your Honor, I think I'm also next up for Hudson Crossing --

THE COURT: Okay.

MR. ALLINSON: -- LLC. On that the changes that the debtors have proposed do address substantially all of our concerns, and so we're going to stand down on that objection.

THE COURT: All right. Thank you.

MR. SINGH: Your Honor, just one clarification. If there is going to be a reservation with respect to that assumption dispute, the -- because of the short term that is remaining, it may just be easier, Your Honor, for the debtor to reject that lease and potentially do away with the benefit of having the remaining term. So unless the party has a dispute, I think we would want that right reserved because we're not technically assuming today because the issue is being deferred.

THE COURT: Well, yeah, you are. You're deciding -- you have to decide today whether you're going to assume or reject.

MR. SINGH: Right. So, understood, Your Honor. Understood.

THE COURT: Do we want to take a break or --

MR. SINGH: No, Your Honor, I think it's, I think it's, I think it's okay.

Page 64

THE COURT: All right, anybody else?

You don't have to respond. He's not -- he's not -- he's changing that statement.

MR. SINGH: Your Honor, sorry. I misclarified. If it's not later authorized to be assumed by Your Honor because we failed to show adequate assurance, right, then wouldn't the lease -- I think you would, you would disallow it and it would be rejected, is the point. Not that we are changing our determination, but that Your Honor is not allowing the assumption at a later point.

THE COURT: Because you have not proven adequate assurance of future performance.

MR. SINGH: Right, if that dispute isn't later resolved.

MR. ALLINSON: Your Honor, I think that's calling for an advisory opinion. It won't happen until we get there.

MR. SINGH: Okay, Your Honor, that's fine.

THE COURT: Okay.

MR. STEPHENSON: Cory Stephenson, Your Honor, here on behalf of JEM Investors, LLC.

JEM has two leases that were originally with Samson Merger Sub, store number 2446 and 2479. One of those stores, 2479, is one of the dark stores that were referenced a little bit earlier, and that's where a lot of our concerns arise.

JEM had asked for a few things, particularly some kind

Page 65

of process for -- the debtors' counsel specified that there would be a specific time where resolved cure defaults would be paid. But JEM was looking for some kind of process where we could submit and then receive some kind of response from the debtor or the assignee with respect to any alleged cure defaults, so that there be would be an actual timeline rather than this, this ordinary course language, which essentially just leaves us with very little with respect to guidance as to when we may be able to resolve these issues. Other than, you know, we can request that the cures be -- or I'm sorry, request that the defaults be cured, file something, show up for a hearing, and then at some point wait for a ruling, and then we would have the 10-day payment, or presumably the 10-day payment for whatever the cures are.

Now, one of the big issues at the dark property is nonmonetary defaults. There are some issues with respect to deterioration at the building and also in the parking area. JEM had also requested to the extent that, you know, the debtor isn't going to resolve those immediately, that JEM be able to go in and resolve and remediate those issues on the property, rather than let the property simply deteriorate.

That's particularly concerning to my client because the property is vacant. There is no one monitoring who's trying to access the building or even successfully accessing the building.

Page 66

THE COURT: Okay.

MR. STEPHENSON: It creates a bit of a safety issue. And the condition of the building certainly isn't going to improve with the, the paint peeling off the side and, you know, the potholes widening.

And the final issue is JEM had asked for guidance with respect to what the plans were for the two properties. I know the one is still operating, and debtors' counsel said that the other, I suppose the intent is just to let it sit and pay the rent as time goes on. So if that is the case, then that's fine. But really we're just looking for a little more guidance and the opportunity to move in. And to the extent the debtor is not complying with the contracts, do whatever kind of preventative maintenance is required.

THE COURT: I'll hear from the debtor on that.

MR. SINGH: Your Honor, the only thing I would say is, you know, for an expedited determination we're trying to address these as quickly as we can. I'm happy to commit to counsel that, you know, we can speak next week and try to get the clients together to have a discussion about these issues.

With respect to going in and fixing, you know, damages or asserted damages at the property, we're going to go by whatever the lease says. Yes, it's gone dark, but that doesn't mean we're not complying.

THE COURT: Well, they say you're not maintaining.

Page 67

MR. SINGH: No, I understand that.

THE COURT: You say you are.

MR. SINGH: Yeah, I mean we should have a discussion about it, and if there is still a dispute after the fact then they can -- it's a cure dispute, right. We're not maintaining that there's some monetary damage that's associated with that that they want to assert against us, right, because there has been some sort of alleged default. And so we will deal with that in the appropriate time. But I think we should have a conversation and see if we can address whatever those, whatever those defaults are.

THE COURT: All right, I will give you the time to have that conversation, but if it's not satisfactory to JEM, then they can seek an immediate hearing to --

MR. SINGH: Right.

THE COURT: -- discuss it.

MR. SINGH: That's fine, Your Honor.

MR. STEPHENSON: I have nothing further. Thank you, Your Honor.

THE COURT: Thank you.

Anybody else wish to be heard?

Does that resolve all of the objections then?

Do you want to take a break?

MR. SINGH: Yes. I apologize, Your Honor. Could we just have just a five-minute break?

Page 68

THE COURT: All right, we'll stand adjourned for a recess.

(Recess from 12:05 p.m. until 12:38 p.m.)

THE COURT: All right, we're back on the record, and sorry for the delay.

MR. SCHROCK: Thank you for giving us the time, Your Honor. Ray Schrock on behalf of Weil Gotshal for the debtors.

THE COURT: So you settled everything and --

MR. SCHROCK: I think we did, Judge. I think we resolved, I think we resolved the point.

Thanks for the time. We did -- it was helpful to have it. And this is just really -- this is just a clarifying comment. In Section 8.1 of the plan, and the reason we were having this back-and-forth on the -- from the debtor and sponsor side, there is a concept of a defined term called an Assumed SEG II Lease. And in that, when we had drafted the plan, we had contemplated that we would have assumption issues, including adequate assurance, with respect to the Assumed SEG II Leases, as that defined term is used in the last sentence of 8.1(a), resolved at the time of the confirmation hearing.

And just in light of Your Honor's order, which of course we're, we're perfectly fine with, to adjourn the assumption decision on one particular lease that we were going to assumed -- have assumed, we just want to make clear for the

Page 69

record that, you know, that lease in particular would not be an Assumed SEG II Lease, unless and until Your Honor actually enters an order allowing for the assumption and assignment of the lease. And of course if it's not, you know, if it's not, then it will be -- the plan's terms will be there.

But just in light of this, there's this language here that just states that -- you know, makes clear that it's drafted with the implicit notion that assumption issues would be decided by the state. And we just want to make clear, it's only going to be as Assumed SEG II Lease if Your Honor allows for the assumption.

With that, Your Honor --

THE COURT: All right, well, does the landlord agree with that?

MR. ALLINSON: Your Honor, Ipanema objects. The documents are very clear. The definition of Assumed SEG II Lease is very clear. It means that they were attached to the plan as a specific schedule. It includes the Ipanema lease. The provisions of the plan are very clear that the debtors are not permitted to reject an Assumed SEG II Lease. It doesn't say upon assumption and assignment of an Assumed SEG II Lease.

THE COURT: But you're saying they can't assume it.

MR. ALLINSON: No, no, Your Honor. They haven't demonstrated adequate assurance of future performance. That's all I'm saying.

Page 70

THE COURT: Well, and in the absence of that, they can't assume that.

MR. ALLINSON: That's not what I'm saying, Your Honor. I'm saying they will reserve that -- the way this plan is arranged, we reserve our rights to bring that issue up at the assumption dispute.

MR. SCHROCK: Your Honor, this is what I'm talking about. They're trying to get a catch-22 where you don't order an assumption, and then somehow we're deemed not to have rejected it. But the code is binary. If we don't assume it --

THE COURT: It's rejected.

MR. SCHROCK: -- it's rejected. That's the only way we can resolve this issue. And so when we saw this ambiguity in the plan language, we just felt compelled to bring it up for the record. Listen, that's, that's the law.

MR. ALLINSON: Your Honor, we're not trying to gain a catch-22 here. The debtors are trying to gain a catch-22. They have to -- they've made their decision --

THE COURT: Yes.

MR. ALLINSON: -- as of today that they are assuming and assigning all the leases on the Assumed SEG II Lease schedule. That includes the Ipanema lease.

What we're --

THE COURT: Well then your objection to their

Page 71

assumption of that is withdrawn?

MR. ALLINSON: It's not of drawn -- withdrawn. What we're saying is that the way they have set this --

THE COURT: What do you think the effect of having the hearing on the cure also be the hearing on adequate assurance of future performance? What will happen at that hearing if I determine that you are correct and they have not given adequate assurance of future performance?

MR. ALLINSON: Then I think they can move the lease to the assumed leases bucket.

THE COURT: No, it can't be assumed if they haven't established adequate assurance of future performance.

MR. ALLINSON: The assumed, the assumed lease bucket, Your Honor, for the reorganized debtors, not for SEG II. They established they have $517 million worth of funding available to satisfy adequate assurance of future performance with regard to those leases.

MR. SCHROCK: Your Honor, see, but, this is, this is a marginal store.

THE COURT: You need to speak into a microphone to be sure that you're being heard.

MR. SCHROCK: Yes, sorry, sorry. Sorry, Your Honor.

Your Honor, it's a marginal store. We are going to assume it to SEG II. And if we can find another, you know, solution for it, we will. Otherwise, we're going to reject

Page 72

it.

And I think what the landlord is pointing to is there's a provision in the plan that, that I said, you know, that it's a very general provision, 8.1(a) that says if there is a pending adequate assurance dispute, you know, the lease is not deemed assumed. But there's a further provision that says in no event shall any debtor or reorganized debtor, as applicable, be permitted to reject, in a quote, assumed SEG II or assumed lease subject to the Green Co. letter agreement.

And I think what, what we're hearing is I'm just saying listen, if Your Honor doesn't enter an order assuming it, then it's going to be treated in accordance with the plan. And this, this cannot be an Assumed SEG II Lease if Your Honor does not order that it be assumed. And we're not going to have this lease get stuck with the reorganized enterprise. It's being carved off, you know, for SEG II. And, you know, we hope that it finds a home, but if it, if it does not, then, you know, it will be resolved in that fashion.

And so, listen, it's our plan, and to the extent that they want us to clarify in the language, I'm certainly clarifying it now that it's only on the Assumed SEG II Lease schedule, to the extent Your Honor issues an order allowing for the assumption.

MR. ALLINSON: Your Honor, this Court should not countenance a claim at this time that if they cannot square

Page 73

away a certain lease on the SE -- on the Assumed SEG II Lease's schedule, they can reject it. There is nothing in this plan that says that. That -- I think that's a primary point that we need to resolve right here before going any further.

MR. SCHROCK: I actually didn't think it was such a controversial point, Judge. We're not assuming a lease if your, if Your Honor doesn't allow for its assumption. And so I just didn't want to get caught in a defined term where we had contemplated that we would, you know, deal with these adequate assurance issues for SEG II, and somehow the reorganized company gets stuck with a lease to which it never intended, which it be ferreted out, it sounds like that's exactly what the landlord had intended.

THE COURT: Let me look at the plan.

MR. SCHROCK: So, Your Honor, we could resolve it in a couple different ways. One, you know, to the extent the debtors can clarify for the record it's only an SEG -- Assumed SEG II Lease to the extent that Your Honor issues an assumption order, that would be fine. I think otherwise --

THE COURT: Is there a definition? Assumed means those leases identified on the schedule --

MR. SCHROCK: Right.

THE COURT: -- of assumed leases.

MR. SCHROCK: Right. And my clarifying change was

Page 74

simply going to note that, you know, we'd add a note to the schedule that says, you know, to the extent it's -- the Court actually enters an assumption order. I don't, I don't want to twist this plan provision into forcing the reorganized entity to be liable for this lease, and if there is any question about it, the other alternative is we'll just reject the lease. But we can't have the reorganized entity get saddled, you know, with this obligation. And I think that -- I'm not aware of any court ever, you know, saying you can't satisfy adequate assurance so let's put it, let's put it back. I've only seen this issue be resolved the way I just noted, which is either it's assumed or it's rejected. That's the way the code works.

MR. ALLINSON: Your Honor, that argument is disingenuous. There was language in the plan, actually I'll wait till Your Honor's --

MR. SCHROCK: Disingenuous, certainly wasn't disingenuous but --

THE COURT: I'm sorry, go ahead.

MR. ALLINSON: Your Honor, the argument that it's either assume or reject is disingenuous. The plan provides at Section, I believe it's 8.2(b) under "Determination of Assumption Disputes and Deemed Consent," I'm sorry, the plan provided -- it has since been amended. But it originally provided as follows: "To the extent the assumption dispute is

Page 75

resolved or determined unfavorably to the debtor or the reorganized debtor, as applicable, such debtor or reorganized debtor, as applicable, may reject with the consent of the requisite consenting noteholders the applicable executory contract or unexpired lease, after such determination, provided that in no event shall any debtor or reorganized debtor, as applicable, be permitted to reject an Assumed SEG II Lease or Assumed Lease" -- capital A, capital L -- "or Assumed Lease, subject to the Green Co. letter agreement."

That has been changed in the amended plan to lop off everything before "provided that"; that is, to take out all reference to the unfavorable determination to the debtors of an assumption determination -- an assumption dispute. And what was left is simply the very last clause, which is now an independent sentence. "In no event shall any debtor or reorganized debtor, as applicable, be permitted to reject an Assumed SEG II Lease," defined term, "or an Assumed Lease," defined term, "subject to the Green Co. letter agreement." What could be more clear?

THE COURT: Well, I think what's not clear is they're defining an assumed SEG lease as a lease on that list, regardless of whether or not the assumption is approved by the Court.

MR. ALLINSON: That is correct, Your Honor. Because they're deemed to be -- have made their decision today, and

Page 76

the assumption becomes effective no later than the effective date. And in the meantime, there can be an assumption dispute. And if that assumption dispute is resolved unfavorably, the prior treatment was they can't reject.

THE COURT: Well, but what's being determined unfavorably is that the debtor has established the predicate to assuming a lease, and that is adequate assurance of future performance.

MR. ALLINSON: Adequate assurance of future performance is explicitly contained within the definition of what can be contained in an assumption dispute.

THE COURT: I understand. However, the problem is that if there is no adequate assurance of future performance, there can be no assumption under 365. Whether you call it assumed or not, it can't be assumed.

MR. ALLINSON: Well, Your Honor, we didn't draft this plan. They drafted it.

THE COURT: I know, and they're trying to clarify it for the record --

MR. ALLINSON: Your Honor --

THE COURT: -- that that can't be what is intended.

MR. ALLINSON: Your Honor, they, they took and defined a term as Assumed SEG II Lease to mean well, the Court hasn't approved that it's assumed. It's just on this list. But we're calling that an Assumed SEG II Lease. That's the way

Page 77

they set this up.
THE COURT: I know, and he's trying to clarify that that can't be what was intended.
MR. ALLINSON: He's trying to make a material change to the plan at the confirmation hearing, Your Honor.
MR. SCHROCK: Judge, we are certainly not trying to make a material change to the confirmation -- to this plan at the hearing. I'm trying to make clear what I think is, you know, that make sure that the plan doesn't -- isn't contrary to applicable law.
THE COURT: I think that's correct. It's the provision that says it can't be rejected --
MR. ALLINSON: They have other alternatives.
THE COURT: There is no other alternative.
MR. ALLINSON: There are other alternatives. In fact, we suggested --
THE COURT: If they can't be assumed, it's got to be rejected.
MR. ALLINSON: It can be put on the assumed leases schedule, as opposed to the assumed SEG II leases schedule.
THE COURT: It could be, but the debtor is not intending that. And that -- there is nothing in this language that would suggest that's the alternative, that anybody would have read that as the alternative.
MR. ALLINSON: I read that as the alternative and

Page 78

shared that with the debtors. They didn't respond.
THE COURT: I'm sure there is a definition of assumed leases.
MR. SCHROCK: There is.
MR. ALLINSON: Yes, Your Honor, it's --
THE COURT: And that's all on the other schedule.
MR. ALLINSON: Exactly.
THE COURT: And you're not on that schedule.
MR. ALLINSON: That's correct.
THE COURT: So how can that be the default?
MR. ALLINSON: Because if -- I'm not saying it's the default. I'm saying it's another option. They could put us on that schedule and then there wouldn't be an adequate assurance problem.
THE COURT: But they don't want to put you on that. They've put you on the assumed SEG leases. But if it cannot be assumed, it's got to be rejected.
MR. ALLINSON: We also suggested another alternative as to how they could satisfy adequate assurance of future performance. And that would be specifically to have SEG II earmark $2.3 million for this lease to the extent, to the extent it was not otherwise resolved, such as by an early termination agreement.
THE COURT: Well, that can be addressed in the adequate assurance, and they can make their -- you can discuss

Page 79

or they can -- you can put on your evidence and they can put on their evidence, and that is an option that they could do. But if they don't elect to do that, I can't approve assumption of that lease, correct, in the face of your objection to adequate assurance?
MR. ALLINSON: Your Honor, they've set this entire mechanism up in a certain way. What that mechanism was was that the leases on assumed lists couldn't be rejected, and that assumption disputes could be put off until after confirmation. Now --
THE COURT: But equally, equally, an equal -- equally valid reading of this is regardless of what I say, if it's on the assumed SEG lease, it's assumed? I mean that's the plain language of it, regardless of what your objection may be.
MR. ALLINSON: That's what they brought to the Court, Your Honor.
MR. SCHROCK: And we're seeking to clarify that if Your Honor doesn't order that the lease can be assumed, then listen, it's not an assumed --
THE COURT: It's deemed rejected.
MR. SCHROCK: It is. I don't know any other way for the law to, to work, Your Honor. And I, I -- we saw the ambiguity. We wanted to clear it up. And, you know, we think that's the way we should deal with it.
MR. ALLINSON: Your Honor, there, there is an

Page 80

alternative. There are a couple of alternatives that I can think of right away. I've mentioned them both. They can earmark their own funds, their own --
THE COURT: But they don't have to do that.
MR. SCHROCK: We're not doing that.
THE COURT: They don't have to do that.
MR. SCHROCK: We are not doing that.
MR. ALLINSON: Well, Your Honor, then I don't know what to make of the language that says that they can't reject leases that are on those lists.
THE COURT: They can't reject, but if it's not assumed, under 365 it's deemed rejected.
MR. ALLINSON: I understand that.
THE COURT: And it's not by their election. That's how it could be read. The debtor can't elect to reject it.
MR. ALLINSON: Well, then --
THE COURT: They've elected to assume and assign it to SEG.
MR. ALLINSON: And then I go back to my original objection here, Your Honor. We're here today on a dearth of due process. If we're going to have a full-blown adequate assurance evidentiary hearing today, that should have been made more clear.
THE COURT: And I've held that you can reserve that evidentiary ruling until the cure dispute. But the effect

will be no different from if I decided it today, and if I decided it today, it would be deemed rejected if it is not assumed and assigned.

MR. ALLINSON: Well then, Your Honor, I don't see any reason to go forward with a dispute on adequate assurance. What's the point?

THE COURT: You may want them to reject -- it to be deemed rejected. I don't know.

MR. ALLINSON: We don't, Your Honor. That's why we suggested that they earmark funds. What we want to make sure is that there are sufficient funds that either they or their assignee will adequately perform all of the obligations to the end of this lease, and they have not established, respectfully we submit they have not established they can do that. They've said it's 44 leases and 46 million. That's about a million --

THE COURT: Well, they may do that for your lease because your lease is the only one to which there is that -- and I'm going to reserve any ruling on whether or not whatever evidence they present about SEG's ability to perform is satisfactory, or whether some other adequate assurance of future protection can be offered to you for that lease.

MR. ALLINSON: As long as you're reserving your ruling on that, Your Honor, that's fine.

THE COURT: Oh, I am.

But I think for the record, if I determine what is

offered is not adequate assurance, I think it would result in the deemed rejection, not an elected rejection by the debtor.

MR. SCHROCK: Thank you very much, Your Honor.

Your Honor, I don't believe we have any other landlord objections at this stage.

THE COURT: So I think that has resolved all objections pending, am I right?

MR. SCHROCK: That's correct, Your Honor.

THE COURT: Okay. Then I will confirm the plan. Do you want to go through the changes? Do we need to go through any other changes? I know that the landlord changes were incorporated in here, and I think you mentioned the resolution as to SEC.

MR. SCHROCK: Yes.

THE COURT: Was there anything else?

MR. SINGH: Those are just -- the redline that we handed up just incorporated some of those additional language changes. And then the remaining changes I don't think are material, Your Honor. They are clarifying and supplementing the fact on the exit fees are being approved by Your Honor, and that nature. I'm happy to go through them, but I don't think we need to.

THE COURT: Okay.

MR. SCHROCK: Okay. Thank you very much, Your Honor. We really appreciate your time.

THE COURT: And have you uploaded the, the order?

MR. SINGH: Yes, Your Honor, it's been --

THE COURT: And the blackline, again, has no other changes other than articulated?

MR. SINGH: No, Your Honor, unless you would like us to incorporate any changes from today, your ruling, but I think the record is clear so I'm not sure we need to.

THE COURT: Okay. All right, you uploaded this order?

MR. SINGH: Yes, that's uploaded for Your Honor.

THE COURT: All right, then I'll enter the order approving confirmation.

MR. SCHROCK: Thank you very much, Your Honor.

MR. SINGH: Thank you, Your Honor.

MR. SCHROCK: Thank you.

THE COURT: And congratulations on getting here over many obstacles, including today.

MR. SCHROCK: Thank you. Thank you, Your Honor. All right.

THE COURT: All right, we'll stand adjourned then. Thank you.

MR. SCHROCK: Thank you.

(The hearing adjourned at 1:02 p.m.)

C E R T I F I C A T I O N

I, Julie H. Parrack, transcriber, certify that the foregoing is a correct transcript, to the best of my ability, from the official electronic sound recording of the

/s/Julie H. Parrack May 15, 2018
Julie H. Parrack

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Exhibit G

Transcript of Hearing
In re Aegean Marine Petroleum Network, Inc., Case No. 18-13374-MEW (Bankr. S.D.N.Y. April 1, 2019)

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-13374-mew

- x

In the Matter of:

AEGEAN MARINE PETROLEUM NETWORK INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

April 1, 2019

11:02 AM

B E F O R E :

HON MICHAEL E. WILES

U.S. BANKRUPTCY JUDGE

ECRO: JONATHAN

HEARING re Fee Applications

HEARING re Oaktree substantial contribution application continued

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: My apologies. The truth of the matter is that on Friday, I was wondering why you hadn't gotten me a confirmation order until Allison said, Kirkland's wondering if you had any problems with the confirmation order they sent. I didn't even know you had sent it in. So I apologize for that delay.

MR. HAYES: Well, apologies for any miscommunication on our end.

THE COURT: It's entirely my fault. I missed the email.

MR. HAYES: Well, I -- on that note, I'll have you know that we are -- the company is ready to close imminently. And this is one of -- one of the last open issues is resolution of the condition precedent and the plan for payment of the committee professionals' fees and expenses. And so we view the scope of today's hearing as pretty narrowly in terms of determining what are the reasonable fees and expenses so that we can get that number and make sure that we can pay in order to go effective. And Mercuria is ready to pay the reasonable and documented fees and expenses once that number is determined.

So what we hope to leave today's hearing with is -- are those numbers so that we can -- so that we're prepared to close.

THE COURT: Let me make sure I understand the numbers that are being sought. As I understand it, U.S. Bank seeks $432,133.50, which includes $323,000 of legal fees, 98,000-plus of administrative time, and a few miscellaneous items. Is that right?

MR. CURCHACK: Yes and no, Your Honor. It -- that is correct through the time that those bills were prepared. Since the last hearing, we have incurred additional fees thanks to the preparation for today and dealing with the objection, so that number is slightly higher. But we have -- I have with me a supplemental bill for approximately $22,000 that would be on top of that.

We figured we would -- assuming we reach agreement as to the substance of the matter today, we will work out the specifics of those numbers, obviously, with the Debtor and Mercuria.

THE COURT: Then Deutsche Bank, as I understand it, seeks $65,000 -- $65,478.40 for trustee fees and another 390,011.92 for legal fees. Is that correct?

MR. SOMERSTEIN: Yes, Your Honor. Mark Somerstein, Ropes & Gray for Deutsche Bank Trust Company Americas. As Mr. Curchack indicated with respect to U.S. Bank, I've also prepared a supplemental statement which we could hand up and hand -- distribute to the parties. We've incurred an additional $44,500 since the last hearing, Your

Case 21-1536-KBO Doc 395-7 Filed 05/01/21 Page 9 of 62

Honor.

THE COURT: And on the committee members, it's the same two indentured trustees but also MX, which as I understand it was seeking 123,856.68. is that correct?

MS. VANLARE: Yes, Your Honor. Jane Vanlare, Cleary, Gottlieb, Steen & Hamilton on behalf of American Express. That's right. And as with the other committee members, we have an additional invoice that -- for the interim time period that's, I believe, close to $9,000, just over $9,000, which we can also submit.

THE COURT: Okay. Thanks. And that's it. There are no other applications in front of me, correct?

MR. HAYES: That's correct, Your Honor.

THE COURT: Okay. Now, I understand that there's arguments about whether Section 2C is the only provision that applies to these, whether it's an appropriate way of looking at it, but it, by its terms, preserves a reasonableness objection. Is there any objection to these fees on reasonless grounds? I should look at Mr. Matsumoto for that.

MR. MATSUMOTO: Good morning, Your Honor. Brian Matsumoto for the Office of United States Trustee. Your Honor, we didn't do the normal review that we normally do on these fee applications. One is because we believe that the 503(b) would apply. One of the other considerations here is

that I don't know -- I don't think with respect to Cleary, but with the indentured trustees, their fees include prepetition services I think as -- going back as early as May of 2018, which normally obviously is not even reviewed as administrative expenses in a bankruptcy case.

Here, again, depending on what provision or certainly as they currently seek to be treating these fees as admin expenses, they're essentially elevating prepetition fees to bootstrapping it then into a post-petition admin expense.

THE COURT: Okay. But you got notice of the amounts that were being sought.

MR. MATSUMOTO: Yes.

THE COURT: And you knew that arguments are going to be made in front of me, that I should judge them applying the terms of Section 2.C.

MR. MATSUMOTO: Right.

THE COURT: And under 2.C, do you have an objection on reasonableness grounds or is your only objection that this should be done in a different way?

MR. MATSUMOTO: No objection on reasonableness grounds except to the extent, as I said, the bifurcation between prepetition fees and post-petition. I mean, normally our reasonableness review is limited to post-petition fees.

THE COURT: Okay.

MR. MATSUMOTO: And I wouldn't want the characterization that we would treat prepetition expenses as reasonable post-petition expenses.

THE COURT: Mh hmm. And I understand your -- yes, please.

MR. FRIEDMAN: Just on reasonableness, Your Honor, from counsel to Mercuria Ronald Friedman from Silverman Acampora, we did have a -- what I would call a limited objection on reasonableness, and we're prepared to go through with each one of the parties. There is certain -- as ordinary analysis of time, there's some transitory timekeepers. We know there's certain expenses were on the invoices as well as certain duplication of efforts and a couple of multiple partner meetings that we thought may have been, you know, slightly unreasonable. But certainly willing to have a conversation with each one of the parties, Your Honor.

THE COURT: And when you say limited objections, give me an idea of what that amounts to per applicant here.

MR. FRIEDMAN: Relative to the Cleary Gottlieb invoice, Your Honor, for example, they build in 0.25-hour increments, and ordinarily the review is done in a different way. We discarded that for a period of time. I believe that you're looking at a, you know, somewhere between a 20

or 30 percent, you know, analysis on that one.

Relative to the Deutsche Bank invoice --

THE COURT: 28 or 30 percent. Why? Just because you don't like the quarter-hour increments?

MR. FRIEDMAN: No, no, no. Again, I discounted the quarter-hour increments --

THE COURT: Okay.

MR. FRIEDMAN: -- and 20 to 30 percent was -- it was in prep time before the committee was even formed that was invoiced to the tune of, I think, about 6 or 7,000. I have it all itemized, Your Honor, but point is that there was some prepetition time. We believe there was some duplicate time of timekeepers. There were certain people attending to confirmation hearing and other hearings telephonically, other people attending in person. I'm not sure that that was reasonable. Certainly maybe it wasn't necessary, but maybe it wasn't reasonable. We want to be able to have that conversation with each one of the applicants, and we thought that was the purpose of today's hearing. And so we have done that analysis with each one of them.

But if you're asking for the scope, Your Honor, it's a percentage across the board. If we look at it, it's different for each timekeeper because U.S. Bank, for example, had local counsel with Mr. Curchack at Loeb & Loeb

as well as Maslon firm that had been admitted pro hac vice. And thereafter, it appeared that at each hearing, there was a Loeb & Loeb person as well as a Maslon person, and many times there was a Maslon person on the phone as well, all with different time entries. And we just thought that that was something that we should be able to have a conversation about, and I'm confident that we would be able to have a resolution on that. Same thing related to Ropes & Gray, Your Honor.

MR. SOMERSTEIN: Your Honor, Mark Somerstein for Deutsche Bank. Your Honor, today's -- my phone was on all weekend. Today's not the day for discussions. Today is the day for trial. So I would love to hear, in addition, as Mr. Qureshi points out, the invoices were provided. The invoices were provided to the U.S. Trustee, the company, and Mercuria on the 27th, so it's been more than just when the filings were made this weekend, Your Honor. In all candor, they didn't have the supplemental, but it's a page and a half. I'm happy to show it to you now.

THE COURT: Okay. Now, to a very large extent, the issues that the parties have posed are procedural issues about the theory on which fees and expenses are paid. Mr. Matsumoto, I know you have an objection you've just said about paying prepetition items, but if these were all described as substantial contribution applications, would

you object to them?

MR. MATSUMOTO: I believe that even under substantial contribution (indiscernible) doesn't contemplate the prepetition expenses. Those (indiscernible).

THE COURT: I understand. What about the post-petition ones?

MR. MATSUMOTO: Post-petition, I don't -- again, I did not analyze them for that purpose because it was my understanding the parties weren't certain as to substantial contribution. But my initial plans and review of matters did not seem to indicate anything that was not normal committee duties that would be normally performed that would substantiate a substantial contribution (indiscernible).

THE COURT: Well, the indentured trustees and MX were directly involved in the negotiations of the restructuring -- first restructuring support agreement and then the proposed new deal with Oaktree and then the revised deal with Mercuria, weren't they? They took the lead on all those things, didn't they?

MR. MATSUMOTO: Once again, that negotiation certainly presented jurisdiction of the fiduciary obtained by the estate, which is the committee's counsel to the extent that individual members had their own professionals overseeing and participating. Once again, the normal rules are committee members pay their own expense. I mean, they

had estate fiduciary negotiating and review of those provisions. Adding on additional professional fees is not what the code contemplates. Code doesn't contemplate that committee members can hire their own financial advisors, their own accountants, and their own attorneys to participate along with the retained fiduciary committee.

So yes, I have no idea -- I was not involved in any of the negotiations. I don't know to what extent the professionals accompanied or solely represented individual committee members in the discussions. But pursuant to the bankruptcy code, that's something that committee members have to decide on their own, as to whether or not -- how and to what extent they have representatives assisting them in the function of their duties.

THE COURT: So not only do you think procedurally the objections should have been worded differently, but you would object as a substantive matter to the allowance of these amounts as substantial contribution payments.

MR. MATSUMOTO: Yes. Well, Your Honor, my understanding is they don't seek to qualify for substantial contribution. But yes, to the extent that they're saying the invoice that they provided establishes substantial contributions, I don't -- I don't necessarily agree with that and certainly I would oppose any characterization of the normal functions of representating a committee member as

satisfying the substantial contribution standard.

THE COURT: Okay. The plan has a whole host of provisions on the indentured trustees and not just the provision about committee members. And it says that the indentures are terminated, except that certain responsibilities will continue. And then it says that they'll pay all the fees and expenses. Why should I be thinking of that solely in terms of a request on behalf of committee members as opposed to just the deal that Mercuria and the other party struck with the indenture trustees as to what they would and wouldn't continue to have responsibility to do and what they would and wouldn't have the right to get under their indentures?

MR. MATSUMOTO: Your Honor, I believe that's subsumed within the argument that we make that 1129(a)(4) and 1123(b)(6) or whatever other provisions that might be in both to incorporate planned provisions or payments under the plan that are -- that are violated or not permitted.

THE COURT: Well, if the indenture were viewed as an executory contract -- I'm not saying that it is, and it hasn't been described that way -- but if it were and if the terms were kind of both modified and assumed at the same time, to say these ongoing responsibilities you have continued to perform and, as part of that, we'll pay your fees. That wouldn't be a 503(b) issue, would it?

MR. MATSUMOTO: Not as Your Honor framed it. I'm not quite sure I fully understand Your Honor's characterization of these expense --

THE COURT: But that's sort of what they're -- I mean, it's -- a lot of these things for committee members, for example, there's no independent contract that entitles them to fees. The indentures have contracts that entitle them to collect their fees, right?

MR. MATSUMOTO: Yes, Your Honor. And normally -- we've had discussions with similar indenture trustees and other similar parties --

THE COURT: And I know you have charging liens, but do you also have agreements that debtors will pay those fees?

MR. SOMERSTEIN: Yes, Your Honor, we do.

THE COURT: Yeah.

MR. SOMERSTEIN: And, Your Honor, I think you're hitting the nail on the head. But really, the overarching point here, Your Honor, is the trustees agreed to forego exercising the charging liens in exchange for the direct payment. So it just -- we just don't get these -- we believe that the U.S. Trustee's objection here is completely off base, and I'll reserve an opportunity to make a record because we understand that this issue is important to the U.S. Trustee could go beyond Your Honor's ruling today.

MR. QURESHI: And, Your Honor, for the record, Abid Qureshi, Akin Gump on behalf of the Committee. If I could just point out that American Express also has a contract with the Debtor that provides for their payment fees.

THE COURT: Okay.

MR. MATSUMOTO: And, Your Honor, as far as I know, the position of the program currently, I believe that we haven't necessarily addressed the specifics in this case, but our position is that if the effect of any -- of the plan incorporates these obligations as part of the plan itself, if it in fact contradicts other sections of the code, then we believe that it's improper. Ultimate --

THE COURT: Well, I understand your argument. But, you know, in Lehman, what they did was -- in Judge Sullivan's words, they did a direct workaround. The committee members -- as committee members, no other argument that I could see in support of their claim for their attorney's fees were trying to work around the statute and say, well, we're going to use different provisions of the plan. And Judge Sullivan said you can't do that.

I understand that, but we pay lots of people's fees. We pay DIP lender's fees. We recognize the fact that certain contracts ordinarily provide for the payment of fees. Banks don't lend money unless you pay their lawyers.

So we don't treat that as if a substantial contribution application needs to be filed or anything like that to justify that as an administrative expense. It's a cost of the contract.

So the indentured trustees maybe ought to be thinking a little harder about how they're going to conceptualize this. It's not enough to just say it's not 503(b) because I don't have a very clear explanation to what it is if it's not.

But it is an unusual situation. They're not seeking fees only as committee members. They've got contracts that cover their prepetition and post-petition fees that are independent of the bankruptcy that say that the Debtor is supposed to pay them. And in effect -- in effect, what the Debtor is saying under the plan is, I'm going to do that. I'm going to honor that provision of the contract. You're not going to withdraw. You're going to continue to perform your responsibilities, at least to the extent of making the distributions to noteholders that the plan calls for, and I'll honor the payment obligations. Isn't that a little different?

MR. MATSUMOTO: Your Honor, we're not attempting to vitiate contractual obligations that may exist. In fact, Your Honor, I believe in conversations with committee professionals -- I mean individual members, professionals,

and indentured trustees would oftentimes ask, and frankly, I'm not sure I've ever gotten a direct response, why don't we go about the settlement? Whatever your fees are, the charging liens or related fees -- for example, in this case, as Your Honor articulated, the various fees, I think they total just slightly under $1 million. Settlement with respect to the unsecured creditors committee could be $41 million as opposed to 40, and the charging liens can apply. Whatever contractual obligations exist pursuant to, you know, that applies to the individual noteholders and so forth can be enforced and, in fact, are enforced in other cases where either the plan does not contemplate its fees from -- for individual committee members, presumably the charging lien is not invalidated. It still exists.

And in fact, again, part of the lack of response and so forth seems to be a preference. They want the -- they want (indiscernible) the Court. By allowing the Court to incorporate it as part of the plan and approve it, they don't even have to account to their noteholders. I mean, if you look at the response with respect to the indentured trustees, they essentially acknowledge that there are two provisions. They characterize it as two separate provisions.

THE COURT: If the plan said we are going to assume, reinstate, whatever word they chose to make, our

obligation to pay the fees and expense of the indentured trustee, that wouldn't be a 503(b) issue, would it?

MR. MATSUMOTO: Well, I'm sorry, Your Honor. I don't think I have a response at this point. I would have a problem with the idea of essentially elevating -- for example, part of that fee, the prepetition fees, by reinstating it, then essentially elevating a prepetition expense --

THE COURT: That happens whenever -- that happens any time anybody assumes a contract, doesn't it?

MR. MATSUMOTO: Yes, but --

THE COURT: You got to -- you got to take the whole thing or nothing, or you can take it with such modifications as the other party is willing to agree to.

MR. MATSUMOTO: Well --

THE COURT: That's why, you know, I'm not sure that executory contract is necessarily correct description because I'm not sure the indentures are acting for the Debtors once -- trustees are acting for the Debtors as opposed to the noteholders, but that's kind of what this is like. This is like I've got this obligation. I owe you money. I want you to continue to perform this function. I'll pay the fees, and you agree to do that function but with clarification in the plan as to just what your obligations are and aren't.

So I'm just not sure I see why that's a 503(b) issue. It's an -- it's -- whether it's a modified version of the contract, whether it's a new contract, whatever it is. It's basically saying you're going to do this, and I'm going to pay you this. And it's in the plan, and nobody objected to it.

MR. MATSUMOTO: Once again, Your Honor, there are contracts that exist prepetition. And once the bankruptcy occurs, some of those prepetition contracts may or may not be enforceable or presumably if they run contrary to the code, the code governs. And here, what you're -- the bulk of the fees, as far as I can tell -- although I went through the prepetition amount, the bulk of the fees occurs with respect to their post-petition services as to the committee members. And there are statutory provisions that specifically address that.

I mean, I understand what Your Honor is saying. There are a lot of contracts or provisions and so forth, and putting aside the issue as to whether or not that contract is --

THE COURT: And I approve lease assumptions all the time, and part of the cure obligation is to pay the landlords prepetition and post-petition legal fees. And it doesn't go through 503(b)4, right? It doesn't have to be a substantial contribution application. In fact, there's no

pretense there that the landlords' attorneys are doing anything for the benefit of anyone other than the landlord.

MR. MATSUMOTO: Your Honor, I believe the code provision contemplates the cure provision just as the code specifically addresses, members' professional fees, which are treated -- I think, in fact, that there was this concern that committee members -- I mean, again, part of the issue --

THE COURT: Well, if a landlord were a member of the committee, you wouldn't say that that membership terminated its ordinary rights to have whatever cure obligations paid to it on the assumption of the lease.

MR. MATSUMOTO: Agreed, Your Honor. Let me be -- if a landlord were placed on the committee, sure, statutes would not be issued. It would -- it would still be applicable, but at the same -- at the same time --

THE COURT: Well, here's what troubles me. You know, the premise of your argument based on Lehman is that this is a pretense, essentially. This is an end run around to get a substantial contribution or a committee fee payment without a committee fee payment. And your argument is that Judge Sullivan said you can't do that.

But as to the indenture trustees, it seems to me it's more complicated than that. They certainly haven't given up on the argument that they're entitled to Article

2.C of the plan, but they've got a separate provision that's -- there's a whole lot of provisions in the plan that say, in effect, some obligations under the indenture are terminated. What it actually says is the indentures will be deemed terminated, but certain obligations will survive on both sides. Certain obligations as to -- and rights of the indentured trustees and certain obligations of the Debtor.

Now, if that had been a proposed treatment as an executory contract to which somebody had objected, then maybe I could have an argument as to whether it's really an executory contract. If it had been a proposed reinstatement provision and somebody wanted to object as to whether it was unequal treatment, I maybe could've considered that. I have no objections to this provision.

So why do I -- why do I -- am I required to ignore all these other provisions of the plan and these contractual obligations that it seems to me are being honored, and treat this as if it's entirely a 503(b) issue? It seems to me different from Lehman in that regard. Isn't it?

MR. MATSUMOTO: Your Honor, respectfully, I don't agree that Lehman doesn't apply. From our standpoint, the import of Lehman was, in fact, to honor the provisions of the bankruptcy code specifically with concerns that individual committee members would be able to finance their representation of the committee that they should normally

bear. And this goes specifically to those -- to that concern. I mean, what would stop -- again, under Your Honor's theory, they can hire as many professionals as they want as members. They can hire financial advisors. They can hire any number of professionals and burden the estate with that obligation. And I believe the code want to avoid that.

I mean, part of the problem was there is a fiduciary representing committee members.

THE COURT: But the difference is they're not coming to me saying, we made a post-petition agreement to do things differently from what the bankruptcy code says, and we put it in the plan, and you should ignore what the bankruptcy code says because we've agreed among ourselves to modify it. That's what bothered Judge Sullivan.

They come to me with a pre-bankruptcy contract that says that they get their fees paid by the Debtors. And I have plan that says I'm going to do it. The Debtor says they're going to do it. And like I say, I see about ten different possible conceptual descriptions of why that's being done in the papers, and it might behoove the indentured trustees to think real hard about exactly how they characterize it in the future.

But what does seem to me to be going on is something different from an end run around 503(b)4. There

is nothing in the code that says that a contract -- a valid pre-bankruptcy contract for an indentured trustee to get its fees must be dishonored in bankruptcy or cannot be paid or cannot be assumed or cannot be reinstated or cannot be made part of a modified deal after the case. Not that I know of.

And the idea that it has to be cabined into 503 as a committee member and can't be thought of any way -- any other way just doesn't seem right to me.

MR. MATSUMOTO: Well, Your Honor, I don't believe the the approach and the argument that we're advancing eliminates their obligations as and indentured trustee. I mean, they assert, in fact, reserve the right specifically to exercise their charging lien, which is normally -- and our position, and certainly the position that we take --

THE COURT: That's a backup right. They also have a contractual right to have the Debtors pay their fees. The charging lien is how they protect themselves in the event the Debtors don't do it.

MR. HAYES: Your Honor, if I may step in briefly, I think also if it's helpful, another way to think about it is these are amounting that Mercuria has agreed to pay as non-Debtor, so coming from non-Debtor sources. So I think that's just another way of avoiding getting into the 503(b) issue.

MR. CURCHACK: Your Honor, Walter Curchack on

behalf --

THE COURT: Yeah.

MR. CURCHACK: -- of U.S. Bank. Just to follow up on that as another distinction from the Lehman case, where Judge Sullivan refers to the dilution of the distribution to other unsecured creditors, that the payment of that $26 million would have been. In this case, in fact, to recognize the U.S. Trustee's objection would be -- have the opposite effect. Would reduce the distributions to the unsecured creditors because of the fact Mercuria agreed to pay these fees.

THE COURT: Well, you know, you say Mercuria agreed to pay them. The plan actually says the Debtors will pay them. I know -- I know in economic impact, that means Mercuria will pay them, but it does say the Debtors.

MR. CURCHACK: Actually, Your Honor, the Debtors or the reorganized Debtors with respect to --

THE COURT: Right.

MR. CURCHACK: -- 4Q, so --

THE COURT: Right.

MR. MATSUMOTO: Look, Your Honor, again, the point that I mentioned before is that notwithstanding all of these sort of hairsplitting interpretations, I've always wondered -- and as I said, I've never really gotten a clear answer as to a lot of these issues as -- I mean, avoiding all the

issues about whether or not there's a contract being assumed or not assumed, if the settlement were to incorporate whatever fees are -- for example, as I said, in this case, if the settlement were $41 million as opposed to $40 million --

THE COURT: Well, I'll tell you one reason. It's because the unsecured creditors pool doesn't go only to the noteholders. It goes to other people too, so it still wouldn't exactly work.

MR. MATSUMOTO: Well, once again, Your Honor, in this case, you still also have the American Express, which is not a noteholder whose fees are also being applied.

THE COURT: So if I were to say to indentured trustees around the country, you cannot get your fees paid even under your indenture and even if the plan says you get your fees paid under the indenture, you can only get them if you show that you made a substantial contribution to the case as a whole, which means not just representing your own constituency but doing something else, why wouldn't every indentured trustee quit on the first day of the bankruptcy case and say to the Debtors, you know what? You want an indentured trustee, go make a new post-bankruptcy agreement that will provide -- I guarantee you 100 percent -- that will provide for the payment of all of that new indentured trustee's attorney fees and expenses, just as every

indenture does, and then I'd be approving it just the same way I do for DIP lenders or other people who say, I'm not going to do certain kinds of commercial relationships with you unless you cover those costs.

So what am I accomplishing if I adopt your view other than to force debtors to kind of put new indentured trustees in place in all their cases?

MR. MATSUMOTO: I'm not sure that's necessarily the result that would occur. It seems to me, again, they do have the charging lien separate --

THE COURT: I'm pretty sure it would occur. If I tell indentured trustees, you may not get your fees if you are the pre-bankruptcy trustee, even though a brand-new one I'll give the fees to, well, then, you know, U.S. Bank and Deutsche Bank would be trading off cases. They'll be saying, okay, here. You replace me on this one, and I'll replace you on that one. And we'll be in exactly the same position. What's the point?

MR. MATSUMOTO: I don't understand why the charging lien would be invalidated. I mean, by preventing the payment --

THE COURT: But they've got fiduciary responsibilities, arguably, to their noteholders. So, yeah, they can stay in place and apply their charging lien and take it out of the pockets of their noteholders, or they can

resign and let the Debtors scramble around to find a new indentured trustee who the Debtors will have to pay without it coming out of the pocket of the noteholders. And if you're the indentured trustee, and if you're going to be accused of having to do what's in the best interests of the noteholders, what are you going to do?

MR. MATSUMOTO: Well, Your Honor --

THE COURT: You're going to resign. I just -- I just don't see -- you know, as I said, I understand that the theory on which this is being done maybe hasn't been laid out all that well, but the concept, which is that the only way an indentured trustee should be allowed to get its payment is through a substantial contribution application just doesn't seem to make sense to me.

MR. MATSUMOTO: Well, that's essentially what the code provides. And --

THE COURT: Okay. I disagree as to -- the code doesn't say you can't pay anybody's attorney's fees unless they make a substantial contribution. Indentured trustees serve a commercial function. And as I say, the Debtors probably would have to scramble to find somebody else to do the job if these people didn't continue. They'd have to pay the fees anyway. So I just can't see that bankruptcy code says that 503(b)(4) is the only way you can do that.

MR. MATSUMOTO: Well, according to Your Honor's

approach, in fact, you have non-estate fiduciaries, professionals who are now being compensated by -- essentially by the estate, notwithstanding the characterization as Mercuria -- Mercuria is essentially funding the estate. And ultimately, it's literally coming through as funds that are made available for estate purposes.

Here, now we have unlimited professionals who can bill the estate. They have no -- they're not estate fiduciaries. They don't have any conflicts of check. They're not obligated by any conflict of determination. And they perform all these professional functions and still get compensated by the estate. And I believe the code wanted to specifically narrow the estate obligations to pay those fees. Notwithstanding, as I said, the obligation for the indentured trustees to be paid is embodied in their charging lien regardless of -- and that's not affected by the code. (Indiscernible) distributions for the unsecured has to be taken into account. And from our standpoint, at least as we see it at this point, they've been --

THE COURT: Okay.

MR. MATSUMOTO: They've been considered the settlement amount to take into account these things, that way avoiding concerns about non-estate fiduciaries billing -- essentially billing the estate and charging the estate

for all of these fees and functions that are really not subject to the oversight of the bankruptcy process, I mean, the transparency that normally -- that's contemplated by the code is for naught. Here, for example, the provisions that they -- the indentured trustees refer to their separate provisions under the plan, they'll -- the provision under, I believe 4Q essentially provides for essentially no oversight. And that's why, from our standpoint, the – session that deals with committee fees and professional was intended to be a companion provision but one that governed -- - that governed all of the professionals, whether or not they're indentured trustees or not.

Having said that, I would still -- we're still not happy about that plan provision. For one, it didn't give the Court any oversight over it except unless there was an objection. Further, it was only on five days' notice. It wasn't on widespread notice. And so what's being asked for here is essentially non -- no oversight by any other creditors or party in interest, and really no oversight by the Court. And yet these obligations are being imposed and not the minimal obligations. We are talking about here almost $1 million, which according to their procedure, the Court would never be able to review or seek, and certainly unless arguably there was an objection.

So I don't believe that's that what the bankruptcy

code intended. I think the bankruptcy code wanted, you know, these oversights to occur. I mean, to have the Court review these fees and certainly even to, perhaps, be concerned about potential conflicts that may exist upon this non-estate fiduciaries and professionals who are being compensated. I don't -- at the same level as the administrative expenses.

THE COURT: Somebody who knows the Trust Indenture Act and the securities laws etc. better than I do, please help me answer this question. If the indentured trustees had resigned on the first day of this case, what would the Debtors have been obligated to do?

MR. SOMERSTEIN: Unless Mr. Curchack, who has been doing this a little bit longer than I have -- Mark Somerstein, Ropes & Gray for Deutsche Bank Trust Company Americas Trustee -- then the Debtor would've had to find a replacement, Your Honor.

THE COURT: Is that obligation under other federal statute, or --

MR. SOMERSTEIN: It's under the indenture. And I -- Mr. Curchack probably has more familiarity to the Trust Indenture Act provision, but I believe that it's embodied in the Trust Indenture --

MR. CURCHACK: Well, Your Honor, the Trust Indenture Act requires a trustee. And in most cases, for

example, in these cases, the trustee has to have a certain level of capital, has to be a certain kind of an institutional trustee. So there are specific limits on who can be a trustee in the first place. Beyond that, whose responsibility it is does somewhat differ from indentured to indentured since some say the first step is the trustee has to find a successor and then the holders have to appoint one. But ultimately, all of them end up that there has to be one, and it's the Debtor's responsibility, or the issuer's responsibility.

MR. SOMERSTEIN: That's the most common formulation. The most common formulation is the trustee would resign, and the company would appoint, the issuer would appoint.

MR. MATSUMOTO: Your Honor, again, I'm certainly not (indiscernible) the state expert, but it seems to me that if the fulcrum security (indiscernible) unsecured notes, I question as to what obligation the Debtor has, you know, to ensure that a trustee (indiscernible).

Your Honor mentioned that --

THE COURT: Well, the fulcrum security was the unsecured notes here, or, you know, the unsecured obligations at the parent company level.

MR. MATSUMOTO: I'm not sure -- in this case, I don't think the unsecureds are appropriately secured.

MR. CURCHACK: Your Honor --

THE COURT: I'm puzzled at that. You know, that's -- they're not -- depending on what happens with the litigation trust, they're getting $40 million. They're getting a partial recovery. People below them only get money if the litigation trust recoveries are enough to pay them in full. So doesn't that make the unsecured creditors, which include these noteholders, the fulcrum group?

MR. MATSUMOTO: I thought the fulcrum security were the secured creditors who had priority over the unsecured creditors. I mean, they -- they're all --

THE COURT: They're all at the subsidiary level, right? I don't think there are any unsecured creditors at the parent company level.

MR. MATSUMOTO: At the subsidiary level, the unsecureds would be paid in full.

THE COURT: Right. And so are the -- yeah. So the fulcrum is the group that basically isn't being paid in full but is getting some recovery. And I think that is the unsecured group.

MR. CURCHACK: Well, Your Honor, Walter Curchack again. I just -- just to sort of follow up on where you're going with this, the issue of having indentured trustee is important, in fact, even before the bankruptcy case. I mean, the whole continuity and the presence of indentured

trustees is fundamental to the debt economy, the debt market, for the entire economy. Without indentured trustees, because of the TIA as well as just ordinary custom and practice, it would be very difficult to manage public debt issues. So there has to be an indentured trustee.

THE COURT: Certainly I think I have seen plans that include payments to noteholders that don't separately provide for the payments of the indentured trustee's fees and expenses and -- or they make their recoveries out of their charging liens.

MR. CURCHACK: That's correct, Your Honor, and it's generally a function of the economics of the transaction and the nature of the plan consideration. If, for example, there's no cash being distributed to the noteholders, it's hard for them to pay the IT.

THE COURT: I guess, Mr. Matsumoto, I understand your objection, but it does not seem to me that this is the same as the situation in Lehman. These people are not seeking payments of their fees and expenses just because they're committee members. And they're not seeking to make an end run around the changes that were made in the code to kind of stop the automatic payment of committee members' fees and expenses. And the indentured trustees are people who have contractual rights to the payment of their fees and expenses.

Now, maybe that's not an absolute right under the bankruptcy code. Certainly if the Debtors wanted to ignore and reject those responsibilities or treat them as prepetition obligations, then that's how they would be treated. But I don't think it's an evasion of Section 503(b)(4) for parties to make a commercial agreement to honor a contractual obligation when doing so is not a subterfuge but instead has a real benefit to the Debtors in the sense that they don't have to find somebody else to do this job. They can just use who's there right now.

So to me, the issue in Lehman was somebody was evading the only statutory way that they could have gotten the fees that they wanted. I just don't see that here. Now, whether somebody in the future wants to object that a provision of this kind is an assumption of an executory contract that's not really an executory contract or a new contract that calls for too much to be paid, or a form of plan treatment that gives the indentured trustees a higher recovery on their claims that other people want to get, I don't know. Nobody made those objections here. Everybody was fine with it.

So your objection is that it's an evasion of the only statutory way to get this. I don't think that's correct. There are other ways in which a plan can provide, I think, and not the ways that the Lehman court was

describing. It's not just that the plan can't have other terms in general, for example. Whether it's an assumption or a new contract or a reinstatement, however you want to conceive of it, it's just commercial deal. It's no different from fee payments that I approve in lots of other deals. So I just don't have a problem with it.

MR. MATSUMOTO: So, Your Honor, I know you don't necessarily agree. In this case, we may disagree as to where fulcrum security is, but as you know, there are many plans from which the (indiscernible) unsecureds are completely (indiscernible) and what exists under a plan is essentially a (indiscernible). Amounts are allocated to be distributed to the unsecured creditors. If Your Honor -- under Your Honor's ruling, the Debtor could still, nevertheless, in that case, when there's only a (indiscernible) plan that's issued to unsecured creditors, the Debtors could still provide for the payment of individual committee members' professional fees out of essentially what are estate assets.

THE COURT: First of all, I'm talking about the indentured trustees. I'm not -- and I'm making a ruling that would be the same whether they were or were not members of the creditor's committee, okay?

Second, if in the case you posited, a Debtor wanted to pay the indentured trustees, I suspect you and

lots of other people, including secured creditors or whoever the actual real fulcrum security was, would probably be objecting and would probably succeed.

But that's my problem. I'm telling you that I see other grounds on which this obligation can be paid and are not evasive grounds. They're not just invoking the fact that 1129 generally refers to the approval of these, as though that were an authorization to pay anybody's fees you want. They're not relying on a board provision in 1123 that says they can do other things that are consistent with the code. They're not relying on an argument that they can do something consistent with the code when what they're really doing is trying to evade a code provision, which is what Judge Sullivan said in Lehman.

They're saying, I'm getting my fees paid as my contract calls for. Whether -- and like I say, whether that's reinstatement, assumption, a new contract that kind of incorporates some obligations but not others, it's not an evasion of 503(b)(4), and it's in the plan, and nobody objected to it, so I'm going to allow it. Okay?

And maybe in the future you'll have other objections, and maybe the indentured trustees will do some real work to think through how they want to characterize these provisions in the future so that a poor judge like me doesn't have to struggle with it. But I don't have an

objection here. And as long as I'm convinced that it's not just an evasion of 503(b)(4), I'm not going to say that 503(b)(4) is elusive.

MR. MATSUMOTO: I understand, Your Honor. I would like to request a stay pending appeal.

THE COURT: No, I don't think so. I think it's too important for this to move on, and I actually think if you did appeal that particular issue, if you were to succeed and if those payments were to be undone, I don't think they would really -- that staying the entire restructuring is necessary. Okay.

MR. MATSUMOTO: Understood, Your Honor.

THE COURT: Okay. Thanks.

MR. MATSUMOTO: Thank you.

THE COURT: Now, as to AmEx, I hear Mr. Qureshi saying that they too have a contract, but that's the first I heard it -- I'm hearing of it.

MR. QURESHI: Your Honor, again for the record, Abid Qureshi, Akin, Gump, Strauss, Hauer & Feld on behalf of the committee.

It is correct that they do have a contract. And you're right, this is the first time we've raised that. That is not --

THE COURT: What's the nature of the obligation that's owed to AmEx here?

MR. QURESHI: Your Honor, I will defer to American Express's counsel on that point. Ms. Vanlare is here, and she can address that. But before I hand the podium over to her, if I could, a couple things with respect to American Express.

Like with the indentured trustees, this is in no way, shape, or form any kind of effort to circumvent 503(b) or to evade any other provision of the bankruptcy code. The reality here, Your Honor, is that when the terms of the RSA were negotiated, this was a point. The fees of the committee members who were acting in their capacity as estate fiduciaries, and this was a negotiated point. Now, I hear the United States Trustee say --

THE COURT: But the RSA doesn't even -- all the RSA says is that the plan will provide for the reimburse -- the plan will provide for it.

MR. QURESHI: Right.

THE COURT: It doesn't guarantee that there won't be an objection to that provision. It doesn't say even what standards will govern it. It doesn't even preclude the possibility that it will be judged on a substantial contribution basis. It just says the plan will provide for it.

MR. QURESHI: It -- all of that is correct, Your Honor, but what happened in the RSA negotiations is that we

secured the agreement, in this case, of Mercuria to fund that amount so that it would not dilute other creditors and negatively impact other creditors. Now, the United States --

THE COURT: That's a -- that's a slight difference from Lehman where one of the points that Judge Sullivan made was that one of the reasons, he thought that he should be careful about allowing the workaround, as he described in that case, was that it would have a small, almost infinitesimal, but small nevertheless detectable effect on other creditors' recoveries. It's true that he said that, but I don't think a fair reading of his decision is that that was the decisive point.

MR. QURESHI: Fair enough. Given --

THE COURT: It seemed pretty clear from his decision he would've ruled the same way whether that was the case or not.

MR. QURESHI: Given the numbers in that case, Your Honor, that's certainly fair. But I think the better approach, certainly on the facts here, is Judge Lane in AMR. Right? Which --

THE COURT: That predated the Lehman decision.

MR. QURESHI: It did predate the Lehman decision, but I don't --

THE COURT: In fact, he relied in part on the

decision that Judge Sullivan overturned.

MR. QURESHI: But Your Honor, I think here, again, the RSA that the -- the important point that was negotiated in the RSA is that the payment of these fees would come from Mercuria, and therefore not dilute recoveries to creditors. And yes, the implementation for that was through the plan. The amount at issue with respect to American Express, quite frankly, will -- would very -- would very quickly be dwarfed by having to go through the 503(b) process. But it's in total, I think, in the range of $130,000, 131 inclusive of what has been incurred over the course of the last couple of weeks.

And Your Honor, I just don't think that -- look, the bankruptcy code in certain instances I think needs to be approved practically. And here, where there is no adverse impact at all, there is full disclosure with respect to these fees and what these fees are and time records available to parties who want to -- who want to review those, I --

THE COURT: Aren't you asking me basically to say Judge Sullivan got it wrong?

MR. QURESHI: I --

THE COURT: And to refuse to follow the Lehman decision?

MR. QURESHI: I don't think so, Your Honor,

because I --

THE COURT: Sure feels that way to me.

MR. QURESHI: I think that -- I think that Lehman is distinguishable. But to the extent Your Honor doesn't agree with that, then yes. I think the better reading -- now, it -- I recognize, as Your Honor pointed out at confirmation, this Court always hears that every case is unique. And to some extent, of course it is. But here in context, $130,000 in fees given the overall numbers in this case, the combination of 1123(b)(6) and 1129(a)(4) --

THE COURT: What were the dollar amounts in Lehman?

MR. QURESHI: $26 million.

THE COURT: In the context of that case?

MR. QURESHI: In the context of that case probably equally small. But nonetheless, coming out of the estate, unlike the case here. I mean, the practical effect here will be to give Mercuria a windfall, albeit a small one, but allow Mercuria out of an obligation that they agreed to and that was negotiated in good faith as part of the RSA.

Now, here the United States Trustees say, well, why didn't you just negotiate differently? Why didn't you take that $40 million and gross it up?

Well, the answer to that, Your Honor, reflects the good faith of all of this. We weren't trying to maneuver in

some way to work around a provision of the bankruptcy code. The way the negotiations happen to fall out -- and Your Honor certainly has lots of experience from your days practicing in these kinds of negotiations -- an amount was agreed to for creditor recoveries. And then there was an additional discussion to say, and now you need to pay these fees. And the committee succeeded with the help of American Express and the other committee members in getting to that result, ultimately for the benefit of all creditors.

We didn't approach it as, well, we need a workaround in the event of this 503(b) argument, so let's just gross the number up. That's not how the negotiations played out. So I think it would be an impractical reading of the code.

And, look, Your Honor, on the record that we have, I think, frankly, it would not be difficult to satisfy the 503(b) element with respect to American Express and their contribution here. We could make that record in short order. They were acting in their capacity as an estate fiduciary. They were active in the negotiations. They were active in formulating that the committee took in those negotiations. And I can certainly represent to the Court that but for the role of American Express, it's unclear to me whether we would've achieved the deal that we did, a deal that has very tangible benefits to all creditors.

So I do think that the 503(b) criteria can quite easily be satisfied here, Your Honor. But nonetheless, from a precedential perspective, to require in circumstances like this that the 503(b) showing always be made where there is an arm's-length agreement that is reached as part of a negotiation where a non-Debtor is agreeing to make the payment, I don't think, Your Honor, that that can be read as being inconsistent with any provision code.

THE COURT: Let me hear more about the contractual argument.

MS. VANLARE: Good morning again, Your Honor. Jane Vanlare, Cleary, Gottlieb, Steen & Hamilton on behalf of American Express. As Mr. Qureshi represented, there is a provision in the contract that underlies American Express's claim against the Debtors that allows for the addition of legal fees to the claim. So while it's not entirely analogous to the indentured trustee claims, it's a similar situation where the prepetition contract does also provide for fees.

THE COURT: What is then -- what is -- what does the debt arise out of here, the underlying debt?

MS. VANLARE: It is -- it's a financing arrangement along the lines of a credit-card type lending, although it was not a credit card but similar type of unsecured lending.

THE COURT: And help me a little more. It advances to cover what kinds of things?

MS. VANLARE: It's my understanding that they were advances to cover things like bunkers and other things that the Debtors needed in the course of its -- of their operations. Basically, American Express would pay certain vendors of the Debtors, and then the Debtors were obligated to compensate American Express. You know, pay monthly invoices for those amounts that were advanced on their behalf.

THE COURT: And is it just the parent company that's the obligor or some of the subsidiary companies?

MS. VANLARE: Just the parent company.

THE COURT: Okay. So it's not a secured obligation, and it's not an entity that's not paying everybody in full.

MS. VANLARE: It is not a secured obligation. I'm sorry. I didn't hear the last part.

THE COURT: And it's not an entity that's not paying people in full.

MS. VANLARE: That's right. That's right.

THE COURT: Now, the difference seems to me to be the indentured trustees are still doing things that the Debtors need somebody to do. But American Express doesn't have an executory contract. It's not being assumed. And

when it's seeking its fees, it's not really doing anything that the Debtors need it to do. It's just trying to collect on its claim, isn't it?

MS. VANLARE: I think -- I think that's right, Your Honor. I think that is a difference. I think the similarity arises where it's similar to the U.S. Trustees. It's an obligation that arises out of the prepetition contract, and the Debtors -- although really Mercuria -- are essentially choosing to pay that -- pay those expenses. Again, that's one theory. As Mr. Qureshi I think identified, there are a number of other theories under which we believe we're entitled to, to the fees.

THE COURT: But on the one hand, I can at least conceptualize the Debtor's agreement as to the indentured trustees as a -- I'm going to pay you this, and you're going to give me these post-petition services. If they honor that obligation to you, that's just giving American Express something that maybe other unsecured creditors aren't getting. That would be a problem.

MS. VANLARE: I think that's where the fact that this was negotiated part of a deal and, you know, for all the reasons, again, that were previously enumerated, I think this is a different situation.

I don't think the basis for our reimbursement is simply the prepetition contract. I think that's just one

basis as one -- and one analogy that we want to identify. But I think -- again, I would -- I would ask Your Honor to look to the fact this was a deal that was agreed to. I think, as Mr. Qureshi had said, I don't think we would have an issue with a 503 -- with satisfying the 503(b) requirements. We'd rather avoid, frankly, just the expense and the time of filing a separate application. We don't think we need to do that, but I think because there was a deal here that was struck, I think that we made a -- we made a number of contributions. We were instrumental in those negotiations, and I think that the Lehman case is really distinguishable based on the fact that the estate is not truly bearing the economic cost.

THE COURT: If I were to require you to make a 503(b)(4) application and to show substantial contribution, would you waive the condition in the plan that requires your fees to be paid before the plan can go effective?

MS. VANLARE: I would need to confer with my client, Your Honor.

THE COURT: All right. Yes, Mr. Matsumoto.

MR. MATSUMOTO: Your Honor, I just wanted, I guess, the clarification back to -- sort of to go back to the indentured trustee. I know Your Honor indicated that you believe that there is a separate obligation of the Debtor with respect to the indentured trustee. But if Your

Honor's ruling was to implicate that you're approving under 1129(a)(4) or 1123(b)(6) or some other -- again, I understand the rationale you give, but I'm wondering whether or not they're (indiscernible) particular statutory provision under the plan.

THE COURT: Well, what I'm pegging it to is, as I say, it's a little unclear whether it's a modification of a contact and an assumption of that contract on the theory that there are executory obligations, or whether it's new contract with the indentured trustee under which they agree to do certain things, and this is what they get in return, whether it's a reinstatement --

Conceptually, it's not entirely clear, but what is clear to me is it's not just an end-run around the provisions in the Bankruptcy Code because the indentured trustee isn't just trying to collect for enforcement of its claim or for being a committee members. It's got actual responsibilities that it's performing during the course of the case.

And so an agreement to pay the indentured trustee's fees in that context seems to me a lot more like the situation where the debtor pays the fees of other parties to commercial contracts that it enters into including DIP lenders. And I don't think that that's a workaround. I don't think that's an evasion. I think it's

just that's what administrative expenses are. They are commercial obligations that you incur in connection with getting services from people during the course of the case.

And since the plan provided for it, well, I'm not going to say what the theory was because I can think of three possible theories, nobody objected to it. So the important point to me is it's not just an evasion of 503(b)(4). Whether it would apply in all cases, whether there are other objections to it, I'll leave for other cases.

With AmEx, though, I have a problem. It seems quite clearly covered by Judge Sullivan's decision in the Lehman case. I think as a technical matter, there are cases that say that I am a unit of the district court and that I can ignore a district court's decision the same way any other district judge could do. Whatever the merits of that or not, it seems unwise for me to ignore a decision that Judge Sullivan issued and that he regarded as not really subject to even sufficient dispute to allow an immediate appeal.

I don't think, maybe I'm wrong, but I don't think that other judges of this district have since expressed their disagreement with Judge Sullivan. Does anybody know to the contrary?

MR. MATSUMOTO: I'm not aware of --

THE COURT: Yeah. So I don't think this is a situation where I can conceptualize this as a commercial arrangement with American Express that is similar to the commercial arrangement with the indentured trustees. American Express was acting as a creditor. If it made a substantial contribution, that's fine, but I think the U.S. Trustee is right. It has to show that in order to get its fees. Whether it's because it was a committee member or just otherwise, it's got to show a substantial contribution. So --

MS. VANLARE: Your Honor?

THE COURT: Yes, go ahead.

MS. VANLARE: If I may, just one other distinction here and one other avenue I think through which we are entitled to payment, and that's the RSA itself and the contractual obligations of the parties under the RSA including Mercuria. There's a provision, at least one provision that I can think of in which they agreed to take any actions to effectuate the terms of the restructuring.

So I think one way to do this would be to say that this is enforcing -- Your Honor enforcing a contract that had been approved by the Court.

THE COURT: They gave you exactly what you asked for, a plan that provides for the reimbursement of the reasonable and documented fees and expenses of the committee

members. I don't see anything in it that guarantees that I'll approve that provision or that the U.S. Trustee won't object. You know, I understand your argument. If it comes out of Mercuria's pocket, $123,000 does not seem like the end of the world for this case. But Judge Sullivan's decision is on point and the U.S. Trustee's objection is on point. So I think you do have to proceed by way of substantial contribution application. Okay.

MS. VANLARE: Okay. Thank you, Your Honor.

MR. MATSUMOTO: Your Honor, I do apologize and if you'll bear with me, but as Your Honor knows, the decision that anything with respect to the professional fees of committee members is an important one. And since I have to go back and address it with my supervisors --

THE COURT: Oh, try one more time.

MR. MATSUMOTO: Pardon.

THE COURT: Well, try one more time.

MR. MATSUMOTO: No, no. I'm sorry, Your Honor. I just wanted to understand the landscape. For example, if the indentured trustee were not part of the committee and there was an agreement, would it make any difference for Your Honor if the plan provision provided for the indentured trustee member's fees if they weren't committee members. I'm just trying to determine whether or not --

THE COURT: Yes, I think that's what I said that I

think of the indentured trustee language here as something that would apply regardless of whether they had been members of the committee or not. And there's nothing that requires a debtor to make such an agreement with an indentured trustee. Indentured trustees can work things out in different cases.

All I'm saying to you, Mr. Matsumoto, is while I wouldn't want to commit myself to one of the many possible theories as they could support this, whether it's executory contract, modified executory contract, partial reinstatement, new contract, whatever it is, there are many other ways in which this can be justified than through -- than by saying that they made a substantial contribution. It's a commercial arrangement. The Debtor gets some benefit of having an indentured trustee in place, maybe even satisfies a statutory obligation of the Debtor's.

And so in that context, agreeing to pay their fees seems to be that's exactly what they would do if they had to replace the indentured trustee because nobody would do it otherwise or unlikely anybody would do it otherwise. And that to me just a term of a commercial arrangement. And as long as it's a reasonable and customary term of a commercial arrangement, much like DIP lenders getting their own fees, then it's administrative expense just because that's what it is. It's a term of the commercial arrangement.

And so I just don't think of this as having to go through 503(b)(4) because it's not an expense that a creditor has incurred in the course of enforcing its own claim but claiming to have in the process conferred a benefit on the estate as a whole. This is -- the indentured trustee are doing something that the debtors need somebody to do. It's very different in that sense for me.

MR. MATSUMOTO: All right. Thank you, Your Honor.

THE COURT: Okay.

MR. QUERESHI: Your Honor, if I may with respect to American Express propose the following. I believe that it's quite clear that all of the parties that can conceivably be interested in this issue are here pursuant to obviously the filings that were made on Friday. Although we did not seek 503(b)(4) as the basis for American Express to be paid its fees, we'd be prepared to make that record right now.

And, Your Honor, I think it's really quite straightforward because I would rely in part on the confirmation record because I think the confirmation record is robust in establishing the terms of the agreement that was reached with Mercuria, how those terms evolved from where things were at the beginning of the case, in other words, how those terms improved over the beginning of the case.

So as I look at the 503(b)(4) requirements in this circuit, Your Honor, I think that the -- and I'm referring now to the way those are framed by the district court in AMR, the first prong being whether the services benefitted a creditor of the estate itself or all interested parties. And satisfaction of that prong, we would again rely upon the terms of the plan itself as benefitting unsecured creditors when viewed in light of how those terms improved from the beginning of the case.

The other two criteria, Your Honor, whether the services resulted in actual and significant and demonstrative benefit and whether those services were duplicated by the efforts of others, I would propose to satisfy in one of two ways. My colleague, Mr. Zuzulo's in the courtroom. He is counsel at Akin Gump. He was involved at every step of the way in the negotiations leading to the perem. I can proffer his testimony. He's obviously here.

Or I can put him on the stand for a very brief direct to really establish two things, Your Honor, which I believe satisfied those elements of the AMR case. The first is that American Express in their capacity as a state fiduciary was, number one, acting in that capacity at all times; number two, was actively involved in the negotiations with Mercuria and in the committee's deliberations in the formulation of positions that the committee took in the

course of those negotiations; and lastly, that it is unclear whether the deal that was achieved with Mercuria would have been possible but for the involvement of American Express.

Stated differently, had the committee professionals been left to their own devices and not had the input of American Express and their counsel and not had the involvement of Cleary Gottlieb in lending their experience and their guidance in those negotiations.

THE COURT: Careful. You got your own fee application.

MR. QUERESHI: Unclear whether we would get to the same result. So I'd like to avoid if possible the expense and really I'm in part saving Mercuria some money here too by having to come back and do this again and see if we can make that evidentiary record today given that I think any party that conceivably has an interest in it is here.

THE COURT: Mr. Matsumoto?

MR. MATSUMOTO: Your Honor, I don't know that Your Honor's had a chance to review the time records again (indiscernible).

THE COURT: Let's just say I read them with the same level of sustained attention that I'm ever able to read time records.

MR. MATSUMOTO: Mind-numbing.

THE COURT: Exactly.

MR. MATSUMOTO: I understand, Your Honor, and part of my concern is that the description of the (indiscernible) are essentially one that would be a professional representing for on an individual member and obviously, seem to support the argument that their efforts were critical to the settlement with Mercuria.

THE COURT: Well, he's got some changes he wants to talk to American Express about, right?

MR. QUERESHI: Yes.

THE COURT: And maybe the Trustees as well.

MR. QUERESHI: Yeah. I mean two things on that note, Your Honor. To satisfy 503(b)(4), it's of course not the time records that are controlling. It's what they do as opposed to does the time record that they have submitted disclose in sufficient detail what they did. So I --

THE COURT: Right. But it does have to be time spent in doing the things that amounted to a substantial contribution?

MS. QUERESHI: Fair enough, Your Honor. I do agree at least that much is satisfied by their time records. And secondly, with respect to the issues that Mercuria may have with the invoice itself, I will note that all of the invoices reflect a 15 percent discount that Cleary Gottlieb gave off its standard hourly rates. That's already baked into the amounts that they are seeking in the motion here

today, Your Honor.

MR. FRIEDMAN: Your Honor, if I may, we certainly appreciate the process because it's all about the process here and having some clarity, I think enables us to have a pathway forward.

With respect to the indentured trustees and having heard Your Honor's, you know, it's a commercial arrangement aspect, certainly Mercuria's prepared to pay the undisputed portion of the committee members' fees, but we recognize there are multiple paths, as Your Honor did and certainly the noteholders' counsel, that they have a number of provisions in the plan that enable them to be compensated.

So we're certainly prepared to pay the undisputed portion of those fees. We'd like to be able to have those conversations so that we can have clarity on that. What we don't want to have, Your Honor, is any concern relative to the 503 issue and the process, as I mentioned, relative to the indentured trustees and certainly even with respect to the Cleary Gottlieb fee.

So we've heard Your Honor's indications and rulings. We're certainly anxious to try to bring some closure to this issue. And like I said, we have the ability to make payments directly under the plan. We're prepared to do so. We're prepared to pay the undisputed portion of those invoices. We'd like to be able to hopefully have an

agreement from all parties of those dollar amounts so that we can move forward in that process.

MR. SOMERSTEIN: Your Honor, Mark Somerstein, Ropes & Gray, for Deutsche Bank Trust Bank of the Americas, for the record. I keep hearing counsel say that they're going to pay undisputed amounts. That's not what the plan says. The plan says they'll pay the reasonable and documented fees. And actually, Your Honor, can I approach? May I approach and hand up the supplemental (indiscernible) to the Court, the ones that we circulated this morning? I've handed them to counsel.

THE COURT: No, it's not necessary because I'm not going to rule on this before you've even talked to him about what he has in mind. When he says undisputed, I assume what he's saying is that he may thing that some of your fees aren't reasonable. So if it provides for reasonable and documented fees, then okay. Then maybe he's got an issue, maybe he doesn't.

But before I decide whether I can resolve that today or proceed with substantial contribution today seems to me you should all talk about what he has in mind and decide to what extent you've got issues with it and to what extent if you want to fight, you've got your witnesses here. Maybe depending on what he wants to do and what people agree to do in response to that, maybe the U.S. Trustee will be

comfortable with the rest as a substantial contribution in the case of AmEx. I don't know.

But you need to have that discussion. So why don't you do that while we have our -- we'll have an extended lunch break. We'll get back together at 2:30.

MR. SOMERSTEIN: Thank you, Your Honor.

THE COURT: And you can let me know whether peace has broken out or whether there are issues to proceed and how you'd like to proceed with them.

MR. FRIEDMAN: And one other point if I may, Your Honor, the payment of the committee members' fees under that provision of the plan is the condition precedent. And certainly, because some of those fees may not be paid pursuant to that provision of the plan because as Your Honor recognized, there were multiple paths to deal with the indentured trustee issues, we'd like to make sure that we get this over the goal line as promptly as possible. Thank you.

THE COURT: Okay.

ALL ATTORNEYS: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 12:12 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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