IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	:	Chapter 11
MODIVCARE INC., *et al.*,	:	Case No. 25-90309 (ARP)
Debtors.[1]	:	(Jointly Administered)

DEBTORS' OMNIBUS BRIEF (A) IN SUPPORT OF PLAN CONFIRMATION AND (B) OBJECTING TO COMMITTEE'S MOTIONS FOR STANDING TO PURSUE CLAIMS AND LIEN CHALLENGES

[1] A complete list of each of the Debtors in these chapter 11 cases (the "***Chapter 11 Cases***") and the last four digits of each Debtor's taxpayer identification number (if applicable) may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/ModivCare. Debtor ModivCare Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 6900 E. Layton Avenue, Suite 1100 & 1200, Denver, Colorado 80237.

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ModivCare Inc. ("***ModivCare***") and its debtor subsidiaries (the "***ModivCare Subsidiaries***") in the above-captioned cases, as debtors and debtors in possession (collectively, the "***Debtors***" or the "***Company***"), respectfully state as follows in support of this omnibus brief (this "***Brief***") (a) in support of confirmation of the *First Amended Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and its Debtor Affiliates* (as modified, amended, or supplemented from time to time, the "***Plan***") [Docket No. 465], and (b) objecting to the (i) *Motion of the Official Committee of Unsecured Creditors for (I) Leave, Derivative Standing, and Authority to Commence and Prosecute Certain Uptier Transaction Claims and Causes of Action on Behalf of the Debtors' Estates and (II) Exclusive Settlement Authority* [Docket No. 728] (the "***2025 Transactions Standing Motion***") and (ii) (y) *Omnibus Motion of the Official Committee of Unsecured Creditors (I) Objecting to Claims and (II) for (A) Leave, Derivative Standing, and Authority to Commence and Prosecute Certain Lien Challenge Claims and Causes of Action on Behalf of the Debtors' Estates and (B) Exclusive Settlement Authority* [Docket No. 729] and (z) *Official Committee of Unsecured Creditors' First Supplement to Lien Challenge Motion* [Docket No. 806] (collectively, the "***Lien Challenge Motion***," and together with the 2025 Transactions Standing Motion, the "***Committee Motions***"), each filed by the Official Committee of Unsecured Creditors (the "***Committee***").

In further support of this Brief, the Debtors intend to file the *Declaration of Chad J. Shandler In Support of Confirmation of the Debtors' Proposed Plan of Reorganization* (the "***Shandler Declaration***"), the *Declaration of Zul Jamal In Support of Confirmation of the Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and Its Debtor Affiliates* (the "***Jamal Declaration***"), and the *Certification of James Lee Regarding the Solicitation of Votes and*

Tabulation of Ballots Cast On the First Amended Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and Its Debtor Affiliates (the "***Vote Certification***").[2]

PRELIMINARY STATEMENT

1. The Committee's pleadings are long on rhetoric and short on law and evidence. The Court should confirm the Plan and overrule the Committee's objection. After months of discovery and multiple depositions, its remaining attacks on the Debtors' projections and valuation rest on speculative assumptions, inappropriate comparables, and an unsubstantiated leap in enterprise value that even its own constituents are unwilling to underwrite through the equity rights offering. Its challenge to the Plan's typical and customary releases ignores both the governing business judgment standards for such releases and the undisputed record of arm's-length negotiations, substantial contributions, and overwhelming creditor support, including from over 88% in number of voting General Unsecured Creditors (as defined below). Its request for derivative standing and lien challenges is likewise legally defective and economically irrational, at best reshuffling value among secured creditors, and at worst diluting the very unsecured creditors the Committee purports to represent. In lieu of this litigation-driven wish list, which is completely devoid of the capital necessary to reorganize the business, the Debtors offer a confirmable, value-maximizing Plan that preserves their critical business enterprise and honors statutory and contractual creditor priorities. It is not only the best path, it is the only truly viable path forward to reorganize the business.

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[2] All capitalized terms used but not defined in this section will have the meaning set forth in the First Day Declaration, the Plan, the *Order (A) Approving Disclosure Statement; (B) Scheduling Confirmation Hearing; (C) Establishing Related Objection and Voting Deadlines; (D) Approving Related Solicitation Procedures, Ballots, and Release Opt-Out Forms and Form and Manner of Notice, (E) Approving Procedures for Assumption of Executory Contracts and Unexpired Leases; (F) Approving Equity Rights Offering Procedures and Related Materials; and (G) Granting Related Relief* [Docket No. 457] (the "***Solicitation Procedures Order***"), the *Declaration of Daniel B. Silvers, Investigating Director of Modivcare Inc., in Support of Joint Chapter 11 Plan of Reorganization of Modivcare Inc. and Its Debtor Affiliates* [Docket No. 687] (the "***Silvers Decl.***"), or the Vote Certification, as applicable.

2. During these Chapter 11 Cases, the Debtors have secured improved treatment for the Committee's constituents in the Plan, obtained favorable exit financing terms, and negotiated settlements on contracts that could not be salvaged. The Debtors also have been responsive to the Committee's extensive demands for documents and several rounds of depositions,[3] despite the heavy burden it is imposing on the estates. These efforts underscore the Debtors' commitment to achieving what they believe to be the best possible outcome for all parties: confirmation and prompt consummation of the Plan.

3. Unfortunately, the Committee has been markedly adversarial from the start. Indeed, the Committee served its first of many discovery requests the same day Committee counsel filed its notice of appearance in the Chapter 11 Cases. Additionally, the Committee has: (a) criticized the Debtors for paying approximately $150 million to certain of the Committee's own constituents, the critical vendors; (b) objected to the Debtors obtaining DIP financing, without which the Debtors would have been unable to operate their businesses; (c) objected to a straightforward settlement with United Healthcare ("***UHC***"), the Debtors' largest customer, that eliminated uncertainty and accelerated recovery of $25 million; and (d) alleged, without any evidence, that the Debtors "engaged in financial manipulation" and conspired to depress valuation to advantage the First Lien Lenders as future equity holders.

4. After already consuming substantial estate resources on an extraordinarily costly investigation, with the Debtors on the precipice of confirming the Plan, which enjoys

[3] To date, the Committee has taken more than a dozen depositions in less than two months. Ten of these depositions occurred within a span of 15 days. The Committee's deponents have sat for more than 70 hours of testimony and have been subject to more than 50 hours of examination by the Committee's counsel. Further, since September 15, 2025, the Debtors have produced approximately 26,880 documents responsive to three sets of document requests from the Committee, totaling 71 individual requests. The Debtors have also produced documents in response to at least eight requests for loose documents from the Committee, seeking at least 14 different categories of documents. Finally, the Debtors' financial advisor—FTI—and investment banker—Moelis—have provided the Committee's financial advisor—AlixPartners—with access to thousands of documents via a virtual data room.

overwhelming creditor support, the Committee now (a) advances a Plan Objection that rests on speculation rather than evidence and on business projections that even its own advisors cannot defend, and (b) seeks derivative standing to pursue claims that have no viable legal basis. At this stage, prolonging these unfounded disputes would delay emergence, increase administrative costs, and jeopardize recoveries that creditors have overwhelmingly accepted.

5. If the Court confirms the Plan, it does not even need to address the Standing Motions. And in that regard, the Committee's plan objection fails on all levels. It is predicated on a contrived valuation analysis and speculative, unsupported projections that are designed to put the General Unsecured Claims and Subordinated Unsecured Notes "in the money" while simultaneously alleging that the Debtors were insolvent in January and March of this year when the 2025 Transactions were executed. Even a cursory review of those projections and valuation, which were created by outside parties who lack familiarity and embeddedness with the Debtors, reveals misguided foundations. For example, the Committee's comparable company valuation analysis includes companies such as Lyft and home-health and hospice companies—businesses that bear no resemblance to the Debtors' business and operate under entirely different reimbursement structures, cash conversion cycles, and working capital dynamics. These fundamental business and operational pressures have been all but ignored in the Committee's financial projections, which are further tainted by unfounded assumptions such as the reinstatement of the terminated UHC contract.[4]

6. The logical leap that is required to reach the point at which General Unsecured Claims and Subordinated Unsecured Notes are in the money cannot be overstated. The midpoint

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[4] At the hearing on the UHC Settlement Agreement, counsel to UHC unequivocally stated that the termination of the UHC Agreement "was not a bluff." *See Hr'g Tr.* 86:18-20, October 30, 2025 ("So this was not a bluff. United's position that this termination is real. Unfortunately, but that unfortunately where the parties found themselves").

of the Committee's enterprise valuation range reflects an increase of $702 million or 84% from the midpoint of the Debtors' valuation. The Committee disparages the Debtors' valuation and projections as conservative, relying on statements from David Mounts Gonzales, a former director who had conflicts between his fund's interests (a substantial equity holder in ModivCare Inc.) and those of the Debtors. This culminated in Mr. Mounts Gonzales resigning from the Board on November 10, 2025, and the next day his fund threatened to cause delay, increase professional fee burn, and file an examiner motion unless the lenders made a "settlement" payment to his fund (and no other equityholders).[5]

7. The Committee's valuation is also self-defeating for many of its other arguments. If the Committee's assessment of value were reasonable, it means that the Debtors have offered Holders of General Unsecured Claims (the "***General Unsecured Creditors***") a warrant package that is immensely valuable on the Plan's effective date. Further, the participation rights offered in respect of the Debtors' $200 million equity rights offering should be irresistible. In that context, the current lack of participation in the equity rights offering speaks volumes as to the credibility of the Committee's valuation. The Debtors will demonstrate at trial that their valuation and projections are reliable and reasonable, the business risks are real, value is appropriately allocated under the Plan, and that while all valuations are inherently uncertain, the Plan mitigates that risk through the warrant package.

8. The Committee's arguments with respect to Plan confirmation are also plagued with internal inconsistencies. On the one hand, the Committee alleges that enterprise value is

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[5] Given his obvious conflicts of interest and potential breach of duty of loyalty, counsel to the Debtors notified the office of the United States Trustee as shown on the letter appended as **Exhibit 1**. Counsel to the fund for which Mr. Mounts Gonzales is a general partner responded with the letter appended as **Exhibit 2**. Unless otherwise indicated, references to exhibits are to the exhibits listed on **Appendix A** filed contemporaneously with this Brief under separate notice of filing.

sufficient to deliver full recoveries to both the First Lien Lenders and Second Lien Noteholders. On the other hand, the Committee argues the First Lien Lenders are substantially undersecured. Both cannot be true.

9. Similarly, the Committee argues that any deficiency claims of the Second Lien Notes should share *pari passu* with General Unsecured Claims, but the Committee then asserts that classifying the Second Lien Notes and General Unsecured Claims together is improper.[6] Further, the backbone of the Plan Objection—that all Alleged Unencumbered Assets are an earmarked pot of value for unsecured creditors—is wrong as a matter of law and ignores the priming DIP Liens, adequate protection liens, and unpaid administrative expense claims (including the Committee's own professional fees) that must be satisfied first.

10. As discussed more fully below, the Debtors have met their burden for plan confirmation. The Plan was proposed in good faith, is feasible, is in the best interests of creditors, and is fair and equitable. It preserves an essential business enterprise, maximizes value, and distributes that value consistent with statutory priorities and economic realities. The Court should overrule the Committee's plan objection and confirm the Plan, which necessarily moots the Committee's request for standing.

11. In any event, the Committee's 2025 Transactions Standing Motion is built on a fiction that the three distinct transactions comprising the "Uptier Transaction"—(a) the grant of liens to the Second Lien Noteholders; (b) the release of subsidiary guarantees for the Subordinated Unsecured Notes; and (c) the contractual subordination of the Subordinated Unsecured Notes to

[6] The Committee has also previously commented that they represent the Second Lien Noteholders; *See Hr'g Tr.* 128:6-21, September 30, 2025 ("Well, one of the arguments they're making is why do we care about whether 80- to $120 million of value going out because it doesn't come out of unsecured' s pockets. It does come out of unsecured's pockets. It comes out of the unsecured pockets of the 2Ls who the Committee speaks for."). Notably, 99% of the Second Lien Noteholders voted in favor of the Plan. *See* Vote Certification, Exhibit A.

the Second Lien Notes—somehow can be unwound in one fell swoop as an alleged fraudulent transfer. The Committee's effort fails from the start because the Bankruptcy Code and caselaw is unequivocal that securing antecedent debt constitutes value and cannot form the basis of a fraudulent transfer. The Committee's misleading attempt to rebrand the Second Lien Notes as "new debt" rather than antecedent debt fails to get around this basic principle. If the antecedent debt was discharged by novation as the Committee argues, then that debt forgiveness constitutes value in return for which the Debtors can grant liens on the "new debt." The proposed cause of action, in any event, is pointless. Even if there were a viable cause of action, the Plan already treats the Second Lien Notes as entirely unsecured claims, meaning avoiding the liens would accomplish nothing other than wasting estate resources.

12. After this first hurdle are two more: (a) reinstating the subsidiary guarantees; and (b) rescinding the Subordination Agreement. In respect of the first, it is unfathomable how the Committee believes it to be in the best interests of any of the Debtors to reinstate funded debt claims across their entire corporate enterprise. That result would harm the Debtors' estates and the very creditors the Committee is supposed to represent, as their unsecured claims would be significantly diluted by the Subordinated Unsecured Notes.

13. The issues with respect to the final hurdle are even more stark. As an initial matter, the Proposed Complaint fails to state rescission as a cause of action. That aside, the subordination of the Subordinated Unsecured Notes to the Second Liens Notes is purely a contractual issue between the holders of such Claims and irrelevant to the Debtors, who cannot even bring such an action. The Committee's bid for derivative standing to pursue this action therefore reflects either a fundamental misunderstanding of the Subordination Agreement, or an attempt to use estate resources for the sole benefit of one creditor constituency. While Subordinated Unsecured

Noteholders may represent a significant proportion of ModivCare Inc.'s unsecured creditor base, the Committee cannot masquerade as their litigation proxy (causing the estates to pay for such litigation). If the causes of action had any merit, the Subordinated Unsecured Noteholders—sophisticated financial investors with every opportunity to act—would have pursued them long ago at their own cost (as opposed to at the expense of the estates). Their failure to do so speaks louder than any argument the Committee can muster. For these reasons, the 2025 Transactions Standing Motion should be denied.

14. The Committee's Lien Challenge Motion is just as flawed. For the Committee's claims to yield even a penny of additional recovery for unsecured creditors, the value of any Alleged Unencumbered Assets must first overcome the aggregate amount of: (a) $100 million DIP Claims; (b) First Lien Adequate Protection Claims; and (c) any unpaid administrative expense claims (again, including the Committee's own professional fees). The Committee wholly ignores this waterfall and asserts that unencumbered assets flow straight to unsecured creditors. They do not. Unencumbered assets are property of the Debtors' estates, not general unsecured creditors. As will be shown at the confirmation hearing, there is simply not enough value to reach that point, let alone exceed what is already provided to general unsecured creditors under the Plan. For these reasons, the Lien Challenge Motion should be denied.

15. Unfortunately, the Committee's conduct has failed to produce any tangible benefit for its constituents and has destroyed tens of millions of dollars of value in the form of professional fees from the Debtors' estates and any future equity value through their actions. The Plan, on the other hand, will provide real value to all stakeholders and preserve an enterprise that plays a vital role in the American healthcare system. Confirmation of the Plan is demonstrably better than

liquidation and is supported by the Debtors' key stakeholders, including those that the Committee purports to represent.

FACTUAL BACKGROUND

I. THE DEBTORS' BUSINESS AND THE EVENTS PRECEDING THE CHAPTER 11 CASES

A. THE DEBTORS' CORPORATE HISTORY, BUSINESS LINES, AND EXPANSION EFFORTS

16. ModivCare[7] was founded nearly three decades ago to connect vulnerable patient populations to essential healthcare and social services. *Declaration of Chad J. Shandler in Support of Debtors' Chapter 11 Petitions and First Day Relief* [Docket No. 14] (the "***First Day Declaration***") ¶ 18. The Debtors bridge critical healthcare gaps for at-risk communities by coordinating millions of non-emergency medical rides, delivering millions of in-home personal care hours that supports independent living, and providing monitoring and digital engagement tools for hundreds of thousands of individuals that expand preventive health access. First Day Decl. ¶ 8. ModivCare delivers these mission-critical services to millions of Americans annually across 48 states and the District of Columbia through a platform of four core business segments, more than 20,000 employees and caregivers, and a vast network of transportation provider partners. First Day Decl. ¶ 7. The Debtors' four core business segments are: Non-Emergency Medical Transportation ("***NEMT***"), Personal Care Services ("***PCS***"), Remote Patient Monitoring ("***RPM***"), and a corporate segment ("***Corporate***"). First Day Decl. ¶ 7. Through their business

[7] On January 5, 2021, ModivCare filed a Certificate of Amendment to its Second Amended and Restated Certificate of Incorporation (as amended, the "***Certificate of Incorporation***") with the Secretary of State of the State of Delaware to effect a change of the company's name from "the Providence Service Corporation" to "ModivCare Inc.," effective as of January 6, 2021. *See* **Exh. 3** (January 6, 2025 ModivCare Inc. Form 8-K (January 6, 2021)) at Exhibit 3.1, Certificate of Incorporation.

segments, the Debtors are a critical provider of essential services to the American public, who in turn, have come to rely on the Debtors and the services they provide.

17. As more fully described in the First Day Declaration, beginning in 2020 and continuing through 2022, the Debtors executed a series of acquisitions and platform investments that expanded scale, enhanced technology, and established foundational capabilities across the NEMT, PCS, and RPM segments. First Day Decl. ¶ 25.[8] Since 2022, the Debtors pursued operational modernization to support scale and improve efficiency. First Day Decl. ¶ 25. The Debtors also began exploring artificial intelligence and automation to optimize scheduling, routing, and care coordination, though certain initiatives were delayed by near-term liquidity constraints, surety collateral demands, and covenant pressure. First Day Decl. ¶ 25. These expansion efforts positioned the Debtors as the leader in NEMT while growing PCS and RPM capabilities to deliver integrated supportive care to those in need. At the same time, acquisition-driven growth increased leverage and cash interest liabilities, contributing to liquidity strain when industry headwinds intensified working capital needs, as described below.

B. FINANCIAL HEADWINDS, NEGATIVE INDUSTRY TRENDS, AND REGULATORY CHALLENGES

18. By late 2024, the Debtors' capital structure and liquidity were strained by, among other things, overlapping macroeconomic, political, and industry-specific headwinds. The Debtors incurred net losses of $201.3 million for the year ended December 31, 2024, and $204.5 million

[8] *See* also **Exh. 4** (2024 ModivCare Inc. Form 10-K) at 7-8 (summarizing ModivCare's growth and strategic acquisitions from December 2007 to March 2023).

for the year ended December 31, 2023.[9] And as of December 2024, the Debtors' revolving credit facility was fully drawn.[10]

19. Industry dynamics, including tightening reimbursement and rising service utilization across Medicaid and Medicare Advantage,[11] persistent labor cost inflation,[12] and competition from regional and technology-enabled entrants,[13] further compressed the Debtors' margins. The Debtors also operate amid regulatory shifts affecting reimbursement, eligibility redeterminations, and program integrity, including anticipated and enacted state budget cuts and changes under the One Big Beautiful Bill Act and American Rescue Plan Act of 2021, all of which pressured Medicaid funding and Medicare Advantage supplemental benefits. First Day Decl. ¶ 45.

C. <u>The Debtors' Capital Structure</u>

20. As of the Petition Date and prior to the Debtors' incurrence of $100 million in incremental DIP Facility loans, the Debtors had approximately $1.4 billion of funded debt against approximately $162 million of adjusted EBITDA. First Day Decl. ¶ 41. Secured funded debt

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[9] *See id.*at 32.

[10] *See* **<u>Exh. 5</u>** (December 20, 2024 ModivCare Board Discussion Materials) at slide 2, footnote ("As of WE 12/22, there is no availability on the revolver as it is fully drawn."); *see also* **<u>Exh. 6</u>** (May 8, 2025 ModivCare Inc. Form 8-K) at unnumbered press release exhibit, PDF p. 4 ("Modivcare ended the [first] quarter [of 2025] with $116.0 million in cash and remained fully drawn on its revolver.").

[11] *See* **<u>Exh. 7</u>** (Q1 2025 ModivCare Inc. Form 10-Q) at 28 (noting "a shift in membership dynamics as a result of Medicaid redetermination efforts, ***which have and may continue to decrease membership levels at our NEMT segment***" and "advancement of regulatory priorities, which include the Centers for Medicare & Medicaid Services ('CMS') final rule, Ensuring Access to Medicaid Services, which, in six years, requires states to generally ensure that a minimum of 80.0% of Medicaid payments are used toward compensation for direct care workers, ***which may lower profit margins at our PCS segment***") (emphasis added).

[12] *See id.* (reporting that "***labor costs and trip costs are rising at a higher rate than reimbursement***, which results in lower profit margins than previously reported") (emphasis added).

[13] *See* **<u>Exh. 4</u>** (2024 ModivCare Inc. Form 10-K) at 35 ("We have experienced, and expect to continue to experience, competition from new entrants into the markets in which we operate. Increased competition may result in pricing pressures, loss of or failure to gain market share, or loss of or failure to gain clients or payors, any of which could have a material adverse effect on our operating results. Our business may also be adversely affected by the consolidation of competitors, which may result in increased pricing pressure or negotiating leverage with payors, or by the provision of our services by payors or clients directly to customers, including through the acquisition of competitors.").

totaled approximately $1.188 billion in outstanding principal amount, comprised of the following: (a) approximately $78.8 million under an incremental term loan facility; (b) approximately $270.7 million under a revolving credit facility; (c) approximately $522.2 million under the First Lien Term Loan; and (d) approximately $316.2 million under Second Lien Notes (as defined below). First Day Decl. ¶ 33. Subordinated and unsecured funded debt totaled approximately $228.8 million in outstanding principal amount. First Day Decl. ¶ 33.

1. <u>First Lien Facility</u>

21. ModivCare is party to that certain *First Lien Credit Agreement* dated as of February 3, 2022 (as amended from time to time (the "***First Lien Credit Agreement***") and most recently by *Amendment No. 5 to Credit Agreement*, dated as of January 9, 2025 (the "***Fifth Amendment***")),[14] with Wilmington Trust, National Association[15] as administrative agent (the "***First Lien Agent***") and Wells Fargo Bank, National Association and other lenders party thereto (collectively, the "***First Lien Lenders***"), and certain subsidiaries of ModivCare from time-to-time party thereto as guarantors. First Day Decl. ¶ 34. The facility is secured by first priority liens on substantially all assets of the Debtors whether now owned or hereafter acquired and wheresoever located, including all proceeds thereof and accessions thereto.[16] First Day Decl. ¶ 34. As of the Petition Date, approximately $871.7 million in aggregate principal amount was outstanding under the First Lien Facility. First Day Decl. ¶ 35.

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[14] A true and correct copy of the Fifth Amendment is appended as **<u>Exhibit 8</u>**.

[15] JPMorgan Chase Bank, N.A. served as the initial administrative agent, but has since resigned as administrative agent as of August 7, 2025.

[16] A true and correct copy of the Security Agreement evidencing the first priority lien is appended as **<u>Exh. 9</u>**; *see also* **<u>Exhs. 10</u>**, **<u>11</u>**, and **<u>12</u>** (Lien Searches).

2. Second Lien Notes

22. In connection with the 2025 Transactions (as defined below), certain of the Subordinated Unsecured Notes (as defined below) were exchanged pursuant to an exchange agreement, dated January 9, 2025 (the "***Exchange Agreement***"),[17] into *Second Lien Senior Secured PIK Toggle Notes due October 1, 2029* (the "***Second Lien Notes***"). First Day Decl. ¶ 36. The Second Lien Notes were issued under the *Second Lien Senior Secured PIK Toggle Notes Indenture*, dated March 7, 2025 (as amended from time to time, the "***Second Lien Notes Indenture***"),[18] by and among Ankura Trust Company, LLC, as trustee and notes collateral agent (the "***Second Lien Agent***"), the subsidiaries of ModivCare from time to time party thereto as guarantors, and holders of Second Lien Notes (the "***Second Lien Noteholders***"). First Day Decl. ¶ 36. The Second Lien Notes are secured by second priority liens on substantially all assets of the Debtors whether now owned or hereafter acquired and wheresoever located, including all proceeds thereof and accessions thereto.[19] As of the Petition Date, the principal amount outstanding under the Second Lien Notes was approximately $316.2 million. First Day Decl. ¶ 36.

3. Subordinated Unsecured Notes

23. ModivCare is the issuer of 5.000% Senior Unsecured Notes due October 1, 2029 (the "***Subordinated Unsecured Notes***") under the Senior Notes Indenture dated August 24, 2021 (as amended from time to time, the "***Subordinated Unsecured Notes Indenture***"),[20] by and between ModivCare, as issuer, and Wilmington Saving Fund Society, FSB (as successor to The Bank of New York Mellon Trust Company, N.A.) as trustee (the "***Subordinated Unsecured Notes***

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[17] A true and correct copy of the Exchange Agreement is appended as **Exhibit 13**.

[18] A true and correct copy of the Second Lien Notes Indenture is appended as **Exhibit 14**.

[19] A true and correct copy of the Notes Pledge and Security Agreement evidencing the second priority liens is appended as **Exhibit 15**; *see also* **Exhs. 10**, **11**, and **12** (Lien Searches).

[20] A true and correct copy of the Subordinated Unsecured Notes Indenture is appended as **Exhibit 16**.

Trustee"), the subsidiaries of ModivCare from time to time party thereto as guarantors, and holders of Subordinated Unsecured Notes (the "***Subordinated Unsecured Noteholders***"). First Day Decl. ¶ 37.

24. In connection with the 2025 Transactions, the requisite holders of Subordinated Unsecured Notes[21] entered into that certain *Fifth Supplemental Indenture*, dated as of March 7, 2025 (the "***Fifth Supplemental Indenture***"),[22] that, among other things, released all the guarantors of their guarantees under the Subordinated Unsecured Notes Indenture (such guarantee release, the "***Subsidiary Guarantee Release***"). First Day Decl. ¶ 37. Accordingly, the Subordinated Unsecured Notes are solely an obligation of ModivCare, as issuer under the Subordinated Unsecured Notes Indenture. First Day Decl. ¶ 37.

25. In addition, JPMorgan Chase Bank, N.A. (as the then-administrative agent and collateral agent for the First Lien Lenders), the Second Lien Agent, and the Subordinated Unsecured Notes Trustee entered into a Subordination Agreement dated March 7, 2025 (the "***Subordination Agreement***"),[23] pursuant to which, among other things, the right of payment held by the Subordinated Unsecured Noteholders was subordinated to the prior payment in full, in

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[21] Section 9.02 of the Subordinated Unsecured Notes Indenture provides that, with the consent of the holders of at least a majority in principal amount of the Subordinated Unsecured Notes then outstanding (the "***Majority Consents***"), certain provisions of the Subordinated Unsecured Notes Indenture may be amended, supplemented, or otherwise modified. *See* **Exh. 16** (Subordinated Unsecured Notes Indenture) § 9.02. The Subordinated Unsecured Noteholders, including Jupiter (as defined herein), have long understood there was a simple-majority (greater than 50.1%) threshold to execute the Fifth Supplemental Indenture. *See* **Exh. 17** (January 8, 2025 email from D. Rowe (Jupiter) to C. Ali) ("[redacted]"); *see also* **Exh. 18** (Jan. 10, 2025 email from D. Rowe (Jupiter) to C. Ali) ("[redacted]"). Jupiter's understanding of this simple-majority amendment right was also reflected in investor analyses noting that "[redacted]" **Exh. 19** (January 2025 "MODV – Situation Update" Deck (Jupiter)) at 8. ModivCare solicited, received, and delivered to Wilmington Saving Fund Society, FSB, as trustee, the requisite Majority Consents, as certified by an Officers' Certificate delivered to the trustee in connection with the execution and delivery of the Fifth Supplemental Indenture.

[22] A true and correct copy of the Fifth Supplemental Indenture is appended as **Exhibit 20**.

[23] A true and correct copy of the Subordination Agreement is appended as **Exhibit 21**.

cash, of the First Lien Lenders and the Second Lien Noteholders. Thus, by virtue of the Fifth Supplemental Indenture and the Subordination Agreement, the Subordinated Unsecured Notes are both structurally and contractually subordinated to the claims of the First Lien Lenders, the Second Lien Noteholders, and all other creditors of the Debtors (and *pari passu* to unsecured creditors of ModivCare only). And because the Subordination Agreement is a contractual agreement between and among creditors, the Debtors are not a party to it. Instead, the Debtors are merely an acknowledging party.[24]

26. As of the Petition Date, the remaining principal balance of the Subordinated Unsecured Notes was approximately $228.8 million and comprised only of those unsecured notes that were not exchanged pursuant to the Exchange Agreement. First Day Decl. ¶ 37.

D. THE DEBTORS PURSUE STRATEGIC ALTERNATIVES IN THE FIRST QUARTER OF 2025

27. In late 2024, the Debtors were confronted with rapidly tightening liquidity (primarily due to working capital), looming covenant defaults, and deteriorating customer confidence. Liquidity tightened as collections from Medicare, Medicaid, and certain non-government payors slowed due to the complex reimbursement regulations and payor rules governing the Debtors' business.[25] State government budgetary constraints also extended the time between when the Debtors submitted claims and payment.[26]

28. In parallel, customer sentiment deteriorated markedly following certain public filings, including an auditor's going concern opinion.[27] The opinion disclosed, among other

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[24] *See* **Exh. 21** (Subordination Agreement) at 1 (ModivCare Inc. and its debtor affiliates are not listed as parties to the Subordination Agreement); *see also id.* at Signature Page to Subordination Agreement.

[25] *See also* **Exh. 4** (2024 ModivCare Inc. Form 10-K) at 28 (discussing ModivCare's delays in collection, or non-collection, of accounts receivable).

[26] *Id.*

[27] *See, e.g.*, *id.* at 82-84 (Report of Independent Registered Public Accounting Firm).

things, that the Debtors "expect[] not to meet one or more financial covenants that raise[d] substantial doubt about [the Debtors'] ability to continue as a going concern."[28] Unsurprisingly, key stakeholders—particularly state governmental counterparties—reacted by de-risking their exposure to the Debtors. This erosion of confidence deepened the Debtors' cash challenges, fueling further revenue pressure and intensifying covenant and liquidity stress. Compounding these dynamics, a large commercial payor, Humana Inc., terminated certain of its contracts with the Debtors in late 2024.

29. In response to these challenges, the Debtors initiated a focused effort to stabilize their capital structure and extend their operating runway. With guidance from their advisors at the time, including investment bankers from Moelis & Company ("***Moelis***") and legal counsel at Kirkland & Ellis, LLP ("***K&E***"), the Debtors evaluated a range of alternatives to bridge to a more durable solution, including equity financing, asset sales, and out-of-court restructurings.[29]

30. Specifically, during the second half of 2024, the Debtors became aware that they were facing acute liquidity issues.[30] At different times during the fourth quarter of 2024, the

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28 *Id.* at 82.

29 *See, e.g.*, **Exh. 22** (November 20, 2024 ModivCare Board Materials) § II (Deutsche Bank Presentation) ("[Deutsche Bank] fielding inbound inquiries [regarding the RPM segment] from selected interested parties, providing preliminary information and gauging market sentiment."); **Exh. 23** (November 29, 2024 ModivCare Board Minutes) at 1 ("[R]epresentatives of the Moelis team present at the Meeting . . . made a presentation to the Board, concerning, among other things, proposed next steps to address the Company's financial condition . . . ."); *id.* (documenting a discussion "about potentially disclosing publicly the Company's intent to market for sale one or more of the Company's business segments, about alternative equity and debt financing options, and about the Company's cash collection issues and forecasted year-end liquidity."); **Exh. 24** (November 29, 2024 Board Deck) at slide 1 (discussing year end capital need and expected Q4 2024 EBITDA to come in below wall-street consensus of $52 million).

30 *See, e.g.*, **Exh. 24** (November 29, 2024 Moelis and Kirkland Board Deck) at slide 1 ("Expected Q4 2024 EBITDA to come in below wall-street consensus of $52mm[.]"); **Exh. 25** (December 20, 2024 Moelis and Kirkland Board Deck) at slide 2 (forecasting increasing negative liquidity beginning January 5, 2025 absent a liquidity injection of $75 million).

Debtors retained Moelis,[31] FTI Consulting, Inc. ("***FTI***"),[32] and K&E to advise them in determining how best to address their near- and long-term liquidity needs and balance sheet. The Debtors' board of directors (the "***Board***") met frequently throughout late November 2024, December 2024, and early January 2025 to discuss, among other things, the Debtors' need for a near-term liquidity injection and covenant relief.[33] In the course of its engagement at that time, Moelis spoke with constituents across ModivCare's capital structure, as well as potential outside investors in an effort to obtain financing to address the Debtors' liquidity issues.[34] The Board, aided by the Debtors' advisors, considered various proposals to address the Debtors' liquidity issues, including, but not limited to, two equity financing proposals. Ultimately, the Debtors determined, based on advice from their advisors, that the best option available to the Debtors was to execute the Fifth Amendment to receive a $75 million liquidity injection and enter into certain other transactions, including, but not limited to, the Exchange Agreement (collectively, the "***2025 Transactions***").[35]

31. The 2025 Transactions are described in greater detail below, but generally resulted in the following in separate transactions: (a) $105 million in incremental secured financing for the Debtors through the $75 million Incremental Term Loan (as defined below) and $30 million of Second Lien Notes; (b) the exchange of approximately $270 million principal amount of the

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[31] A true and correct copy of Moelis's Engagement Letter, effective as of November 22, 2024, is appended as **Exhibit 26**.

[32] A true and correct copy of FTI's Engagement Letter, dated November 29, 2024, is appended as **Exhibit 27**.

[33] From November 20, 2024 to January 6, 2025, the Board met at least a dozen times in addition to numerous committee meetings held during the same period. *See, e.g.*, **Exh. 23** (November 29, 2024 ModivCare Board Minutes) at 1 (discussing ModivCare's capital needs and liquidity position); **Exh. 28** (December 13, 2024 ModivCare Board Minutes) at 1 (discussing ModivCare's capital needs and liquidity position) **Exh. 25** (December 20, 2024 Board Deck) at 2 (forecasting negative liquidity absent a $75 million liquidity injection).

[34] *See* **Exh. 5** (December 20, 2024 ModivCare Board Discussion Materials) at slide 4 (summarizing in a chart the "[v]arious financing alternatives being discussed with ModivCare investors").

[35] *See* **Exh. 29** (January 6, 2025 ModivCare Board Minutes) at 2 (documenting the authorization of the Fifth Amendment, among other transactions).

Debtors' existing Subordinated Unsecured Notes for an equivalent principal amount of new Second Lien Notes (the "***Uptier Exchange***"); and (c) the release of the ModivCare Subsidiaries from their guarantees under the Subordinated Unsecured Notes Indenture and the contractual subordination of the Subordinated Unsecured Notes.

1. The Fifth Amendment, the Exchange Agreement, the Fifth Supplemental Indenture, and the Subordination Agreement

32. **Fifth Amendment**. On January 9, 2025, the Debtors entered into the Fifth Amendment pursuant to which certain of the Debtors' existing First Lien Lenders agreed to provide the Debtors with an incremental first lien term loan of $75 million, with a maturity date of January 10, 2026 (the "***Incremental Term Loan***").[36] The Fifth Amendment amended the First Lien Credit Agreement by, among other things: (a) suspending the net leverage ratio and interest coverage ratio tests through the end of June 2025; (b) resetting the net leverage and interest coverage ratios from July 2025 through the end of 2025; (c) lowering the Debtors' minimum liquidity requirement from $75 million to $25 million with the imposition of weekly, monthly, and quarterly testing periods; (d) requiring the Debtors to implement sale processes milestones for their RPM and PCS businesses; (e) of the Debtors' seven member Board, requiring the appointment of three directors that were acceptable to the First Lien Lenders; and (f) requiring the Debtors to create a strategic alternatives committee of the Board consisting only of three directors acceptable to the First Lien Lenders.

33. **Exchange Agreement**. Concurrently with the execution of the Fifth Amendment, the Debtors entered into the Exchange Agreement, dated January 9, 2025, with certain holders of the Subordinated Unsecured Notes (who were affiliates of First Lien Lenders that provided the

[36] *See* **Exh. 8** (Fifth Amendment) § 1.

Incremental Term Loan) pursuant to which approximately $251 million in principal amount of the Subordinated Unsecured Notes were to be exchanged for an equivalent principal amount of new Second Lien Notes.[37] The Debtors consummated the transactions contemplated by the Exchange Agreement on March 7, 2025.[38]

34. **Fifth Supplemental Indenture & Subordination Agreement**. The Exchange Agreement further required the Debtors to use their reasonable best efforts to obtain the consent of holders of a majority in principal amount of the Subordinated Unsecured Notes to enter into what ultimately was the Fifth Supplemental Indenture.[39] Under the Fifth Supplemental Indenture dated March 7, 2025, the guarantees provided by the ModivCare Subsidiaries under the Subordinated Unsecured Notes Indenture were released—meaning ModivCare Inc. is now the only obligor on the Subordinated Unsecured Notes.[40] Moreover, pursuant to the Subordination Agreement dated March 7, 2025, the payment of the Subordinated Unsecured Notes was subordinated to the payment in full in cash to the loans arising under the First Lien Facility and the Second Lien Notes.[41] Accordingly, the Subordinated Unsecured Notes are both (a) contractually subordinated to the First Lien Facility and the Second Lien Notes as a result of the Subordination Agreement and (b) structurally subordinated to all claims of any kind (whether

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37 Immediately prior to the entry into the Exchange Agreement, the Subordinated Unsecured Notes were trading at 57 cents on the dollar. *See* **Exh. 30** (Expert Report of Zul Jamal, dated October 17, 2025) at 15 (chart tracking the Debtors' debt trading history from September 2024 to September 2025).

38 At the time of the notes exchange, the Subordinated Unsecured Notes were trading at 37 cents on the dollar (a 20 cent drop from the time the Exchange Agreement was announced in January 2025). *See id.* (Expert Report of Zul Jamal, dated October 17, 2025) at 15 (chart tracking the Debtors' debt trading history from September 2024 to September 2025).

39 *See* **Exh. 13** (Exchange Agreement) § 1.4(iii).

40 *See* **Exh. 20** (Fifth Supplemental Indenture) § 2.2 ("Effective immediately . . . all [g]uarantees of the [g]uarantors under the [Subordinated Unsecured] Notes and the [Subordinated Unsecured Notes] Indenture shall be automatically released and terminated . . . .").

41 *See id.* § 2.1(b).

secured or unsecured) at the ModivCare Subsidiaries as a result of the Fifth Supplemental Indenture. Further, the Debtors may not make, and the Subordinated Unsecured Noteholders may not ask, demand, sue for, take, or receive, any payments with respect to the Subordinated Unsecured Notes until the First Lien Facility and then the Second Lien Notes are repaid in full in cash.[42] Any payment otherwise made or received on account of the Subordinated Unsecured Notes prior to the repayment of the First Lien Facility and then the Second Lien Notes is prohibited and must be redirected to satisfy those senior obligations.[43] As detailed below, at no time (including in the Committee Motions) has any party alleged that the Exchange Agreement, the Fifth Supplemental Indenture, or the Subordination Agreement violated or otherwise breached the First Lien Credit Agreement or the Subordinated Unsecured Notes Indenture. Furthermore, no holder of Subordinated Unsecured Notes commenced any cause of action challenging any portion of the 2025 Transactions, whether prepetition or since the commencement of the Chapter 11 Cases.

2. <u>The Coliseum Transactions</u>

35. In addition to the transactions described above, the Debtors entered into a Purchase and Exchange Agreement, dated January 9, 2025 (the "***Coliseum Purchase and Exchange Agreement***"), with Coliseum Capital Partners, L.P. ("***Coliseum***") and Blackwell Partners LLC – Series A (together, the "***Coliseum Parties***"). As of such date, Coliseum Capital Partners, L.P. and its affiliates collectively held approximately 20.9% of the outstanding common shares of ModivCare.[44] The Coliseum Purchase and Exchange Agreement provided for the Coliseum Parties to purchase $30 million of new Second Lien Notes and to exchange approximately $20.2 million principal amount of Subordinated Unsecured Notes for an equivalent principal amount of

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42 *See* **<u>Exh. 21</u>** (Subordination Agreement), Art. 4.

43 *See id.* at Art. 8.

44 A true and correct copy of the Coliseum Purchase and Exchange Agreement is appended as **<u>Exhibit 31</u>**.

new Second Lien Notes (collectively the "***Coliseum Transactions***"). Because the Coliseum Parties were material shareholders of ModivCare, the Coliseum Transactions required the affirmative approval from 66 ⅔% of ModivCare's existing shareholders (excluding Coliseum Capital Partners, L.P. and its affiliates and associates) under Delaware General Corporation Law section 203.[45]

36. On February 3, 2025, ModivCare filed and distributed a definitive Schedule 14A proxy statement and mailed a full set of hardcopy proxy materials to all stockholders of record as of the January 22, 2025 record date, together with a formal Notice of Special Meeting setting the special meeting for March 3, 2025.[46] The proxy statement explained ModivCare's proposal to approve the Coliseum Transactions, the applicable voting standards and procedures, including the Delaware General Corporation Law requirement that the Coliseum Transactions be approved by at least 66 ⅔% of ModivCare's existing shareholders, among other relevant information.[47] Consistent with SEC rules, ModivCare also posted the proxy materials to a publicly accessible website.[48] The public notice and proxy materials thus provided timely, clear, and comprehensive disclosure sufficient to inform stockholders and enable an informed vote on the Coliseum Transactions.

37. On March 13, 2025, the Debtors held a special shareholders meeting to determine whether to approve the Coliseum Transactions.[49] At such meeting, shareholders holding well in

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[45] *See* **Exh. 31** (Coliseum Purchase and Exchange Agreement) § 3.7 ("The required vote for the [s]tockholder [a]pproval is the affirmative vote of holders of 66 2/3 of the outstanding shares of common stock of [ModivCare] held by stockholders other than Coliseum Capital Partners, L.P. and its affiliates and associates.").

[46] *See* **Exh. 32** (February 3, 2025 ModivCare Inc. Schedule 14A).

[47] *Id.*

[48] As of the date hereof, the proxy materials remain available at web.viewproxy.com/MODV/2025SM.

[49] The special meeting of shareholders originally noticed for March 3, 2025 was rescheduled for March 13, 2025. *See* **Exh. 33** (March 3, 2025 ModivCare Inc. Form 8-K).

excess of the necessary 66 ⅔% of the outstanding shares of common stock of ModivCare (excluding Coliseum Capital Partners, L.P. and its affiliates and associates) approved the Coliseum Transactions. *See* Silvers Decl. ¶ 8. On March 14, 2025, the Coliseum Parties purchased $30 million in new Second Lien Notes from ModivCare and exchanged approximately $20.2 million principal amount of Subordinated Unsecured Notes for an equivalent principal amount of new Second Lien Notes.

38. The approvals for the 2025 Transactions—each of which was a separate transaction—followed robust internal and external diligence processes. The Fifth Amendment was the product of extensive, arm's-length negotiations with the First Lien Lenders and, as required, was approved by a majority of the First Lien Lenders.[50] The Exchange Agreement—also executed on January 9, 2025 and consummated on March 7, 2025—proceeded only after a majority in principal amount of Subordinated Unsecured Noteholders consented to a supplemental indenture.[51] With respect to the Coliseum Transaction, over 66 ⅔% of the disinterested stockholders approved Coliseum's (a) purchase of $30 million of Second Lien Notes;[52] and (b) exchange of approximately $20.2 million of unsecured notes into Second Lien Notes. Throughout this process, the Board and its committees met frequently, and the Debtors were advised by external advisors, reflecting a comprehensive internal and external diligence cadence for each 2025 Transaction.

[50] *See* **Exh. 8** (Fifth Amendment) at Signature Pages (evidencing support by a majority of the First Lien Lenders).

[51] *See* **Exh. 13** (Exchange Agreement) at Recitals; *see also* **Exh. 7** (Q1 2025 ModivCare Inc. Form 10-Q) at 20; **Exh. 34** (January 9, 2025 ModivCare Inc. Form 8-K) at Item 1.01.

[52] The Second Lien Notes issued to Coliseum bore an all-in cost of capital that was the same as the Subordinated Unsecured Notes and satisfied the junior capital requirement under the Fifth Amendment at a meaningfully lower cost than would have been available to the Debtors in the market.

39. In addition, the transactions did not completely close for approximately two months (between the signing of the Fifth Amendment on January 9, 2025 and consummation of the Coliseum Transactions on March 13, 2025) and were known to holders of the Subordinated Unsecured Notes. The Debtors, together with their advisors (K&E, Moelis, and FTI), facilitated the transactions and coordinated engagement with lenders, noteholders, and other stakeholders.[53] The Board considered options available to the Debtors[54] and, with the benefit of professional advice, authorized the 2025 Transactions, which at least in part, had to be approved by a supermajority of the Debtors' shareholders, to provide critical runway.[55] The Debtors' advisors also evaluated the feasibility of equity capital raises and asset sales during this period. As discussed above, however, those paths did not materialize on the necessary timeline or at values sufficient to address the Debtors' liquidity and leverage profile.

40. At least one member of the Committee, Jupiter Asset Management Limited ("***Jupiter***"), contacted the Debtors' investment banker, Moelis, to express preliminary interest in transactions that eventually became the 2025 Transactions. Jupiter holds approximately $41.6 million in Subordinated Unsecured Notes. When Jupiter approached Moelis, Moelis provided Jupiter with a nondisclosure agreement and lender discussion materials on the same day of Jupiter's outreach to facilitate further engagement. Beyond this initial email expression of interest,

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53 *See, e.g.*, **Exh. 35** (December 26, 2024 ModivCare Board Minutes) (documenting a discussion, led by Mr. Zul Jamal of Moelis, concerning, among other things, "the Company's financial forecasts and cash position and short-term required cash uses, the requirements for approval of the Term Sheets and related matters, the proposed financial and other covenants and other terms included in the Term Sheets, alternative financing options potentially available to the Company including debtor in possession financing through voluntary bankruptcy, potential tax implications associated with the timing of any of the foregoing, and the status of the Company's receipt from its existing lenders of any required consents to any of the financing alternatives, as applicable").

54 *See id. see also* **Exh. 36** (December 30, 2024 ModivCare Special Meeting Board Materials) at § I, PDF p. 4 (evaluating junior capital financing alternatives, among other alternatives).

55 *See, e.g.*, **Exh. 29** (January 6, 2025 Board Minutes) at 2 (documenting the authorization of the Fifth Amendment, and Exchange Agreement); **Exh. 37** (January 7, 2025 Board Minutes) at 1-2 (documenting the authorization of the Coliseum Transactions).

Jupiter did not submit a formal proposal, term sheet, or take any other actions indicating interest in lending new money to the Debtors. In emails produced to the Debtors, however, Jupiter affirmatively noted that the $75 million of new-money financing contemplated by the Fifth Amendment would be a "perfect outcome"[56] and offered to "'vote' [its] bonds towards the 50% threshold needed to effectuate an exchange into 2L paper."[57]

41. Against this backdrop, the Debtors determined that the 2025 Transactions were the only viable and executable near-term solutions to address their mounting liquidity crisis and urgent covenant relief needs. With the assistance of their professional advisors, the Debtors concluded that these transactions were necessary to keep the Debtors operating in the ordinary course of business and avoid a value-destructive bankruptcy filing. Absent the consummation of the 2025 Transactions, the Debtors likely would have faced a free-fall bankruptcy, which would have destroyed value for all stakeholders. While the 2025 Transactions ultimately did not eliminate longer-term liquidity challenges and industry headwinds, they provided vital breathing space, allowed the Debtors to evaluate potential asset sales, maintained going-concern value, and enabled the Debtors to continue providing critical healthcare services to millions of customers. Perhaps more importantly, although not the Debtors' intention at the time, the 2025 Transactions ultimately allowed the Debtors to prepare for, and smoothly file, these Chapter 11 Cases, which proposes to give value across the Debtors' capital structure that would have been unavailable (and likely destroyed) had the Debtors been forced to file for bankruptcy in early 2025 without the benefit of a restructuring support agreement or prearranged chapter 11 plan.

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[56] *See* **Exh. 17** (January 8, 2025 Email from D. Rowe (Jupiter) to C. Ali) ("[redacted]").

[57] *See* **Exh. 38** (December 22, 2024 Email from D. Rowe (Jupiter) to S. Shnayder (TCW)).

E. The Debtors' Corporate Governance Structure After the Fifth Amendment

42. As set forth above, the Debtors implemented targeted corporate governance enhancements after consummation of the Fifth Amendment that were designed to bolster independent oversight, accelerate strategic decision-making, and align board expertise with the Debtors' ongoing operational priorities. Among other changes, the Fifth Amendment required the addition of three independent directors from a vetted slate negotiated at arm's length with the Debtors and the First Lien Lenders.[58] The ultimate selection process, run with the assistance of the Debtors' retained advisors, was competitive and focused on seasoned executives with demonstrable independence, deep industry experience, and proven ability to navigate complex healthcare environments. The three independent directors ultimately selected for shareholder approval were Alec Cunningham, Erin L. Russell, and Daniel B. Silvers. The three nominees were thereafter presented to and approved by ModivCare's public stockholders at the 2025 Annual Meeting of Stockholders held on June 17, 2025, at which all recommended director nominees were elected.[59] Any suggestion by the Committee that these independent directors are "lender designated" or somehow not truly independent is simply false, especially since they were voted upon and approved by ModivCare's public shareholders as described above. And, of course, these three independent directors do not constitute a majority of the Debtors' seven member Board.

43. Following ModivCare's June 17, 2025 annual meeting of shareholders, the Board consisted of the following seven members: (a) Leslie V. Norwalk, Chairperson of the Board (public company governance and healthcare policy experience); (b) L. Heath Sampson, Chief Executive Officer (operational leadership); (c) Todd J. Carter (finance and capital markets

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[58] *See* **Exh. 8** (Fifth Amendment) § 5.12.

[59] *See* **Exh. 39** (June 17, 2025 ModivCare Inc. Form 8-K) at Item 5.07.

experience); (d) David Mounts Gonzales (appointed in March 2025 in connection with an equity investment); (e) Alec Cunningham (healthcare operations experience); (f) Erin L. Russell (healthcare industry and investment experience); and (g) Daniel B. Silvers (financial and investment experience). First Day Decl.[60] Each director brought relevant expertise to the Board, including leadership and governance experience at public companies and operational experience within healthcare services. First Day Decl. ¶ 30.

44. Historically, the Board has maintained three standing committees to support effective oversight and compliance: (a) an audit committee; (b) a compensation committee; and (c) a nominating and governance committee. Consistent with the Board's emphasis on transparency and collaboration, all directors (regardless of committee membership) are invited to attend all meetings of the various committees. First Day Decl. ¶ 32. In addition to these standing committees, the Board formed two special committees in furtherance of the Fifth Amendment to address the Debtors' strategic and capital structure needs as market conditions and liquidity pressures intensified in 2025.

45. First, on April 20, 2025, the Board formed the strategic alternatives committee of the Board (the "***SAC***") comprised of three independent directors: Ms. Russell (Chairperson), Mr. Cunningham, and Mr. Silvers.[61] The SAC was tasked with overseeing sales and marketing processes for the PCS and RPM segments. Second, on June 20, 2025, the Board established the Capital Structure Committee (the "***CSC***") comprised of five directors: Messrs. Silvers (Chairperson), Carter, Cunningham, and Mounts Gonzales, and Ms. Russell.[62] The CSC was formed to investigate, review, evaluate, analyze, negotiate, and recommend changes to the

[60] *See also id.*

[61] *See* **Exh. 40** (May 20, 2025 Resolutions Approving Formation of the SAC).

[62] *See* **Exh. 41** (June 20, 2025 Resolutions Approving Formation of the CSC).

Debtors' capital structure, including all restructuring matters. Neither committee, however, had the power to approve transactions on their own. Rather, both committees would make recommendations to the full Board, and the full Board, in turn, would vote to approve or reject the proposed recommendations.

46. These governance measures reflect a deliberate and well-documented effort to ensure independent oversight, strengthen Board competencies in healthcare-related operations, and position the Debtors to make informed, timely decisions in a rapidly evolving regulatory and financing environment. In the months leading up to these Chapter 11 Cases, in addition to regular full Board meeting, both the SAC and CSC met at least weekly and coordinated closely to consider all available options to address the Debtors' financial challenges and maximize value for all stakeholders, including out-of-court financing or restructuring, asset sales, and in-court processes. These actions further demonstrate that the Debtors, with the guidance of a reconstituted and independent Board and the support of experienced advisors, engaged in robust, good-faith processes to stabilize operations, preserve going-concern value, and advance a consensual restructuring supported by key creditor constituencies.

II. OPERATIONAL CHALLENGES CONTINUE AFTER THE FIFTH AMENDMENT

A. THE DEBTORS CONTINUE TO FACE OPERATIONAL AND FINANCIAL HEADWINDS

47. In the months leading up to these Chapter 11 Cases, the Debtors encountered three interrelated developments that further destabilized liquidity and customer confidence: (a) significant customer contract non-renewals and losses, most notably the non-renewal of the UHC relationship; (b) significant increases in cash collateral requirements from surety providers and insurance carriers; and (c) regulatory and reimbursement headwinds—including post-COVID

changes to Medicaid eligibility and expected reductions tied to federal measures such as the One Big Beautiful Bill Act and American Rescue Plan Act of 2021.

48. **United Healthcare**. Deepening the Debtors' liquidity crisis, one of the Debtors' largest customers, UHC began signaling that it was considering non-renewal of its longstanding agreements, citing ModivCare's financial condition and leadership changes. UHC had been a longstanding customer pursuant to a Network Access Agreement (the "***UHC Agreement***") with underlying statements of work that renewed annually. Payments under the UHC Agreement were largely made on a per-member-per-month basis subject to an annual reconciliation or "true-up" that does not commence until the following year. *Declaration of Chad J. Shandler in Support of the Motion of Debtors for Entry of an Order Pursuant to Bankruptcy Rule 9019 (A) Approving a Global Settlement Agreement by and Among the Debtors and UHC and (B) Granting Related Relief* [Docket No. 543] (the "***UHC Settlement Declaration***") at ¶ 6–7. That payment structure created a significant liquidity lag for services already rendered by the Debtors. *Id*. at ¶ 7.

49. In early 2025, the Debtors sought to mitigate the strain caused by the payment structure by proposing a transition to either a fee-for-service model or accelerated payment of accrued "true-ups" model, but those discussions did not yield agreement. *Id*. at ¶ 8. UHC thereafter issued notices of non-renewal pursuant to the terms of the UHC Agreement. *Id.*[63]

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[63] *See also* **Exh. 42** (UHC Termination Letter). After the Petition Date, the Debtors and UHC amended the UHC Agreement to implement a two-phase wind-down (with phase-one markets ending December 31, 2025, and phase-two markets ending February 28, 2026) with enhanced reporting and transition obligations to ensure continuity for UHC members. UHC Settlement Decl. at ¶ 7. The Debtors agreed to provide enhanced reporting and operational transition obligations. UHC agreed to pay $25 million immediately on account of services rendered from January through June 2025(otherwise not reconciled until at least March 2026) and higher rates for services from July 2025 through termination, while the Debtors agreed to terminate certain addenda approximately two-and-a-half months early and accept an approximately $15 million revenue concession. *Motion of Debtors for Entry of an Order Pursuant to Bankruptcy Rule 9019 (A) Approving a Global Settlement Agreement by and Among the Debtors and UHC and (B) Granting Related Relief* [Docket No. 594] (the "***UHC Settlement Motion***") at ¶¶ 16–17. The Debtors concluded that the UHC Settlement Agreement delivered necessary liquidity, improved 2025 rates, and provided recovery certainty, which outweighed litigation and

50. **Other Contract Losses**. The Debtors also experienced losses of other key contracts, including the non-renewal of the South Carolina state Medicaid contract. The loss of these key customer contracts created a legitimate concern for the Debtors that other customers – who can terminate their contracts for convenience – would similarly migrate away from the Debtors resulting in a "run on the bank" scenario. Thus far in 2025, the aggregate financial impact of non-renewals and unsuccessful RFP outcomes is in excess of $700 million in annualized lost revenue (primarily caused by the non-renewal of the UHC Agreement), compared to new contracts and renewals expected to generate approximately $65 million in annualized revenue. These developments magnified liquidity pressures, complicated contract renewals, and underscored the need for a timely comprehensive restructuring to stabilize counterparties' confidence.

51. **Cash Collateral Demands from Sureties & Insurance Companies**. Amid continuing operational and liquidity pressures, the Debtors' surety providers demanded additional collateral to secure obligations under the Debtors' surety bonds. First Day Decl. at ¶ 50. With limited capacity to issue further letters of credit, the Debtors posted approximately $38.3 million of cash collateral to support approximately $76.5 million of outstanding surety bonds. *Id.* Under the relevant surety arrangements, providers may request additional collateral at any time and for any reason. *Id.*[64] The Debtors determined that posting collateral was necessary to maintain bonding capacity and avoid breaches under customer contracts terminable for convenience; failure to meet collateral requirements risked contract terminations and a destabilizing downward spiral. *Id.*

collection risk on account of year-end reconciliations after the UHC relationship ends. *Id.* at ¶ 17; UHC Settlement Decl. at ¶ 12.

64 *See also* **Exh. 43** (June 30, 2025 Surety Bond Discussion Materials) at slide 2.

52. Insurance carriers likewise required collateral to secure obligations under high-deductible insurance programs – often involving significant per-claim deductibles – against the backdrop of the Debtors' operations and claims profile inherent in the NEMT business. These collateral requirements further strained the Debtors' liquidity.[65] As of September 30, 2025, the Debtors had posted $44.9 million of cash collateral relating to $76.9 million outstanding surety bonds.

B. <u>OUT-OF-COURT RESTRUCTURING EFFORTS IN MID-2025</u>

53. The Debtors' restructuring efforts accelerated in 2025. On January 9, 2025, Chad Shandler, a senior FTI professional, was appointed as the Company's Chief Transformation Officer (the "***CTO***"), and FTI also provided additional temporary personnel to support the CTO function and the Debtors' transformation initiatives.[66] The Debtors retained Latham & Watkins LLP ("***Latham***") and re-engaged Moelis as investment banker and placement agent to pursue strategic alternatives to address the Debtors' balance sheet and operational challenges.[67] With Moelis leading the market outreach, the Debtors tested financing and strategic options across the capital structure, including: (a) additional out-of-court financing and junior capital solutions; (b) potential equity investments (including non-disclosure agreements with existing equity holders); and (c) asset sales for PCS and RPM, as discussed below. The Debtors also prepared contingencies for an in-court consensual restructuring, if required. First Day Decl. ¶¶ 53–56.

54. As part of these efforts, the Debtors executed non-disclosure agreements with a group of First Lien Lenders and Second Lien Noteholders—who later became the Consenting

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[65] *See* **<u>Exh. 44</u>** July 21, 2025 ModivCare Board Materials at § II, PDF p. 32 (detailing insurance-related and other collateral postings).

[66] *See* **<u>Exh. 45</u>** (CTO Engagement Letter).

[67] *See* **<u>Exh. 46</u>** (March 25, 2025 ModivCare Special Board Meeting Materials) at Appendix 2, PDF p. 47, 51-52 (listing Moelis's sale process efforts).

Creditors. The parties engaged in weeks of arm's-length discussions, exchanging multiple iterations of term sheets covering near-term liquidity support, covenant resets, comprehensive deleveraging, and related DIP financing. First Day Decl. ¶¶ 55–56. In the weeks leading up to the Petition Date, the Debtors also executed non-disclosure agreements with two existing equity holders regarding a potential equity investment. First Day Decl. ¶ 55. Despite good-faith negotiations, such out-of-court financing and junior capital options did not gain traction, particularly given lender reluctance to provide additional capital outside of a chapter 11 process so soon after the Fifth Amendment.

55. In parallel with their financing efforts, the Debtors sought to sell PCS and RPM to raise additional funds needed to meet debt milestones.[68] The Debtors engaged investment bankers—Guggenheim Partners for PCS and Deutsche Bank for RPM—to run sale processes, which extended into August 2025, reaching out to and executing non-disclosure agreements with more than fifteen potential strategic and financial bidders for each segment. First Day Decl. ¶ 55. The PCS sale process began in early 2024, and the RPM process commenced in 2025 after the Fifth Amendment.[69] Ultimately, the Debtors did not receive actionable proposals on the required timeline or at values sufficient to address liquidity and leverage. The contemplated asset sales did not materialize. First Day Decl. ¶ 55.

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[68] *See* **Exh. 8** (Fifth Amendment) § 6.04.

[69] *See, e.g.*, **Exh. 47** (February 25, 2025 Deutsche Bank Project Victory / Pacer Board Update) at slide 5 (summarizing the RPM sale process timeline) and slide 12 (summarizing the PCS sale process timeline).

III. <u>MODIVCARE PIVOTS TO PREPARING FOR CHAPTER 11</u>

A. <u>CREDITOR NEGOTIATIONS, THE RSA, AND FILING FOR CHAPTER 11</u>

56. By late June 2025, the Board understood that the Debtors were likely to experience covenant breaches by September 30, 2025.[70] Further, the timing variability of receivables and cash collections created material uncertainty around liquidity.[71] Most critically, UHC's midsummer contract non-renewal severely reduced forward revenue expectations. Further, on July 3, 2025, ModivCare lost its contract with the State of South Carolina to serve as the state's NEMT broker.[72] The Debtors later estimated that the UHC and South Carolina non-renewals, together with other contract losses, yielded approximately $438 million in annualized lost revenue in 2025.[73]

57. Against this backdrop, the Board (through its SAC and CSC) met at least weekly from June through August 2025, overseeing a dual-track effort to stabilize liquidity and evaluate strategic alternatives. With Moelis leading the market outreach, the Debtors tested financing and strategic options across the capital structure, including: (a) additional out-of-court financing and junior capital solutions; (b) potential equity investments (including non-disclosure agreements with existing equity holders); and (c) targeted asset sales for PCS and RPM, as discussed above. Despite broad engagement, none of these alternatives proved actionable on the required timeline or sufficient to address looming covenant non-compliance, near-term liquidity needs, and the

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70 *See, e.g.*, **<u>Exh. 48</u>** (June 2025 Liquidity Update) at slide 2 (forecasting minimum liquidity covenant breaches as early as July 6, 2025).

71 *See* **<u>Exh. 4</u>** (2024 ModivCare Inc. Form 10-K) at 28 (discussing ModivCare's delays in collection, or non-collection, of accounts receivable).

72 *See also* **<u>Exh. 49</u>** (Government Affairs Update) at slide 6 (listing the loss of the South Carolina contract and estimating the value lost at $124 million).

73 *See* Financial Projections attached as Exhibit D to the Disclosure Statement.

operational and revenue impacts of the UHC non-renewal.[74] After considering these risks and alternatives, the Board considered available alternatives and, on August 20, 2025, approved a resolution authorizing the Debtors' chapter 11 filing.[75]

58. **Restructuring Support Agreement & DIP-to-Exit Loan**. The Chapter 11 Cases are supported by a comprehensive Restructuring Support Agreement ("***RSA***")[76] with Consenting Creditors (as defined in the RSA) and a $100 million debtor-in-possession ("***DIP***") financing facility sized to provide necessary liquidity through the cases **and** converts into a junior five-year exit facility. The DIP-to-exit facility stabilized operations, allowed the Debtors to preserve critical client and vendor relationships, and funded working capital needs.

59. As of the Petition Date, the Consenting Creditors held approximately 90% of the First Lien Loans and approximately 70% of the Second Lien Notes. As of this filing, however, these numbers have grown to approximately 93% of the First Lien Loans and over 95% of the Second Lien Notes. As detailed in Section VIII of this Brief, the Plan has been overwhelmingly accepted by each voting class (Class 3 and Class 4) at the ModivCare Subsidiaries. The ModivCare Subsidiaries have no rejecting classes. The only class of voting creditors who have rejected the Plan are the holders of the Subordinated Unsecured Notes (Class 5) at ModivCare, whose claims are structurally and contractually subordinated to all other claims at the ModivCare Subsidiaries.

60. **Original Chapter 11 Plan**. On September 4, 2025, the Debtors filed the *Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and Its Debtor Affiliates* [Docket No. 119]

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[74] *See, e.g.*, **Exh. 50** (May 23, 2025 SAC Deck) at slides 4-5 (summarizing various strategic alternative initiatives and their statuses); **Exh. 51** (July 9, 2025 SAC Deck) at slides 3-5 (describing strategic alternative initiatives and their statuses).

[75] *See also* **Exh. 52** (August 20, 2025 Joint ModivCare Board and CSC Minutes).

[76] A true and correct copy of the RSA is annexed to the First Day Declaration as Exhibit A.

(the "***Initial Plan***"). The Initial Plan provided the following treatment for creditors: (a) 98% of the reorganized equity to First Lien Lenders (subject to dilution); (b) 2% of the reorganized equity to Second Lien Noteholders (subject to dilution), plus warrants for up to 45% of the reorganized equity at different exercise prices over a five year term; and (c) offered General Unsecured Creditors and Subordinated Unsecured Noteholders the opportunity to participate in a $200 million equity rights offering. Initial Plan Art. IV.

61. **First Amended Chapter 11 Plan**. On October 6, 2025, the Debtors filed the *First Amended Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and Its Debtor Affiliates* [Docket No. 465]. The Plan reclassified the Second Lien Notes as entirely unsecured claims and classified them together with other General Unsecured Claims in Class 4. Plan § 4.4(a)-(b). The Plan provides the following modified treatment for creditors: (a) 98% of the reorganized equity to First Lien Lenders (subject to dilution); (b) 2% of the reorganized equity to Second Lien Noteholders and General Unsecured Creditors (subject to dilution), plus warrants for up to 45% of the reorganized equity at different exercise prices over a five year term; and (c) offers Subordinated Unsecured Noteholders the opportunity to participate in a $200 million equity rights offering. Plan Art. IV.

62. As described more fully in paragraphs 291 and 292 below, because the Plan treats the Second Lien Notes as entirely unsecured claims, the Debtors have already effectively avoided the liens granted in the Uptier Exchange for all practical purposes. There is no benefit to challenging the Uptier Exchange when the Second Lien Notes are receiving no increased recovery under the Plan as compared to other General Unsecured Creditors.

B. The Debtors Nominate Mr. Silvers to Lead An Independent Investigation

63. On August 14, 2025, the Board empowered one of its independent directors, Mr. Silvers, to oversee a comprehensive investigation of potential claims and causes of action that the Debtors might hold against current and former investors, creditors, equityholders, members, directors, managers, and officers, and certain other parties currently or formerly affiliated or otherwise related to or involved with the Debtors, and to provide recommendations to the CSC of the Board and the full Board on whether to prosecute, compromise, settle, exculpate, release, or otherwise dispose of any such claims or causes of action (the "***Investigation***").[77] Silvers Decl. ¶ 8.[78] Mr. Silvers brings over twenty-five years of experience in the financial industry, including senior roles across investment banking, asset management, and corporate leadership, and extensive public company board service, which the Debtors determined would aid him in executing the investigatory responsibilities independent of management and other stakeholders. Silvers Decl. ¶¶ 4-7. Latham initially assisted Mr. Silvers in the Investigation. Silvers Decl. at 8. In light of Latham's past representation of the former First Lien Agent, however, Mr. Silvers ultimately determined to retain separate counsel at Quinn Emanuel Urquhart & Sullivan, LLP ("***Quinn Emanuel***") on September 15, 2025. Silvers Decl. ¶ 8.

64. Under Mr. Silvers direction, Quinn Emanuel conducted an extensive and thorough investigation into potential estate claims and causes of action. Silvers Decl. ¶ 9. To further inform the Investigation, Quinn Emanuel solicited input from the Committee on two separate occasions. The Committee's counsel, however, declined to share specific theories beyond indicating a view

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[77] In paragraph 95 of the 2025 Transactions Standing Motion, the Committee makes accusation of document production that attempt to call into question the Investigation. The Debtors dispute this accusation and any inference that this somehow impaired the Investigation and reserve all rights.

[78] *See also* **Exh. 53** (August 14, 2025 ModivCare Joint Board and CSC Minutes) at 1-2 (documenting the approval of the Investigation and the delegation of authority to Mr. Silvers to lead the Investigation).

that certain January and March 2025 transactions may support fraudulent transfer claims against secured lenders. Silvers Decl. ¶ 10.

65. The Investigation focused primarily on discrete categories of transactions and conduct, including, but not limited to: (a) the 2025 Transactions; (b) the processes to market and potentially sell the Debtors' RPM and PCS business segments; (c) the period between the 2025 Transactions and the Petition Date; (d) cash transfers to non-Debtor affiliates and/or by ModivCare to its Debtor subsidiaries; (e) transfers to directors and officers in excess of $500,000 outside the ordinary course within the four years preceding the Petition Date; and (f) other material transactions during the same four-year period. Silvers Decl. ¶ 11.[79]

66. To develop a complete factual record, Mr. Silvers directed Quinn Emanuel to undertake expedited discovery in order to meet the relevant deadlines of the Chapter 11 Cases. Silvers Decl. ¶ 12. Quinn Emanuel served 21 requests for production on the Debtors and obtained access to over 25,000 documents, a virtual data room maintained by the Debtors, and additional information provided through informal requests to the Debtors' advisors. Silvers Decl. ¶ 12. To manage costs and avoid duplicative efforts, Quinn Emanuel did not serve duplicative requests on the First Lien Lenders but instead secured access to the First Lien Lenders' full production of documents to the Committee. Silvers Decl. ¶ 12.

67. In parallel with document discovery, Mr. Silvers directed Quinn Emanuel to interview ten witnesses, including eight current and former officers and directors of the Debtors, as well as representatives from FTI, Moelis, and Latham. Silvers Decl. ¶ 14. In addition, Quinn

[79] In the Lien Challenge Motion, the Committee suggests that Mr. Silvers' Investigation was somehow flawed by his failure to analyze Section 552(a)'s impact on the First Lien Lenders' prepetition liens. This assertion shows a fundamental misunderstanding of the Investigation. Specifically, Mr. Silvers' task was to investigate prepetition matters and conduct, not to analyze the impact the Bankruptcy Code has on prepetition liens by operation of law. While not a dispositive fact, the Debtors are compelled to draw attention to this misstatement of what the Investigation should have included.

Emanuel attended each Committee-led interview and deposition to ensure alignment of the factual record and to avoid unnecessary duplication (except for two Committee depositions for which transcripts were later reviewed). Silvers Decl. ¶ 15.

68. Throughout the Investigation, Quinn Emanuel provided Mr. Silvers with regular updates regarding facts, impressions, and legal analyses under consideration. Mr. Silvers actively engaged in these updates through frequent informal calls and formal videoconference meetings. Silvers Decl. ¶ 16. Formal videoconferences occurred on eight different occasions, during which Mr. Silvers received detailed briefings and provided guidance to Quinn Emanuel. Silvers Decl. ¶ 17. On November 5, 2025, Quinn Emanuel furnished to Mr. Silvers a draft privileged report exceeding 85 pages, summarizing factual findings to date and presenting legal analyses of potential claims. Silvers Decl. ¶ 17.

69. In his declarations, dated November 10, 2025 and November 24, 2025, Mr. Silvers reported that the transactions and conduct reviewed, including the 2025 Transactions, the sales processes for RPM and PCS, certain intercompany transfers, and identified insider payments, do not give rise to meritorious or value-creating claims against the parties investigated. He concluded that pursuing the potential claims would not be a prudent use of estate resources and would likely produce no net benefit to the Debtors' estates or unsecured creditors (as compared to recoveries already provided to unsecured creditors in the Plan).

70. On November 24, 2025, the Committee sent a letter to the Court alleging that Mr. Silvers and Quinn Emanuel improperly withheld Quinn Emmanuel's reports concerning the Investigation (the "***Quinn Reports***").[80] On November 25, 2025, the Court held a status conference to address the Committee's concerns and advised the parties to continue to meet-and-confer. The

[80] *See Letter dated November 24, 2025* [Docket No. 804].

following day, the Debtors provided redacted copies of the Quinn Reports to counsel to the Committee to, among other things, supplement the record and demonstrate both the rigor and breadth of Mr. Silvers' Investigation.[81]

IV. OVERVIEW OF THE PLAN

71. The restructuring contemplated in the Plan will leave the Debtors' businesses intact and significantly deleverage the Debtors' capital structure, as its total funded indebtedness (including accrued but unpaid interest) will be reduced from approximately $1.4 billion to approximately $300 million inclusive of principal and interest—an approximately 80% debt reduction relative to the debt balance as of the Petition Date. This deleveraging will enhance the Debtors' long-term growth prospects and competitive position and allow the Debtors to emerge from the Chapter 11 Cases as a stronger, reorganized group of entities better able to invest in the business, deliver value to customers, continue providing critical services to persons in need, and withstand a challenging market environment.

72. The following table summarizes the treatment of Claims and Interests under the Plan and designates which Classes are Impaired by the Plan and which Classes of Claims and Interests are entitled to vote on the Plan:

Class	Treatment
Class 1: Other Secured Claims	Unimpaired and presumed to accept the Plan.
Class 2: Other Priority Claims	Unimpaired and presumed to accept the Plan.

[81] Although the Debtors maintain that disclosure of these materials was not required, their production eliminates any plausible suggestion that the Committee lacks sufficient information to evaluate the Investigation and/or Mr. Silvers's conclusions and recommendations arising from it.

Class	Treatment
Class 3: First Lien Claims	Impaired and entitled to vote on the Plan. • Conversion to a portion of an exit facility. • 98% of the reorganized equity (subject to dilution by the Backstop Fee, the Equity Rights Offering, the New Warrants, and the MIP). • Cash proceeds of the Equity Rights Offering, if applicable. • First Lien Deficiency Claims are waived and receive no distribution under the Plan.
Class 4: General Unsecured Claims	Impaired and entitled to vote on the Plan. • 2% of the reorganized equity (subject to dilution by the Backstop Fee, the Equity Rights Offering, the New Warrants, and the MIP), or, for claims of less than $1 million, an option to receive a ratable share of $32 million (determined *pro rata* for all Holders of General Unsecured Claims regardless of whether such Holders make such election). • Three series of warrants exercisable at different strike prices.
Class 5: Subordinated Unsecured Notes	Impaired and entitled to vote on the Plan. • The right to purchase up to $200 million of reorganized equity at a valuation equal to the amount at which Holders of First Lien Claims would be paid in full.
Class 6: Intercompany Claims	Unimpaired and presumed to accept the Plan.
Class 7: Subordinated Claims	Impaired and deemed to reject the Plan.
Class 8: Intercompany Interests	Unimpaired and presumed to accept the Plan.
Class 9: Existing Parent Equity Interests	Impaired and deemed to reject the Plan.

V. PLAN SOLICITATION

73. The Court established certain solicitation and voting tabulation procedures with respect to the Plan on October 17, 2025 ("***Solicitation and Voting Procedures***"). Pursuant to the Solicitation and Voting Procedures, and as more fully set forth in the Vote Certification, the Solicitation Agent caused the Solicitation Packages, Equity Rights Offering Materials, and Notices

of Non-Voting Status and Release Opt-Out Forms to be served on the applicable Holders of certain Claims and Interests on October 23, 2025.[82]

74. The Debtors solicited votes on the Plan only from Holders of Claims in Classes 3, 4, and 5. Holders of Claims and Interests in Classes 1, 2, 6, and 8 are Unimpaired under the Plan, and are therefore presumed to accept the Plan. Holders of Claims and Interests in Classes 7 and 9 receive no recovery, and are therefore deemed to reject the Plan. Accordingly, the Debtors did not solicit votes from the Holders of such Claims and Interests.

75. Pursuant to the Solicitation Procedures Order, the Voting Deadline for all Holders of Claims in Classes entitled to vote on the Plan was set at November 25, 2025 at 4:00 p.m. (prevailing Central Time). The Vote Certification sets forth the tabulation of votes received from the voting members of Classes 3, 4, and 5, which is summarized below:

Class	Number Accepting (%)	Amount Accepting (%)	Number Rejecting (%)	Amount Rejecting (%)	Result
Class 3: First Lien Claims	99.44	97.73	0.56	2.27	Accepted
Class 4: General Unsecured Claims	89.75	79.38	10.25	20.62	Accepted
Class 5: Subordinated Unsecured Notes	48.39	19.56	51.61	80.44	Rejected

VI. ROADMAP

76. This brief consists of five parts. *First*, the Debtors respond to the Committee's Plan Objection. *Second*, the Debtors demonstrate that the Plan satisfies all requirements of Section

[82] Verita also emailed to Holders of General Unsecured Claims in Class 4 (that are not Holders of Second Lien Claims) who indicated on their ballots their request for the Equity Rights Offering Materials, and otherwise did not elect to receive their pro rata share of the GUC Cashout Value, the Equity Rights Offering Materials on a rolling basis.

1129 of the Bankruptcy Code and, accordingly, request that the Court confirm the Plan and approve the Restructuring Transactions provided for therein.[83] *Third*, the Debtors address the Plan confirmation objection of the U.S. Trustee. *Fourth*, although mooted if the Court confirms the Plan, the Debtors address the 2025 Transactions Standing Motion. *Fifth*, the Debtors address the Lien Challenge Motion.

77. Certain other parties also have filed objections with this Court, while others provided informal comments to the Debtors (collectively, the "***Objections***"). For convenience of the Court, the Debtors have attached as **Exhibit A** hereto a reply chart to this Brief (the "***Reply Chart***"), summarizing the Debtors' response to the Objections. The Debtors have included certain language in the Confirmation Order, as summarized in the Reply Chart, in an attempt to resolve these other Objections. The Reply Chart also responds to certain other open issues to the extent not discussed in detail herein.

VII. REPLY TO COMMITTEE'S PLAN OBJECTION

78. The Committee alleges that the Plan: (a) discriminates unfairly; (b) is not in the creditors' best interests; (c) violates the classification requirements under Section 1122; and (d) contains improper Debtor releases. Each of these alleged issues is dealt with in individual subsections below. As an initial matter, there are a handful of mistaken assumptions underlying the Committee's arguments. *First*, that the Debtors' valuation and financial projections are overly conservative and there is significant value available to General Unsecured Creditors and

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[83] *See In re Lakeside Glob. II Ltd.*, 116 B.R. 499, 505 (Bankr. S.D. Tex. 1989) ("In order to confirm a reorganization plan, the bankruptcy court must be satisfied that the plan complies with all of the requirements of § 1129(a) of the Bankruptcy Code.") (internal citations omitted); *In re Star Ambulance Serv. LLC*, 540 B.R. 251, 259 (Bankr. S.D. Tex. 2015) ("As the proponents of the Plan, the Debtor must establish by a preponderance of the evidence that each of the confirmation requirements set forth in Bankruptcy Code [Section] 1129 has been met.") (internal citation omitted); *In re Lone Star Utils. LLC*, 2014 WL 4629129, at *2 (Bankr. N.D. Tex. Sept. 15, 2014) ("The Debtor has the burden of proving the elements of Bankruptcy Code section 1129(a) by a preponderance of the evidence.").

Subordinated Unsecured Noteholders. *Second*, that unwinding the 2025 Transactions requires a radical change to the value allocation and classification scheme under the Plan. *Third*, that Mr. Silvers' investigation into potential estate claims and causes of action was not comprehensive enough to support the releases contemplated in the Plan.

79. In support of its arguments, the Committee has put forward its own valuation analysis and financial projections. In so doing, the Committee did not seek meaningful input from, nor spend significant time with, the Debtors' management. The Committee portrays an unrealistically optimistic future, ignoring critical realities such as: (a) the impact of the One Big Beautiful Bill on the Debtors' key revenue streams; (b) the unequivocal UHC Agreement termination; (c) the fact that several achievable cost-cutting initiatives have already been implemented; (d) the Debtors' sureties refusing to release collateral; and (e) the loss of other valuable contracts with state Medicaid agencies and MCOs.

80. Instead, the Committee relies on assertions from David Mounts Gonzales, a former director who repeatedly prioritized his personal equity stake over maximizing enterprise value for all stakeholders. Just days before the Chapter 11 filing, while still a member of the Board, his fund advanced a financing proposal to certain of the Second Lien Noteholders without ever informing the Debtors or their advisors. And while Mr. Mounts Gonzales consistently voiced concerns about what he thought were potential estate causes of action (related to the propriety of the 2025 Transactions, alleged missed sale opportunities, and the decision to file for chapter 11) and objected to the appointment of Mr. Silvers as the independent and disinterested investigator of those claims, he never sought to bring an examiner motion while serving on the Board. It was not until the day after Mr. Mounts Gonzales resigned from the Board that he threatened to use an examiner motion as a bargaining chip to try obtain an approximate $8 million settlement (half his

equity investment) for his own fund.[84] Any statements made by this former Board member lack credibility and do nothing to support the Committee's case.

81. The Committee also cherry-picks snippets of deposition testimony and cites them out of context to cast the Debtors' own valuation and projections as inaccurate and self-denigrating.[85] Unlike the Committee, the Debtors' valuation and projections were developed with individuals deeply embedded in the business—including FTI who has been working with the Debtors for over a year— who understand the Debtors' business, day-to-day operations, finances, and customer and surety dynamics firsthand. Those individuals have no incentive to skew assumptions either conservatively or aggressively, nor to favor one creditor class over another.

82. As the Seventh Circuit aptly observed *In Re Central Ice Cream Co.*, 836 F.2d 1068, 1072, n. 3 (7th Cir.1987): "People who must back their beliefs with their purses are more likely to assess the value of the [asset] accurately than are people who simply seek to make an argument." That principle applies here: the Debtors' valuation is grounded in reality and reasonableness, while the Committee's is pure litigation posturing. Indeed, if the Committee's constituents believed in its valuation and projections, they would be eager to participate and over-subscribe in the $200 million equity rights offering. This would provide capital to reorganize the Debtors' business. Instead, participation has been virtually nonexistent, which speaks volumes about the credibility of the Committee's position. The Debtors will demonstrate at the Confirmation Hearing that their valuation and projections are indeed reasonable, the business risks are real, and that value is appropriately allocated under the Plan.

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[84] Consistent with their professional and ethical duties, counsel for the Debtors promptly informed the U.S. Trustee of this development in a letter dated as of November 12, 2025, a copy of which is attached hereto as Exhibit 1.

[85] The Committee liberally relies on deposition testimony and submitted to the Court several full deposition transcripts. Most of these witnesses will appear live at trial and therefore their deposition testimony is inadmissible hearsay. For the few witnesses (Messrs. Sampson and Kern, and Ms. Guttierez) who will appear by deposition, only those designated portions of their transcripts should be before the Court.

83. As for unwinding the 2025 Transactions, the Committee largely repeats its arguments from its standing motion in its Plan Objection—that the 2025 Transactions constituted a fraudulent transfer and/or preference, and that the First Lien Lenders' liens do not extend to postpetition revenues or the UHC Settlement Agreement (as defined below)—now supplemented with further "evidence" from Mr. Mounts Gonzales of the Debtors' supposed fraud. Again, Mr. Mounts Gonzales is not a credible source, and in any event, his statements fall well short of demonstrating any fraud has occurred. The Debtors have addressed the various flaws with the 2025 Transactions Standing Motion at length in paragraphs 224 - 306 below.

A. <u>THE PLAN IS FAIR AND EQUITABLE</u>

84. The Committee contends that the Plan fails to meet the "fair and equitable" standard under Section 1129(b)(1) because the First Lien Lenders will allegedly receive more than the value of their Allowed Claims. That is incorrect. As will be demonstrated at trial, the value of the New Common Interests that the First Lien Claims will receive under the Plan is less than the face amount of their Claims. For the same reason, the Plan does not violate the corollary to the absolute priority rule, and in any event, Class 4 (who would be the only Class entitled to any surplus recovery of Class 3) has voted to accept the Plan.

85. The Committee attempts to bolster its argument through Section 552 of the Bankruptcy Code, which it believes renders unencumbered all postpetition revenue and the UHC Settlement Agreement proceeds (among other things). As explained in more detail herein, the Committee has misconstrued and overstated the effect of Section 552. Regardless, to the extent that Section 552 does result in any diminution in the value of the First Lien Lenders' liens, they receive adequate protection liens on a dollar-for-dollar basis in exchange. Such liens cover all assets of the Debtors, including any unencumbered assets. Accordingly, the "secured portion" of

the First Lien Claims is far greater than $299 million, as was suggested by the Committee, and more than the value of the New Common Interests they stand to receive.

86. Ultimately, the Committee's "fair and equitable" argument hinges on valuation but, as described in more detail in paragraph 137 below, the Plan is "fair and equitable" because it follows the "absolute priority" rule: Classes 3 and 4 have voted to accept the Plan and Class 5 cannot receive a distribution until all senior Classes have received 100 percent recovery.[86]

B. THE PLAN SATISFIES THE "BEST INTEREST OF CREDITORS" TEST

87. The Committee has identified certain property it believes to be unencumbered by prepetition liens. As a threshold matter, even if such assets are not subject to prepetition liens, they are still subject to the *postpetition* DIP facility and adequate protection liens under the Final DIP Order. Further, the secured creditors maintain superpriority claims for diminution in value pursuant to Section 507(b) of the Bankruptcy Code. Moreover, unencumbered assets belong to the estate—they are not reserved for general unsecured creditors. To the extent any unencumbered value remained after satisfaction of these postpetition liens and claims in full, such value would next be used to pay general administrative expenses of these Chapter 11 Cases. *See In re K & L Lakeland, Inc.*, 128 F.3d 203, 207 (4th Cir. 1997) ("[g]enerally, administrative expenses are paid

[86] Importantly, the Subordination Agreement contains a turnover provision requiring that any consideration distributed to the Subordinated Unsecured Noteholders be held in trust for the benefit of the senior creditors. As a result, even if the Committee persuaded the Court that the "secured portion" of the First Lien Claims is only $299 million, and the Subordinated Unsecured Noteholders somehow received a distribution ahead of full payment of the First Lien Claims, those recoveries could not be retained. The turnover provision would automatically require the Subordinated Unsecured Noteholders to transfer any such distributions to the First Lien Lenders until they are paid in full. **Exh. 21** (Subordination Agreement) at Section 10 ("Should any payment, distribution or security (other than Permitted Subordinated Payments) be received by any Subordinated Creditor upon or with respect to the Subordinated Debt prior to termination of this Agreement in accordance with Section 12, such Subordinated Creditor shall receive and hold the same in trust for the benefit of Senior Agent and Senior Trustee for the benefit of the Senior Creditors and shall forthwith deliver the same, subject to the Senior Intercreditor Agreement, to Senior Agent or Senior Trustee, as applicable, in precisely the form received (except for the endorsement or assignment of such Subordinated Creditor where necessary) for application to the Senior Obligations (subject to the Senior Intercreditor Agreement), and, until so delivered, the same shall be held in trust by such Subordinated Creditor as the property of Senior Agent or Senior Trustee for the benefit of the Senior Creditors.").

from the unencumbered assets of a bankruptcy estate rather than from secured collateral"); *In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (stating that "as a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens. A secured creditor's interest in its collateral is a substantive property right created by non-bankruptcy law, which may not be substantially impaired when bankruptcy intervenes."); *In re Westwood Plaza Apartments, Ltd.*, 154 B.R. 916, 921 (Bankr. E.D. Tex. 1993) (same); *In re Matter of CD Elec. Co., Inc.*, 146 B.R. 786, 789 (Bankr. N.D. Ind. 1992) (same). This is further evidenced by the fact that the First Lien Lenders were granted a Section 506(c) surcharge waiver in the Final DIP Order, reinforcing that their collateral is a last resort (not the primary source) of funding administrative expenses. *See* Final DIP Order ¶ 8. Accordingly, contrary to the Committee's arguments, such assets (or their value) do not belong to unsecured creditors, and the Plan does not need to increase recoveries to unsecured creditors.

<table>
<tr><th>Asset</th><th>Committee Valuation</th><th>Debtors' Position</th></tr>
<tr><td>Postpetition Revenue</td><td>$501.4 million - $576.2 million</td><td rowspan="2">The prepetition liens and collateral of the First Lien Lenders and Second Lien Noteholders includes, among other things, the Debtors' prepetition service contracts and all proceeds, products, offspring, or profits of such service contracts.

Therefore, and as discussed in paragraphs 314-325, the Debtors' postpetition revenue constitutes "proceeds" of prepetition collateral pursuant to Section 552(b)(1) of the Bankruptcy Code.</td></tr>
<tr><td>UHC Settlement Agreement Proceeds</td><td>$25 million</td></tr>
</table>

Asset	Committee Valuation	Debtors' Position
Ownership Stake In Matrix Medical Network	$56 million	*First*, any value associated with the Debtors' minority interest in Matrix Medical Network could be negligible or zero. The Debtors cannot influence monetization, and the Matrix Medical Network joint-venture (the "***JV***") is burdened by substantial leverage and potential tax exposure. The Committee provides no evidence suggesting otherwise. *Second*, even if value existed, it is fully encumbered. ModivCare Inc. pledged 100% of its equity in Prometheus Holdco LLC—which exists solely to hold the JV equity and may incur only de minimis indebtedness—to secure the first- and second-lien obligations. The Committee identifies no creditors of Prometheus Holdco LLC, so the equity pledge is structurally senior to any Matrix Medical Network value, and any recoveries would flow first to the secured lenders. *Third*, any economic proceeds attributable to Matrix Medical Network are further subject to the DIP Liens and First Lien Adequate Protection Liens, leaving no plausible pathway for unsecured creditor recovery.
Avoidance Actions	Not valued	The Debtors acknowledge this asset is unencumbered by prepetition liens. The proceeds, however, are subject to the DIP Liens and First Lien Adequate Protection Liens.
Motor Vehicles	Not valued	The Debtors understand the First Lien Lenders will be responding to the Committee's assertions that these assets are unencumbered. Accordingly, the
Cash In Certain Debtor Bank Accounts	Approx. $402,000	

Asset	Committee Valuation	Debtors' Position
Commercial Tort Claims	$11.2 million	Debtors do not offer their views on the merits of the Committee's arguments, though reserve their rights to do so. The correct valuation of the motor vehicles, however, is $1.2 million, based on the fair market value estimate provided by the Debtors' fleet management partner. With respect to commercial tort claims, generally the Debtors do not believe such claims have value. As to the specific claims identified by the Committee that are listed on the Debtors' schedules and statements, the amounts asserted are inherently uncertain given the nature of the claims and litigation more generally. These assets, however, are subject to the DIP Liens and the First Lien Adequate Protection Liens.

88. As demonstrated above and as will be shown at the Confirmation Hearing, the aggregate value of the Alleged Unencumbered Assets (as defined below) is woefully insufficient to satisfy the more than $100 million DIP Facility Claims and First Lien Adequate Protection Liens and Claims that sit ahead of any recovery to junior stakeholders. Put differently, there is no plausible scenario, whether in chapter 7 or chapter 11, in which residual value from the Alleged Unencumbered Assets would ever reach General Unsecured Creditors or Subordinated Unsecured Noteholders. Yet, notwithstanding this substantial structural shortfall, the Plan nonetheless allocates a midpoint recovery of $55 million to the General Unsecured Creditors, reflecting a value proposition they would not otherwise receive under any realistic valuation or liquidation outcome.

C. THE PLAN'S CLASSIFICATION SCHEME IS APPROPRIATE

89. The Committee's classification arguments are not just wrong, they are incoherent. On the one hand, the Committee attempts to void the liens securing the Second Lien Notes; on the

other, it insists those same claims must be treated separately to General Unsecured Creditors because of their secured status. The Committee then pivots again, suggesting that the true nature of the Second Lien Notes (being funded debt claims) mandates that they be treated separately, citing cases that supposedly support that position. *See* Plan Obj. ¶¶ 76-77. But those cases state merely that the nature of the debt can justify different classification even where such claims are otherwise substantially similar. *See In re Robertshaw US Holding Corp*., 662 B.R. 300, 318 (Bankr. S.D. Tex. 2024) ("Substantially similar claims may be separately classified for 'good business reasons'"); *Save Our Springs Alliance v. WSI (II) COS, L.L.C*., 632 F.3d 168, 174 (5th Cir. 2011) ("S.O.S's plan treats all its unsecured creditors identically, so they should all have been in the same class absent a legitimate reason to classify them separately"). The opposite (*i.e.*, that differences in the character of unsecured debts requires separate classification) is not true. *See Matter of Greystone III Joint Venture*, 995 F.2d 1274, 1281 (5th Cir. 1991), *cert. denied*, 506 U.S. 821 (1992); *See* 7 Collier on Bankruptcy ¶ 1122.03[4(b)(i)] (16th ed.) ("The general approach, which flows from the statutory language and several court of appeals opinions, is that a plan proponent may not separately classify an unsecured deficiency claim, including one created under section 1111(b), from other general unsecured claims"). In fact, numerous cases have held that classifying deficiency claims separately from other general unsecured creditors is impermissibly discriminatory.[87] Section 1122 affords plan proponents broad discretion in classifying claims, and the Debtors' approach here is entirely consistent with that principle.

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[87] *Matter of Greystone III Joint Venture*, 995 F.2d at 1277-81 (holding that lower courts erred when they approved the separate classification of trade debt and an unsecured deficiency claim); *Barakat v. Life Insur. Co. of Virginia* (*In re Barakat*), 99 F.3d 1520, 1523-29 (9th Cir. 1996) (holding that it was impermissible, absent a business justification, to separately classify a deficiency claim from the general unsecured class); *Boston Post Road Ltd. P'ship v. Federal Deposit Ins. Corp.* (*In re Boston Post Road Ltd. P'ship*), 21 F.3d 477, 481-484 (2d Cir. 1994) (declining to separately classify unsecured deficiency claim and general unsecured trade claims, on the basis that the claims enjoy similar rights and privileges within the Bankruptcy Code despite arising under different circumstances); *John Hancock Mut. Life Ins. Co. v. Rt. 37 Bus. Park Assocs*., 987 F.2d 154, 159-162 (3rd Cir. 1993) (declining to allow separate classes for deficiency claims and unsecured trade creditor claims); *Lumber*

90. The Debtors' decision to classify the Second Lien Noteholders and General Unsecured Creditors together reflects the reality that their claims are substantially similar and, in economic effect, indistinguishable—both are effectively unsecured. This was a deliberate decision, made precisely to avoid the classification disputes the Committee previewed in its objection to the Disclosure Statement.[88] Indeed, the Plan's classification already gives the Committee the benefit of its request to avoid the liens granted in the Uptier Exchange as an alleged fraudulent transfer. Yet the Committee now accuses the Debtors of "gerrymandering" and "silencing unsecured creditors." That accusation is difficult to square with the undisputed voting mechanics this Court knows well: class acceptance requires 50% in number and 66 ⅔% in value. By combining the votes of the 73 Second Lien Noteholders with the 737 other General Unsecured Creditors in Class 4, the Debtors did precisely the opposite of gerrymandering—they created real uncertainty as to whether they could satisfy the numerosity requirement for Class 4 to accept the Plan. The Plan's classification here is fundamentally different from the cases cited by the Committee where debtors artificially split unsecured creditors into multiple classes, thereby manufacturing at least one consenting impaired class solely to satisfy Section 1129(a)(10) of the Bankruptcy Code.

91. Finally, Class 3 (First Lien Claims) has always been a consenting impaired class regardless of Class 4 (General Unsecured Creditors). Even if the General Unsecured Creditors were separately classified from the Second Lien Noteholders and that separate class rejected, the

Exch. Bldg. Ltd. P'ship v. The Mut. Life Ins. Co. (*In re Lumber Exch. Bldg. Ltd. P'ship*), 968 F.2d 647, 649–50 (8th Cir. 1992) (holding that the separate classification of deficiency claims from unsecured trade claims was a thinly veiled attempt to manipulate the vote to assure acceptance of the plan by an impaired class); *Travelers Ins. Co. v. Bryson Properties XVIII* (*In re Bryson Properties XVIII*), 961 F.2d 496, 502 (4th Cir. 1992) (holding that there is no basis for distinguishing between Code-created deficiency claims and "naturally" occurring unsecured claims).

[88] *Objection of the Official Committee of Unsecured Creditors to the Debtors' Emergency Motion for Approval of the Disclosure Statement and Related Solicitation Procedures* [Docket No. 421], ¶ 25.

Plan would remain confirmable since Section 1129(a)(10) is satisfied by the impaired consenting Class 3 and the rejecting General Unsecured Creditor class would be subject to cram down under Section 1129(b).[89] Thus, separate classification of General Unsecured Creditors—and their acceptance—is not outcome-determinative for confirmation.

D. THE DEBTOR RELEASES CONTAINED IN THE PLAN ARE CUSTOMARY AND APPROPRIATE

92. The Committee argues that the Plan includes improper Debtor releases because, in its view, Mr. Silvers is not independent, and his investigation (conducted with Quinn Emanuel) was insufficient. Both assertions are false.

1. Mr. Silvers Is Independent

93. Courts consistently hold that independence turns on whether a director "base[s] his decision on the corporate merits of the subject before the board rather than extraneous considerations or influences."[90] Under that standard, the relevant question is not whether a director has previously interacted with sophisticated market participants, but whether those interactions reasonably call into doubt the director's ability to exercise impartial judgment in the matter at hand. *See In re Baker Hughes, a GE Company, Derivative Litigation*, No. 2019-0201-LWW, 2023 WL 2967780 at *12–16 (Del. Ch. Apr. 17, 2023), *aff'd* 312 A.3d 1154 (Del. 2024) (explaining that independence turns on whether affiliations create a material risk of bias). Accordingly, courts focus on concrete indicia of bias—such as a material personal financial interest in a challenged transaction, direct involvement with targets of an investigation, communications reflecting improper alignment, or overlapping board service that compromises objectivity. *See Baker Hughes*, 2023 WL 2967780 at *11–16 (The Delaware Chancery Court held that the investigation

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[89] 11 U.S.C. § 1129(b)(1).

[90] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

director was independent because he (a) did not stand to gain a personal financial benefit or face a material detrimental impact from the transactions, (b) had no ties to General Electric and was unconflicted given there was no overlap between his time on the board that would compromise objectivity, and (c) had no affiliations with interested parties so substantial that they raised a material question of fact as to whether he could make unbiased decisions.). The touchstone is whether there is a material impairment of judgment, not whether a director was nominated by a particular constituency or has operated within the same market as other stakeholders. *See Aronson*, 473 A.2d at 816 ("Thus, it is not enough to charge that a director was nominated or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director. It is the care, attention and sense of individual responsibility to the performance of one's duties, not the method of election, that generally touches on independence.").

94. The Committee's assertion that Mr. Silvers is "anything but independent" because he was nominated by, or has previously conducted business with, certain Consenting Creditors fails under that standard. It is commonplace in distressed situations for sophisticated creditors to nominate highly qualified directors capable of navigating complex restructuring processes, and courts routinely reject the notion that such nominations alone compromise independence. *See In re Crimson Exploration Inc. Stockholder Litigation*, 2014 WL 5449419 (Del. Ch. 2014) (stockholder's significant stake in business, and ability to nominate directors did not make it a controller, and the mere presence of nominees on the board did not, without more, create a disabling conflict or trigger entire fairness); *see also In re KKR Financial Holdings LLC Shareholder Litigation*, 101 A.3d 980 (Del. Ch. 2014) (Bouchard, C.), *aff'd sub nom. Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015) (presence of directors affiliated with a significant stockholder did not automatically convert that stockholder into a controller or render

the board conflicted). The Committee does not articulate—because it cannot—any circumstance in which Mr. Silvers subordinated the Debtors' interests to those of any creditor, nor does it identify any transaction in this case from which Mr. Silvers stands to derive personal benefit. At most, the Committee points to isolated, arm's-length transactions over a multi-year period that happen to have intersected the paths of Mr. Silvers and certain lenders. Those attenuated business intersections are a far cry from the type of material, disabling conflicts that could reasonably undermine independence. Moreover, with respect to any potential claims unrelated to lenders, the Committee identifies no meaningful personal, financial, or professional connection between Mr. Silvers and any current or former director, officer, or other Related Party (as defined below).

95. In short, the Committee offers speculation and rhetoric, not facts—much less facts sufficient to call into question Mr. Silvers' ability to act in the Debtors' best interests. Nothing in the record supports a finding that his judgment was impaired, biased, or anything other than independent and disinterested.

2. <u>The Investigation Was Thorough and Comprehensive</u>

96. As for Mr. Silvers' Investigation, it was more than sufficient. Mr. Silvers, with the advice and assistance of Quinn Emanuel, undertook an extensive investigation into the appropriateness of the Debtor Releases. The Investigation focused primarily on:

- the propriety of the 2025 Transactions;
- the Debtors' decision to consummate the 2025 Transactions;
- the processes underlying the Debtors' efforts to sell their RPM and PCS businesses;
- the period between the consummation of the 2025 Transactions and the filing of these Chapter 11 Cases;
- cash transfers made by the Debtors to non-Debtor affiliates and/or by ModivCare Inc. to its Debtor subsidiaries;

- transfers to any of the Debtors' directors and officers, other than ordinary compensation and expense reimbursements, totaling more than $500,000 to any individual director or officer during the four years preceding the Petition Date; and
- other material transactions consummated by the Debtors during the four years preceding the Petition Date.

97. In furtherance of the robust scope of investigation, and as further discussed in paragraphs 63 - 70, Mr. Silvers and Quinn Emanuel:

- served 21 requests for production on the Debtors and obtained access to over 25,000 documents, a virtual data room maintained by the Debtors, and additional information through informal requests to the Debtors' advisors;
- conducted interviews of ten witnesses, including seven current and former officers and directors of the Debtors (*e.g.*, the chairperson of the Board, the chief executive officer, the chief transformation officer, current and former Board members, and senior finance and corporate development personnel), as well as representatives from Moelis and Latham;
- attended Committee-led interviews and depositions;
- had frequent phone calls to discuss facts, impressions, and legal analyses; and
- had eight formal videoconferences, in which Mr. Silvers received detailed briefings.

98. Quinn Emanuel summarized the above efforts in a PowerPoint presentation exceeding 85 pages, detailing factual findings and legal analyses of potential causes of action related to the events outlined in paragraph 65, which Quinn Emanuel presented to Mr. Silvers. Mr. Silvers then submitted a declaration to the Court setting out the facts considered and his preliminary conclusions [Docket No. 687], and a supplemental declaration with his final conclusions [Docket No. 803]. As noted by the Committee, Mr. Silvers and Quinn Emanuel did not investigate "issues related to Section 552". They did not do so because there is nothing to investigate—Section 552 operates automatically as a matter of law.

99. Following the Investigation, and having considered the advice of Quinn Emanuel, Mr. Silvers concluded the only claims that might exist relate to the exchange component of the

Coliseum Transactions as a preferential transfer. In respect of the balance of the claims that were investigated—including actual and constructive fraudulent transfer claims, equitable subordination, "lender liability" theories, claims against officers and directors for breach of fiduciary duties of care or loyalty, claims against advisors for professional liability or aiding and abetting breach of fiduciary duty, and claims related to intercompany transfers—the Investigation did not identify facts supporting colorable claims. The Committee's decision not to pursue those causes of action either, despite its aggressive litigation tactics and own lengthy investigation, corroborates that conclusion.

100. Mr. Silvers and Quinn Emanuel reported their findings to the Board of ModivCare Inc., which considered the prospects and potential implications of pursuing the potential claims relating to the Coliseum Transactions. Ultimately, the Board agreed with Mr. Silvers and determined that litigation would be an unnecessary and wasteful use of estate resources for the same reasons as set out in paragraphs 296 - 305. Namely, the prospects of such claims succeeding are low, the expense of pursuing them would be high, and the Plan already treats the Second Lien Notes as unsecured claims, meaning any preference recovery could not result in anything more than the very Plan before this Court. Moreover, because the Debtor Releases were a critical component of the intensely negotiated RSA, the Debtors determined, in their business judgment, that it was in their best interests to release such claims.

3. **<u>The Releases Provide The Debtors With Valuable Consideration And Are In The Best Interests Of The Debtors' Estates</u>**

101. The Committee also alleges the various released parties provided no consideration. As illustrated in the following chart, which is supported by the evidence provided in the Silvers Declaration, that allegation is false.

Released Parties	Value Provided
Debtors and Reorganized Debtors	The Debtors' explored every viable option and alternative to craft the Plan before this Court— a Plan that serves the best interests of all stakeholders. That is more than sufficient consideration for the Debtor Releases.
Consenting Creditors, the First Lien Agent, and the Second Lien Notes Trustee	These parties facilitated the DIP Facility and the RSA, without which the Debtors would have faced a free-fall bankruptcy to the detriment of all parties. These parties also provided a critical funding lifeline through the 2025 Transactions, a transaction in which their investment was almost immediately cut by approximately 20%.[91] Their commitment and sacrifice underscore why their releases are not only justified but essential.
The DIP Lenders, DIP Backstop Commitment Parties, and the DIP Agent	As above, these parties provided $100 million to support the Debtors during these Chapter 11 Cases. Without this, the Debtors' business would have been irreparably harmed.
Each Holder of a Claim that grants the Third-Party Releases	Granting the Third-Party Release (as defined below) constitutes valuable consideration, in exchange for which the Debtor Release is justified. Without it, the Debtors could not have secured the necessary support for the Plan and faced a free-fall bankruptcy.
Each Related Party, which includes, among other things, a Person's current and former affiliates, directors, officers, managers, officers, equity holders, advisors, and affiliated investment funds.	The foregoing Released Parties (as defined below) could not have delivered value without the efforts of the Related Parties. Further, the releases afforded to Related Parties are appropriately tailored: they are limited to circumstances in which such parties could be required by the applicable Releasing Party to grant releases under principles of agency or where the claims would otherwise be asserted derivatively. In this way, the same consideration supporting the third-party releases granted by holders of Claims effectively applies here, and the scope of the Related Party releases remains coextensive with, and no broader than, the authority or derivative nature of the underlying claims. Further, if the Debtor Release did not include the Related Parties, it would be almost meaningless as parties could

[91] The $75 million Incremental Term Loans, which are not challenged by the Committee, traded below 80 cents on the dollar before the end of April 2025, within four months after they were advanced.

Released Parties	Value Provided
	circumvent the Debtor Release simply by litigating with related affiliates, subsidiaries, members, and directors and officers. If that occurred, it could interfere with the Reorganized Debtors, whose indemnification obligations for certain parties are not discharged or affected by the Plan.

102. There are also a number of reasons why approving the releases are in the best interest of the estates and critical to reorganization of the Debtors. *First*, there is a substantial identity of interest between the Debtors and Reorganized Debtors, on the one hand, and the Released Parties—particularly current and former directors and officers—on the other. Under the Plan, contractual indemnification rights held by these individuals are preserved.[92] Accordingly, if litigation were later brought against them, the Reorganized Debtors may ultimately bear the cost of defending or indemnifying those individuals. Regardless of whether every director or officer is sued or only a subset of former individuals, the estates could face indemnity claims, fee reimbursement, and value leakage. Moreover, such litigation would impose material distraction on the Reorganized Debtors, diverting key personnel from executing the transactions under the Plan and impairing operational performance during a critical period of transition. These consequences are directly adverse to creditor recoveries and the success of the Debtors' reorganization.

103. Those risks are particularly unwarranted here because, with the sole exception of avoidance claims relating to the Uptier Transaction and lien challenges that fail as a matter of law, the Committee is not seeking standing to bring the claims and Mr. Silvers concluded that such claims are not colorable. In other words, litigation risk would introduce financial and operational

[92] *See* Plan § 8.4.

harm with no prospect of creating value. Bankruptcy courts routinely recognize that indemnification obligations and disruption to management create a compelling identity of interest supporting releases, especially where potential claims lack merit and threaten to undermine—not enhance—the reorganization.[93] For these reasons, the strong identity-of-interest amongst the parties strongly supports approval of the Debtor Release.

104. *Second*, the Debtor Release is supported by substantial contributions from the parties benefiting from such release. These parties provided direct and measurable value to the Debtors' estates, both pre- and postpetition, by discharging their responsibilities diligently, providing experienced directors and management, and devoting significant time and resources to negotiating the RSA and the Plan. In the lead-up to the filing (and with respect to many of the Released Parties, even before, through and after the 2025 Transactions), these parties worked extensively to identify viable out-of-court alternatives. After determining that chapter 11 was necessary, the Released Parties negotiated and executed the RSA, advanced the consensual restructuring embodied in the Plan, and fully cooperated in the independent investigation conducted by Mr. Silvers and Quinn Emanuel. Simply put, the Plan and the restructuring transactions thereunder—along with the benefits they confer on all stakeholders—would not exist without the substantial efforts of these parties.

105. *Third*, the Debtor Release is integral to the Plan. The Released Parties provided time, capital, and risk tolerance that enabled the Debtors to avoid a prolonged and value-destructive

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[93] *See In re Blitz U.S.A.*, No. 11-13603, 2014 WL 2582976, at *6 (Bankr. D. Del. Jan. 30, 2014) (finding an identity of interest between the debtor and several other parties due to, among other things, indemnification obligations and shared insurance proceeds); *In re Master Mortgage Investment Fund, Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994) (finding a compelling "identity of interests" where suits against officers would effectively be suits against the debtor due to indemnification obligations, and where enjoining such litigation was necessary to prevent disruption of management and protect the reorganization from burdensome, low-merit claims that would undermine rather than enhance creditor recoveries).

litigation process. Without the Debtors Release, the Debtors' prepetition lenders would not have agreed to support a restructuring that provides considerable value to junior stakeholders, and they could still withdraw that support if material litigation exposure is reintroduced. Such an outcome would jeopardize the settlements at the heart of the RSA and Plan, threaten confirmation, and likely push the Debtors into costly litigation with their secured creditors whose liens and adequate protection and superpriority administrative claims attach to the value of any such causes of action. The record makes clear that the Debtor Release was necessary to garner support for the Plan and avoid a contested, value-destructive process.

106. *Fourth*, the overwhelming creditor support confirms that the Debtor Release is reasonable, appropriate, and beneficial to the estates. As reflected in the Vote Certification, holders of 99% of Class 3 and nearly 90% of Class 4 (by amount) voted to accept the Plan. The Debtors openly disclosed that the Committee was conducting an investigation prior to solicitation and did not support the Plan. The notion that the voting results can be disregarded because the Committee disagrees with the outcome is untenable. Given that the Debtor Release is integral to the Plan, creditors' affirmative acceptance votes represent the best evidence of market-based support for the release provisions.

107. *Finally*, the Plan provides meaningful recoveries to unsecured creditors who have no entitlement to value on an absolute priority basis. The Debtors' Liquidation Analysis (as defined below) makes clear that unsecured creditors would receive no distribution absent the settlements embedded in the Plan. Under the Plan, the First Lien Lenders agreed to allocate approximately 2% (subject to dilution) of the reorganized equity to unsecured creditors as well as a robust warrants package—value they would otherwise not be entitled to receive. In light of the substantial concessions made by senior creditors, the extensive support across voting classes, and

the Committee's own constituents' support for the Plan, approval of the Debtor Release is warranted.

108. For all of the foregoing reasons, and as further discussed and supported in paragraphs 135 - 144 below, the Debtors respectfully submit that the Debtor Release is consistent with and justified under the controlling Fifth Circuit standard and should be approved.

VIII. <u>THE PLAN MEETS THE REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129 OF THE BANKRUPTCY CODE</u>

109. To confirm a plan, a court must find that both the plan and the debtor are in compliance with each of the requirements of Section 1129 of the Bankruptcy Code. Further, the proponent of a plan must demonstrate compliance with Section 1129 by a preponderance of the evidence.[94] For the reasons set forth below, the Plan and the Debtors meet the requirements of Section 1129 of the Bankruptcy Code.

A. <u>THE PLAN COMPLIES WITH ALL APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE – 11 U.S.C. § 1129(A)(1)</u>

110. Section 1129(a)(1) of the Bankruptcy Code provides that a court may confirm a plan of reorganization only if "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]."[95] As set forth herein, the Plan complies with the requirements of the Bankruptcy Code in terms of both (a) the classification of Claims and Interests and (b) the content of the Plan.

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[94] *Heartland Fed. Savings & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) (recognizing that "preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.") (internal citation omitted).

[95] 11 U.S.C. § 1129(a)(1). The legislative history of Section 1129(a)(1) explains that this provision encompasses the requirements of Sections 1122 and 1123 governing classification of claims and contents of the plan, respectively. *See* H.R. REP. No. 95-595, at 412 (1977); S. REP. No. 95-989, at 126 (1978).

1. <u>The Classification of Claims and Interests in the Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code</u>

111. Section 1122(a) of the Bankruptcy Code states: "[e]xcept as provided in subsection (b) of this section,[96] 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."[97] The plan proponent has broad discretion in classifying claims under Section 1122 and, as implied by the statute, a plan may place substantially similar claims in different classes when a reasonable nondiscriminatory basis exists for such classification.[98] In evaluating whether a plan complies with Section 1122, courts look to the kind, species, or character of each category of claims. If a plan classifies substantially similar claims in different classes, there must exist a reasonable, non-discriminatory basis for such treatment, such as a business or economic justification for the separate classification or a legal distinction between the claims. *See In re Briscoe Enters.*, 994 F.2d at 1167 (Claims may be classified separately for good business reasons and a plan proponent cannot "classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."); *In re Mirant Corp.,* No. 03-46590 (DML), 2007 WL 1258932 at *7 (Bankr. N.D. Tex. Apr. 27, 2007) ("Section 1122 of the Bankruptcy Code does not require that all substantially similar claims be placed in the same class. Decisions interpreting section 1122(a) generally uphold separate classification of different groups of unsecured claims when a reasonable basis exists for that classification.") (internal citations omitted). Here, and contrary to the

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96 The Plan does not include a class for administrative convenience, so Section 1122(b) of the Bankruptcy Code does not apply in the Chapter 11 Cases.

97 11 U.S.C. § 1122(a).

98 *In re Idearc, Inc.*, 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009), *subsequently aff'd sub nom. In re Idearc, Inc.,* 662 F.3d 315 (5th Cir. 2011); *see also In re Eagle Bus Mfg., Inc.*, 134 B.R. 584, 596 (Bankr. S.D. Tex. 1991), *aff'd, NLRB v. Greyhound Lines (In re Eagle Bus Mfg.)*, 158 B.R. 421 (S.D. Tex. 1993); *Matter of Greystone III Joint Venture*, 995 F.2d 1274, 1278-79 (5th Cir. 1991) ("A fair reading of both subsections [of Section 1122] suggests that ordinarily 'substantially similar claims,' those which share common priority and rights against the debtor's estate, should be placed in the same class.").

Committee's suggestions—which are dealt with in detail in paragraphs 78 - 83 —the Plan classifies substantially similar Claims and Interests in the same Class, satisfying Section 1122(a) of the Bankruptcy Code.

112. Article III of the Plan classifies seven Classes of Claims against the Debtors and two Classes of Interests in the Debtors, which are described in the Plan and *Disclosure Statement for First Amended Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and Its Debtor Affiliates* [Docket No. 550] ("***Disclosure Statement***"). Pursuant to Section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, Priority Tax Claims, Restructuring Expenses, Professional Fee Claims, and DIP Claims are not classified and are separately treated. The Classes under the Plan are designated as follows: Other Secured Claims (Class 1), Other Priority Claims (Class 2), First Lien Claims (Class 3), General Unsecured Claims (Class 4), Subordinated Unsecured Notes (Class 5), Intercompany Claims (Class 6), Subordinated Claims (Class 7), Intercompany Interests (Class 8), and Existing Parent Equity Interests (Class 9).

113. The classification scheme set forth in the Plan complies with Section 1122(a) of the Bankruptcy Code because each Class contains only Claims or Interests that are substantially similar to each other. Furthermore, the classification scheme created by the Plan is based on the similar nature of the Claims or Interests contained in each Class and not upon an impermissible classification factor. Similar Claims have not been placed into different Classes in order to affect the outcome of the vote on the Plan. Rather, Other Secured Claims, Other Priority Claims, First Lien Claims, General Unsecured Claims, Subordinated Unsecured Notes, Intercompany Claims, and Subordinated Claims respectively, have been classified to reflect the economic and contractual realities of such claims, and/or their unique proposed treatment under the Plan, as negotiated in connection with the RSA.

114. As noted above, and consistent with the Debtors' valuation that the Second Lien Notes are entirely unsecured claims, those Claims are properly classified with other General Unsecured Claims. Subordinated Unsecured Notes, though also unsecured, are properly classed as separate to the General Unsecured Claims, as they are (a) against ModivCare Inc. only, and therefore structurally subordinated to all General Unsecured Claims against the subsidiaries of ModivCare Inc., and (b) contractually subordinated under the Subordination Agreement to the Second Lien Notes. For that to change, the Committee would first need to obtain standing to challenge all three distinct elements of the 2025 Transactions and then successfully prevail on each claim.

115. Intercompany Interests and Existing Parent Equity Interests have been classified separately due to their distinct nature and their separate proposed treatment under the Plan.[99] Because each Class consists of only similar Claims or Interests, the Court should approve the classification scheme of the Plan as consistent with Section 1122(a) of the Bankruptcy Code.

2. <u>The Plan Satisfies the Requirements of Section 1123(a)</u>

116. The Plan complies with all subsections of Section 1123(a) of the Bankruptcy Code, which sets forth seven requirements that every chapter 11 plan must satisfy.[100]

117. **<u>Designation of Classes of Claims and Interests – 11 U.S.C. § 1123(a)(1)</u>**. Section 1123(a)(1) of the Bankruptcy Code requires a plan to designate classes of interests and claims, other than the types of claims specified in Section 507(a)(2) (administrative expense claims), Section 507(a)(3) (claims arising in the "gap" period in an involuntary case),[101] and

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[99] *See id.*

[100] 11 U.S.C. § 1123(a). Section 1123(a)(8) does not apply in the Chapter 11 Cases because the Debtors are not individuals.

[101] The Debtors commenced a voluntary chapter 11 case; therefore, there are no "gap" period claims of the kind specified in Section 507(a)(3) of the Bankruptcy Code.

Section 507(a)(8) (priority tax claims).[102] As described above, Article III of the Plan designates Classes of Claims and Interests in compliance with Section 1123(a)(1).

118. **Specification of Unimpaired Classes – 11 U.S.C. § 1123(a)(2)**. Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan."[103] Article III of the Plan provides that Claims and Interests in Classes 1, 2, 6, and 8 are Unimpaired under, and conclusively presumed to accept, the Plan.

119. **Specification of Treatment of Impaired Classes – 11 U.S.C. § 1123(a)(3)**. Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan."[104] As provided in Article III of the Plan, Claims and Interests in Classes 3, 4, 5, 7, and 9 are designated as Impaired under the Plan. In accordance with Section 1123(a)(3), Articles III and IV of the Plan specify the treatment afforded to the Impaired Classes of Claims.

120. **Same Treatment of Claims or Interests Within Each Class – 11 U.S.C. § 1123(a)(4)**. Section 1123(a)(4) of the Bankruptcy Code requires that the treatment of each claim or interest in each particular class be the same as the treatment of all other claims or interests in such class unless the holder of a particular claim or interest agrees to less favorable treatment.[105] The Plan complies with Section 1123(a)(4) by ensuring that the treatment of each Claim or Interest in each particular Class is the same as the treatment of all other Claims or Interests in such Class

[102] 11 U.S.C. § 1123(a)(1).

[103] 11 U.S.C. § 1123(a)(2).

[104] 11 U.S.C. § 1123(a)(3).

[105] 11 U.S.C. § 1123(a)(4).

unless the Holder of a particular Claim or Interest has agreed to less favorable treatment with respect to such Claim or Interest.

121. **Adequate Means for Implementation of Plan – 11 U.S.C. § 1123(a)(5)**. Section 1123(a)(5) of the Bankruptcy Code requires that a plan "provide adequate means for the plan's implementation," and gives several examples of what may constitute "adequate means."[106] In accordance with Section 1123(a)(5) of the Bankruptcy Code, the Plan, including Article V of the Plan, provides adequate means for its implementation, including, among other things:

- the continued corporate existence of the Debtors and the vesting of assets in the Reorganized Debtors under Section 5.4 of the Plan;
- the adoption of the New Corporate Governance Documents that will govern the Reorganized Debtors and the appointment of the new board of directors of the Reorganized Debtors, as provided in Sections 5.5 and 5.13 of the Plan, respectively, and as set forth in the Plan Supplement;
- the issuance of New Common Interests for distribution in accordance with the terms of the Plan, as detailed in Section 5.16 of the Plan;

[106] *See* 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) requires a plan to provide for "adequate means" for the plan's implementation, "such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate . . . among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose."

- the entry by the Reorganized Debtors into the Exit Facilities Documents and New Warrants Agreement, as detailed in Sections 5.7 and 5.10 of the Plan; respectively;
- consummation of the Equity Rights Offering, as detailed in Section 5.8 of the Plan;
- the cancellation of existing securities and agreements (to the extent not already cancelled and extinguished), as detailed in Section 5.11 of the Plan;
- the cancellation of all notes, instruments, certificates or other agreement or document evidencing debt of the Debtors, Existing Parent Equity Interests, and other Interests, as detailed in Section 5.12 of the Plan;
- the release of all Liens, except as otherwise provided in the Plan or in any contract, instrument, release or other agreement or document created pursuant to the Plan, following (i) distributions to Holders on account of Allowed DIP Claims, Allowed First Lien Claims, and Allowed Second Lien Claims and (ii) payment of Restructuring Expenses, and, in the case of an Other Secured Claim, satisfaction in full of the portion of the Other Secured Claim that is Allowed as of the Effective Date, as detailed in Section 5.12 of the Plan;
- the preservation of certain causes of action by the Reorganized Debtors pursuant to Section 5.2 of the Plan and the Plan Supplement;
- the various discharges, releases, injunctions, indemnifications and exculpations provided in Article X of the Plan;
- the process for implementation of the Management Incentive Plan in Section 5.14 of the Plan; and
- the assumption or rejection of executory contracts and unexpired leases to which any Debtor is a party, as detailed in Article VIII of the Plan.[107]

122. Accordingly, the Plan provides adequate means for its implementation in a manner consistent with Section 1123(a)(5) of the Bankruptcy Code.

123. **<u>Prohibition on the Issuance of Nonvoting Equity Securities – 11 U.S.C. § 1123(a)(6)</u>**. Under Section 1123(a)(6) of the Bankruptcy Code, a plan must "provide for the inclusion in the charter of the debtor, if the debtor is a corporation, . . . of a provision prohibiting the issuance of nonvoting equity securities . . . ." 11 U.S.C. § 1123(a)(6). The New Governance

[107] *See* Plan, Art. 5.5.

Documents of the Debtors will prohibit the issuance of non-voting equity securities to the extent prohibited by Section 1123(a)(6) of the Bankruptcy Code.[108] As a result, the Plan complies with Section 1123(a)(6) of the Bankruptcy Code to the extent applicable.

124. **Selection of Directors and Officers — 11 U.S.C. § 1123(a)(7)**. Section 1123(a)(7) of the Bankruptcy Code provides that a plan shall "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director or trustee under the plan and any successor to such officer, director or trustee."[109]

125. In accordance with Section 1123(a)(7) of the Bankruptcy Code, the provisions of the Plan and the Reorganized Debtors' formation documents, bylaws and similar constituent documents, the manner of selection of officers and directors or managers, as applicable, of the Reorganized Debtors is consistent with the interests of creditors and equity security holders and with public policy. The Debtors disclosed in the Plan Supplement the process for determining the composition of the Reorganized Parent board of directors following the Effective Date, and will disclose the identity and affiliations of the Persons proposed to serve on the New Board as soon as such Persons are known and determined.[110] The Debtors' existing officers are expected to continue as officers of the Reorganized Debtors following the Effective Date.[111] As described in the Plan, the Reorganized Debtors will adopt the Management Incentive Plan after the Effective

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[108] *See* Plan Supplement, Exhibit C [Docket No. 725].

[109] 11 U.S.C. § 1123(a)(7).

[110] *See* Plan Supplement, Ex. C-1.

[111] *See* Plan Art. 5.13(c); For the avoidance of doubt, no employees are relatives of officers such that they would qualify as "insiders" under Section 101(31) of the Bankruptcy Code.

Date.[112] Accordingly, the Plan satisfies the requirements of Section 1123(a)(7) of the Bankruptcy Code.

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

126. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan.[113] 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 estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[114]

127. The Plan is consistent with Section 1123(b) of the Bankruptcy Code. Specifically, under Articles III and IV of the Plan, Classes 1, 2, 6, and 8 are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of, or otherwise provides treatment in accordance with Section 1124(2) of the Bankruptcy Code to, the Holders of Claims and Interests within such Classes.[115] On the other hand, Classes 3, 4, 5, 7, and 9 are Impaired because the Plan modifies the rights of the Holders of Claims or Interests within such Classes as contemplated by Section 1123(b)(1) of the Bankruptcy Code.[116] As permitted by Section 1123(b)(2) of the Bankruptcy Code, for the reasons set forth below, Article VIII of the Plan provides for the assumption, subject to certain exceptions set forth in Article VIII of the Plan, of all of the Debtors'

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[112] *See* Plan, Art. 5.14.

[113] *See* 11 U.S.C. § 1123(b).

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

[115] *See* Plan, Art. III.

[116] *See id.*

executory contracts and unexpired leases pursuant to Section 365 of the Bankruptcy Code.[117] Finally, for the reasons set forth below, the release, exculpation, and injunction provisions contained in Article X of the Plan are consistent with Section 1123(b) of the Bankruptcy Code.

4. <u>The Assumption or Rejection of Executory Contracts and Unexpired Leases Under the Plan Is Appropriate Pursuant to Sections 365 and 1123(b)(2) of the Bankruptcy Code</u>

128. As set forth in Section 1123(b)(2) of the Bankruptcy Code, a plan may provide for the assumption, rejection or assignment of any executory contract or unexpired lease not previously rejected.[118] Pursuant to Article VIII of the Plan, and except as otherwise provided therein, each Executory Contract and Unexpired Lease that has not expired by its own terms shall be deemed assumed as of the Effective Date, unless such contract or lease: (a) has been assumed, assumed and assigned, or rejected by the Debtors by prior order of the Bankruptcy Court; (b) is the subject of a motion to reject filed by the Debtors pending on the Effective Date; (c) is identified as a rejected Executory Contract or Unexpired Lease by the Debtors on the Schedule of Rejected Executory Contracts and Unexpired Leases; (d) is rejected or terminated pursuant to the terms of the Plan; or (e) is the subject of a pending Cure Dispute. The Plan provides that entry of the Confirmation Order by the Bankruptcy Court shall constitute approval of such assumptions or rejections, as applicable, pursuant to Sections 365 and 1123 of the Bankruptcy Code as of the Effective Date.[119] Under the Plan, the Debtors reserve the right to amend or supplement the Schedule of Rejected Executory Contracts and Unexpired Leases in their discretion up to and through the Effective Date.

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[117] *See* Plan, Art. VIII.

[118] 11 U.S.C. § 1123(b)(2).

[119] *See* Plan, Art. 8.1(b).

129. The Plan provides that all Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases, pursuant to the Plan or the Confirmation Order, if any, must be Filed with the Bankruptcy Court within twenty-one (21) days after service of an order of the Bankruptcy Court (including the Confirmation Order) approving such rejection.[120] Any Claim arising from the rejection of Executory Contracts or Unexpired Leases that becomes an Allowed Claim is classified and shall be treated as a Class 4 General Unsecured Claim.

130. Section 365(a) provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease."[121] Courts routinely approve motions to assume, assume and assign, or reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment.[122] Indeed, courts recognize that to impose more exacting scrutiny than the business judgment standard would slow a debtor's reorganization, thereby increasing its cost and undermining the "Bankruptcy Code's provision for private control" of the estate's administration.[123]

131. The assumption or rejection by the Debtors of their Executory Contracts and Unexpired Leases in accordance with and subject to the terms and conditions of the Plan is both

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[120] *See* Plan, Section 8.3.

[121] 11 U.S.C. § 365(a).

[122] *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 57 U.S. 370, (2019) (recognizing business judgment standard); *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (same); *In re Eagle Bus Mfg.*, 134 B.R. at 597 (confirming plan in which decisions regarding assumption or rejection of executory contracts and unexpired leases were based on sound business judgment and in best interests of the estate); *see also In re Idearc, Inc.*, 423 B.R. at 162 (citing *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986) (for the proposition that courts will approve a debtor's assumption or rejection of an executory contract or unexpired lease unless evidence is presented that the debtor's decision to assume or reject "[was] so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.")).

[123] *Richmond Leasing Co. v. Cap. Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

beneficial and necessary to the Debtors' and Reorganized Debtors' business operations upon and subsequent to emergence from chapter 11. The assumption or rejection of each of the executory contracts and unexpired leases proposed to be assumed or rejected pursuant to Section 365 of the Bankruptcy Code and the Plan is a sound exercise of the Debtors' business judgment and is in the best interest of the Debtors, their Estates and their creditors.[124] Based upon, among other things, the Reorganized Debtors' anticipated financial wherewithal after the Effective Date, each Reorganized Debtor that is assuming an Executory Contract or Unexpired Lease pursuant to the Plan will be fully capable of performing under the terms and conditions of the respective contract or lease to be assumed, or assumed and assigned, on and after the Effective Date.[125]

132. Finally, the assumption by the Debtors of (a) the Indemnification Obligations pursuant to Section 8.4 of the Plan and (b) all the D&O Policies pursuant to Section 8.6 of the Plan, is of fundamental importance to the Debtors' reorganization process, a sound exercise of the Debtors' business judgment, and in the best interest of the Debtors and their Estates.

5. <u>The Plan Complies with Section 1123(d) of the Bankruptcy Code</u>

133. Section 365(b)(1) and Section 1123(b)(2) of the Bankruptcy Code provide that a debtor may not assume an executory contract or unexpired lease unless, among other things, it cures any defaults at the time of assumption.[126] 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 applicable nonbankruptcy law."[127]

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[124] *See id.*

[125] *See id.*

[126] 11 U.S.C. § 365(b)(1); 11 U.S.C. § 1123(b)(2).

[127] 11 U.S.C. § 1123(d).

134. The Plan complies with Section 1123(d) of the Bankruptcy Code. Section 8.2 of the Plan provides for the satisfaction of any monetary amounts by which each executory contract and unexpired lease to be assumed is in default by payment of the default amount in cash on the Effective Date or on such other terms as the parties to each such executory contract or unexpired lease may otherwise agree in accordance with Section 365(b)(1) of the Bankruptcy Code.

6. <u>The Plan's Release, Exculpation, and Injunction Provisions Comply with the Bankruptcy Code</u>

135. Article X of the Plan includes certain releases of the Debtors and third-parties, an exculpation provision, and an injunction provision.[128] These provisions comply with the Bankruptcy Code and applicable law because, among other things, they are fair and equitable, are given for valuable consideration, are the product of extensive good faith, arm's-length negotiations by sophisticated entities that were represented by able counsel and financial advisors, were a material inducement for parties to enter into the RSA, and are in the best interests of the Debtors and the Chapter 11 Cases. In addition, the Third-Party Release contained in the Plan is consensual and consistent with Fifth Circuit precedent. None of the release, exculpation, or injunction provisions are inconsistent with the Bankruptcy Code and, thus, the requirements of Section 1123(b) of the Bankruptcy Code are satisfied.

a. <u>The Debtor Release Complies with the Bankruptcy Code and Is Appropriate</u>

136. Section 10.6(a) of the Plan provides for releases by the Debtors, the Reorganized Debtors, Reorganized Parent, and their Estates of any and all Causes of Action, including any derivative claims, that the Debtors could assert against the Released Parties[129] (the "***Debtor***

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[128] *See* Plan, Art. X.

[129] "***Released Parties***" means, collectively, each of: (a) the Debtors; (b) the Reorganized Debtors; (c) the Consenting Creditors, (d) the First Lien Agent; (e) the DIP Lenders; (f) the DIP Backstop Commitment Parties; (g) the DIP Agent; (h) the Second Lien Notes Trustee; (i) each Holder of a Claim in a Voting Class that does not affirmatively

Release”). The Bankruptcy Code clearly contemplates that the Debtors are permitted to settle or release any claim or cause of action that they might otherwise have against a third party: Section 1123(b)(3)(A) of the Bankruptcy Code states that a plan may provide for “the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.” 11 U.S.C. § 1123(b)(3)(A). Accordingly, the Debtors may release estate causes of action as consideration for concessions made by its various stakeholders pursuant to the Plan.[130] In this circuit, courts have generally found that chapter 11 debtors are generally allowed to release claims pursuant to

elect to “opt out” of the Third-Party Releases as provided on its respective ballot; (j) each Holder of a Claim or Interest in a Non-Voting Class that does not affirmatively elect to “opt out” of the Third-Party Releases as provided on its respective Release Opt-Out Form; and (k) with respect to each of the foregoing persons in clauses (a) through (j), each Related Party, solely to the extent such Related Party would be liable whether directly or under principles of agency for any such Claims or Causes of Action asserted against the applicable Entity in the foregoing clauses (a) through (j) to whom they are related. Notwithstanding the foregoing, any Person that opts out of the releases set forth in the Plan shall not be deemed a “Released Party” hereunder; *provided*, *that* any Holder of a Claim or Interest that timely objects to the Third-Party Release, either through (i) a formal objection Filed on the docket of the Chapter 11 Cases, or (ii) an informal objection provided to the Debtors by electronic mail, and such objection is not withdrawn on the docket of the Chapter 11 Cases or via electronic mail, as applicable, before or at the Confirmation Hearing (and in the case of the latter on the record), shall not be a “Released Party” hereunder; *provided, further*, any Person or Entity (and each such Person or Entity’s Related Parties) that files an objection with the Bankruptcy Court to any substantive pleading in the Chapter 11 Cases, including to approval of the DIP Facility or the confirmation of this Plan, or commences any Cause of Action in the Bankruptcy Court or any other court of competent jurisdiction against any director of the Debtors, or against any Consenting Creditor relating to such Consenting Creditor’s secured Claims, shall not be a Released Party.

“***Related Parties***” means with respect to a Person, that Person’s current and former affiliates, and such Person’s and its current and former affiliates’ current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, participants, successors, and assigns, subsidiaries, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, fiduciaries, trustees, advisory board members, financial advisors, limited partners, general partners, attorneys, accountants, managed accounts or funds, management companies, fund advisors, investment bankers, consultants, investment managers, investment advisors, representatives, and other professionals, and such Person’s respective heirs, executors, estates, and nominees, each in their capacity as such.

[130] *See*, *e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (plan release provision “constitutes an acceptable settlement under § 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan.”); *see also In re Heritage Org.*, *L.L.C.,* 375 B.R. 230, 259 (Bankr. N.D. Tex. 2007); *In re Mirant Corp.*, 348 B.R. 725, 738-39 (Bankr. N.D. Tex. 2006), *aff’d sub nom. Objecting Class 3 Claimholders v. New Mirant Entities,* No. 06-cv-744-A, 2006 WL 3780884 (N.D. Tex. Dec. 26, 2006); *In re Gen. Homes Corp.*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991).

Section 1123(b)(3)(A) of the Bankruptcy Code if the release is (a) "fair and equitable" and (b) "in the best interests of the estate."[131]

(i) The Debtor Release Is Fair and Equitable

137. The "fair and equitable" prong of the foregoing analysis is generally interpreted, consistent with that term's usage in Section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule. *See Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 355-56 (5th Cir. 1997) ("The words 'fair and equitable' are terms of art—they mean that senior interests are entitled to full priority over junior ones.") (citations omitted); *see also In re Mirant Corp*., 348 B.R. at 738 ("'[F]air and equitable' translates to the absolute priority rule."). The Plan, including the Debtor Release, complies with the Bankruptcy Code's absolute priority rule because (a) Classes 1, 2, 6, and 8 are Unimpaired, (b) Classes 3 and 4 have voted to accept the Plan, (c) the Holders of Claims and Interests in Classes 6 and 8 are Affiliates and/or party to the RSA, pursuant to which they agreed to support the Plan, and (d) with respect to Holders of Subordinated Unsecured Notes in Class 5, Subordinated Claims in Class 7, and Existing Parent Equity Interests in Class 9, no Holder of a Claim or Interest junior to the Claims and Interests in such Classes will receive or retain on account of such Claims or Interests any property under the Plan. Therefore, the release is "fair and equitable" to all Classes. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) ("[T]he absolute priority rule provides that a *dissenting class* of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan.") (internal citation omitted) (emphasis added); *see also In re Mirant Corp.*,

[131] *See In re Jackson Brewing Co*., 624 F.2d 599, 602 (5th Cir. 1980) (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)); *In re Bigler LP*, 442 B.R. 537, 543 n.6 (Bankr. S.D. Tex. 2010*); In re Derosa-Grund*, 567 B.R. 773, 784–85 (Bankr. S.D. Tex. 2017); *see also In re Mirant Corp*., 348 B.R. 725, 738 (Bankr. N.D. Tex. 2006).

348 B.R. at 738 ("Because 'fair and equitable' translates to the absolute priority rule, in order for a settlement to meet that test it must be consistent with the requirement that *dissenting classes* of creditors must be fully satisfied before any junior creditor receives anything on account of its claim.") (emphasis added).

(ii) The Debtor Release Is in the Debtors' Best Interests

138. Courts generally determine whether a release is "in the best interests of the estate" by reference to the following factors:

a) the probability of success of litigation;

b) the complexity and likely duration of the litigation, any attendant expense, inconvenience, or delay, and possible problems collecting a judgment;

c) the interest of creditors with proper deference to their reasonable views; and

d) the extent to which the settlement is truly the product of arm's-length negotiations.[132]

139. Ultimately, courts afford a debtor some discretion in determining for itself the appropriateness of granting plan releases of estate causes of action. *See In re Gen. Homes Corp.*, 134 B.R. 8536, 861 (Bankr. S.D. Tex. 1991) ("[t]he court concludes that such a release is within the discretion of the Debtor").

140. As detailed in paragraphs 63 - 70, Mr. Silvers has conducted a thorough investigation to determine any potential claims that may be brought by the Debtors or on behalf of their estates. That investigation, which was conducted with the assistance of Quinn Emanuel, involved reviewing tens of thousands of documents, ten witness interviews, and countless hours of phone calls and formal video conferences to discuss relevant facts and legal analyses.

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[132] *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010) (citation omitted); *In re Mirant Corp.*, 348 B.R. at 739-40 (citing *Off. Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 355-56 (5th Cir. 1997)).

Ultimately, the investigation did not identify any viable causes of action the Debtors may have against the Released Parties, other than claims relating to the exchange component of the Coliseum Transactions as a preferential transfer. Mr. Silvers concluded, however, that the Plan already treats the Second Lien Notes as unsecured claims, meaning any preference recovery could not result in anything more than the very Plan before this Court. Accordingly, pursuing the claim (or any other unsupported claims) would only generate unnecessary expense without any potential benefit to the Debtors' estates under the current Plan. The Board agreed with Mr. Silvers' assessment.

141. The Committee's investigation appears to have yielded similar results. Despite the Committee's aggressive litigation tactics and its own extensive investigation, it has only identified tenuous claims or causes of action related to the propriety of the 2025 Transactions, and the scope of the First Lien Lenders' and Second Lien Noteholders' liens. For the reasons set forth in paragraphs 224 - 329, those purported claims are overstated. The Committee alleges no claims or causes or action for: (a) actual and constructive fraudulent transfer claims (other than parts of the 2025 Transactions); (b) equitable subordination; (c) "lender liability" theories; (d) claims against officers and directors for breach of fiduciary duties; (e) claims against advisors for professional liability or aiding and abetting breach of fiduciary duty; and (f) claims related to intercompany transfers. This reinforces that there are no such potential claims that may be brought on behalf of the Debtors' estates. Accordingly, attempting to pursue them without any supporting evidence would be futile, and the associated costs and risks would far outweigh any potential benefit. That *de minimis* benefit, if any, also pales in comparison to the value and benefits provided by the Plan.

142. Moreover, the evidence demonstrates that each Released Party has played an integral role in the Chapter 11 Cases. The Released Parties made significant contributions to the Chapter 11 Cases, each as detailed in paragraph 101, and their inclusion in the Debtor Release was

a material inducement for their funding, participation, negotiation, and ultimate resolution of these Chapter 11 Cases through the Plan. Indeed, absent the Debtor Release, it is highly unlikely the Released Parties would have agreed to support the Plan. Without that support, the Debtors believe that they would not be in a position to confirm the Plan and conclude these Chapter 11 Cases.

143. In addition, the Plan, including the Debtor Release, was negotiated by sophisticated entities that were represented by able counsel and financial advisors. Accordingly, the Debtor Release is fair, equitable, and in the best interests of the Debtors' estates. Thus, the Debtor Release is justified under the controlling Fifth Circuit standard and should be approved. Furthermore, the scope of the Debtor Release is appropriately tailored and limited to conduct connected to these Chapter 11 Cases and related transactions and includes customary carve-outs for willful misconduct, actual fraud, and gross negligence.

144. Accordingly, the Debtor Release is a reasonable exercise of the Debtors' business judgment, satisfies the factors considered by the Fifth Circuit, and should be approved under section 1123(b)(3)(A) of the Bankruptcy Code.

b. <u>The Consensual Third-Party Release Complies with the Bankruptcy Code and Is Appropriate</u>

145. The third-party release provision contained in Section 10.6(b) of the Plan provides that each Releasing Party,[133] including each Holder of a Claim or Interest in a Class who does not

[133] "***Releasing Parties***" means, collectively, each of, and in each case in its capacity as such: (a) each Debtor; (b) each Reorganized Debtor; (c) the Consenting Creditors; (d) the First Lien Agent; (e) the DIP Lenders; (f) the DIP Backstop Commitment Parties; (g) the DIP Agent; (h) the Second Lien Notes Trustee; (i) [reserved]; (j) each Holder of a Claim in a Voting Class that does not affirmatively elect to "opt out" of the Third-Party Release as provided on its respective ballot; (k) each Holder of a Claim or Interest in a Non-Voting Class that does not affirmatively elect to "opt out" of the Third-Party Release as provided on its respective Release Opt-Out Form; (l) each Related Party of each Entity in clauses (a) through (k), solely to the extent such Related Party (I) would be obligated to grant a release under principles of agency if it were so directed by the Entity in the foregoing clauses (a) through (k) to whom they are related or (II) may assert Claims or Causes of Action on behalf of or in a derivative capacity by or through an Entity in clause (a) through (i); *provided*, *that*, any Holder of a Claim or Interest that timely objects to the Third-Party Release, either through (i) a formal objection Filed on the docket of the Chapter 11 Cases or (ii) an informal objection provided to the Debtors by electronic mail, and such objection

affirmatively elect to opt out of the releases contained in the Plan, is deemed to release the claims it holds against the Debtors, the Reorganized Debtors, and the other Released Parties (the "***Third-Party Release***"). While the Supreme Court has held that the Bankruptcy Code prohibits non-consensual third-party releases, outside of certain circumstances not applicable here, the Supreme Court did not call into question the permissibility of consensual third-party releases,[134] and the Fifth Circuit has long allowed consensual third-party releases. *See*, *e.g*., *In re Robertshaw US Holding Corp.*, 662 B.R. at 322 (Bankr. S.D. Tex. 2024) (noting the permissibility of consensual third-party releases); *In re CJ Holding Co.*, 597 B.R. 597, 608 (S.D. Tex. 2019) ("The Fifth Circuit does not preclude bankruptcy courts from approving a 'consensual non-debtor release.' Bankruptcy courts within the Fifth Circuit commonly exercise jurisdiction to approve nonparty releases based on agreed plans."); *see also In re Camp Arrowhead*, *Ltd.*, 451 B.R. 678, 701-02 (Bankr. W.D. Tex. 2011) ("the Fifth Circuit does allow permanent injunctions *so long as there is consent.*") (emphasis in original). Indeed, as noted by a bankruptcy court in this circuit, "most courts allow consensual non-debtor releases to be included in a plan."[135] Here, the solicitation process gave, and the Plan expressly allows for, the ability of affected parties in interest to object to (formally or informally) and/or opt out of the Third-Party Release. Accordingly, the Third-Party Release is justified under Fifth Circuit precedent as consensual.

146. The Fifth Circuit, like other circuits, has not directly defined what constitutes a "consensual" third-party release. Nonetheless, bankruptcy courts in the Fifth Circuit largely analyze whether third-party releases are consensual by focusing on the facts and circumstances of

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is not withdrawn on the docket of the Chapter 11 Cases or via electronic mail, as applicable, before the Confirmation Hearing, shall not be a "Releasing Party;" *provided, further,* that the Second Lien Notes Trustee and the First Lien Agent shall be Releasing Parties solely in their respective capacities as Second Lien Notes Trustee and the First Lien Agent and not individually or in any other capacity.

134 *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 226-27 (2024).

135 *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007).

the specific process—*i.e.*, whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look it over [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[136]

147. The notice furnished by the Debtors to parties in interest, the opportunity to review afforded to such parties, and the general disclosure in the Chapter 11 Cases meets the established requirements for the Third-Party Release to be considered consensual. Indeed, the Debtors clearly and conspicuously, in all-bold text, included the full text of the Third-Party Release language in the Ballots, the Release Opt-Out Form, and the Notices of Non-Voting Status and Release Opt-Out Forms, which were sent to all potential Releasing Parties. Additionally, the Debtors made this information available free of charge on the case website maintained in the Chapter 11 Cases by the Solicitation Agent.[137] In each of the foregoing, the Debtors explicitly provided the potential Releasing Parties with clear directions for how to opt out of the Third-Party Release. And notably, the Debtors know the process worked because, as reflected in the Vote Certification, certain parties did, in fact, timely elect to opt out of the Third-Party Release by submitting Ballots or Release Opt-Out Forms, as applicable, to the Solicitation Agent, or by emailing the Debtors directly.[138]

148. Furthermore, the Debtors included language in the Ballots that made clear that, even if a creditor opted out of the Third-Party Release, such creditor would still receive the consideration and treatment for its Claim provided under the Plan.[139] Importantly, under the Plan,

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[136] Conf. Hr'g Tr. 47:7-11, *In re Energy & Expl. Partners, Inc.*, No. 15-44931 (RFN) (Bankr. N.D. Tex. Apr. 21, 2016) [Docket No. 730]; *see also In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323-24 (Bankr. S.D. Tex. 2024) (noting procedures for providing notice and opportunity to opt out of third party releases).

[137] *See* https://www.veritaglobal.net/modivcare.

[138] *See* Vote Certification.

[139] *See* bold, conspicuous language in the box on the first page of each Ballot providing: "Please be advised that your decision to opt out of the Releases does not affect the amount of distribution you will receive under the Plan. Specifically, your recovery under the Plan will be the same if you opt out…"

the Releasing Party granting the Third-Party Release could opt out of the Third-Party Release without the need to object to or vote against confirmation of the Plan. This procedure was laid out in detail in the Solicitation Procedures Motion and the notices approved by the Court in the Solicitation Procedures Order and provided to the Releasing Parties.

149. Further, the Release Opt-Out Form is only one way by which a party can effectively opt out of the Third-Party Release. As set forth in the Plan, any party can also file a formal objection on the docket maintained in the Chapter 11 Cases or an informal objection by emailing the Debtors and, in either case, upon doing so, such party will not be held to be a Releasing Party.[140] These procedures for opting out of the Third-Party Release are consistent with what the Bankruptcy Court determined "has long been settled in this District" for constituting consent.[141]

150. Suffice it to say, the confluence of steps that the Debtors took in connection with the Third-Party Release meets the applicable consent standard under which "[h]undreds of chapter 11 cases have been confirmed in this District . . ." This standard looks to whether there has been adequate notice of Third-Party Release and the consequences of electing not to opt out and whether the Thirds-Party Release is narrowly tailored to the circumstances of the Chapter 11 Cases.[142]

151. The Fifth Circuit also has shed light on the issue of consent through a series of decisions addressing the res judicata effect of a confirmed chapter 11 plan that contains a third-party release provision.[143] For example, in *Republic Supply*, the Fifth Circuit found that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted

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[140] *See* Plan Art. I.

[141] *In re Robertshaw US Holding Corp.*, 662 B.R. at 323.

[142] *Id.* at 323-24

[143] *See Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App'x 281, 286-88 (5th Cir. 2016); *FOMPuerto Rico S.E. v. Dr. Barnes Eyecenter Inc.*, 255 Fed. App'x 909, 911-12 (5th Cir. 2007); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914, 919 (5th Cir. 2000); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

and confirmed as an integral part of a plan of reorganization,"[144] and ultimately held that such provision was binding and enforceable.[145] The Fifth Circuit addressed the same issue on three occasions thereafter, analyzing the specificity of the third-party release to determine its res judicata effect.[146] *Republic Supply* and its Fifth Circuit progeny ultimately stand for the proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of the settlement, and given for consideration do not violate" the Bankruptcy Code.[147]

152. The Third-Party Release meets the *Republic Supply* standard.

153. *First*, the Third-Party Release is consensual. As set forth above, parties in interest were provided fair and extensive notice of the Chapter 11 Cases, the Plan (including the Third-Party Release), and the deadline to object to confirmation of the Plan and related releases. Further, all Holders of Claims in the Voting Classes were provided with an opportunity to opt out of the Third-Party Release on their Ballots, and all non-Affiliate Holders of Claims and Interests in Non-Voting Classes were provided with an opportunity to opt out of the Third-Party Release on the Release Opt-Out Forms included with the Notice of Non-Voting Status. Any Holders of Claims in the Voting Class or Non-Voting Classes that timely submitted a valid Release Opt-Out Form or otherwise objected to granting the Third-Party Release (formally or informally) will not be deemed to grant the Third-Party Release.[148]

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[144] *Republic Supply*, 815 F.2d at 1050.

[145] *Id.* at 1053.

[146] *See generally Hernandez*, 628 Fed. App'x. 281 (comparing the specificity of the third-party release provisions at issue in *Republic Supply*, *Applewood*, and *Dr. Barnes Eyecenter*).

[147] *In re Wool Growers*, 371 B.R. at 776 (citing *Republic Supply*, 815 F.2d at 1050; *FOMPuerto Rico*, 255 Fed. App'x at 911-12).

[148] *See* Plan, Art. I.

154. In sum, all potential Releasing Parties were given ample opportunity and means to opt out of the Third-Party Release. All parties in interest were also given ample notice of the Third-Party Release. All Releasing Parties were given ample opportunity to demonstrate their consent to the Third-Party Release by taking the simple and easy-to-follow steps necessary to elect to opt out of the Third-Party Release, thus demonstrating their consent or non-consent.[149]

155. *Second*, the language in the Plan and the solicitation materials is sufficiently specific so as to put the Releasing Parties on notice of the Third-Party Release. The Third-Party Release describes in detail the nature and type of Claims being released, including Claims with respect to:

> (i) the governance, management, transactions, ownership, or operation of the Debtors or the Non-Debtor Affiliates, (ii) the purchase, acquisition, sale, merger, or rescission of any business line, Assets, or Security of the Debtors or the Non-Debtor Affiliates, (iii) the subject matter of, or the transactions, events, circumstances, acts or omissions giving rise to, any Claim or Interest that is treated in the Restructuring Transactions, including the negotiation, formulation, or preparation of the Restructuring Transactions, (iv) the business or contractual arrangements between any Debtor or Non-Debtor Affiliate and any other Person (including Consenting Creditors), (v) the Prepetition Funded Debt Documents, (vi) the Debtors' and Non-Debtor Affiliates' in- or out-of-court restructuring efforts, (vii) intercompany transactions, (viii) the formulation, preparation, dissemination, negotiation, solicitation, entry into, Filing, or consummation of this Plan, the Plan Supplement the Disclosure Statement, the Restructuring Support Agreement and related prepetition transactions, the Definitive Documents, the Equity Rights Offering Documents, the Corporate Governance Documents, the New Corporate Governance Documents, the Chapter 11 Cases, or any Restructuring Transaction, (ix) any contract, instrument, release, or other agreement or document created or entered into in connection with this Plan, the Plan Supplement, the Disclosure Statement, the Restructuring Support Agreement, the Definitive Documents, the Equity Rights Offering Documents, the Corporate Governance Documents, or the New Corporate Governance Documents, the Chapter 11 Cases, the pursuit of Confirmation and consummation of the Plan, the administration and implementation of the Plan or Confirmation Order, including the issuance or distribution of securities pursuant to the Plan, (x) the distribution,

[149] *See* Vote Certification.

> including any disbursements made by a Distribution Agent, of property under this Plan, or any other related agreement, or (xi) any other act or omission, transaction, agreement, event, or other occurrence related to any of the foregoing and taking place on or before the Effective Date.[150]

Each of the Notice of Confirmation Hearing, the Ballots, and the Release Opt-Out Forms contained the same clear disclosure providing the nature and types of Claims being released, thus providing sufficient specificity to the Releasing Parties of the nature and types of Claims being released. The clear language of the Plan and the language sent to the Releasing Parties in the Ballots and Release Opt-Out Forms transparently placed the Releasing Parties on notice of the types of Claims being released. And notably, this language is consistent with other third-party releases that have been approved by this Court.

156. *Third*, the Third-Party Release is integral to the Plan and a condition to the global settlements embodied therein. As described above, the provisions of the Plan and RSA, including the Third-Party Release, were integral to the global settlement, and such parties may be unwilling to support the Plan without the Third-Party Release. Indeed, the RSA, which set forth the global settlement embodied in the Plan, required that the parties would incorporate release provisions into the Plan.[151]

157. *Fourth*, the Third-Party Release is to be provided in exchange for significant consideration. All parties in interest benefit from the Restructuring Transactions contemplated by the RSA and the Plan—including the distributions under the Plan and the reduction of debt—which will allow the Debtors to emerge as reorganized entities better positioned for long-term growth to the benefit of the Debtors' employees, vendors, and commercial counterparties. That

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[150] Plan, Section 10.6(b).

[151] *See Declaration of Chad J. Shandler in Support of Debtors' Chapter 11 Petitions and First Day Relief* [Docket No. 14], Ex. A.

accomplishment is a direct result of the contributions of and, in some cases, material concessions made by, the Released Parties. Such contributions include, among other things: (a) compromising Claims and accepting impaired recoveries; (b) participating in the Exit Facilities; (c) permitting the use of encumbered assets and cash collateral during the Chapter 11 Cases, including to pay over $150 million to certain General Unsecured Creditors; (d) negotiating and supporting the Plan; and (e) in the case of the Debtors' directors, officers, and employees, their immense efforts on behalf of the Debtors both prior to and throughout the Chapter 11 Cases. Furthermore, Holders of Claims and Interests who do not opt out of the Third-Party Release will be considered Released Parties, receiving a release from Releasing Parties under the Plan.

158. The Consenting Creditors engaged with the Debtors in extensive good faith negotiations and spent many months working with the Debtors to develop and implement a value-maximizing restructuring, culminating with the upcoming hearing on confirmation of the Plan. In short, the contributions and efforts of the Released Parties in formulating the Plan have allowed the Debtors to achieve a value-maximizing outcome and strongly support approval of the Third-Party Release.

159. Finally, as noted above, "[h]undreds of chapter 11 cases have been confirmed in this District" with third-party releases contained in a plan, and can thus be bound by such releases using the procedures employed here.[152] Here, the Plan goes further by providing (a) all Holders of Claims and Interests the opportunity to opt out of the Third-Party Release by filing a formal objection or emailing the Debtors informally, (b) Holders of Claims in the Voting Classes with the opportunity to opt-out of the Third-Party Release, regardless of whether they voted to accept or reject the Plan, by indicating their election to opt-out on their Ballot, and (c) Holders of Claims

[152] *In re Robertshaw US Holding Corp.*, 662 B.R. at 323.

and Interests in Non-Voting Classes with the opportunity to opt-out of the Third-Party Release by indicating their election to opt-out on the Release Opt-Out Form. Thus, the Third-Party Release is a permissible, consensual release because the Holders of Claims and Interests who elect not to opt-out of the Third-Party Release have manifested their consent through their choice not to exercise their right to opt-out of such releases through any of the various methods clearly set forth in their Ballots, the Release Opt-Out Form, and the Plan (and it bears emphasis that doing so was as easy as checking a box on a form).

c. <u>The Exculpation Provision Complies with the Bankruptcy Code and Is Appropriate</u>

160. Section 10.7 of the Plan provides that each Exculpated Party—*i.e.*, the Debtors and their Estates, each independent director of the Debtors,[153] and the Committee and each member of the Committee—shall be exculpated from any Claims or Causes of Action for any act taken or omitted to be taken between the Petition Date and the Effective Date relating to the Chapter 11 Cases, except for acts or omissions that are found to have been the product of willful misconduct, actual fraud, or gross negligence (the "***Exculpation Provision***"). Unlike the Third-Party Release, the Exculpation Provision does not affect the liability of Exculpated Parties *per se*, but rather sets a standard of care of willful misconduct, actual fraud, or gross negligence in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors' restructuring.[154] A bankruptcy court may approve an exculpation provision in a chapter 11 plan because a bankruptcy court cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good

[153] As discussed in greater detail below in connection with the U.S. Trustee's objection, exculpation of the independent directors is appropriate because "the disinterested fiduciaries of a debtor-in-possession act pursuant to the same authority and perform the same functions as a bankruptcy trustee, [thus] they are afforded identical protections." *In re Instant Brands Acquisition Holdings Inc.*, Case No. 23-90716, 2025 WL 685756 (Bankr. S.D. Tex. March 3, 2025).

[154] *See*, *e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000).

faith.[155] Accordingly, an exculpation provision represents a legal conclusion resulting from certain findings a bankruptcy court must reach in confirming a plan.[156] Once the court makes its good faith finding, it is appropriate to set the standard of care of the fiduciaries involved in the formulation of that chapter 11 plan.[157] Exculpation provisions appropriately prevent future collateral attacks against debtors. Accordingly, the Exculpation Provision in the Plan is appropriate because it provides protection to the Exculpated Parties, who served as fiduciaries during the restructuring process.

161. The Exculpation Provision is an integral component of the global settlement embodied in the Plan and is the product of good faith, arm's-length negotiations. The Exculpation Provision is narrowly tailored to the Debtors and their estates, excludes acts of willful misconduct, actual fraud, and gross negligence, and relates only to acts or omissions in connection with or arising out of the administration of the Chapter 11 Cases.[158] Accordingly, the Exculpation Provision should be approved.

d. <u>The Injunction and Gatekeeping Provisions Comply with the Bankruptcy Code and Are Appropriate</u>

162. The injunction provision set forth in Section 10.5 of the Plan (the "***Injunction Provision***") implements the Plan's discharge, release, and exculpation provisions, in part, by permanently enjoining all Persons from commencing or maintaining any action against the Debtors or the Reorganized Debtors, as applicable, on account of or in connection with or with respect to any Claims or Interests discharged, released, exculpated, or settled under the Plan. Thus, the

155 *See* 11 U.S.C. § 1129(a)(3).

156 *See* 11 U.S.C. § 157(b)(2)(L).

157 *In re PWS Holding Corp.*, 228 F.3d at 246 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity" for actions within the scope of their duties).

158 Plan, Art. 10.7.

Injunction Provision is a key provision of the Plan. Accordingly, to the extent the Court finds that the Plan's exculpation and release provisions are appropriate, the Injunction Provision should be approved. *See*, *e.g.*, *In re Camp Arrowhead*, 451 B.R. at 701-02 ("[T]he Fifth Circuit does allow permanent injunctions *so long as there is consent*. Without an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing. . . .") (citing *In re Pacific Lumber Co.*, 584 F.3d at 253; *In re Pilgrim's Pride Corp.*, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010)).

163. In addition, the Plan provides for a "gatekeeping" provision to implement the Plan's exculpation and release provisions. Specifically, Section 10.5 of the Plan provides that, for any Person or Entity to commence or pursue a Claim or Cause of Action of any kind against the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties that relates to or is reasonably likely to relate to any act or omission in connection with, relating to, or arising out of Claims or Causes of Action subject to the Debtor Release, the Third-Party Release, or the Plan's exculpation provision, the Court must (a) first determine, after notice and a hearing, that such Claim or Cause of Action represents a colorable Claim of any kind and (b) specifically authorize a Person or Entity to bring such Claim or Cause of Action, as applicable, against any of any such Debtor, Reorganized Debtor, Exculpated Party, or Released Party; *provided, that* the foregoing shall only apply to Claims or Causes of Action brought against a Released Party if the Person or Entity bringing such Claim or Cause of Action is a Releasing Party (the "***Gatekeeping Provision***"). The Gatekeeping Provision is consistent with the one authorized in *In re Highland Capital* and ones contained in recent plans confirmed in this District.[159] Further, the scope of the

[159] *See NexPoint Advisors, L.P., et al. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 437–38 (5th Cir. 2022) ("***Highland I***"). As discussed in more detail below, the U.S. Trustee's reliance on Highland II (defined below) to challenge the scope of the Gatekeeping Provision fails because the Gatekeeping Provisions only applies to parties other than the Debtors and the Exculpated Parties to the extent such parties are

Gatekeeping Provision is limited to Claims and Causes of Action that are appropriately enjoined under the Plan making it permissible under *Highland II*.[160] In addition, the Gatekeeping Provision is limited to parties that have performed valuable services in connection with the Debtors' restructuring, including negotiating and supporting the RSA, the Plan, and the other Definitive Documents, among other aspects of the Restructuring Transactions. The value-maximizing outcome set forth in the Plan is a direct result of the efforts of the Debtors, the Reorganized Debtors, and the Released Parties. Accordingly, the Gatekeeping Provision is appropriate and should be approved.

B. THE DEBTORS HAVE COMPLIED WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE – 11 U.S.C. § 1129(A)(2)

164. Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a plan comply "with the applicable provisions of this title."[161] Whereas Section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, Section 1129(a)(2) of the Bankruptcy Code is concerned with the applicable activities of a plan proponent under the Bankruptcy Code.[162] In determining whether a plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of Sections 1125 and 1126 of the Bankruptcy Code.[163]

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deemed to have consensually agreed to be bound by the Third-Party Release. Highland II only addressed the scope of the Gatekeeping Provision with respect to non-consensual exculpation and injunction provisions.

[160] *Highland Capital Mgmt. Fund Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 132 F.4th 353 (5th Cir. 2025) ("***Highland II***").

[161] 11 U.S.C. § 1129(a)(2).

[162] *See* 7 Collier on Bankruptcy ¶ 1129.02[2] (16th ed.).

[163] The legislative history to Section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under Sections 1125 and 1126. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.").

165. As set forth above and as evidenced by the Vote Certification and the Solicitation Affidavit [Docket No. 801] the Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Procedures Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. In addition, the Debtors and their professionals acted in good faith in all respects in connection with the solicitation of votes on the Plan and the tabulation of such votes. Accordingly, the requirements of Section 1129(a)(2) of the Bankruptcy Code have been satisfied. *See In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (holding Section 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to Plan).

C. THE PLAN HAS BEEN PROPOSED IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW – 11 U.S.C. § 1129(A)(3)

166. Section 1129(a)(3) of the Bankruptcy Code provides that a court shall confirm a plan of reorganization only if the plan has been "proposed in good faith and not by any means forbidden by law."[164] Section 1129(a)(3) does not define good faith, but it is generally held that a plan is proposed in good faith if there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.[165] "[T]he requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give the debtors a reasonable opportunity to make a fresh start." *In re Cajun Elec. Power Coop.*, 150 F.3d 503, 519 (5th Cir. 1998) (quoting *In re T-H New Orleans*, 116 F.3d at 802); *see also Brite v.*

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[164] 11 U.S.C. § 1129(a)(3).

[165] *See 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).

Sun Country Dev. (In re Sun Country Dev.), 764 F.2d 406, 408 (5th Cir. 1985); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999) ("The good faith standard requires that the plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code'" (citations omitted)). The plan proponent must also show that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success. *See In re T-H New Orleans*, 116 F.3d at 802 (finding that a court may only confirm a plan for reorganization if the plan has been proposed in good faith and not by any means forbidden by law and that where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of Section 1129(a)(3) is satisfied); *see also In re Food City, Inc.*, 110 B.R. 808, 810 (Bankr. W.D. Tex. 1990) (explaining that the term "law" as used in this section, includes state law, and applies not to the substantive provision of a plan itself but rather to the means employed in proposing a plan.).

167. The objectives and purposes of the Bankruptcy Code, and chapter 11 reorganization in particular, have been described by the United States Supreme Court as follows: "to revive the debtors' businesses and thereby preserve jobs and protect investors" and to "maximiz[e] the value of the bankruptcy estate[;]"[166] "to permit the successful rehabilitation of debtors;"[167] and "to provide jobs, to satisfy creditors' claims, and to produce a return for [debtors'] owners."[168] These opinions recognize the primary legislative goal of rehabilitating viable businesses.[169]

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166 *Toibb v. Radloff*, 501 U.S. 157, 163 (1991).

167 *In re Bildisco*, 465 U.S. at 527.

168 *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983).

169 *See In re Bildisco*, 465 U.S. at 528.

168. The Plan accomplishes this goal in the Chapter 11 Cases by providing the means by which the Reorganized Debtors may continue to operate as viable entities. The Debtors commenced these cases only after thoroughly exploring all other available options to preserve the going concern value of their businesses and to maximize the value of their estates. Those efforts included: (a) seeking additional debt and equity investments from the Consenting Creditors and cornerstone investors such as AI Catalyst Fund, Coliseum, and Jupiter; (b) pursuing asset-backed financing alternatives; and (c) extensive negotiations regarding an out-of-court restructuring with the Consenting Creditors.

169. The Plan is the product of extensive and arm's-length negotiations between and among the Debtors and the Consenting Creditors, and it provides a mechanism for preserving the going-concern value of the Debtors through emergence from chapter 11. In addition, the Plan provides for the continued employment of the Debtors' employees and through the Plan and other orders of the Court allows for recoveries to General Unsecured Creditors that would otherwise have been unavailable.

170. As will be further demonstrated at the Confirmation Hearing, the Debtors have satisfied the good faith requirement of Section 1129(a)(3) of the Bankruptcy Code. The Debtors proposed the Plan with the legitimate and honest purpose of reorganizing a company burdened by an unsustainable debt load.

171. The terms of the Plan were negotiated in good faith with the Consenting Creditors, and their respective advisors, and achieve an outcome that is fundamentally fair to all stakeholders.[170] Indeed, notwithstanding the Committee's aggressive litigation strategy, the

[170] *See* Shandler Declaration.

broad-based and overwhelming support of the Plan—even from the Committee's own constituents—speaks to the good faith of the parties involved and the fairness of the Plan.[171]

D. The Plan Provides That Payments Made by the Debtors for Services or Costs and Expenses Are Subject to Approval – 11 U.S.C. § 1129(a)(4)

172. Section 1129(a)(4) of the Bankruptcy Code provides that a court shall confirm a plan only if "[a]ny payment made or to be made by the proponent, [or] by the debtor, . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."[172] In other words, the debtor must disclose to the court all professional fees and expenses, and such professional fees and expenses must be subject to court approval.[173]

173. In accordance with Section 1129(a)(4) of the Bankruptcy Code, no payment for services or costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Plan and incidental to the Chapter 11 Cases, including Claims for professional fees, has been or will be made by any Debtor other than payments that have been authorized by order of the Bankruptcy Court. Article II of the Plan provides for the payment of various Administrative Claims, including Professional Fee Claims, which are subject to Court approval and the standards of the Bankruptcy Code. Accordingly, the provisions in the Plan comply with Section 1129(a)(4) of the Bankruptcy Code.

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171 *See* Vote Certification.

172 11 U.S.C. § 1129(a)(4).

173 *See In re Cajun Elec. Power Coop.*, 150 F.3d at 514-15 (concluding that Section 1129(a)(4) is designed to assure payments for professional services are subject to the bankruptcy court's approval and determination of reasonableness); *see also In re McCommas LFG Processing Partners, LP*, 2007 Bankr. LEXIS 4053, at *45 (Bankr. N.D. Tex. 2007).

E. The Debtors Have Disclosed All Necessary Information Regarding the Reorganized Debtors' Directors and Officers and Insiders – 11 U.S.C. § 1129(a)(5)

174. 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 the reorganized debtor.[174] 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.[175] In addition, 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.[176] Section 1129(a)(5)(A)(ii) directs the Court to ensure that the post-confirmation governance of the Reorganized Debtors is in "good hands," which courts have interpreted to mean: (a) that management has experience in the reorganized debtor's business and industry;[177] (b) that management has experience in financial and management matters;[178] (c) that the debtor and creditors believe control of the entity by the proposed individuals will be beneficial;[179] and (d) that the post-confirmation governance does not "perpetuate[] incompetence, lack of discretion,

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174 *See* 11 U.S.C. § 1129(a)(5)(A)(i).

175 *See* 11 U.S.C. § 1129(a)(5)(B).

176 *See* 11 U.S.C. § 1129(a)(5)(A)(ii).

177 *See In re Rusty Jones*, *Inc.*, 110 B.R. 362, 372, 375 (Bankr. N.D. Ill. 1990) (stating that section 1129(a)(5) was not satisfied where management had no experience in the debtor's line of business); *In re Toy & Sports Warehouse*, *Inc.*, 37 B.R. 141, 149-50 (Bankr. S.D.N.Y. 1984) (continuation of debtors' president and founder, who had many years of experience in the debtors' businesses, satisfied Section 1129(a)(5)).

178 *See In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992) ; *In re Sherwood Square Assoc.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989).

179 *See In re The Landing Assocs.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) ("In order to lodge a valid objection under § 1129(a)(5), a creditor must show that a debtor's management is unfit or that the continuance of this management post-confirmation will prejudice the creditors") (internal citation omitted); *see also In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990).

inexperience, or affiliations with groups inimical to the best interests of the debtor."[180] The "public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[181]

175. The Debtors disclosed in the Plan Supplement the process for selecting the directors of the New Board of Reorganized Parent who will serve as of the Effective Date. The Debtors will disclose the identify and affiliations of the Persons proposed to serve on the New Board as soon as such Persons are known and determined. In addition, the Debtors disclosed the identity of the officers of Reorganized Parent who will be employed as of the Effective Date in the Plan Supplement. Furthermore, there are no employees who are insiders other than by virtue of being a director or officer.

176. As noted above, certain of the individuals who will serve as directors and officers of the Reorganized Debtors are members of the Debtors' existing management team. The Reorganized Debtors' appointment or continuance of officers, directors, and managers is "consistent with the interests of creditors and equity security holders and with public policy."[182] The proposed directors and officers of the Reorganized Debtors have significant knowledge and business and industry experience and will give the Reorganized Debtors continuity in running their businesses. The Debtors submit that the requirements of Section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied.

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[180] *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).

[181] 7 Collier on Bankruptcy ¶ 1129.02[5][b] (16th ed.).

[182] 11 U.S.C. § 1129(a)(5)(A)(ii).

F. THE PLAN DOES NOT CONTAIN ANY RATE CHANGES SUBJECT TO THE JURISDICTION OF ANY GOVERNMENTAL REGULATORY COMMISSION – 11 U.S.C. § 1129(A)(6)

177. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the rates charged by a reorganized debtor in the operation of its business approve any rate change provided for in the plan. The Plan does not contain any rate changes subject to the jurisdiction of any governmental regulatory commission and no rate changes under the Plan will require governmental regulatory approval. As a result, the requirements of Section 1129(a)(6) of the Bankruptcy Code have been satisfied.

G. THE PLAN IS IN THE BEST INTERESTS OF CREDITORS – 11 U.S.C. § 1129(A)(7)

178. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity holders. This "best interests" test focuses on individual dissenting creditors, rather than classes of claims.[183] The best interests test requires that each holder of a claim or equity interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor was liquidated under chapter 7 of the Bankruptcy Code.[184]

179. As Section 1129(a)(7) of the Bankruptcy Code makes clear, the Liquidation Analysis applies only to non-accepting holders of impaired claims or interests.[185] If a class of claims or interests unanimously approves the plan, the best interests test is deemed satisfied for all members of that class.[186] Under the Plan, Claims in Classes 3, 4, and 5 are Impaired and allowed

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[183] *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999).

[184] 11 U.S.C. § 1129(a)(7).

[185] *See* 11 U.S.C. § 1129(a)(7).

[186] *In re Drexel Burnham Lambert*, 138 B.R. at 761; *see also In re Star Ambulance Serv., LLC*, 540 B.R. at 264.

to vote on the Plan. The Plan was accepted by Classes 3 and 4.[187] The Plan was not accepted by Class 5 and deemed rejected by Classes 7 and 9. As such, the best interests test is applicable to the rejecting Holders of Claims and Interests in Classes 3, 4, 5, 7, and 9.

180. Based on the liquidation analysis performed by FTI, financial advisor to the Debtors, and annexed to the Disclosure Statement as Exhibit C (the "***Liquidation Analysis***"), including the methodology used and estimations and assumptions made therein, it is clear that the best interests test is satisfied as to Classes 3, 4, 5, 7, and 9. A chapter 7 liquidation of the Debtors' estates would result in a substantial loss of value otherwise available to Holders of Claims in Classes 3 and 4 when compared to the proposed distributions under the Plan, and would result in no change to the distribution of Holders of Claims in Classes 5, 7, and 9.[188] In fact, a liquidation under chapter 7 as set forth in the Liquidation Analysis would materially and adversely affect the ultimate proceeds available for distribution to most Holders of Allowed Claims and Interests in the Chapter 11 Cases. The Plan provides Holders of Claims in Classes 3 and 4 with a recovery greater than what would be available in a liquidation under chapter 7, and Holders of Claims in Classes 5, 7, and 9 with a recovery no less than what would be available in a liquidation under chapter 7; thus, the Plan satisfies the best interests test.

H. ACCEPTANCE OF IMPAIRED VOTING CLASS –11 U.S.C. § 1129(A)(8)

181. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept a plan or not be impaired by a plan.[189] A class of claims or interests that is not impaired under a plan is "conclusively presumed" to have accepted the plan and need not be

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[187] *See* Vote Certification.

[188] *See* Disclosure Statement, Ex. C.

[189] *See* 11 U.S.C. § 1129(a)(8).

further examined under Section 1129(a)(8) of the Bankruptcy Code.[190] A class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half in the number of claims in the class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan.[191] As further discussed below, if any class of claims or interests rejects a plan, such plan must satisfy the "cramdown" requirements of Section 1129(b) of the Bankruptcy Code with respect to such claims or interests.

182. As set forth in Articles III and IV of the Plan, Classes 1, 2, 6, and 8 are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan pursuant to Section 1126(f) of the Bankruptcy Code. The Holders of Claims in the Voting Classes were impaired and eligible to vote. Holders of Claims in Classes 3 and 4 voted in favor of the Plan, while Holders of Claims in Class 5 voted against the Plan in respect of ModivCare Inc. (being the only Debtor that such Holders have Claims against). Classes 7 and 9 were deemed to reject the Plan. The Plan therefore does not satisfy Section 1129(a)(8) of the Bankruptcy Code with respect to Classes 5, 7 and 9.

183. To be clear, however, the Plan has been unanimously accepted by all voting classes of the ModivCare Subsidiaries. The only rejecting classes (Classes 5, 7, and 9) are located at the parent entity ModivCare Inc. If the Committee's arguments in respect of classification had any merit (they do not), the resulting class of general unsecured creditors (excluding the Second Lien Noteholders) would have also rejected the Plan. Notwithstanding such rejection, the Plan would nevertheless be confirmable because, as discussed below, it satisfies Section 1129(b) of the Bankruptcy Code with respect to such rejecting Classes.

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[190] *See* 11 U.S.C. § 1126(f).

[191] 11 U.S.C. § 1126(c).

I. The Plan Provides for Payment in Full of All Allowed Priority Claims – 11 U.S.C. § 1129(a)(9)

184. The Plan satisfies the requirements of Section 1129(a)(9) of the Bankruptcy Code, which requires that persons holding priority claims under the Bankruptcy Code receive specified cash payments.[192] The treatment of Administrative Claims under the Plan is consistent with Section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class Has Accepted the Plan – 11 U.S.C. § 1129(a)(10)

185. In general, Section 1129(a)(10) requires that, to the extent there is a class of impaired claims under a plan that at least one impaired class of claims must accept the plan, excluding the votes of any insiders.[193] As shown in the Vote Certification, Classes 3 and 4 voted to accept the Plan.[194] As such, at least one impaired Class of Claims has voted in sufficient number and amount to accept the Plan, without regard to the votes of insiders.[195] Accordingly, the Plan satisfies Section 1129(a)(10) of the Bankruptcy Code. Even if the Committee's classification arguments were successful, the result would be no different.

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[192] 11 U.S.C. § 1129(a)(9). Under Section 1129(a)(9), unless otherwise agreed, a plan must provide that:

> the holder of a claim entitled to priority under Section 507(a)(2) or 507(a)(3) will receive cash for the allowed amount of the claims on the effective date of the plan;
>
> the holder of a claim entitled to priority under Section 507(a)(1), (4), (5), (6), or (7) will receive either deferred cash payments for the allowed amount or cash for the allowed amount for the claim on the effective date of the plan;
>
> the holder of a tax claim entitled to priority under Section 507(a)(8) will receive regular installment payments in cash (i) of the total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order of relief under Section 301, 302, or 303; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under Section 1122(b)); and
>
> the holder of a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under Section 507(a)(8), but for the secured status of that claim, will receive cash payments on account of that claim in the same manner and over the same period, as prescribed in subparagraph (C).

[193] 11 U.S.C. § 1129(a)(10).

[194] *See* Vote Certification.

[195] *See* Vote Certification.

K. THE PLAN IS FEASIBLE – 11 U.S.C. § 1129(A)(11)

186. Pursuant to Section 1129(a)(11) of the Bankruptcy Code, a plan of reorganization may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by 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."[196] As described below, the Plan is feasible under Section 1129(a)(11) of the Bankruptcy Code.

187. To establish that a plan is feasible, "the [bankruptcy] court need not require a guarantee of success . . . [o]nly a reasonable assurance of commercial viability is required."[197] Indeed, "[a]ll the bankruptcy court must find is that the plan offer[s] 'a reasonable probability of success.'"[198] While the debtor bears the burden of proving plan feasibility, the applicable standard is by a preponderance of the evidence, which means presenting proof that a given fact is "more likely than not."[199] The courts have fashioned a series of factors that may be considered in the determination of whether a debtor's plan is feasible. These factors, while varying from case to case, traditionally include: (a) the adequacy of the debtor's capital structure; (b) the earning power of its business; (c) economic conditions; (d) the abilities of the debtor's management; (e) the probability of the continuation of the same management; and (f) other related matters affecting successful performance under the provisions of the plan.[200] As demonstrated below, consideration of these factors supports a finding that the Plan is feasible.

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[196] 11 U.S.C. § 1129(a)(11).

[197] *In re Briscoe Enters.*, 994 F.2d at 1165-66 (quoting *In re Lakeside Glob. II*, 116 B.R. at 507).

[198] *In re T-H New Orleans,* 116 F.3d at 801 (quoting *In re The Landing Assocs.*, 157 B.R. at 820).

[199] *In re Briscoe Enters.*, 994 F.2d at 1164; *see also In re T-H New Orleans*, 116 F.3d at 801. Further, a number of courts have held that this standard constitutes a "relatively low threshold of proof." *In re Mayer Pollock Steel Corp.*, 174 B.R. 414, 423 (Bankr. E.D. Pa. 1994) (stating that the debtors "have established that they meet the requisite low threshold of support for the Plan as a viable undertaking.").

[200] *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 226-27 (Bankr. D.N.J. 2000) (citing *In re Temple Zion*, 125 B.R. 910, 915 (Bankr. E.D. Pa. 1991));

188. Here, the Shandler Declaration and the financial projections attached to the Disclosure Statement as Exhibit D (the "***Financial Projections***") will demonstrate that the Plan is feasible. These Financial Projections demonstrate that the Debtors will have sufficient earnings to meet their obligations under the Plan.[201] Although the Debtors' businesses operate in a competitive industry and market, and although it is impossible to predict with certainty the precise future profitability of the Debtors' businesses or industries and markets in which the Debtors operate, confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtors, the Reorganized Debtors, or any successors to the Reorganized Debtors under the Plan. The proposed Plan, negotiated in good faith between the Debtors and their major creditor constituencies, has more than a reasonable likelihood of success because the transactions contemplated under the Plan will enable the Debtors to continue their current operations while generating positive free cash flow while eliminating approximately $1.1 billion of prepetition funded debt.

189. In formulating the Plan, the Debtors and their financial advisors sought to ensure that the Plan would provide sufficient free cash flow to allow the Debtors to continue to operate their business successfully after emergence and to satisfy all of their obligations under the Plan. By substantially reducing the Debtors' prepetition debt, entering the Exit Revolving Facility, and consummating the Equity Rights Offering, the Reorganized Debtors will be better positioned to service ongoing debt obligations and generate cash flow to reinvest in their businesses. Indeed, the Plan ensures that the Debtors' capital structure is aligned with their businesses and long-term growth strategy. Accordingly, the Plan provides for a workable reorganization, with more than a

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In re Toy & Sports Warehouse, 37 B.R. at 151 (citing *In re Landmark at Plaza Park, Ltd.*, 7 B.R. 653, 659 (Bankr. D.N.J. 1980)); *see also In re T-H New Orleans*, 116 F.3d at 801 (discussing the factors that the bankruptcy court examined in its decision that the debtor's plan was feasible).

[201] Disclosure Statement, Exh. D.

reasonable likelihood of success, and, therefore, satisfies Section 1129(a)(11) of the Bankruptcy Code.

L. ALL STATUTORY FEES HAVE BEEN OR WILL BE PAID – 11 U.S.C. § 1129(A)(12)

190. Section 1129(a)(12) of the Bankruptcy Code provides that a court may confirm a plan of reorganization only if "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan."[202] Article XII of the Plan provides for the payment by each of the Debtors of all fees payable pursuant to Section 1930(a) of the Judicial Code for each quarter (including any fraction thereof) until the earliest to occur of (a) the final decree closing such Debtors' Chapter 11 Case, (b) an order dismissing such Debtor's Chapter 11 Case, or (c) an order converting such Debtor's Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code. Thus, the Plan meets the requirements of Section 1129(a)(12) of the Bankruptcy Code.

M. THE PLAN PROVIDES FOR THE ASSUMPTION OF ANY RETIREE BENEFIT OBLIGATIONS – 11 U.S.C. § 1129(A)(13)

191. Section 1129(a)(13) of the Bankruptcy Code requires that a plan of reorganization provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits."[203] Article VIII of the Plan provides that all Employee Plans (which include programs applicable to retirees) that exist as of the Petition Date shall be assumed on the Effective Date as Executory Contracts pursuant to Sections 365 and 1123 of the Bankruptcy Code. Therefore, Section 1129(a)(13) of the Bankruptcy Code, to the extent applicable to the Debtors, is satisfied.

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[202] 11 U.S.C. § 1129(a)(12).

[203] 11 U.S.C. § 1129(a)(13).

N. <u>SECTIONS 1129(A)(14)-(A)(16) OF THE BANKRUPTCY CODE ARE INAPPLICABLE</u>

192. Based on the facts of the Chapter 11 Cases, Sections 1129(a)(14) through (16) of the Bankruptcy Code are not applicable to the Chapter 11 Cases.

O. <u>SECTION 1129(B): THE PLAN SATISFIES THE "CRAMDOWN" REQUIREMENTS</u>

193. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where the plan is not accepted by all impaired classes of claims and Interests. This mechanism is known colloquially as "cram down." Section 1129(b) provides in pertinent part:

> [I]f all of the applicable requirements of [Section 1129(a) of the Bankruptcy Code] other than [the requirement contained in Section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.[204]

194. Thus, under Section 1129(b) of the Bankruptcy Code, the Court may "cram down" a plan over rejection by impaired classes of claims or Interests so long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes.[205]

195. The three Classes of Claims or Interests that have rejected the Plan are only relevant to ModivCare Inc.: Class 5 (Subordinated Unsecured Notes); Class 7 (Subordinated Claims); and Class 9 (Existing Parent Equity Interests). The ModivCare Subsidiaries do not have any rejecting Classes. The Debtors, respectfully submit that the Plan at ModivCare Inc. may nonetheless be confirmed over the rejection by such Classes pursuant to Section 1129(b) of the Bankruptcy Code,

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204 11 U.S.C. § 1129(b)(1).

205 *See id.*

because the Plan does not discriminate unfairly and is fair and equitable with respect to all non-accepting Impaired Classes.

1. **The Plan Does Not Discriminate Unfairly**

196. The Plan does not discriminate unfairly with respect to the Impaired Classes that have, or were deemed to have, rejected the Plan at ModivCare Inc. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. *See In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"), *rev'd on other grounds sub nom. Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999). Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists. *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) (explaining that "whether or not a particular plan does [unfairly] discriminate is to be determined on a case-by-case basis"); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (finding that determination of unfair discrimination requires court to "consider all aspects of the case and the totality of all the circumstances"). At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[206] In other words, Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes; it prohibits only discrimination that is unfair.[207] Accordingly, between two classes of claims or two classes of interests, there is no unfair discrimination if (a) the

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[206] *See In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 654-55 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

[207] *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990).

claims or interests in each such class are dissimilar from those in the other class,[208] or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for disparate treatment of otherwise similar claims or interests.[209]

197. Though Classes 4 and 5 both contain general unsecured claims, their separation under the Plan does not constitute unfair discrimination. The payment of General Unsecured Claims in Class 4 before payment of the Subordinated Unsecured Notes in Class 5 is not an arbitrary choice by the Debtors—it is required given the Debtors' capital structure. In connection with the 2025 Transactions, the subsidiary guarantees of the Subordinated Unsecured Notes were validly released. Accordingly, the Subordinated Unsecured Notes are against ModivCare Inc. only. In contrast, the General Unsecured Claims have claims against, or are treated as having claims against, each of the ModivCare Subsidiaries given Sections 5.1 and 5.3 of the Plan, which substantively consolidate all Debtors other than ModivCare Inc.

198. Therefore, Class 5 is structurally subordinated to the First Lien Claims, Second Lien Notes, and all other General Unsecured Claims of the ModivCare Subsidiaries and cannot receive any distribution until those claims have been paid in full. Moreover, the Subordinated Unsecured Notes are contractually subordinated to the First Lien Claims and Second Lien Notes pursuant to the Subordination Agreement. Under the Subordination Agreement, the Subordinated Unsecured Notes cannot be repaid until the First Lien Claims and Second Lien Notes are repaid in full. Until then, any funds so distributed would have to be turned over to the First Lien Lenders or Second Lien Noteholders (as applicable).[210]

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

[209] *See, e.g., In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990); *In re Rivera Echevarria*, 129 B.R. 11, 13 (Bankr. D.P.R. 1991).

[210] *Subordination Agreement by and amongst JP Morgan Chasebank, N.A., Ankura Trust Company LLC, and Wilmington Savings Fund Society, FSB, executed February 25, 2025*, Section 10.

199. The different treatment of Class 5 therefore reflects the economic, structural, and contractual realities of the Subordinated Unsecured Notes and is reasonable and justified. A chapter 11 plan that required payment to the Subordinated Unsecured Notes against ModivCare Inc. without payment of the General Unsecured Claims in full would be patently unconfirmable. Similarly, the proposed treatment of Subordinated Claims in Class 7 is warranted, because such Claims are subordinated to all other claims and interests pursuant to Section 510(b) of the Bankruptcy Code.

200. Classes 8 and 9 both relate to Interests but are entirely unique from one another. Class 9 relates to Existing Parent Equity Interests and is thus structurally subordinate to the Intercompany Interests comprising Class 8. Further, the preservation of Intercompany Interests is solely a means to preserve the corporate and organizational structure of the Debtors. It is being done to avoid the unnecessary cost of reconstituting the same structure in connection with the consummation of the Plan. The Plan's treatment of the Intercompany Interests has no economic substance and does not enable any junior creditor or interest holder to retain or recovery any property of value under the Plan.

201. Accordingly, because the Plan does not discriminate unfairly with respect to Classes that have been or may be deemed to reject the Plan, the Debtors respectfully submit that the Plan satisfies the requirements of Section 1129(b) of the Bankruptcy Code.

2. <u>The Plan Is Fair and Equitable</u>

202. Sections 1129(b)(2)(B)(ii) and (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, under the plan, no holder of any junior claim or interest will receive or retain property under the plan on

account of such junior claim or interest.[211] Generally, this requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[212] Additionally, in order for a plan to be "fair and equitable," no creditor may be paid more than what it is owed (*i.e.*, no class of creditors may receive more than 100% of its claims).[213]

203. With respect to the Classes that have rejected the Plan (*i.e*., Classes 5, 7, and 9), no Claim or Interest in a Class junior to such Classes will receive a recovery under the Plan on account of such Claim or Interest. Such Classes relate to ModivCare Inc. only and are therefore structurally subordinated to the Claims and Interests in Classes 6 and 8. Payment of creditors in full at the ModivCare Subsidiaries is required before value could flow up to creditors and interest holders of ModivCare Inc. Further, the preservation of Intercompany Claims and Intercompany Interests is solely a means to preserve the corporate and organizational structure of the Debtors. It has no economic substance.

204. Moreover, no Holder of a Claim is receiving more than 100% of its claim. As will be set forth in the Jamal Declaration and as set forth in the valuation analysis attached to the Disclosure Statement as Exhibit E, the estimated potential range of the Reorganized Debtors' Enterprise Value (as defined in the Disclosure Statement) is approximately $750 million to $925 million. Accordingly, and as set forth below and in Article I.B. of the Disclosure Statement, no Holder of a Claim will receive under the Plan more than 100% of what it is owed.

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

[212] *See 203 N. LaSalle P'ship*, 526 U.S. at 459.

[213] *See* 7 Collier on Bankruptcy ¶1129.03[4][a]; *see also In re Granite Broad. Corp.*, 369 B.R. 120, 140 (Bankr. S.D.N.Y. 2007) ("There is no dispute that a class of creditors cannot receive more than full consideration for its claims, and that excess value must be allocated to junior classes of debt or equity, as the case may be.").

Class and Designation	Approx. Percentage Recovery
Class 1: Other Secured Claims	100%
Class 2: Other Priority Claims	100%
Class 3: First Lien Claims	58% - 79%
Class 4: General Unsecured Claims	2.0% - 1.9%[214]
Class 5: Subordinated Unsecured Notes	0%
Class 6: Intercompany Interest	100%
Class 7: Subordinated Claims	0%
Class 8: Intercompany Interests	100%
Class 9: Existing Equity Interests	0%

205. For these reasons, the Plan is "fair and equitable" and, therefore, consistent with the requirements of Section 1129(b) of the Bankruptcy Code.

P. THE PLAN IS NOT AN ATTEMPT TO AVOID TAX OBLIGATIONS – 11 U.S.C. § 1129(D)

206. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act. The Plan meets these requirements because the principal purpose of the Plan is not avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act, and there has been no filing by any governmental agency asserting such a purpose.

Q. THE WAIVER OF A STAY OF THE CONFIRMATION ORDER IS APPROPRIATE

207. 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."

[214] Approximate percentage recovery reflects recovery on account of primary equity allocation and does not include potential value of the New Warrants. Recovery inclusive of New Warrants based on Black Scholes analysis estimated at 5.0% to 15.6%. Recoveries assume $200m of Exit Term Loans allocated to First Lien Claims.

Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale or lease of property (other than cash collateral). Each rule also permits modification of the imposed stay upon court order.

208. The Debtors submit that good cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the Confirmation Order will be effective immediately upon its entry. *First*, the RSA contains a milestone that the Plan to go effective no later than December 24, 2025, and the Debtors will need to take action to consummate the Plan during the period between the entry of the Confirmation Order and the emergence milestone. *Second*, the Chapter 11 Cases and the related transactions contemplated in the Plan have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information. *Third*, each day the Debtors remain in chapter 11, they incur significant administrative and professional costs. If these cases were to extend well into the new year, the Debtors would require additional financing, further burdening the estates. Based on the foregoing, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

IX. THE U.S. TRUSTEE OBJECTION SHOULD BE OVERRULED

209. The U.S. Trustee reasserts and incorporates by reference several objections to the Plan that were raised previously in its objection to the approval of the Debtors' Disclosure

Statement.[215] The Debtors addressed those arguments at the time,[216] but nevertheless restate their positions on each point below.

A. PURDUE DOES NOT SUPPORT THE U.S. TRUSTEE'S OBJECTION

210. The U.S. Trustee contends that the Third-Party Release constitutes an impermissible non-consensual release based on the U.S. Trustee's categorial assertion that the opt-out mechanism employed under the Plan, and, by extension, countless other plans confirmed in complex chapter 11 cases in this district, "does not constitute consent to a non-debtor release in a chapter 11 plan."[217] Instead, the U.S. Trustee argues that the Court must apply state contract law principles to determine whether the Third-Party Release is consensual,[218] and the U.S. Trustee claims that under such preferred state contract law analysis, the opt-out mechanism employed by the Plan is "insufficient for this Court to make a finding of consent . . . ."[219] Not so. Third-party releases are permitted under Fifth Circuit precedent when the release is consensual. *See In re CJ Holding Co.*, 597 B.R. at 608-09 ("The Fifth Circuit does not preclude bankruptcy courts from approving a 'consensual non-debtor release.'") (citation omitted). Indeed, bankruptcy courts within the Fifth Circuit "commonly exercise jurisdiction to approve [consensual third-party] releases…"[220] Here, as discussed in detail above, the Third-Party Release and the opt-out process

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[215] *See United States Trustee's Objection to Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of ModivCare Inc. and its Debtor Affiliates* [Docket No. 810] (the "***U.S. Trustee Objection***") (incorporating by reference the *United States Trustee's Objection to Approval of Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of ModivCare Inc., and its Debtor Affiliates and Related Solicitation Procedures* [Docket No. 397] (the "***U.S. Trustee Disclosure Statement Objection***")).

[216] *See Debtors' Omnibus Reply to Objections to Disclosure Statement and Solicitation Procedures Motion* [Docket No. 448].

[217] U.S. Trustee Disclosure Statement Objection, ¶ 21.

[218] *Id.* ¶ 23–25.

[219] *Id.* ¶ 29.

[220] *Id.*

is fully consensual.[221] Accordingly, the Third-Party Release is permissible under Fifth Circuit precedent. The U.S. Trustee's claim that *Purdue* somehow warrants revisiting the long-established practice in this district is foreclosed by the Supreme Court's express statements to the contrary.

211. In *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), the Supreme Court held that the Bankruptcy Code does not allow for the inclusion of non-consensual, third-party releases in chapter 11 plans outside the context of Section 524(g) of the Bankruptcy Code. However, as clearly noted in its opinion, the Supreme Court limited its holding to the issue before it:

> As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.[222]

212. As this Court is well-aware, the Fifth Circuit has long-prohibited nonconsensual, third-party releases in chapter 11 plans. Accordingly, "*Purdue* did not change the law in this Circuit." *In re Robertshaw US Holding Corp.*, 662 B.R. 300 at 323 (Bankr. S.D. Tex. 2024); *id.*324 ("Hundreds of Chapter 11 cases have been confirmed in this District with consensual third-party releases with an opt-out. And, again, *Purdue* did not change the law in this Circuit."); Conf. Hr'g Tr. 32:3-4, *In re Indep. Contract Drilling, Inc.*, No. 24-90612 (ARP) (Bankr. S.D. Tex. Jan. 9, 2025) [Docket No. 127] ("Case law in the Fifth Circuit allows the use of injunctions in consensual third- party releases."). Indeed, the U.S. Trustee admits as much. *See* U.S. Trustee Disclosure Statement Objection, ¶ 18 (recognizing it "has long been the conclusion held by the

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[221] *See* ¶¶ 152-59, *supra*.

[222] *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 224-25 (2024).

Fifth Circuit" that nonconsensual third-party releases are not authorized by the Bankruptcy Code). Despite paying lip service to the reality that *Purdue* did not change the law in the Fifth Circuit, the U.S. Trustee makes the puzzling assertion that *Purdue* somehow mandates revisiting whether "imposing non-debtor releases based on a failure to opt out is permissible."[223] The Supreme Court expressly stated the opposite: *Purdue* neither calls into question consensual third-party releases nor offers a view as to what qualifies as a consensual release. As the Bankruptcy Court observed, "[t]hese words must be read literally."[224]

213. The U.S. Trustee invites the Court to expand *Purdue*, in contravention of the Supreme Court's own statements, to upend the existing practice in the Southern District of Texas of providing consent to a third-party release through an opt-out (as opposed to an opt-in). In truth, the U.S. Trustee Objection has nothing to do with what *Purdue* requires. It is based on the U.S. Trustee's desire to see *Purdue* expanded to compel a result that is inconsistent with longstanding Fifth Circuit practice. As the Bankruptcy Court recognized in *Robertshaw*, the "[U.S.] Trustee wants to use the *Purdue* holding as an opportunity to advance its long-held position that consensual third-party releases in a plan should require an opt-in feature, rather than an opt-out." *Robertshaw* 662 B.R at 323. No such expansion is warranted. Indeed, the Supreme Court expressly stated that its decision neither called into question the validity of consensual releases nor expressed any view on what constitutes a consensual release which, ironically, are precisely the issues the U.S. Trustee seeks to have this Court revisit based on *Purdue*. As the Bankruptcy Court observed in *Robertshaw*, "what constitutes consent, including opt-out features and deemed consent for not

223 U.S. Trustee Disclosure Statement Objection, ¶ 21.

224 *In re Robertshaw US Holding Corp.*, 662 B.R. at 323.

opting out, has long been settled in this District."[225] Accordingly, the U.S. Trustee Objection should be overruled.

214. Further, the U.S. Trustee's arguments have been presented, and unequivocally rejected, numerous times in this District and in others.[226] For example, in *Robertshaw*, the Bankruptcy Court upheld an opt-out process similar in all material respects to what was used in this case over the U.S. Trustee's objection. The Third-Party Release and opt-out procedures in the

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[225] *Id.* (emphasis added).

[226] *See, e.g.*, Conf. Hrg Tr. 23: 3-7, *In re DocuData Solutions, L.C.*, No. 25-90023 (CML) (Bankr. S.D. Tex. Jun. 23, 2025) [Docket No. 914] ("the opt outs work. They're consistent with Fifth Circuit case law as I understand it. And I do find that the concept of consent and not speaking when you have the opportunity to speak, is consent, under federal law."); *See In re Wolfspeed, Inc., et al.*, No. 25-90163 (CML) [Docket No. 285] (Bankr. S.D. Tex. Sep. 8, 2025) (approving a plan with similar gatekeeper provisions over the objection of the U.S. Trustee (*In re Wolfspeed, Inc., et al.*, No. 25-90163 (CML) [Docket No. 233] (Bankr. S.D. Tex. Aug. 21, 2025)); Conf. Hr'g Tr. 92:18-19, *In re Cutera, Inc.*, No. 25-90088 (ARP) (Bankr. S.D. Tex. Apr. 16, 2025) [Docket No. 251] ("I think that . . . the release provision was appropriate."); Conf. Hr'g Tr. 43:4-7, *In re The Container Store Group, Inc.*, No. 24-90627 (ARP) (Bankr. S.D. Tex. Jan. 24, 2025) [Docket No. 201] ("I think that, based on the facts in this case and the process that was run, that the releases are -- because of the opportunity for all the parties to have opted out, are consensual."); Conf. Hr'g Tr. 31:25-32:13, *In re Independence Contract Drilling, Inc*., No. 24-90612 (ARP) (Bankr. S.D. Tex. Jan. 9, 2025) [Docket No. 127] ("*Purdue* does not address the use of injunctions in consensual third party releases, as the one before the Court today. Case law in the Fifth Circuit allows the use of injunctions in consensual third party releases… Therefore, for all of these reasons, the Court overrules the objections and will confirm the Plan."); Conf. Hr'g Tr. 20:20-23, *In re Vroom, Inc.*, No. 24-90571 (CML) (Bankr. S.D. Tex. Jan. 8, 2025) [Docket No. 128] ("I'm comfortable that [the third-party release] runs afoul of no law and that these should be approved and that they[]… don't run afoul of *Purdue*."); Conf. Hr'g Tr. 32:18-35:9, *In re Intrum AB*, No. 24-90575 (CML) (Bankr. S.D. Tex. Dec. 31, 2024) [Docket No. 275] (approving third party releases for which consent was confirmed through opt outs); Conf. Hr'g Tr. 66:3-6, *In re Diamond Sports Grp., LLC*, No. 23-90116 (CML) (Bankr. S.D. Tex. Nov. 14, 2024) [Docket No. 2680] ("When I look at everything, I'm going to approve the Plan under the law. I think it complies with every provision under the law. I think the opt-outs worked."); Corrected Findings of Fact, Conclusions of Law, and Order (I) Confirming Further Modified Second Amended Joint Chapter 11 Plan of Wesco Aircraft Holdings, Inc. *et al*. and (II) Granting Related Relief, *In re Wesco Aircraft Holdings, Inc.*, No. 23-90611 (MI) (Bankr. S.D. Tex. Jan. 6, 2025) [Docket No. 2550]; Memorandum Decision on Plan Confirmation at 28; *In re Robertshaw US Holding Corp.*, No. 24-90052 (CML) (Bankr. S.D. Tex. Aug. 16, 2024) [Docket No. 959] ("[T]he consensual third-party releases in the Plan are appropriate, afforded affected parties constitutional due process, and a meaningful opportunity to opt out. There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan. . . . And, again, Purdue did not change the law in this Circuit."); Conf. Hr'g Tr. 14:10-13, *In re Invitae Corp.*, No. 24-11362 (MBK) (Bankr. D.N.J. July 23, 2024) [Docket No. 869] (overruling the Office of the U.S. Trustee's objections, predicated on *Purdue*, with respect to plan releases, *the opt out mechanism*, and gatekeeper provisions); *see also In re Spirit Airlines, Inc.*, 668 B.R. 689, 721 (Bankr. S.D.N.Y. 2025) (approving consensual third-party release with opt-out mechanism); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013) (confirming a plan that provided that creditors were deemed to have consented to the plan's third party release provisions where: (a) the creditor voted to reject or accept the plan and failed to "opt-out", (b) the creditor failed to return his/her ballot, or (c) the creditor's claims were unimpaired, and therefore, were not entitled to vote).

Chapter 11 Cases are almost identical to the provisions and procedures approved in *Robertshaw*, *Independence Contract Drilling*, *The Container Store*, *Cutera*, *DocuData Solutions*, and *Wolfspeed*, and the U.S. Trustee does not present any new arguments as to why the result should be any different here. That failure is not surprising given the factual similarities between those cases and the Chapter 11 Cases.

B. THE U.S. TRUSTEE'S RELIANCE ON STATE CONTRACT LAW IS WITHOUT SUPPORT

215. The U.S. Trustee's position that state contract law should apply here, instead of federal bankruptcy law, is unsupported. The U.S. Trustee argues that "state law governs the substance of claims" in bankruptcy[227] and thus should apply in determining consent to the third party releases contained in the Plan. This generalized assertion fails to take into account that the bankruptcy court does not determine the validity of any claims or evaluate their substance in considering third-party releases. Nor does this approach—which rests on the idea that the claims themselves were "created and defined by state law" before the "petition in bankruptcy [was] filed,"[228]—apply to the third-party releases here, which will be created and defined exclusively as part of the Plan formed under federal bankruptcy law. *See Kellogg v. United States (In re West Tex. Mktg. Corp.)*, 54 F.3d 1194, 1196 (5th Cir. 1995) ("[T]he validity of any interest that may have accrued prior to the filing of the petition is resolved generally by state law. But, once the petition is filed, federal law controls." (citation omitted)).

216. Further, the U.S. Trustee argues that third-party releases in plans should be viewed as a collection of "separate [settlement] agreements," each of which is governed by state contract

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[227] *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 444, 450 (2007); *see* U.S. Trustee Disclosure Statement Objection, ¶ 23.

[228] *Travelers*, 549 U.S. at 451 (citations omitted).

law.[229] But treating each third-party release as a "separate bilateral contract entirely unrelated to the Plan" is "divorced from . . . reality[.]" *In re Spirit Airlines, Inc.*, 668 B.R. 689, 718 (Bankr. S.D.N.Y. 2025); *see In re LaVie Care Ctrs., LLC*, No. 24-55507, 2024 WL 4988600, slip op. at *14 (Bankr. N.D. Ga. Dec. 5, 2024) ("[T]he basis for the enforcement of consensual releases has not as far as this Court has been able to determine been described anywhere as a 'contract' for them, or an 'agreement' to them."). The Plan's Third-Party Releases are not free-floating settlement agreements, they are an integral part of—and an essential means of implementing—the Plan under the Bankruptcy Code. The creditors providing third-party releases here are doing so only by virtue of the Plan, which is a creature of the Chapter 11 Cases that the creditors are involved in. "[T]he plan ... serves as the mechanism to have the release take effect. . . ."[230] Determining whether a creditor has provided consent to a particular term contained in the Plan "is a matter of federal bankruptcy law, with an already existing and well-developed body of case law on consent in the context of a collective bankruptcy proceeding."[231]

217. Lastly, the U.S. Trustee argues that if state contract law does not apply, federal contract law should, and the result would be the same as if state contract law applied. This assertion, regardless of whether it is true or not, is of no consequence. As explained above, federal bankruptcy law governs the confirmation of chapter 11 plans and the appropriateness of third-party releases. When approving chapter 11 plans and third-party releases, bankruptcy courts ensure that the plans and releases comport with the Bankruptcy Code and federal bankruptcy law, not federal contract law.

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[229] U.S. Trustee Disclosure Statement Objection, ¶ 24.

[230] *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022) (citation omitted), *abrogated in part on other grounds by Purdue*, 603 U.S. 204.

[231] *Spirit Airlines*, 668 B.R. at 716.

C. THE EXCULPATION, INJUNCTION, AND GATEKEEPING PROVISIONS ARE EACH CONSISTENT WITH FIFTH CIRCUIT LAW AND PLANS CONFIRMED IN THIS DISTRICT

218. The U.S. Trustee also objects to the Plan's exculpation provision: Section 10.7, on the basis that it is allegedly inconsistent with Fifth Circuit precedent.[232] However, the U.S. Trustee misconstrues the Exculpation Provision as exculpating "each Director of the Debtors", when it only applies to the independent directors of the Debtors. In *Instant Brands*, the Bankruptcy Court overruled the U.S. Trustee's objection that, under *Highland I*, exculpation of independent directors was only permissible where such directors have been "appointed post-petition pursuant to a court order authorizing them to act as a trustee."[233] Instead, the Bankruptcy Court correctly recognized that "[b]ecause the disinterested fiduciaries of a debtor-in-possession act pursuant to the same authority and perform the same functions as a bankruptcy trustee, they are afforded identical protections."[234] Thus, the *Instant Brands* court concluded that "[a] bankruptcy trustee and the disinterested fiduciaries of a debtor-in-possession may be exculpated for conduct within the[] scope of their duties, absent gross negligence or willful misconduct," held that it was permissible under *Highland I* for the *Instant Brands* debtors to include their independent directors in the plan's exculpation provision, and overruled the U.S. Trustee's objection. Thus, the scope of the Exculpated Parties is firmly within the bounds of *Highland I*. Specifically, in *Highland I*, the Fifth Circuit noted that the exculpation provision as drafted by the *Highland I* debtor was inappropriate and revised the provision by "strik[ing] all exculpated parties from the Plan except [the debtor], the Committee and its members, and the Independent Directors."[235]

232 U.S. Trustee Objection ¶ 5.

233 *In re Instant Brands*, 2025 WL 658756, at *3 (internal citation omitted).

234 *Id.*

235 *Highland I*, 48 F.4th at 438.

219. The U.S. Trustee further objects to the Injunction Provision and Gatekeeping Provision set forth at Section 10.5 of the Plan and discussed at paragraphs 162 through 163 above. However, contrary to the U.S. Trustee's assertions, both of these provisions are consistent with applicable law and practice in the Fifth Circuit and this District. The Injunction Provision is merely the means by which the Third-Party Release and Debtor Release (among others) are enforced. Without an enforcement mechanism, the Plan's release and discharge provisions are essentially a nullity. This argument from the U.S. Trustee is simply a back door through which it attempts to, once again, attack the Third-Party Release itself. As this Court has noted, "[c]ase law in the Fifth Circuit allows the use of injunctions in consensual third party releases." Conf. Hr'g Tr. 32:3-4, *In re Independence Contract Drilling, Inc.*, No. 24-90612 (ARP) (Bankr. S.D. Tex. Jan. 9, 2025) [Docket No. 127]; *see also In re CJ Holding Co.*, 597 B.R. at 608 (collecting cases); *In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-02 (Bankr. W.D. Tex. 2011) ("[T]he Fifth Circuit does allow permanent injunctions so long as there is consent."). Also, as set forth above in paragraph 162 of this Brief, the Injunction Provision is a key part of the Plan that is integral to its function.

220. In addition, the Injunction Provision and the Gatekeeping Provision are consistent with the Fifth Circuit's clarifying opinion in *Highland II*,[236] and the U.S. Trustee's arguments are unpersuasive. *See* Conf. Hr'g Tr. 94:24 – 95:2, *In Cutera, Inc.*, No. 25-90088 (ARP) (Bankr. S.D. Tex. Apr. 16, 2025) [Docket No. 251] ("I don't think *Highland II* . . .addresses whether you can have an injunction and a gatekeeping function in support of a consensual release.") (cleaned up). In *Highland I*, the Fifth Circuit approved the injunction and gatekeeping provisions related to claims that were being properly exculpated under the plan. *Highland I* 48 F.4th at 439. ("We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan."). Later,

[236] *Highland II*, 132 F.4th at 353.

in *Highland II*, the Fifth Circuit clarified that the scope of such provisions may be no broader than the underlying claims being exculpated. *Highland II*, 123 F.4th at 359. ("Even before *Purdue Pharma*, this court had held the same: that any provision that ***non-consensually releases*** non-debtors from liability for debts and/or conduct, and any injunction that acts to shield non-debtors from such liability, must be struck from a bankruptcy confirmation plan.") (emphasis added). Here, the Injunction Provision and Gatekeeping Provision also apply to the Third-Party Release; however, such application is consistent with *Highland I* and *Highland II*. The claims released by the Third-Party Release are subject to the same injunction that applies to the claims subject to the Exculpation Provision. And, critically, the Gatekeeping Provision has been narrowed to "only apply to Claims or Causes of Action brought against a Released Party if such Person or Entity Bringing such Claim or Cause of Action is a Releasing Party."[237] Each of the Exculpation Provision, Injunction Provision and Gatekeeping Provision are linked and only apply to claims that this Court has the power to enjoin.[238] As a result, the Injunction Provision and Gatekeeping Provision are each consistent with others contained in recent plans confirmed in this Court and have been further narrowed to confirm with *Highland II*.

221. Accordingly, *Highland II* is simply not relevant to the facts of the Chapter 11 Cases. In that case, the Fifth Circuit emphasized that their analysis applied to *nonconsensual* releases. As discussed in detail above, the Third-Party Release under the Plan is consensual, and *Highland II* does not provide a basis to claim that injunction provisions or "gatekeeping" provisions cannot

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[237] *See* Plan Art. 10.5. This is a notable difference between the Gatekeeping Provision at issue here and the one struck down in *In re AIO US, Inc.*, No. 24-11836 (CTG), 2025 WL 2426380, at *37 (Bankr. D. Del. Aug. 21, 2025), which was not similarly limited. The Gatekeeping Provision at issue here is consistent with *Highland II* because its scope is co-terminus with the scope of the claims actually enjoined under the Plan and the parties actually bound by the injunction. Thus, the Gatekeeping Provision does not go beyond the Injunction Provision but simply aids in enforcing the Injunction Provision consistent with what is allowed in this circuit.

[238] *Highland II*, 132 F.4th at 360-61 (stating that the Fifth Circuit linked its "treatment of the Exculpation Provision and the Injunction Provision and its Gatekeeper Clause.").

apply to consensual third-party releases. As this Court noted in *The Container Store*, "[w]hile *Highland I* and *II* involve exculpation provisions, which are inherently non-consensual, this case involves a consensual release. Therefore, the *Highland II* holding that the injunction be narrowed to include the same parties as the exculpation clause, should not have an impact on this case, where the Third-Party Release is consensual."[239] As noted previously, the Injunction Provision and Gatekeeping Provision are narrowly tailored to apply to claims or causes of action against Exculpated Parties and to claims or causes of action against Released Parties but only to the extent that the person or entity bringing such claim is a Releasing Party.

222. The value-maximizing outcome set forth in the Plan is a direct result of the efforts of the Debtors and the Released Parties. Accordingly, the Exculpation Provision, the Injunction Provision, and the Gatekeeping Provision are appropriate and should be approved, and the U.S. Trustee Objection should be overruled.

D. Waiver of Stay of the Confirmation Order Is Appropriate

223. Lastly, the U.S. Trustee objects to the Plan's proposed waiver of the 14-day stay imposed by Bankruptcy Rule 3020(e).[240] The Debtors have illustrated the exigent circumstances that justify a waiver of the stay period in paragraphs 207 and 208, including the need to meet certain milestones under the RSA and the DIP Documents, and to minimize further administrative and professional costs. As such, the objection by the U.S. Trustee to the waiver of Bankruptcy Rule 3020(e) should be overruled, and the Debtors reiterate their request that the Court waive 14-day stay period.

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[239] Order at 16, *In re The Container Store Group, Inc.*, No. 24-90627, (Bankr. S.D. Tex. Apr. 7, 2025) [Docket No. 280].

[240] U.S. Trustee Objection ¶ 8.

X. DEBTORS' OBJECTION TO 2025 TRANSACTIONS STANDING MOTION

A. The Legal Standard

224. A debtor-in-possession acts as a fiduciary for the entire estate and all constituents. By contrast, a creditors' committee acts solely on behalf of the unsecured creditor body. It is for this reason that the Bankruptcy Code grants the Debtors, and not other parties (including unsecured creditor committees) the power and authority to pursue, settle, and/or release claims on behalf of the estate. The debtor-in-possession is best positioned to make these critical decisions for the benefit of all stakeholders, while taking into account the various perspectives and interests at issue.

1. The Grant of Derivative Standing Is a Narrow Exception

225. It is well established that "the enforcement of [causes of action belonging to the debtor's estate] generally falls to the debtor-in-possession, which has most of the powers of a bankruptcy trustee to pursue claims on behalf of the estate." *Wooley v. Haynes & Boone, L.L.P. (In re SI Restructuring Inc.)*, 714 F.3d 860, 864 (5th Cir. 2013) (internal quotation marks and citations omitted). Granting a creditors' committee derivative standing to pursue estate claims and causes of action is a narrow and limited exception to the general rule. *See Scott v. Nat. Century Fin. Enters., Inc. (In re Balt. Emergency Servs. II, Corp.)*, 432 F.3d 557, 560 (4th Cir. 2005) ("Derivative standing is thus an implicit exception to the 'general rule' whereby the Bankruptcy Code assigns to the trustee or debtor-in-possession 'the privilege of prosecuting' various actions on behalf of the estate.") (*quoting* 7 Collier on Bankruptcy ¶ 1109.05[1] (15th ed. 2005)).

226. Derivative standing should only be granted when the Bankruptcy Code's "envisioned scheme breaks down." *Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 553 (3d Cir. 2003); *Reed v. Cooper (In re Cooper)*, 405 B.R. 801, 812 (Bankr. N.D. Tex. 2009) (explaining that the grant of derivative standing is appropriate only when there is deviation from "the Bankruptcy Code's . . . scheme.").

This breakdown has not occurred in this case. Rather, the Debtors have obtained significant concessions from the First Lien Lenders and the Second Lien Noteholders resulting in greater recoveries for all stakeholders, including the payment in full of over $150 million to critical General Unsecured Creditors throughout these cases. Ironically, it was the Committee itself that has taken issue with payment in full of these critical, unsecured claims, even though the Committee represent these constituents.[241]

227. The overwhelming support for the Debtors' Plan (with the exception of the Class 5 Subordinated Unsecured Noteholders at ModivCare only) demonstrates that this process has worked and that the Debtors have been good stewards of their bankruptcy estates.

2. Standard for Derivative Standing: Colorability and Unjustifiable Refusal

228. It is the movant's "burden in the first instance to demonstrate that it has satisfied the test for derivative standing." *See G-I Holdings, Inc. v. Those Parties Listed on Exhibit A (In re G-I Holdings, Inc.)*, 313 B.R. 612, 629 (Bankr. D.N.J. 2004). A creditor seeking derivative standing must satisfy three requirements: "(1) the claim is colorable, (2) the debtor-in-possession has refused unjustifiably to pursue it, and (3) the creditor obtains bankruptcy court approval to do so." *SI Restructuring* , 714 F.3d at 863-64; *see also Off. Emp.-Related Issues Comm. of Enron Corp. v. Lavorato (In re Enron Corp.)*, 714 F.3d at 863-64; *see also In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004); ("In the Fifth Circuit, to be granted standing to act on behalf of the trustee, [it] must establish the existence of a colorable claim and an unjustifiable refusal by the . . . debtor in possession to prosecute the claim."); *In re La. World Exposition, Inc.*, 832 F.2d 1391,

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[241] *See Objection of the Official Committee of Unsecured Creditors to the Debtors' Emergency Motion for Approval of the Disclosure Statement and Related Solicitation Procedures* [Docket No. 421] (objecting to potential payments by the Debtors and stating that "the first such category is trade claimants who have been (or will be) paid 100% of their claims in cash under the Debtors' order to pay prepetition trade claims. Given that the Debtors have made no effort to differentiate "critical vendors" from any other.") (internal citations omitted).

1397 (5th Cir. 1987) ("[C]ourts generally require that the claim be colorable, that the debtor-in-possession have refused unjustifiably to pursue the claim, and that the committee first receive leave to sue from the bankruptcy court."). Only if both the colorability and unjustifiable refusal elements are established may a court permit a creditor to assert claims derivatively on behalf of the estate. *SI Restructuring*, 714 F.3d at 863-64. A creditor's failure to establish either of those elements is fatal to its request for standing. *See id.*

3. <u>Burden of Proof</u>

229. In seeking derivative standing, the Committee bears the burden of proving the colorability and unjustifiable refusal elements. *See, e.g., Judgment Factors, L.L.C. v. Packer (In re Packer)*, 816 F.3d 87, 92 (5th Cir. 2016) (observing that standing may be warranted "[i]f the *creditor shows* that the[] conditions are met") (emphasis added); *PW Enters., Inc. v. N.D. Racing Comm'n (In re Racing Servs., Inc.)*, 540 F.3d 892, 900, n.9 (8th Cir. 2008) ("We emphasize that the burden of persuasion always remains with the creditor."); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 954 F.3d 1, 7, n.8 (1st Cir. 2020) ("Here, the [movants] bear the burden of showing that the Board unjustifiably refused to bring an avoidance action against the Commonwealth on behalf of the System.") (citing *Racing Servs.*, 540 F.3d at 900); *In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004) ("In the Fifth Circuit, to be granted standing to act on behalf of the trustee, *the committee must establish* the existence of a colorable claim and an unjustifiable refusal by the trustee or debtor in possession to prosecute the claim.") (emphasis added). A committee seeking derivative standing "does not meet its burden with a naked assertion that the [debtor-in-possession's] refusal is unjustified." *Racing Servs.*, 540 F.3d at 900 (citation omitted). Where a committee offers nothing more than an assertion unsupported by evidence, "the bankruptcy court may properly deny a creditor's motion without explanation." *Id.*

230. Courts have been appropriately wary of granting derivative standing to creditors' committees, as such committees owe fiduciary duties not to the estate at large, but rather to the classes they represent. *See In re First RepublicBank Corp*., 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988) ("A member of a creditors' committee owes a fiduciary duty to all creditors represented by the committee."); *Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 175 n.12 (2d Cir. 2005) ("A creditors' committee owes a fiduciary duty to the class it represents, but not to the debtor, other classes of creditors, or the estate."); *see also Westmoreland Hum. Opportunities, Inc. v. Walsh*, 246 F.3d 233, 256 (3d Cir. 2001) ("We have construed §1103(c) as implying a fiduciary duty on the part of members of a creditor's committee, such as the present Unsecured Creditors Committee, toward their constituent members.").

231. First, with the Debtors' Plan now before the Court for confirmation, the Court can and should deny the Standing Motions. The Investigation and the resulting sound process support not pursuing the asserted claims and proceeding to confirm the Plan. If the Court does so, the inquiry ends.

232. Moreover, in this case, as evidenced by the Vote Certification and as will be shown at the Confirmation Hearing, the Committee is only pursuing the interests of a select few of its constituents (the Subordinated Unsecured Noteholders) to the detriment of the unsecured creditor body as a whole. This effort is most clearly seen in the Committee's flawed arguments that the guarantees once provided by the ModivCare Subsidiaries for the Subordinated Unsecured Notes should be reinstated and that both the Fifth Supplemental Indenture and the Subordination Agreement should be rescinded. Through these efforts, the Committee is seeking to reinstate the guarantees of the Subordinated Unsecured Noteholders at each of the ModivCare Subsidiaries, thereby increasing their respective insolvency and, in turn, lowering recoveries for General

Unsecured Creditors as a whole at the ModivCare Subsidiaries. The Committee fails to explain how reinstating guarantees and rescinding a subordination agreement among creditors is an estate cause of action of the applicable ModivCare Subsidiary (let alone beneficial to it and its stakeholders).

233. The grant of derivative standing is an extraordinary remedy that is simply not appropriate in this case. The terms of the Plan and the recoveries offered thereunder provide significant and otherwise unattainable benefits to the Debtors and all creditors. The Committee's actions to date, including the filing of the Committee Motions and the complaints attached thereto, are value-destructive for all stakeholders and harm the Debtors' business to the detriment of all parties in interest. As set forth in greater detail below, the Committee fails to satisfy either requirement (let alone both requirements) for derivative standing. Furthermore, even if the Committee were able to demonstrate that certain of its claims are colorable (it cannot), the Committee's claims will provide no value to the Debtors' estate, and pursuit of such claims would only increase the professional fee burn already burdening these Chapter 11 Cases, further demonstrating that the Debtors' decision not to pursue these claims is fully justified.

B. THE COMMITTEE FAILS TO ALLEGE COLORABLE CLAIMS IN CONNECTION WITH THE 2025 TRANSACTIONS

234. The Committee bears the burden of establishing that the claims it seeks to prosecute are colorable. *SI Restructuring*, 714 F.3d at 863-64 (5th Cir. 2013); *Packer*, 816 F.3d at 92 (5th Cir. 2016) (explaining that a creditor must demonstrate that the conditions necessary for derivative standing are present); *In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004) ("In the Fifth Circuit, to be granted standing to act on behalf of the trustee, the committee must establish the existence of a colorable claim and an unjustifiable refusal by the trustee or debtor in possession to prosecute the claim. In addition, the committee must obtain leave of the bankruptcy court to sue

on behalf of the estate."). "Colorable" claims are "claims for relief that on appropriate proof would support a recovery." *In re Atl. Nat. Foods, LLC*, No. 25-10676 (MSG), 2025 WL 1747930, at *1 (Bankr. E.D. La. Jun. 24, 2025) (citing *G-I Holdings, Inc. v. Those Parties Listed on Exhibit A (In re G-I Holdings, Inc.)*, 313 B.R. 612, 631 (Bankr. D.N.J. 2004)). In many ways, the first inquiry is similar to "a defendant's motion to dismiss a complaint for failure to state a claim." *Atl. Nat. Foods,* 2025 WL 1747930, at *1 (internal citations omitted). Accordingly, the Committee must state a claim that is "plausible on its face." *Aschcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Atl. Nat. Foods,* 2025 WL 1747930, at *1 (same); *In re Sabine Oil & Gas Corp.*, 547 B.R. 503, 515 (Bankr. S.D.N.Y. 2016), *aff'd*, 562 B.R. 211 (S.D.N.Y 2016) (same). Further, "threadbare recitals of elements of a cause of action, supported by mere conclusory statements, will not suffice." *In re Archdiocese of Milwaukee*, 483 B.R. 693, 697 (Bankr. E.D. Wis. 2012); *In re Diocese of Camden N.J.*, No. 20-21257 (JNP), 2022 WL 884242, at *4 (Bankr. D.N.J. Mar. 24, 2022) (same).

235. Unlike a motion to dismiss, courts may look beyond mere factual assertions and instead "delve into the merits of the action to determine if [a] cause of action is colorable." *Tile Outlet, Inc. v. Off. Comm. of Unsecured Creditors of Tile Outlet (In re Tile Outlet, Inc.)*, No. 05-08032 (SL), 2006 WL 1716125, at *6 (S.D. Tex. June 16, 2006); *see Sabine Oil & Gas* , 547 B.R. at 515 (courts may "engage in some review of disputed facts to determine if there is some factual support for the Committee's allegations"). Courts may also "examine the facts as alleged by the plaintiff for any dispositive affirmative defenses." *Atl. Nat. Foods, LLC*, 2025 WL 1747930, at *1. The claims asserted by Committee are devoid of any evidence and, as a result, are not colorable.

236. The Committee argues that the 2025 Transactions, as alleged fraudulent transfers, should be avoided and that as a result: (a) the Uptier Exchange should be rescinded and all Second

Lien Notes be converted back to Subordinated Unsecured Notes; (b) the guarantees for the Subordinated Unsecured Notes be reinstated at the ModivCare Subsidiaries; and (c) the Subordination Agreement be deemed null and void or otherwise invalidated.[242]

237. These arguments are without merit. While the Committee seeks to lump all parts of the 2025 Transactions together, each must be analyzed independently. When doing so, it becomes clear that the Committee's claims are not colorable. *First*, and as discussed further below, the Uptier Exchange was nothing more than the securing of an antecedent debt.[243] Section 548(d)(2)(A) of the Bankruptcy Code and extensive case law makes clear that the securing of antecedent debt is reasonably equivalent value and not subject to disgorgement as a fraudulent transfer (whether actual or constructive fraud).

238. *Second*, the Committee's cause of action to reinstate the guarantees under the Subordinated Unsecured Notes Indenture would actually have the effect of decreasing the value of the estate of the ModivCare Subsidiaries. Specifically, the remedy of fraudulent transfer is used to ***avoid*** obligations incurred by a debtor, but the Committee is seeking the exact opposite here—they seek to ***reimpose*** claims and obligations (*i.e.*, the Subordinated Unsecured Notes) on the ModivCare Subsidiaries that were released as part of the 2025 Transactions. *See* 11 U.S.C. § 548(a)(1) ("The trustee may ***avoid*** . . . ***any obligation*** (including any obligation to or for the benefit of an insider under an employment contract) ***incurred by the debtor*** . . .") (emphasis added). Even if the liens granted in the Uptier Exchange are avoided (they should not be), the

[242] *See* 2025 Transactions Standing Motion ¶ 57. The Committee also seeks disgorgement of the fees paid by the Debtors in connection with these transactions.

[243] In fact, the Uptier Exchange is practically no different than paying Subordinated Unsecured Notes with Second Lien Notes, and a paydown of debt could hardly be avoided as a fraudulent transfer.

Committee fails to explain how the remedy of fraudulent transfer can be used to reinstate the guarantees of the Subordinated Unsecured Notes at each ModivCare Subsidiary.

239. *Third*, even if the guarantees could be reinstated (they cannot), the Committee fails to explain how the remedy of fraudulent transfer can be used to rescind the Subordination Agreement. Specifically, the Subordination Agreement is primarily between and among creditors—the Debtors are only an acknowledging party to the Subordination Agreement. *See* Exh. 21 (Subordination Agreement). The Debtors and their estates (and, therefore, anyone seeking derivative standing) has no legal right to rescind the Subordination Agreement. The Committee cannot—and should not—be permitted to use estate dollars to litigate the direct claims of a noteholder, rather than the Committee's constituents as a whole. When each transaction is properly analyzed on its own, it is clear that the Committee's 2025 Transactions Standing Motion fails to meet the "colorable claims" standards applicable for derivative standing.

1. <u>The Committee's Constructive Fraudulent Transfer Claims for the 2025 Transactions Are Not Colorable</u>

240. In Count 2 of the Proposed Complaint (as defined in the Committee Motions), the Committee seeks standing to unwind the Uptier Exchange, and avoid the liens that the Debtors granted therein, as a constructive fraudulent transfer.[244] Under Section 548 of the Bankruptcy Code, a claim for constructive fraud requires a showing that (a) the debtor received less than reasonably equivalent value for such transfer or obligation, ***and*** (b) the debtor either (i) was insolvent on the date of such transfer or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an

[244] In Count 1 of the Proposed Complaint, the Committee seeks standing to unwind the Uptier Exchange, and avoid the liens that the Debtors granted therein, as an actual fraudulent transfer. The Debtors respond to this allegation in Section X.B.4 below.

unreasonably small capital; (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (iv) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. 11 U.S.C. § 548(a)(1)(B).

241. The Committee wholly fails to allege a colorable constructive fraud claim in connection with the 2025 Transactions. Even assuming *arguendo* that the Debtors were insolvent when the 2025 Transactions were consummated, the Committee's claim is not colorable because it ignores, among other things, clear black letter law, the realities of the context surrounding the 2025 Transaction, and the actual and significant value exchanged in connection with the 2025 Transactions.[245]

a. <u>The Debtors Received Reasonably Equivalent Value for the 2025 Transactions</u>

242. The Committee is required to allege facts supporting a plausible inference that the Debtors did not receive reasonably equivalent value in the 2025 Transactions. *See, e.g.*, *Off. Comm. of Unsecured Creditors of Fedders N. Am., Inc. v. Goldman Sachs Credit Partners L.P. (In re Fedders N. Am., Inc.)*, 405 B.R. 527, 547 (Bankr. D. Del. 2009) (holding the complaint failed to allege facts permitting a plausible inference that the debtor received less than reasonably equivalent value and thus failed to state a constructive fraudulent transfer claim). The Committee has failed to do so.

243. Determining whether a debtor received reasonably equivalent value for an obligation incurred or transfer made is a fact-intensive two-part inquiry based on the totality of the

[245] For the avoidance of doubt, the Debtors do not concede or admit that they were insolvent when the 2025 Transactions were consummated. The Debtors reserve all rights in this regard, and focus exclusively in this Brief on whether they received reasonably equivalent value for the 2025 Transactions.

circumstances: (a) whether the debtor received value; and (b) whether that value was reasonably equivalent to the obligation incurred or transfer made. *See Jalbert v. G m b H (In re La. Pellets, Inc.)*, 838 F. App'x 45, 49 (5th Cir. 2020). *Nat. Union Fire Ins. Co. of Pittsburgh, Pa. v. U.S. Bank Nat. Ass'n (In re TransTexas Gas Corp.)*, 597 F.3d 298, 306 (5th Cir. 2010).*; ASARCO LLC v. Americas Mining Corp.*, 369 B.R. 278, 338 (S.D. Tex. 2008). Courts generally construe the term "value" broadly to include "any benefit, . . . whether direct or indirect," including "the mere opportunity to receive an economic benefit in the future." *Templeton v. O'Cheskey (In re Am. Housing Found.)*, 785 F.3d 143, 163 (5th Cir. 2015) (citing *Pension Transfer Corp. v. Beneficiaries Under the Third Amend. to Fruehauf Trailer Corp. Ret. Plan No. 003* (*In re Fruehauf Trailer Corp.*), 444 F.3d 203, 212 (3d Cir. 2006)). Value is determined at the time of transfer, so "[n]either subsequent depreciation in nor appreciation in value of the consideration affects the question whether reasonable equivalent value was given." *La. Pellets*, 838 F. App'x at 50 . "[T]he factors most widely considered are (1) disparity between the fair value of the transferred property and what the debtor received; (2) the good faith of the parties; and (3) whether the transaction was at arm's length." *Id.*

244. The Committee is correct that "the proper focus is on the net effect of the transfers" at issue, but the Committee does not follow its own guidance. 2025 Transactions Standing Motion, ¶¶ 7, 79. Rather, the Committee's constructive fraud arguments simply focus on one aspect of the 2025 Transactions, while ignoring all other aspects—importantly, the Committee selectively ignores the aspects of the 2025 Transactions that clearly show a material benefit to the Debtors and the reasonably equivalent value received. The Committee lumps the 2025 Transactions together and argues that if the Uptier Exchange and the grant of the liens to secure

the Second Lien Notes are unwound, all other aspects of the 2025 Transactions should be unwound as well. Such a result is divorced from reality and the law.

(i) The Uptier Exchange: the Granting of Liens for Antecedent Unsecured Debt Is Not a Constructive Fraudulent Transfer

245. The Bankruptcy Code defines "value" for purposes of a fraudulent transfer to include the "satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A). Accordingly, it is universally recognized by courts in the Fifth Circuit that when a debtor satisfies or secures a preexisting obligation, the debtor has received reasonably equivalent value. *La. Pellets, 838 F. App'x at 50* ("When a debtor makes a payment on antecedent debt and receives a dollar-for-dollar reduction of that debt, however, the question is easy because the debtor by definition receives reasonably equivalent value—indeed, exactly equivalent value, assuming, of course that the debt itself was based upon value."). Courts in other key jurisdictions consistently find the same. *See e.g.*, *In re Capmark Fin. Grp., Inc.*, 438 B.R. 471, 518 (Bankr. D. Del. 2010) ("[W]here payment on account of an antecedent debt can be made without running afoul of the fraudulent transfer laws, a debtor may take the lesser step of granting an interest in collateral to secure an antecedent debt.") (collecting cases); *The Off. Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc. v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.),* 394 B.R. 721, 732 (Bankr. S.D.N.Y. 2008) ("A valid antecedent debt provides adequate consideration to support the grant of a security interest.").[246]

[246] *See also Goodman v. S. Crane & Hydraulics, LLC (In re Gulf Fleet Holdings, Inc.)*, No. 12-05048 (RS), 2013 WL 1755490, at *2 (Bankr. W.D. La. Apr. 23, 2013) ("By definition, the satisfaction of an antecedent debt constitutes "reasonably equivalent value" and thus negates an essential element of from the satisfaction of its contractual obligations under these agreements.") (quoting 11 U.S.C. § 548(d)(2)(A)); *Geron v. Palladin Overseas Fund, Ltd. (In re AppliedTheory Corp.)*, 330 B.R. 362, 363 (S.D.N.Y. 2005) ("[A] debtor's grant of a security interest in its assets to a lender who has previously given the debtor a cash loan may not be considered a fraudulent conveyance."); *Off. Comm. of Unsecured Creditors v. Hancock Park Cap. II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141, 1145-46 (9th Cir. 2013) ("[P]ayment of a preexisting debt is value, and if the payment is dollar-for-dollar, full value is given."); *Se. Waffles, LLC v. U.S. Dep't of Treasury, IRS (In re Se.*

246. And to the extent the Committee asserts that the Uptier Exchange did not constitute reasonably equivalent value because the antecedent debt was trading at below its face value, such arguments are without merit. Rather, reasonably equivalent value is evaluated from the perspective of the debtor. *See In re Anand*, 210 B.R. 456, 459 (Bankr. N.D. Ill. 1997) (debtor receives reasonably equivalent value from securitizing antecedent debt, since "from the perspective of the debtor, the value of the interest in the collateral transferred to the creditor can never be more than the amount of the debt"). From the Debtors' perspective, their debt was worth face value when analyzing fraudulent transfer claims. Indeed, courts have held exactly that in various other contexts. *See Travellers Int'l AG v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 134 F.3d 188 (3d Cir. 1998) (valuing public debt at its face value rather than at market discount caused by anticipation of debtor's demise).

247. The Committee's further attempt to recast the exchange of the Subordinated Unsecured Notes for Second Lien Notes as a novation issuing "new" obligations misses the point entirely.[247] The Debtors satisfied $270 million worth of antecedent Subordinated Unsecured Notes

Waffles, LLC), 702 F.3d 850, 857 (6th Cir. 2012) ("Typically, a dollar-for-dollar reduction in debt constitutes—as a matter of law—reasonably equivalent value for purposes of the fraudulent-transfer statutes."); *Stalnaker v. Gratton (In re Rosen Auto Leasing, Inc.)*, 346 B.R. 798, 805 (B.A.P. 8th Cir. 2006) ("For purposes of fraudulent transfer analysis, value includes the satisfaction of an antecedent debt."); *Tavenner v. Wells Fargo Bank (In re Ferguson)*, No. 11-32141-KRH, 2014 WL 1044897, at *4 (Bankr. E.D. Va. Mar. 18, 2014) ("Courts have held consistently that an antecedent indebtedness constitutes value for the granting of a security interest.") (collecting cases); *Anand v. Nat'l Republic Bank of Chi.*, 239 B.R. 511, 517 (N.D. Ill. 1999) ("collateralization of an antecedent debt confers value on the debtor, since the bankruptcy statute's definition of 'value' includes 'securing of a present or antecedent debt of the debtor.'"); *Cuevas v. Hudson United Bank (In re M. Silverman Laces, Inc.)*, No. 01 CIV.6209 (DC), 2002 WL 31412465, at *6 (S.D.N.Y. Oct. 24, 2002) (finding that debtor "received 'value' when its antecedent debt was extended and collateralized"; affirming dismissal of fraudulent transfer claim for failure to plead lack of reasonably equivalent value); *Perkins v. Bamberger (In re Carton)*, No. 20-19781 (ABA), 2023 WL 8057870, at *10 (Bankr. D.N.J. Nov. 20, 2023) ("Because the money received by the Defendant were payments on antecedent debts those payments presumptively constitute reasonably equivalent value."); *Affiliated Physicians and Emps. Master Tr. v. Dept. of Treasury, IRS (In re Affiliated Physicians & Emps. Master Tr.)*, No. 21-14286 (MBK), 2022 WL 16953555, at *7 (Bankr. D.N.J. Nov. 15, 2022) ("It is well-settled that a 'transfer made in satisfaction of an antecedent debt or for an obligation for which the Plaintiff was liable presumptively constitutes reasonably equivalent value.'") (quoting *In re Parker Sch. Uniforms, LLC*, No. 18-10085 (CSS), 2021 WL 4553016, at *7 (Bankr. D. Del. Oct. 5, 2021)).

[247] *See* 2025 Transactions Standing Motion ¶ 56. The Committee does not provide any support for this assertion.

with the issuance of the Second Lien Notes. Nothing in the Bankruptcy Code requires payment of a debt to be made in cash as opposed to new debt. Here, the Debtors secured and/or repaid an antecedent debt and, therefore, a fraudulent transfer cannot exist as a matter of law. Of course, even under the Committee's tortured logic regarding novation, the Committee ignores that a novation means the antecedent debt was forgiven and replaced with a new debt, which forgiveness is itself reasonable equivalent value. *See*, *e.g.*, *Matter of La. Pellets, Inc.*, 838 F. App'x 45, 52 (5th Cir. 2020) (affirming that payments tied to a later change order were for reasonably equivalent value; treating payments as a dollar-for-dollar reduction of the debtor's obligation and holding that payments on antecedent debt do not increase insolvency under Louisiana's revocatory action); *In re Black Elk Energy Offshore Operations, LLC*, 605 B.R. 138, 153 (Bankr. S.D. Tex. 2019) (holding transfer was not a fraudulent transfer because the debtor received reasonably equivalent value through a dollar-for-dollar reduction of an antecedent debt); *In re WRT Energy Corp.*, 282 B.R. 343, 404-06 (Bankr. W.D. La. 2001) (recognizing that "value" under § 548 includes satisfaction or securing of a present or antecedent debt, and that reasonably equivalent value is assessed at the time of transfer under a totality-of-the-circumstances approach).

248. Through the 2025 Transactions, the Debtors satisfied approximately $270 million of unsecured debt in exchange for an equivalent principal amount of new Second Lien Notes. Accordingly, as a matter of law, the Debtors received reasonably equivalent value through the 2025 Transactions. *See La. Pellets*, 838 F. App'x at 50; *Black Elk*, 605 B.R. at 153. And this does not account for the significant additional value the Debtors received through the 2025 Transactions. Specifically, the Debtors received $105 million of new incremental financing (comprised of the $75 million Incremental Term Loan and $30 million to in new Second Lien Notes) and much needed covenant relief. It was because of this incremental financing and the time

afforded the Debtors through the 2025 Transaction that trade creditors continued to be paid in the ordinary course. With the support of the First Lien Lenders, such trade creditors have been paid over $150 million in these Chapter 11 Cases, notwithstanding the Committee's objection of such payments to its own constituents.

249. Contrary to the Committee's assertion that the Debtors' business is worse now than prior to the 2025 Transactions, the consummation of such transactions provided critical value. Importantly, the 2025 Transactions prevented a value-destructive outcome, such as a free-fall Chapter 11 filing, a forced sale, or a suspension of operations. These alternatives would have destroyed the value of the Debtors' businesses and resulted in a significantly reduced recovery for all creditors and constituents.

250. The Committee improperly relies on *In re TOUSA, Inc.,* claiming that the Eleventh Circuit's decision weighs against a finding of reasonably equivalent value being provided in exchange for the Second Lien Notes because the *TOUSA* court stated that "not every transfer that decreases the odds of bankruptcy for a corporation can be justified." *Citicorp N.A., Inc. v. Off. Comm. of Unsecured Creditors (In re TOUSA, Inc.),* 680 F.3d 1298, 1311 (11th Cir. 2012). The facts in *TOUSA*, however, are very different than those here.

251. In *TOUSA*, the plaintiff sought to avoid subsidiary guarantee obligations and liens issued in connection with $500 million of new debt raised by a parent entity to fund the settlement of a litigation in which only the parent entity, and not the subsidiaries, was a defendant. *Id.* at 1304. The defendants argued that the subsidiaries received reasonably equivalent value in exchange for the guarantees and liens because a judgment against the parent would have resulted in a default under the subsidiaries' loan documents and forced the subsidiaries into bankruptcy. *Id.* at 1303. The bankruptcy court found, and the Eleventh Circuit agreed, that bankruptcy would

have been preferable to the incurrence of the new debt, and that the subsidiaries did not receive reasonably equivalent value in exchange for the new debt guarantees in liens, which were unlikely to stave off a bankruptcy filing in any event.[248] *Id.* at 1303.

252. The *TOUSA* fact pattern—with subsidiaries incurring new secured obligations to satisfy another entity's antecedent debt—is the exact opposite of the case here. Specifically, the Uptier Exchange converted existing unsecured debt obligations of the applicable Debtor entities into secured obligations of those same Debtor entities. The Uptier Exchange did not create new debt obligations like in *TOUSA*. Rather, the Uptier Exchange simply secured antecedent debt of ModivCare and the applicable ModivCare Subsidiaries. Unlike in *TOUSA,* the Debtor entities that are now obligated under the Second Lien Notes merely secured ***their own*** pre-existing obligations under the Subordinated Unsecured Notes and did not incur additional or new debt. The fact that the Debtors later commenced the Chapter 11 Cases does not, by itself, negate the reasonably equivalent value received at the time of the 2025 Transactions. For fraudulent transfer analysis, the focus is on the value exchanged when the transaction occurred, not on subsequent business performance. *See In re Hinsley*, 201 F.3d 638, 644 (5th Cir. 2000) ("Value is determined as of the date of transfer."); *see also In re La. Pellets, Inc.*, 838 F. App'x 45, 50 (5th Cir. 2020) ("Because value is determined at the time of transfer, [n]either subsequent depreciation in nor appreciation in value of the consideration affects the question whether reasonable equivalent value was given . . . [W]e cannot use hindsight to recalibrate the risk—or the potential reward—of [the debtor's] investment.") (internal citations omitted); *In re Hannover Corp.*, 310 F.3d 796, 802 (5th Cir. 2002) ("[C]onsistent with economic reality, this and other circuits unequivocally hold that for

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[248] *See In re TOUSA*, 680 F.3d 1298, 1313 (11th Cir. 2012) (holding that "the opportunity to avoid bankruptcy does not free a company to pay any price or bear any burden," and affirming the bankruptcy court's inquiry into "whether there was any chance that the investment would generate a positive return" based on circumstances existing at the time of the transaction).

purposes of § 548 the value of an investment, even a risky one, such as we have before us now, is to be determined at the time of purchase."). For these reasons, the Committee has not asserted a colorable claim to avoid the Uptier Exchange as a constructive fraudulent transfer.

(ii) Fifth Supplemental Indenture: Reinstatement of the Subsidiary Guarantees Harms the ModivCare Subsidiaries and Is Not an Estate Cause of Action

253. As part of the 2025 Transactions, the Debtors received additional value from the released guarantees of the ModivCare Subsidiaries under the Subordinated Unsecured Notes Indenture. The Committee, however, now seeks reinstatement of those released guarantees. The Committee's request is without merit and should be denied.

254. As a procedural matter, the Committee fails to assert an actual count to reinstate the guarantees for the Subordinated Unsecured Notes. Rather, the Committee attempts to include this request within its causes of action for fraudulent transfer by ignoring the Subsidiary Guarantee Release as an individual transaction and aggregating all transactions among the 2025 Transactions together. *See* 2025 Transactions Standing Motion Compl. ¶¶ 113, 121.

255. The Committee also fails to assert a rational theory explaining how either (a) the Subsidiary Guarantee Release transferred value out of the Debtors' estates or (b) reinstating those guarantees would generate value to the Debtors' estates. The reason is obvious: adding funded debt obligations back to an insolvent estate is not value enhancing—releasing such obligations is. Thus, reinstatement (even if a valid cause of action, which it is not) is a potential noteholder remedy, not an estate cause of action. *See Caplin v. Marine Midland Grace Tr. Co. of N.Y.*, 406 U.S. 416, 431-34 (1972) (prohibiting trustees from pursuing claims on behalf of third parties that are the true injured party in fact); *see also Ingalls v. Gressett (In re Bradley)*, 326 F. App'x 838, 839 (5th Cir. 2009) ("It is well established that a trustee has no standing to bring tort claims that belong exclusively to creditors of the bankruptcy estate." (citation omitted)).

256. The holders of Subordinated Unsecured Notes—and neither the Debtors nor any party seeking derivative standing for the Debtors—are the proper parties to bring (and pay for) this cause of action. Tellingly, no Subordinated Unsecured Noteholder has brought a cause of action to unwind the Subsidiary Guarantee Release or any aspect of the 2025 Transactions (even though they were consummated months before the Petition Date). In fact, the Committee does not even allege that the Subsidiary Guarantee Release violated or otherwise breached the Subordinated Unsecured Notes Indenture, presumably because the Committee knows it did not.[249]

257. The Committee has failed to explain how reinstating these guarantees brings value to the estates of the ModivCare Subsidiaries. Courts in the Fifth Circuit routinely deny standing where the challenged transaction allegedly caused an injury to only a group of creditors (like the Subordinated Unsecured Noteholder) rather than an injury to the estate as a whole. *See, e.g.*, *Fla. Dep't of Ins. v. Chase Bank of Tex. Nat. Ass'n*, 274 F.3d 924, 931 (5th Cir. 2001) (holding that the receiver of the estate lacked standing to bring claims on behalf of policyholders in connection with an insurance fraud perpetrated by the company and a trustee because the breaches of duty were to policyholders, not to the company); *Highland Cap. Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.)*, 522 F.3d 575, 584 (5th Cir. 2008) ("[T]he trustee has no right to bring claims that belong solely to the estate's creditors."). The Committee, therefore, has failed to allege colorable claims on account of the Subsidiary Guarantee Release, and its request should be denied.

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[249] *See* **Exh. 16** Subordinated Unsecured Notes Indenture § 9.02 With Consent of Holders (allowing for the amendment, supplementation, or other modification of the Subordinated Unsecured Notes Indenture with the consent of the Holders (as defined there) of a majority in aggregate principal amount of the Subordinated Unsecured Notes then outstanding (50.1%) and prohibiting certain amendments without the consent of each affected Holder, not including the release of guarantees); *see also* **Exh. 18** (Jan. 10, 2025 email from D. Rowe (Jupiter) to C. Ali) ("[redacted]").

(iii) Recission of the Subordination Agreement Is Not an Estate Cause of Action because the Debtors Are Not Parties to the Subordination Agreement

258. The Committee's request for derivative standing to invalidate and unwind the Subordination Agreement on behalf of the Debtors is similarly puzzling and not colorable. As a threshold matter, the Proposed Complaint does not assert a count to unwind the Subordination Agreement or a colorable theory as to how the Subordination Agreement transferred value out of the Debtors' estates. Instead, the Committee again attempts to fold this non-existent cause of action into its broader causes of action for fraudulent transfer by treating all of the 2025 Transactions as a single integrated transaction. *See* 2025 Transactions Standing Motion Compl. ¶¶ 113, 121.

259. The Committee's faulty reasoning ignores the reality that the Subordination Agreement did not transfer value away from the Debtors or require the Debtors to incur an obligation in violation of Section 548(a) of the Bankruptcy Code. The Subordination Agreement also did not change the amount of debt owed by any Debtor. Rather, the Subordination Agreement only changed the priority of payment between and among existing creditors. *See supra* ¶ 25. Thus, voiding the Subordination Agreement would provide no substantive benefit to any Debtor's estate. It might, in theory, benefit a subset of the Committee's constituents (the Subordinated Unsecured Noteholders) who can pay for their own litigation if they believe the claims have merit (which they do not since they never commenced any actions before the Petition Date).

260. Importantly, the Debtors are not a primary party to the Subordination Agreement—they have only acknowledged its existence.[250] As a matter of law, therefore, the Debtors as non-

[250] The parties to the Subordination Agreement are the Subordinated Unsecured Notes Trustee, the First Lien Agent, and the Second Lien Agent. *Supra* ¶ 25.

parties do not have standing to rescind or void the Subordination Agreement. *See* 11 U.S.C. § 541(a); *Schertz-Cibolo-Universal City v. Wright (In reEducators Grp. Health Tr.)*, 25 F.3d 1281, 1284 (5th Cir. 1994) ("[I]f the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action . . . is not property of the estate."); *Thomas v. Citimortgage, Inc. (In re Thomas)*, 459 B.R. 708, 711 (Bankr. E.D. Mich. 2011) ("With respect to the subordination agreement, [the debtor] was not a party to the agreement and does not have standing to challenge its validity."); *see also In re El Paso Refinery, L P*, 171 F.3d 249, 257 (5th Cir. 1999) (holding that both the debtor and the Chapter 7 trustee lacked standing because "[t]he consent language also makes plain that the Intercredit[or] Agreement gave neither [the Debtor] nor its Trustee standing to enforce its terms because they were not a party to the agreement").

261. This Court recently declined standing for a group of noteholders making claims against non-debtor entities based on an uptier transaction that stripped the noteholders of their liens and subordinated their payment because the Court found that these claims were not property of the estate. *See Wesco Aircraft Holdings, Inc. v. SSD Invs. Ltd. (In re Wesco Aircraft Holdings, Inc.)*, No. 23-90611 (MI), 2024 WL 156211, at *6 (Bankr. S.D. Tex. Jan. 14, 2024), *supplemented*, No. 23-90611 (MI), 2024 WL 255855 (Bankr. S.D. Tex. Jan. 23, 2024) (holding that the noteholders lacked standing for a claim because "[t]he 2024/2026 Noteholders claim a breach of contract resulted in the impairment of their secured claim on Wesco's assets, not a harm to those assets themselves or the impairment of a general claim on assets held by all of Wesco's creditors").

262. Even if the Committee's claim could be brought, the only mechanism to challenge the Subordination Agreement is provided under the Subordinated Unsecured Notes Indenture.[251]

[251] The Subordinated Unsecured Notes Indenture requires at least 30% in aggregate principal of outstanding notes must request that the trustee pursue the remedy (among other requirements). *See* **Exh. 16**, Section 6.06 Limitation on Suits.

The Committee has made no allegations of breach of the Subordinated Unsecured Notes Indenture or a breach of duty of good faith and fair dealing. Accordingly, the Committee cannot seek to unwind the Subordination Agreement simply by lumping it together with the 2025 Transactions as whole as an alleged fraudulent transfer.

263. The Fifth Circuit also has held that a lender who has contractually agreed to subordinate its interests is precluded from asserting postpetition claims contrary to that agreement. *See Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 527 (5th Cir. 2004) ("This [prepetition] subordination agreement would be enforceable outside of bankruptcy and, thus, would also be enforceable in bankruptcy. The Carrieri Group, therefore, cannot take post-petition steps to try to alter its subordination agreement and change its equity interests into debt in contravention of Section 510(a)."). The Committee's request would do precisely that: undo the bargained-for subordination—pursuant to an agreement the Debtors are not even party to—and reorder creditor priority to elevate the Subordinated Unsecured Notes above the priority scheme to which their trustee agreed. Notably, there are no parties to the Subordination Agreement challenging the permissibility of the Subordination Agreement. If the Subordinated Unsecured Noteholders have an issue with the Subordination Agreement, then they hold such claims directly in their own name against the Subordinated Unsecured Notes Trustee and can pursue that litigation at their own expense. Recission is, therefore, not a claim belonging to the Debtors or their estates or one that the Committee can seek derivative standing to pursue. The Committee's request to bring such claims is not colorable and wholly inappropriate.

264. Finally, the Committee's request to invalidate and unwind the Subordination Agreement fails because rescission is not an appropriate remedy. This Court has held that equitable remedies, such as recission, are not available when damages are available under the

contract. *See In re Robertshaw US Holding Corp.,* 662 B.R. 146, 161 (Bankr. S.D. Tex. 2024) (concluding that "the remedy of rescission is unavailable [when] money damages are available and will make plaintiff whole" and the "plaintiff does not explain why damages—a legal remedy—would be insufficient") (internal citations omitted). To the extent the Committee seeks "rescission" or some similar equitable remedy, such a request for relief necessarily fails as well. "Under New York law, [r]escission is an extraordinary remedy, appropriate only when the breach is found to be material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *Krumme v. WestPoint Stevens, Inc.*, 238 F.3d 133, 143 (2d Cir. 2000). Courts only employ rescission as a remedy in limited circumstances, such as "fraud in the inducement of the contract, failure of consideration, an inability to perform the contract after it is made, or substantial breach." *Robinson v. Sanctuary Rec. Groups, Ltd.*, 826 F. Supp. 2d 570, 575 (S.D.N.Y. 2011). Critically, "the equitable remedy of rescission is not available where there is an adequate legal remedy, and [when] plaintiff does not explain why damages – a legal remedy – would be insufficient." *Romanoff v. Romanoff*, 148 A.D.3d 614, 616 (1st Dep't 2017) ("The remedy of rescission is unavailable [when] money damages are available and will make plaintiff whole.").

265. The Committee does not (and cannot) articulate why damages would be inadequate, particularly given that the Subordination Agreement, by its terms, did not (a) transfer any value from the Debtors; (b) impose any obligation on the Debtors; or (c) alter the quantum of their indebtedness. Rather, the Subordination Agreement merely reordered the priority of payment among creditor constituencies.

2. __Section 546(e)'s Safe Harbor Bars the Committee's Constructive Fraudulent Transfer and Preference Claims__

266. Even if the Committee had alleged colorable claims for a constructive fraudulent transfer and preference, the safe harbor set forth in Section 546(e) of the Bankruptcy Code would bar such claims. *See Crescent Res. Litig. Tr. ex rel. Bensimon v. Duke Energy Corp.*, 500 B.R. 464, 471 (Bankr. W.D. Tex. 2013) ("Section 546(e) thus affords a 'complete defense to avoidance claims …' if the requirements of the particular exemption are satisfied." (internal citation omitted)). Specifically, Section 546(e) of the Bankruptcy Code provides alleged fraudulent transfer and preference defendants with a safe harbor, subject to the satisfaction of two elements: (a) there must be a qualifying transfer (*i.e.*, a "settlement payment" or a transfer "in connection with a securities contract"); and (b) the challenged transfer must be "made by or to (or for the benefit of) a [qualifying participant]," such as a financial institution or financial participant. 11 U.S.C. § 546(e). *See also Golden v. Cmty. Health Sys., Inc. (In re Quorum Health Corp.)*, No. 20-10766 (BLS), 2023 WL 2552399, at *5 (Bankr. D. Del. Mar. 16, 2023); *Tribune Litig. Tr. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conv. Litig.)*, 946 F.3d 66, 74 (2d Cir. 2019); *Holliday v. K Road Power Mgmt., LLC (In re Bos. Generating LLC)*, No. 12-01879 (REG), 2020 WL 3286207, *25 (Bankr. S.D.N.Y. June 18, 2020).

267. Courts have broadly construed "settlement payment" to encompass any transfer that is made to complete a securities transaction. *abrogated by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.,* 583 U.S. 366 (2018); *Williams v. Morgan Stanley Cap. Grp. Inc. (In re Olympic Nat. Gas Co.)*, 294 F.3d 737, 742 (5th Cir. 2002) (advocating for a broad interpretation of settlement payment); *Holliday v. K. Rd. Power Mgmt., LLC (In re Boston Generating LLC)*, 617 B.R. 442, 486 (Bankr. S.D.N.Y. 2020) ("Section 546(e) sets a low bar for the required relationship between the securities contract and the transfer sought to be avoided,' 'merely requir[ing] that the

transfer have a connection to the securities contract.""). A transfer "in connection with a securities contract" is also defined "with extraordinary breadth," and "expansively includes contracts for the purchase or sale of securities, as well as any agreements that are similar or related to contracts for the purchase or sale of securities." *Sec. Inv. Prot. Corp. v. Ida Fishman Revocable Tr.* (*In re Bernard L. Madoff Inv. Sec. LLC*), 773 F.3d 411, 417-18 (2d Cir. 2014). And courts have construed the "in connection with" requirement "broadly to mean 'related to.'" *See Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A.* (*In re Lehman Bros. Holdings Inc.*), 469 B.R. 415, 442 (Bankr. S.D.N.Y. 2012); *see also Crescent Res.*, 500 B.R. at 476 ("[I]n the context of avoidance of transfers ["in connection with"] has been interpreted to mean 'related to an agreement.'" (internal citation omitted)). Courts have consistently recognized that "[s]ection 546(e)'s 'in connection with' language 'is by its own terms very broad ….'" *Id.* (internal citation omitted); *see also In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d at 420 n.3 (explaining that the conclusion that Congress intended § 546(e) to sweep broadly, is "congruent with the broad interpretation of the 'in connection with a purchase or sale of any security' requirement of Rule 10b-5 in the context of federal securities laws").

268. The 2025 Transactions clearly meet the two elements and, therefore, are protected by the safe harbor in Section 546(e) of the Bankruptcy Code. The 2025 Transactions involved the uptiering of existing Subordinated Unsecured Notes into Second Lien Notes, granting liens and other rights to the holders of Second Lien Notes, and required interest payments tied to the Second Lien Notes. Such transfers were made "in connection with" the Exchange Agreement, the Coliseum Purchase and Exchange Agreement, the Second Lien Notes and Subordinated Unsecured Notes Indentures and, therefore, were in connection with securities contracts.

269. The Second Lien Noteholders and the applicable trustees are also clearly financial participants. *See* 11 U.S.C. § 101(22A)(A) (defining "financial participant" as entity that has certain amount of outstanding securities contracts at time of transaction at issue); 11 U.S.C. § 561(a)(1) (listing "securities contracts" as defined in section 741(7) as a qualifying agreement or transaction); 11 U.S.C. § 741(7) (a "securities contract" is defined in part as "a contract for the purchase, sale, or loan of a security"); 11 U.S.C. § 101(49)(A)(i)-(ii) (a "security" includes notes and stock); *see also In re Samson Resources Corp.*, 625 B.R. 291, 299 (Bankr. D. Del. 2020) ("In short, a financial participant is [A] an entity, [C] who has one or more required agreements [E] in the required amounts, [D] with the debtor or any other entity (other than an affiliate)"). The transfers were affected through financial intermediaries and were made by, to, or for the benefit of qualifying participants, including the applicable trustees and Second Lien Noteholders. Accordingly, the 2025 Transactions fall squarely within the Section 546(e) defense, providing a bar to properly alleged fraudulent transfer claims, which the Committee has failed to do.

3. The Committee's Fraudulent Transfer Claims for the 2025 Transaction Fees are Not Colorable

270. The Committee cites the fact that the Debtors paid various fees in connection with the 2025 Transactions (collectively, the "***2025 Transaction Fees***"). *See* 2025 Transactions Standing Motion ¶¶ 4, 63. But those costs were only incurred because the parties elected to proceed with the transaction—to say that the participating lenders "benefitted" from a transaction because they were reimbursed for costs they only incurred because of that same transaction is circular and illogical.

271. Moreover, the Committee attempts to argue that the 2025 Transaction Fees were additional value lost by the Debtors without receipt of reasonably equivalent value. *See* 2025 Transactions Standing Motion ¶ 95. But sophisticated professional advisors do not work for free,

and the services that professionals provided in facilitating the 2025 Transactions plainly constitute "value." *See Lawrence v. Bonadio, Insero & Co. (In re Interco Sys., Inc.)*, 202 B.R. 188, 194 (Bankr. W.D.N.Y. 1996) ("[W]hen in the exercise of reasonable, good faith business judgment, there is a perceived financial benefit to the corporation which justifies the fees or expenses paid . . . unless the Trustee meets his or her burden to prove that there was in fact no benefit, or a substantially and reasonably quantifiable disproportionate financial benefit, the payment of professional fees or expenses to the professionals or others who perform the services or provided the goods at the request of the corporation and charged a reasonable rate is not avoidable as a fraudulent conveyance."). Accordingly, the Committee's arguments are without merit and not colorable.

4. <u>The Committee's Actual Fraudulent Transfer Claims for the 2025 Transactions Are Not Colorable</u>

272. In Count 1 of the Proposed Complaint, the Committee also seeks standing to unwind the Uptier Exchange, and avoid the liens that the Debtors granted therein, as an actual fraudulent transfer. Section 548(a)(1)(A) of the Bankruptcy Code authorizes avoidance of any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, made within two years before the petition date if the debtor acted "*with actual intent to hinder, delay, or defraud*" creditors.[252] 11 U.S.C. § 548(a)(1)(A) (emphasis added).

273. The Committee has the burden of establishing that the required elements were present to establish there was an actual fraudulent transfer. *Opioid Master Disbursement Tr. II v. Covidien Unlimited Co. (In re Mallinckrodt PLC)*, No. 20-12522 (JTD), 2024 WL 206682, at *23 (Bankr. D. Del. Jan. 18, 2024) ("A plaintiff seeking to recover a transfer as 'actually' fraudulent,

[252] Under relevant state law, the tests for fraudulent conveyance are similar. *See* Col. Rev. Stat. § 38-8-108; N.Y. Debt. & Cred. Law § 276; Tex. Bus & Com Code § 24.005(a)(1).5; Del. Code Ann. Tit. 6, § 1307.

as opposed to 'constructively' fraudulent, must demonstrate that the transfer was made with actual intent to hinder, delay, or defraud the debtors' creditors."). This is a difficult standard to satisfy. *In re Brown Med. Ctr., Inc.*, 552 B.R. 165, 168 (S.D. Tex. 2016).

274. The Committee fails to meet this burden. In particular, the Committee must plead such claims with particularity in accordance with Federal Rule of Civil Procedure 9(b). *Brown Med. Ctr.*, 552 B.R. at168 ("[T]he heightened pleading requirements of Rule 9 apply to . . . actual fraud claims under [Section] 548(a)(1)(A)."); *Katchadurian v. NGP Energy Cap. Mgmt., LLC (In re Northstar Offshore Grp., LLC)*, 616 B.R. 695 (Bankr. S.D. Tex. 2020) (choosing to apply the Rule 9(b) pleading standard in cases involving alleged fraud). While the Rule 9(b) standard may be "somewhat relaxed" for a bankruptcy trustee or someone standing in the trustee's shoes, "to properly allege fraud under Rule 9(b), the plaintiff must plead the who, what, when, where, and why as to the fraudulent conduct." *In re Life Partners Holdings, Corp.*, 926 F.3d 103, 117 (5th Cir. 2019) ("[T]he complaint must contain factual allegations stating the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.") (internal quotations and citations omitted); *Peterson v. Capital One N.A. (In re Mack Indus., Ltd.)*, No. 17-B-09308 (CAD), 2020 WL 6708874, at *7 (Bankr. N.D. Ill. Nov. 16, 2020).

275. The Committee's proposed actual fraudulent transfer claims come nowhere close to meeting this standard. As a threshold matter, the Committee improperly alleges that the Debtors' understanding of the impacts of the 2025 Transactions demonstrates actual fraud. The Committee's sole allegation—that the Debtors understood the 2025 Transactions would grant new liens—does not plead actual fraudulent intent. The Debtors acknowledge that the 2025

Transactions resulted in the grant of new liens. But this does not demonstrate actual fraud. Rather, it is evidence of the Debtors properly granting security for antecedent debt.

276. The Committee's argument misunderstands well-settled law that "[a] debtor may prefer one creditor over another without running afoul of fraudulent conveyance laws." *In re Capmark Fin. Grp., Inc.*, 438 B.R. 471, 518 (Bankr. D. Del. 2010). *See also Foxmeyer Drug Co. v. Gen. Elec. Cap. Corp. (In re Foxmeyer Corp.)*, 296 B.R. 327, 337 (Bankr. D. Del. 2003) ("[A] debtor can favor, indeed prefer, any one or several of its unsecured creditors with a transfer of assets to the detriment of . . . remaining unsecured creditor body, even in the face of such debtor's insolvency. . . ."); *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am., Inc.)*, 24 B.R. 973, 977 (Bankr. N.D. Tex. 1982) ("The Bankruptcy Act recognizes . . . a distinction between a preferential transfer and a fraudulent conveyance . . . . It is difficult to imagine a preference which does not incidentally hinder or delay creditors, for, whenever an insolvent debtor pays one of his creditors in full, he thereby puts the cash or property so used beyond the reach of execution by the others."). The Committee does not identify a single badge of fraud or other fact suggesting deceptive conduct or concealment.

277. But even if such allegations constituted a cognizable legal theory (they do not), the Committee fails to allege sufficient facts with particularity to meet the heightened standard required under Rule 9(b) to prove the Debtors acted "with actual intent to hinder, delay or defraud" their creditors. Despite receiving tens of thousands of documents in discovery and conducting thirteen depositions, the Committee does not (and cannot) provide any facts suggesting actual intent on the part of the Debtors to defraud their creditors. The Committee's sole supportive fact is that the Debtors' Chief Executive Officer stated that certain creditors "would face 'a much harsher reality' as a result of the Fifth Amendment Transactions." 2025 Transactions Standing

Motion ¶ 60. This lone statement does not and cannot establish fraudulent intent—rather, it merely states the obvious reality that secured debt is higher in the recovery waterfall than unsecured debt. *Life Partners Holdings*, 926 F.3d at 117 ("[T]he complaint must contain factual allegations stating the 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.'") (internal citations omitted); *see also Brown v. GE Capital Corp. (In re Foxmeyer Corp.)*, 296 B.R. 327, 337 (Bankr. D. Del. 2003) ("[A]s abundant caselaw makes clear, a debtor can favor, indeed prefer, any one or several of its unsecured creditors with a transfer of assets to the detriment of such debtor's remaining unsecured creditor body, even in the face of such debtor's insolvency, and such transfer, as a matter of law, cannot, without more, then be avoided as a fraudulent conveyance on the ground that such debtor possessed actual intent to hinder, delay, or defraud its creditors.") (collecting cases); *Adamson v. Bernier (In re Bernier)*, 282 B.R. 773, 781 (Bankr. D. Del. 2002) ("[A] debtor's intent to prefer one bona fide creditor over another is not equivalent to intent to hinder, delay or defraud creditors."). Given the high pleading burden the Committee faces here, the failure to plead any facts suggesting an intent on the part of the Debtors to defraud their creditors is fatal to an actual fraud claim.

278. Since there is no direct evidence of fraudulent intent, the Committee asserts that it has pled "badges of fraud" to support its actual fraud claim. Courts can consider a number of factors, including: "(1) the lack of inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or

pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry." *Soza v. Hill (In re Soza)*, 542 F.3d 1060, 1067 (5th Cir. 2008). "While no particular 'badge' is dispositive, courts typically require the confluence of multiple badges to establish fraudulent intent." *Tex. Rangers Baseball Partners v. Paradigm Air Carriers, Inc. (In re Tex. Rangers Baseball Partners)*, 498 B.R. 679, 712 (Bankr. N.D. Tex. 2013).

279. But the Committee's conclusory allegations do not survive even the most cursory scrutiny. *Friedman v. Wellspring Cap. Mgmt., LLC (In re SportCo Holdings, Inc.)*, No. 19-11299 (JKS), 2021 WL 4823513, at *14 (Bankr. D. Del. Oct. 14, 2021) ("Conclusory statements that badges of fraud are present are insufficient; the plaintiff must allege facts demonstrating that badges of fraud exist."). The Committee relies on *Brandt v. KLC Fin., Inc. (In re Equip. Acq. Res., Inc.)*, 481 B.R. 422, 431 (Bankr. N.D. Ill. 2012) for its assertion that the presence of several badges of fraud "may create a presumption that the debtor[s] acted with the requisite intent to defraud." Yet, the Committee attempts to argue (but fails to establish) only three potential badges of fraud: (a) the financial condition of the Debtors, (b) the Debtors did not receive reasonably equivalent value in connection with the 2025 Transactions, and (c) three of the creditors were insiders at the time of the 2025 Transactions by virtue of their equity holdings.[253]

280. For the same reasons discussed above regarding constructive fraudulent transfers, the Committee fails to establish that the Debtors did not receive reasonably equivalent value in connection with the 2025 Transactions. And the Committee has not brought any claims for breach of fiduciary duties, lender liability, or equitable subordination.

281. But even if the Committee's *legal* theory of actual fraud were cognizable (it is not), the Committee's Proposed Complaint does not allege sufficient *facts* to state such a claim. The

[253] *See* 2025 Transactions Standing Motion ¶¶ 63-67.

fundamental problem the Committee finds itself confronting in this case is that the First Lien Lenders are not now, and never were, insiders or in control of the Debtors. The Committee does not (and cannot) allege that the First Lien Lenders had any interest or relationship with the Debtors other than as holders of First Lien Claims or other debt of the Debtors, nor can the Committee or does the Committee allege that the First Lien Lenders controlled the Debtors' Board or its ultimate authority to control the Debtors' disposition of their property. The Committee is thus forced to advance the bizarre (and baseless) theory that the Debtors allegedly understood that (a) the Uptier Exchange could benefit certain creditors at the expense of other creditors; (b) the Debtors consummated the Uptier Exchange for no reason other than to harm the latter group, and (c) the Debtors intended to place the latter group in a worse position in an inevitable bankruptcy filing, all with no actual benefit of any kind received by the Debtors. This theory is illogical and implausible on its face, and, notwithstanding the tens of thousands of documents it received in discovery, the Committee does not and cannot support it with any actual factual allegation. Given the high pleading burden the Committee faces here, the failure to plead any facts suggesting an intent on the part of the Debtors to defraud their creditors is fatal to an actual fraud claim.

282. And while the Debtors concede that the Coliseum Parties were a statutory insider of the Debtors that participated in the Uptier Exchange, the Committee fails to mention that the Coliseum Transactions received well in excess of the required 66 ⅔% approvals of ModivCare's existing non-affiliated public shareholders. *See* Silvers Decl. ¶ 8. Given the overwhelming support of ModivCare's shareholders for the Coliseum Transactions, there can be no argument that Coliseum exercised control over the Debtors in approving the transaction or that the Debtors somehow committed actual fraud with a public shareholder vote.

283. Further, the Committee's arguments regarding the existence of badges of fraud wholly fail to prove there is circumstantial evidence of fraudulent transfer. The Committee argues that three badges of fraud are present here: (a) insolvency, (b) lack of equivalent value for the 2025 Transactions, and (c) the transfers were made to insiders. *See* 2025 Transactions Standing Motion ¶¶ 62-68.[254] The Committee overly relies on insolvency to its own detriment. Insolvency is a decidedly weak badge of fraud given that such allegations could be made in nearly every bankruptcy. *See In re Fedders N. Am., Inc.*, 405 B.R. 527, 547 (Bankr. D. Del. 2009) (rejecting plaintiff's argument that relied on insolvency as its lone badge of fraud). The Committee's other two badges of fraud, lack of equivalent value and transfers to insiders, fail for the reasons described in Sections X.B.1.a & X.B.4, especially when the Coliseum Transactions were approved by a supermajority vote of non-affiliated public shareholders. Essentially, the Committee has argued insolvency as its lone badge of fraud, and this argument fails as a matter of law. *See Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)*, 498 B.R. 679, 712 n.151 (Bankr. N.D. Tex. 2013) ("A single badge of fraud is insufficient to establish intent.").

284. Moreover, the 2025 Transactions were negotiated at arm's length, informed by market realities, and followed robust internal and external diligence processes. Even if the Committee's assertion that the Debtor was insolvent is correct – which the Debtors deny – the Committee has not established that there was actual or constructive fraud involved in the 2025 Transactions. The Committee's fraud allegations therefore are not colorable.

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[254] In Count 2 of the Proposed Complaint, the Committee also alleges that the transfers were not made in the ordinary course and the transfers occurred shortly after the Debtors incurred new debt.

5. The Committee's Claims for Disallowance and Setoff Are Not Colorable

285. Because the Committee's substantive claims all fail as a matter of law, its claims for disallowance (Claim 4) and setoff (Claim 5) necessarily fail as well. *See In re Broadstripe, LLC.*, 444 B.R. 51, 109 (Bankr. D. Del. 2010) ("To disallow a claim under section 502(d) requires a judicial determination that a claimant is liable."); *In re Ultimate Acquisition Partners, LP*, No. 11-10245 MFW, 2012 WL 1556098, at *3 (Bankr. D. Del. May 1, 2012) ("The Court finds that the Trustee's 502(d) claim should be dismissed. A debtor or trustee 'wishing to avail itself of the benefits of section 502(d) must first obtain a judicial determination on the preference complaint.'") (internal citation omitted); *In re Women First Healthcare, Inc.*, 345 B.R. 131, 134-35 (Bankr. D. Del. 2006) (in order to exercise right of setoff, debtor must first show that "the creditor owes [a debt] to the estate").

C. The Debtors Have Not "Unjustifiably Refused" To Pursue The Alleged Claims Relating To The 2025 Transactions

1. The Legal Standard

286. As noted above, derivative standing extends the rights of the debtors-in-possession to self-interested stakeholders and is therefore reserved only for narrow circumstances "when the Bankruptcy Code's envisioned scheme breaks down." *Weyandt v. Fed Home Loan Mortg. Corp. (In re Weyandt)*, 544 F. App'x 107, 110 (3d Cir. 2013) (citing *Cybergenics*, 330 F.3d at 553). For this reason, a creditor must prove that a colorable claim exists and also establish that the Debtors have *unjustifiably* refused to bring such claim. *SI Restructuring*, 714 F.3d at 863-64. Absent proof of unjustified refusal, the Court must deny a creditor's request for derivative standing. *See Diocese of Camden*, 2022 WL 884242, at *9, *12 (denying committee's motion for derivative standing despite there being potentially colorable claims "[b]ecause the Committee has not shown that Debtor is unjustified in refusing to pursue the claims asserted by the Committee"); *In re Milazzo*,

450 B.R. 363, 378 (Bankr. D. Conn. 2011) (where moving creditor "offered no evidence to support a finding that the estate would eventually benefit in an additional monetary amount" and debtor provided testimony regarding "amount of the transfers at issue, the various defenses raised, the complexity of the factual issues to be tried, the anticipated expense and duration of the trial, and the competence and aggressiveness [of] defendant's counsel," derivative standing was not in best interest of estate); *In re Copperfield Invests., LLC*, 421 B.R. 604, 609 (Bankr. E.D.N.Y. 2010) (emphasizing that "[t]he party seeking derivative standing bears the burden of establishing, by competent evidence, that the proposed claims are colorable and that the trustee unjustifiably refused to bring suit").

287. The Fifth Circuit has explained that "in determining whether a debtor-in-possession's refusal was unjustified, we must look to whether the interests of creditors were left unprotected as a result." *La. World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 253, n.20 (5th Cir. 1988). In practice, this inquiry amounts to "little more than a cost benefit analysis." *Id.*; *see also La. World Exposition v. Fed. Ins. Co*., 864 F.2d 1147, 1153 (5th Cir. 1989) (en banc) (emphasizing the Fifth Circuit's "complete agreement" with the cost-benefit analysis mandated by the Second Circuit in *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters)*, 779 F.2d 901, 905 (2d Cir. 1985)). Courts should consider "not only a determination of probabilities of legal success and financial recovery in the event of success," but also the cost to other creditors and to the bankruptcy estate. *STN Enters*, 779 F.2d at 905. To prevail, a creditor bears the burden to produce evidence to "assure [the Court] that there is a sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce." *G-I Holdings,* 313 B.R. at 629 (quoting *STN Enters*., 779 F.2d at 905-06); *see also In re Sabine Oil & Gas Corp*., 547 B.R. 503, 516 (Bankr. S.D.N.Y.),

aff'd, 562 B.R. 211 (S.D.N.Y. 2016) ("[t]he court should weigh the probability of success and financial recovery, as well as the anticipated costs of litigation, as part of a cost/benefit analysis to determine whether the prosecution of claims is likely to benefit the debtor's estate."); *In re Sunbeam Corp*., 284 B.R. 355, 374 (Bankr. S.D.N.Y. 2002) ("Thus, a finding that allowing a committee to pursue a debtor's claim would be necessary and beneficial to the resolution of the bankruptcy proceeding is required in all instances.").

288. Further, to satisfy its burden that derivative standing is warranted, a creditor must establish that its proposed claims would benefit the debtor's estate as a whole and not just specific or individual creditors. *STN Enters*, 779 F.2d at 905 (explaining that the court must examine "whether an action asserting such claim(s) is likely to benefit the reorganization estate"); *Off. Comm. of Unsecured Creditors of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.),* 326 B.R. 532, 548 (W.D. Pa. 2005) (describing the cost-benefit analysis as evaluating whether "in light of the probable costs of litigation, the claims would likely benefit the estate if pursued").

289. Finally, the cost benefit analysis requires more than "blind confidence." *In re Diocese of Camden*, 2022 WL 884242, at *10. The party challenging the debtor's purported refusal to bring a claim—here, the Committee—must "allege sufficient facts" that address the "litigation risks" and likelihood of success for the specific claims. *Id*. The alleged benefit to the estate must be supported by analysis that demonstrates "why [the] amount is accurate or reliable." *Id*. at *11. Conclusory allegations of potential value, even if "substantial," "d[o] not adequately analyze the costs and risks of . . . litigation, and therefore, fail[] to provide a cost-benefit analysis that meets [the] burden of proof" to establish standing. *Id*. at *9.

290. As described in greater detail below, the Committee falls far short of demonstrating that the Debtors unjustifiably refused to pursue the Committee's Proposed Claims (as defined in the Committee Motions) relating to the 2025 Transactions.

2. **Challenging the Uptier Exchange Is a Waste of Estate Resources Because the Plan Already Treats the Second Lien Notes as Unsecured Claims**

291. Under the Plan, the Second Lien Notes are treated as entirely unsecured claims, with no value ascribed to the liens granted in connection with the Uptier Exchange. As a result, even assuming the Committee could prevail on a challenge to the Uptier Exchange, the result would simply replicate the Plan's already existing creditor treatment while imposing additional cost and delay on the estates.

292. The Debtors, exercising sound business judgment and consistent with the Bankruptcy Code's preference for consensual resolution, have already collapsed any "lien uplift" through plan negotiations and settlement rather than through costly litigation. *See In re Caesars Ent. Operating Co., Inc*, 561 B.R. 457, 469 (Bankr. N.D. Ill. 2016) ("[T]he debtors have supplied an adequate justification for their decision not to pursue the claims. . . . The debtors' decision . . . is a reasonable exercise of the debtors' judgment."); *Off. Comm. of Unsecured Creditors v. Cajun Elec. Power Co-op., Inc. (In re Cajun Elec. Power Co-op., Inc.)*, 119 F.3d 349, 354 (5th Cir. 1997) (recognizing that "compromises are a normal part of the process of reorganization, oftentimes desirable and wise methods of bringing to a close proceedings otherwise lengthy, complicated, and costly") (citation omitted). Pursuing duplicative and expensive litigation to reach the same economic outcome the Plan already provides would waste (not create) value for the estates, and would not improve recoveries for unsecured creditors. The Committee identifies no path by which a successful lien challenge would generate incremental proceeds for unsecured creditors beyond

what the Plan already provides.[255] For this reason alone, derivative standing to challenge the Uptier Exchange can be denied.

3. Reinstating the Subsidiary Guarantees and/or Rescinding the Subordination Agreement Would Not Increase Creditor Recoveries as a Whole, But Merely Shift Recoveries Between and Among Creditors

293. Courts hold that derivative standing is "necessarily improper" where it would not benefit the estate as a whole, but merely redistribute value between or among creditors. *Eckbold v. Miller (In re Redden),* No. 04-12335 (PJW), 2013 WL 5436368, at *3 (Bankr. D. Del. Sept. 30, 2013) ("Without an argument that granting standing would benefit the bankruptcy estate, derivative standing is necessarily improper."). The Committee's attempts to reinstate the subsidiary guarantees and/or rescind the Subordination Agreement are paradigmatic examples of claims that purportedly advance the interests of a subset of the Committee's constituency (the Subordinated Unsecured Noteholders) while providing no benefit to the Debtors' estates (or even unsecured creditors) as a whole.

294. Where the net effect of a claim, if successful, is only to redistribute a fixed asset value, then that claim is being asserted only for the limited interests of a specific creditor class, not the estate as a whole. Courts have consistently held that derivative standing is not appropriate when the effect of a claim is to redistribute fixed asset values. *See e.g., In re Educators Grp. Health Tr.*, 25 F.3d 1281, 1284 (5th Cir. 1994) ("[I]f the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate."); *In re Clear the Air, LLC*, 631 B.R. 286, 296 (Bankr. S.D. Tex. 2021) (identifying a fourth factor required for

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[255] For these same reasons, there is no benefit to the Debtors' estates in pursuing lien avoidance claims against the Coliseum Parties as alleged preferential transfer pursuant to Section 547 of the Bankruptcy Code. *See* 2025 Transactions Standing Motion Compl. ¶¶ 122-132. The Plan already avoids these liens by treating the Second Lien Notes held by the Coliseum Parties as unsecured claims.

derivative standing, that the suit be on behalf of the bankruptcy estate, and finding that defendants met the initial burden for summary judgment by pleading that the plaintiff attempted to recover damages for itself rather than on behalf of the estate); *In re Murray Metallurgical Coal Holdings, LLC,* 614 B.R. 819, 834 (Bankr. S.D. Ohio, 2020) ("[A] committee's failure to prove that the claim it seeks to bring would benefit the estate provides an additional basis for denying its request for derivative standing."); *In re McGuirk*, 414 B.R. 878, 880 (Bankr. N.D. Ga. 2009) ("Derivative standing is granted to benefit the estate as a whole, not merely to benefit the creditor bringing the claim."); *Off. Comm. of Unsecured Creditors of AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82, 86 (2d Cir. 2007) ("Requiring bankruptcy court approval conditioned upon the litigation's effect on the estate helps prevent committees and individual creditors from pursuing adversary proceedings that may provide them with private benefits but result in a net loss to the entire estate.").

295. The Committee has failed (and not even attempted) to show that granting it derivative standing to reinstate the subsidiary guarantees and/or rescind the Subordination Agreement will benefit the Debtors' estates as a whole. Instead, the Committee treats the interests of a subset of its constituents (the Subordinated Unsecured Noteholders) as though they were the exclusive interests of the Debtors' estates. Reinstating the subsidiary guarantees and/or rescinding the Subordination Agreement does not increase distributable value—it merely reorders creditor priorities without producing incremental value that benefits the Debtors' estates as a whole. *See Sabine*, 547 B.R. at 570-71 (holding that in considering constructive fraudulent transfer claims, the Court must "consider the fact that any value 'realized' from avoided liens would not be incremental value brought into the estates but instead would be a reallocation of value"); *Murray*,

614 B.R. at 836-37 (holding that committee did not show its recharacterization claim would benefit estate).

296. In a best case scenario for the Committee, success on these claims would simply redirect value away from General Unsecured Creditors as a whole to the Subordinated Unsecured Noteholders in particular. This is precisely the kind of parochial interest that the doctrine of derivative standing was not meant to indulge. *See Murray*, 614 B.R. at 836 (denying standing in part because unsecured creditors would not benefit "[e]ven if the Committee's recharacterization stratagem were successful"). For this reason alone, the Court should deny derivative standing to reinstate the subsidiary guarantees and/or rescind the Subordination Agreement.

4. **The Debtors Would Incur Substantial Costs, Risks, and Delay by Pursuing the Proposed Claims Relating to the 2025 Transactions with No Net Benefit**

297. As noted above, derivative standing should not be granted unless the Committee can show that such relief is in the best interests of the Debtors' estates, based on a cost-benefit analysis. *See In re Murray*, 614 B.R. at 833-34 ("[A] party seeking derivative standing to bring a claim on behalf of a bankruptcy estate must demonstrate that the claim 'would benefit the estate if successful . . . based on a cost-benefit analysis performed by the court.'") (quoting *In re Gibson Grp., Inc.*, 66 F.3d 1436, 1438 (6th Cir. 1995)). The Court can—indeed must—look beyond the pleadings to assure itself that the Committee has established that standing is justified. *See In re STN Enters.*, 779 F.2d at 905-06; *In re Copperfield Invests.*, 421 B.R. at 609 ("The party seeking derivative standing bears the burden of establishing, by competent evidence, that . . . the trustee unjustifiably refused to bring suit."). In its motion, the Committee gives short shrift to the costs and benefits of bringing the Proposed Claims, supporting denial of its motion outright. *See In re Caesars Ent.*, 561 B.R. at 469 ("Because the Committee has addressed neither potential recovery nor potential cost, the Committee has not shown that the recovery might justify the cost.").

298. Here, the cost-benefit analysis weighs heavily against granting derivative standing. *First*, pursuing the Committee's claims will require an enormous outlay of funds to prosecute and defend the lawsuit, for which the Committee has not identified any source of funds that could be used to pursue the expensive litigation necessary to collect on the claims. Second, the Committee's Proposed Claims would not actually benefit the Debtors' estates because most of the claims, even if successful, would merely reallocate value between and among creditors.

299. In analyzing the cost of proposed litigation in the context of a standing motion, courts consider professional fees for both litigating and defending the claims (*see In re Sabine*, 547 B.R. at 574), remaining wary that litigation imposed by a creditors committee may become unjustifiably costly for the debtor, which cannot control costs incurred by the committees' professionals but must nonetheless pay for them. *See* 11 U.S.C. § 330(a)(1); *In re Am.'s Hobby Ctr., Inc*., 223 B.R. 275, 280 (Bankr. S.D.N.Y. 1998) ("It must be remembered that the fees of a creditors' committee['s] professionals are generally absorbed by the debtor in possession pursuant to the statutory scheme."); *In re Grossinger's Assocs*., 184 B.R. 429, 436 (Bankr. S.D.N.Y. 1995) (chapter 7 case in which the court held that "[t]o permit the untimely commencement of a complex and difficult lender liability litigation of highly dubious merit, which would indefinitely delay the otherwise imminent final distribution and closing of this estate, would constitute an abuse of the Court's discretion"). This concern is particularly acute where there is no clear path out of bankruptcy, key commercial relationships are governed by at-will contracts susceptible to termination, and the Debtors' estates face the prospect of business failure due to a lack of capital, conditions under which incremental litigation expense can swiftly erode value and impair any chance of reorganization.

300. Here, the costs of litigation far outweigh any benefit to the estates. Indeed, the Committee barely even mentions—much less analyzes—any of the anticipated costs and sources of funding for the claims it seeks to pursue, and admittedly has not put together any budget or financial forecast for the costs of litigating these alleged claims. Instead, the Committee attempts to shirk its burden of establishing that litigating the Proposed Complaint would benefit the estates, stating that "the 'unjustifiable refusal' element to award derivative standing to a committee is not necessary in situations where, as here, demand would be futile because the debtor has previously agreed not to sue (such as in connection with the proposed plan which seeks to release claims against the directors and officers and ratify the Uptier Transaction)." *See* 2025 Transactions Standing Motion ¶ 92.

301. This naked assertion that the "unjustifiable refusal" element is not applicable here is without merit, and the Committee bears the burden of addressing these issues now since they go to the heart of whether standing is appropriate. On its own, the Committee's failure to analyze the costs of pursuing the Proposed Claims merits a denial of its 2025 Transactions Standing Motion. *See, e.g., In re Catholic Bishop of N. Alaska*, No. F08-00110-DMD, 2009 WL 8412174, at *6 (Bankr. D. Alaska Sept. 11, 2009) (holding that because "[t]he [Committee] has provided no estimate as to the costs for recovery . . . [i]t is impossible for the court to make a cost-benefit analysis under such circumstances").

302. To be clear, the Committee has not identified or offered a source of funding for this proposed litigation, whatever the costs may be. Courts are highly reluctant to grant a creditor derivative standing to pursue estate claims where the movant cannot show how it plans to finance its proposed litigation. *See, e.g., In re Manley Toys Ltd.*, No. 16-15374 (JNP), 2020 WL 1580244, at *8 ("Lack of sufficient funding is a rational basis to decline to pursue claims or to pursue

settlement of claims in lieu of litigation."); *Diocese of Camden*, 2022 WL 884242, at *12 ("The Committee did not explain how this issue could be resolved . . . if [the plan sponsors] do not fund a trust, how a trust with little or no liquid assets would be able to fund what would likely be protracted, expensive litigation.").

303. Indeed, "courts often view favorably the willingness of the party seeking derivative standing to absorb the costs of litigation, since such willingness not only demonstrates a belief in the merits of the claim, but also spares the bankruptcy estate from absorbing any further costs." *In re Smart World Techs*., LLC, 423 F.3d at 180; *see also In re STN Enters*., 779 F.2d at 906 (holding that derivative standing was appropriate where the creditors committee agreed to bear fees and seek recompense out of any recovery); *In re Chalk Line Mfg., Inc*., 184 B.R. 828, 833 (Bankr. N.D. Ala. 1995); *Point Serv. Corp. v. Pritchard Mining Co., Inc*., No. 2:09-0769, 2010 WL 1410673, at *5 (S.D. W. Va. Mar. 31, 2010) (permitting derivative standing because the movant would "proceed at its own expense"). Unsurprisingly, the Committee has made no such representation here.

304. Ultimately, there can be no doubt that, however the Committee's proposed litigation is funded, it will drain significant funds from the Debtors and harm the estates. For example, if White & Case's fee structure is purely hourly, it will indisputably cost millions of dollars in administrative fees, whatever the result of the litigation. And if the Committee utilizes a litigation funder or a contingency arrangement, a "successful" litigation will be even worse for the Debtors' creditors, who will see a sizeable portion of the estates' assets paid to a funder or law firm without any corresponding increase in the distributable value available for creditors, resulting in a net loss for the Debtors' estates. Whatever the fee structure, the Committee's proposed litigation will simply reduce the Debtors' estates and the creditors' recoveries, and the

Committee's failure to identify any workable source of funds for this litigation weighs strongly against the grant of derivative standing.

305. And perhaps worse than these extensive costs, this proposed litigation will materially delay the Debtors' emergence from bankruptcy. The Debtors' most important customer contracts are terminable at will, and prolonging these cases would increase attrition risk, erode enterprise value, and distract management at a critical juncture, to the detriment of all stakeholders.

306. In sum, granting derivative standing would impose enormous costs and delay on the Debtors, who will be forced to pay additional millions of dollars in legal and other professional fees over and above what has already been incurred to date, merely to pursue complex, highly fact-intensive claims, with an extremely low likelihood of success. Such a financial burden directly threatens confirmation of the Plan where there are finite resources available for distribution. Therefore, the Committee's 2025 Transactions Standing Motion should be denied.

XI. DEBTORS' OBJECTION TO COMMITTEE'S LIEN CHALLENGE MOTION

307. As a threshold matter, the Committee (by its own admission) does not require standing to challenge the claims and liens of the First Lien Lenders and the Second Lien Noteholders pursuant to Section 502 of the Bankruptcy Code. The Committee can do so (and has done so) through its Lien Challenge Motion. It is therefore unclear why the Committee also thinks it needs standing to pursue an ordinary-course perfection challenge. For these reasons, the Debtors address the Committee's lien challenges directly and do not discuss the "colorable claims" or "unjustified refusal" standards for derivative standing.[256]

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[256] All capitalized terms used but not defined in this section will have the meaning set forth in the Lien Challenge Motion or the *Final Order (A) Authorizing The Debtors To Obtain Postpetition Financing, (B) Granting Liens And Providing Claims With Superpriority Administrative Expense Status, (C) Authorizing The Use Of Cash Collateral, (D) Modifying The Automatic Stay, And (E) Granting Related Relief* (the "***Final DIP Order***") [Docket No. 463].

308. In the Lien Challenge Motion, the Committee argues that various categories of Debtor assets are not subject to the *prepetition* liens of the First Lien Lenders: (a) postpetition revenues earned by the Debtors on their prepetition contracts; (b) postpetition payments received by the Debtors under the UHC Settlement Agreement; (c) certain motor vehicles; (d) approximately $402,000 of cash in certain Debtor bank accounts; (e) commercial tort claims and chapter 5 avoidance actions; and (f) the Debtors' 46.3% minority equity interest in Matrix Medical Network (collectively, the "***Alleged Unencumbered Assets***").

309. The Debtors understand that the First Lien Lenders will be objecting to the Lien Challenge Motion. Accordingly, the Debtors focus only on the first two categories of Alleged Unencumbered Assets in this Brief: (a) postpetition revenues earned by the Debtors on their prepetition contracts and (b) postpetition payments received by the Debtors under the UHC Settlement Agreement. With respect to those two categories of Alleged Unencumbered Assets, the Committee relies exclusively on Section 552(a) of the Bankruptcy Code. For the reasons set forth below, the Lien Challenge Motion is without merit as a matter of law and should be denied.[257]

310. But even if certain Alleged Unencumbered Assets are not subject to the *prepetition* liens of the First Lien Lenders (whether pursuant to Section 552(a) of the Bankruptcy Code or otherwise), that does not mean such assets (or their value) belong to unsecured creditors or that the Plan must increase recoveries to unsecured creditors as asserted by the Committee. *See* Lien Challenge Motion at ¶ 59 ("the Debtors have filed a proposed plan of reorganization which does not allocate to unsecured creditors the value of the Unencumbered Postpetition Revenue, the UHC Settlement Proceeds or the Additional Unencumbered Assets.").

[257] The Debtors reserve all rights with respect to the other categories of Alleged Unencumbered Assets.

311. Instead, those Alleged Unencumbered Assets (and their value) belong to the Debtors' estates and would be subject to *postpetition* DIP facility and adequate protection liens under the Final DIP Order.[258] And to the extent any unencumbered value remained after satisfaction in full of these postpetition liens and claims, such value would next be used to pay general administrative expenses of these Chapter 11 Cases, including all administrative expenses arising under Section 503(b) of the Bankruptcy Code and professional fees arising under Section 330 of the Bankruptcy Code. *See In re K & L Lakeland, Inc.*, 128 F.3d 203, 207 (4th Cir. 1997) ("[g]enerally, administrative expenses are paid from the unencumbered assets of a bankruptcy estate rather than from secured collateral"); *In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (stating that "as a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens. A secured creditor's interest in its collateral is a substantive property right created by non-bankruptcy law, which may not be substantially impaired when bankruptcy intervenes."); *In re Westwood Plaza Apartments, Ltd.*, 154 B.R. 916, 921 (Bankr. E.D. Tex. 1993) (same); *In re Matter of CD Elec. Co., Inc.*, 146 B.R. 786, 789 (Bankr. N.D. Ind. 1992) (same). This is further evidenced by the fact that the First Lien Lenders were granted a Section 506(c) surcharge waiver in the Final DIP Order, reinforcing that their collateral is a last resort (not the primary source) of funding administrative expenses. *See* Final DIP Order, ¶ 8.

312. As will be shown at the Confirmation Hearing, the value of the Alleged Unencumbered Assets is nowhere close to the aggregate amount of the $100 million DIP Facility, First Lien Adequate Protection Liens, and unpaid chapter 11 administrative expenses. The Debtors will show that the value of the Alleged Unencumbered Assets would be entirely exhausted to pay

[258] In addition, the Committee must succeed on its challenges to the Second Lien Notes in order to avoid the Second Lien Noteholders adequate protection liens and claims. For purposes of this Brief, however, the Debtors are treating the Second Lien Notes as unsecured claims not entitled to adequate protection liens. The Debtors reserve all rights in this regard.

for the general administration of these Chapter 11 Cases, leaving no recovery to General Unsecured Creditors.

313. Finally, even if any excess value of the Alleged Unencumbered Assets remained for General Unsecured Creditors, such excess value would need to exceed what the Plan already provides to General Unsecured Creditors to be a valid confirmation objection. And as will be shown on Exhibit A to the Jamal Declaration, the Plan provides a mid-point value to General Unsecured Creditors of $55 million (with a low-end of $32 million and high-end of $84 million). The Committee will not be able to show that the remaining value (if any) of the Alleged Unencumbered Assets—after being used to pay the $100 million DIP Facility, First Lien Adequate Protection Liens, and unpaid chapter 11 administrative expenses—will exceed this Plan value. For these reasons, the Lien Challenge Motion should be denied and should not prevent or otherwise delay confirmation of the Plan.

A. Postpetition Revenues Earned by the Debtors under Prepetition Contracts Are Proceeds of Prepetition Collateral Under Section 552(b)(1) of the Bankruptcy Code

314. Section 552(a) of the Bankruptcy Code states that "except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a). As a general matter, Section 552(a) of the Bankruptcy Code prevents the attachment of a prepetition floating lien to a debtor's postpetition assets. *Arkison v. Frontier Asset Mgmt., LLC (In re Skagit Pac. Corp.)*, 316 B.R. 330, 335 (B.A.P. 9th Cir. 2004) ("Section 552(a) provides the general rule that property acquired after the commencement of bankruptcy is not subject to prepetition liens."). Paragraph 9 of the Final DIP Order expressly incorporates this result. *See* Final DIP Order, ¶ 9. But as the plain language

of Section 552(a) of the Bankruptcy Code also makes clear, it is subject to (and limited by) Section 552(b)(1) of the Bankruptcy Code.

315. Section 552(b)(1) of the Bankruptcy Code provides that "if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law. . . ." 11 U.S.C. § 552(b)(1).

316. In this case, the prepetition liens and collateral of the First Lien Lenders includes, among other things, the Debtors' prepetition service contracts and all proceeds, products, offspring, or profits of such service contracts. *See* Exh. 9, Security Agreement, Art. 2.[259] The Committee does not even attempt to argue otherwise. Instead, the Committee argues that all revenues resulting from a debtor's postpetition services are earned postpetition and, therefore, can never be "proceeds" of prepetition collateral. *See* Lien Challenge Motion at ¶ 45 ("The payment structures in the Debtors' contracts prove that the Unencumbered Postpetition Revenues are earned on account of postpetition services and not prepetition assets.") & ¶ 49 ("These postpetition revenues are the quintessential product of the Debtors' postpetition efforts–not proceeds of prepetition collateral."). However, without these contracts, there would be no revenues coming into the Debtors' businesses.

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[259] These liens and collateral include the prepetition contracts between the Debtors and UHC, which is discussed more fully in Section X.C.2.B below.

317. These arguments are without merit. Specifically, courts consistently hold that postpetition payments, profits, and collections traceable to prepetition contracts and accounts receivable constitute "proceeds" of prepetition collateral subject to Section 552(b)(1) of the Bankruptcy Code, notwithstanding the postpetition performance by the debtor-in-possession. *See In re Sunberg*, 729 F.2d 561, 561-63 (8th Cir.1984) (holding that a properly perfected postpetition security interest in "crops, growing crops, livestock, farm products, equipment inventory, fixtures, contract rights, accounts and general intangibles" meant that the creditor retained a perfected lien in PIK proceeds arising from a prepetition contract, even though the PIK payment would occur postpetition.); *United Va. Bank v. Slab Fork Coal Co. (In re Slab Fork Coal Co.),* 784 F.2d 1188, 1190-91 (4th Cir.1986), cert. denied, 477 U.S. 905, 106 S.Ct. 3275, 91 L.Ed.2d 565 (1986) (holding that the cash proceeds generated both prepetition and postpetition under a prepetition contract were subject to a prepetition security interest, irrespective of 11 U.S.C. § 552.); *Carlson v. W.J. Menefee Constr. Co. (In re Grassridge Indus., Inc.)*, 78 B.R. 978, 981 (Bankr.W.D.Mo.1987) (holding that the bank's security interest in a prepetition construction contract continued in the postpetition contract payments to the debtor); *In re Patio & Porch Sys., Inc.,* 194 B.R. 569, 574 (Bankr. D. Md. 1996) ("The payments made under the contracts were proceeds of the accounts receivable for purposes of 11 U.S.C. § 552(b) . . . . Consequently, Creditor's perfected security interest in Debtor's accounts receivable did continue postpetition as to the proceeds of the accounts (i.e., the contract payments).").

318. The Committee relies upon cases that are inapposite because they involve different facts (and, therefore, different legal conclusions). For example, the Committee cites to cases dealing with: (a) future wages and individual employment contracts (*see Johnson v. RFF Family P'ship, LP (In re Johnson)* 554 B.R. 448, 465 (Bankr. S.D. Ohio 2016), *aff'd Johnson v. RFF*

Family P'ship, LP (In re Johnson), No. 16-8035, 2017 Bankr. LEXIS 1480 (B.A.P. 6th Cir., June 2, 2017)); and (b) hotel revenues which rest on a different legal analysis under Section 552(b)(2) of the Bankruptcy Code (*see In re Corpus Christi Hotel Partners, Ltd*., 133 B.R. 850 (Bankr. S.D. Tex. 1991); *see also U.S. Trust Nat'l Ass'n. v. Venice MP LLC*, 92 F. App'x. 948 (4th Cir. 2004)).

319. Further, even the cases cited by the Committee hold that postpetition cash is "proceeds" to the extent it is realized by disposing of (or collecting on) collateral that was encumbered prepetition, notwithstanding the postpetition performance by the debtor-in-possession. *See In re Cafeteria Operators, L.P*., 299 B.R. 400, 405, 409 (Bankr. N.D. Tex. 2003) (granting a security interest in the postpetition revenue of the debtor up to the value of the inventory used in generating such revenue as the "proceeds" of the prepetition lender's collateral).

320. The Committee's assertion that the Debtors had no prepetition right to payment under their prepetition contracts, but rather a "mere expectancy" conflates two very different bodies of law. *See* Lien Challenge Motion at ¶ 50. Specifically, the Committee relies on *In re Sebco*, but that case involved tortious interference with prospective business relations, not whether a debtor has a present, enforceable contractual right to payment that can be encumbered by a security agreement. *See Sebco Dev., Inc. v. Siegel & Reiner, LLP*, 82 Misc. 3d 1212, 14 (N.Y. Sup. Ct. Mar. 20, 2024) (explaining that "there having been no trespass or invasion of a substantial legal interest, there is no liability for interference with performance of a competitor's voidable contract absent employment of wrongful means," because in that tort setting "the party seeking to impose liability enjoys no legally enforceable right to performance; his interest is a mere expectancy—a hope of future contractual relations.").

321. Rather than apply the Committee's selective quote from a tortious interference case, the correct perspective is the broad interpretation of "proceeds" contained in the Bankruptcy Code.

See Corpus Christi Hotel Partners, 133 B.R. at 856 ("The term 'proceeds' is not limited to the technical definition of that term in the UCC, but covers any property into which property subject to the security interest is *converted.*"). Because "proceeds" includes any property into which encumbered collateral is converted, the postpetition payments received by the Debtors under their prepetition customer contracts (even if contingent on future performance) constitute proceeds of their prepetition contract rights and are, therefore, encumberable proceeds (not a mere expectancy).

B. Postpetition Payments Received by the Debtors under the UHC Settlement Agreement Are Proceeds of Prepetition Collateral under Section 552(b)(1) of the Bankruptcy Code

322. The Committee does not dispute that the prepetition liens and collateral of the First Lien Lenders includes the prepetition contracts between the Debtors and UHC (collectively, the "***UHC Prepetition Contracts***"). Instead, the Committee argues that the postpetition settlement agreement with UHC (the "***UHC Settlement Agreement***") resulted from the Debtors' postpetition efforts and, therefore, any payments thereunder are not "proceeds" of prepetition collateral. *See* Lien Challenge Motion at ¶ 25 ("The UHC Settlement reflects both postpetition obligations and value derived therefrom.").

323. These arguments are without merit for the same reasons as set forth above with respect to prepetition service contracts in general. *See supra* ¶ 320. But as to the UHC Settlement Agreement in particular, the Committee's arguments are even more misguided. Specifically, the UHC Settlement Agreement secures an immediate $25 million payment for ***prepetition*** services rendered by the Debtors ***from January through June 2025*** and increases contracted payments prospectively while winding down markets in phases. *See* UHC Settlement Motion ¶¶ 16–19 (emphasis added). The true-up payment is expressly tied to the Debtors' ***prepetition performance*** and accrued reconciliation rights under the UHC Prepetition Contracts. The phased wind-down and adjusted fees are realized through the Debtors' ***existing contract rights*** and their ***existing***

accounts and payment intangibles—categories that clearly fall within Section 552(b)(1) as proceeds "directly attributable to prepetition collateral, without addition of estate resources." *Far East Nat'l Bank v. U.S. Trustee (In re Premier Golf Props. LP)*, 477 B.R. 767, 776 (B.A.P. 9th Cir. 2012).

324. The Committee's reliance on *In re ResCap* is misplaced. In that case, the court simply found that the debtor's prepetition goodwill was worthless as of the petition date, the alleged secured lenders were not entitled to adequate protection related to goodwill, and any postpetition goodwill was not created by prepetition assets or their proceeds. *See Off. Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Cap., LLC),* 501 B.R. 549, 597, 612 (Bankr. S.D.N.Y. 2013); *see also Off. Comm. of Unsecured Creditors of Guardian Elder Care at Johnstown, LLC v. S&T Bank, N.A. (In re Guardian Elder Care at Johnstown, LLC)*, 666 B.R. 651, 656–57 (Bankr. W.D. Pa. 2025) (stating that "*ResCap* addressed the valuation of 'goodwill' in the context of secured claims. The Court in *ResCap* simply held that the creditor did not demonstrate diminution in collateral value because the alleged collateral was worthless as of the petition date.").

325. In this case, the UHC Prepetition Contracts were not worthless as of the Petition Date and the only postpetition "services" relating to the UHC Settlement Agreement was the documentation of the settlement agreement itself (and unfortunately the time spent litigating with the Committee over the approval of the UHC Settlement Agreement). Against this backdrop, it is clear that: (a) *ResCap* in inapplicable; (b) postpetition payments received by the Debtors under the UHC Settlement Agreement are proceeds of the Debtors' prepetition services; and (c) the prepetition liens of the First Lien Lenders attach to such postpetition payments as the proceeds of

their prepetition collateral in the UHC Prepetition Contracts pursuant to Section 552(b)(1) of the Bankruptcy Code.

C. The Plan Already Provides General Unsecured Creditors With More Value than the Alleged Unencumbered Assets

326. As detailed in Paragraphs 309 to 313 above, the Committee argues that the value of the Alleged Unencumbered Assets belongs to unsecured creditors and that the Plan must be modified to increase their recoveries to account for such value. *See* Lien Challenge Motion at ¶ 59. This argument is wrong as a matter of law because any Alleged Unencumbered Assets (and their value) belong to the Debtors' estates and would be subject to *postpetition* DIP facility and adequate protection liens under the Final DIP Order.[260] In fact, even the cases cited by the Committee in the Lien Challenge Motion regarding Section 552(a) of the Bankruptcy Code acknowledge that the secured lenders were entitled to postpetition adequate protection liens on new postpetition assets. *See In re Cafeteria Operators, L.P.*, 299 B.R. at 410 ("As adequate protection, Bank Group is granted replacement liens on inventory acquired post-petition and, on a going forward basis, in any other assets of Debtor, as needed to restore and maintain the Bank Group's secured position in inventory as of the Petition Date."); *In re S-Tek 1, LLC*, No.20-12241-j11, 2023 Bankr. LEXIS 673, at *25 (Bankr. D.N.M. Mar. 15, 2023) ("A court can grant a creditor a lien against after-acquired property, which commonly is done by granting a creditor a security interest in post-petition after-acquired accounts receivable as adequate protection for the debtor's use of the proceeds of accounts receivable in which the creditor had a security interest as of the petition date . . . "). *In re Cantu*, No. 08-70260, 2011 WL 160563, at *2 (Bankr. S.D. Tex. Jan. 18, 2011) ("[The] Bank could have sought an order continuing its lien on after-acquired receivables

[260] For purposes of this Brief, the Debtors are treating the Second Lien Notes as unsecured claims not entitled to adequate protection liens. The Debtors reserve all rights in this regard.

and such order would trump §552."), *aff'd sub nom. Cantu v. Int'l Bank of Commerce*, No. CIV.A. M-11-28, 2011 WL 10620314 (S.D. Tex. Aug. 5, 2011), *aff'd sub nom. In re Cantu*, 464 F. App'x 385 (5th Cir. 2012).[261]

327. And to the extent any unencumbered value remained after satisfaction in full of these postpetition liens and claims, such value would next be used to pay general administrative expenses of these Chapter 11 Cases, including all administrative expenses and professional fees. *See In re K & L Lakeland, Inc.*, 128 F.3d 203, 207 (4th Cir. 1997) ("[g]enerally, administrative expenses are paid from the unencumbered assets of a bankruptcy estate rather than from secured collateral"); *In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (stating that "[A]s a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens. A secured creditor's interest in its collateral is a substantive property right created by non-bankruptcy law, which may not be substantially impaired when bankruptcy intervenes."); *In re Westwood Plaza Apartments, Ltd.*, 154 B.R. 916, 921 (Bankr. E.D. Tex. 1993) (same); *In re Matter of CD Elec. Co., Inc.*, 146 B.R. 786, 789 (Bankr. N.D. Ind. 1992) (same).

328. As will be shown at the Confirmation Hearing, the value of the Alleged Unencumbered Assets is nowhere close to clearing these aggregate amounts. Instead, the Debtors will show that the value of the Alleged Unencumbered Assets would be entirely exhausted to pay for the general administration of these Chapter 11 Cases, leaving no recovery to General Unsecured Creditors.

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[261] The Committee's further assertion that the Prepetition Secured Parties' secured claim would be limited to the liquidation value of the Debtors' fixed assets misstates the law and its own cited authority. *See* Lien Challenge Motion at ¶5; *ResCap*, 501 B.R. at 591-95 (discussing market driven approach as opposed to foreclosure value); *see also Assocs. Com. Corp. v. Rash,* 520 U.S. 953, 963, (1997) ("The debtor in this case elected to use the collateral to generate an income stream. That actual use, rather than a foreclosure sale that will not take place, is the proper guide under a prescription hinged to the property's 'disposition or use.'").

329. But finally, even if any excess value of the Alleged Unencumbered Assets remained for General Unsecured Creditors, such excess value would not exceed what the Plan already provides to them. As will be shown on Exhibit A to the Jamal Declaration, the Plan provides a mid-point value to General Unsecured Creditors of $55 million (with a low-end of $32 million and high-end of $84 million). The Committee will not be able to show that the remaining value (if any) of the Alleged Unencumbered Assets will exceed this $55 million mid-point Plan value (or even the $32 million low-end Plan value) to General Unsecured Creditors.

330. For these reasons, the Lien Challenge Motion should be denied and should not prevent or otherwise delay confirmation of the Plan.

THE DEBTORS SHOULD MAINTAIN AUTHORITY TO SETTLE THE ALLEGED CLAIMS

331. Even if the Court were to grant the Committee standing to pursue any of the claims in the Committee Motions—and it should not—the Court should reject the Committee's extraordinary request for sole authority to settle any of the Debtors' claims, and instead recognize the Debtors' clear statutory authority to settle causes of action.

332. The Debtors are vested with exclusive power to pursue and settle claims on behalf of their estates. *See, e.g., Torch Liquidating Tr. ex rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 386-87 (5th Cir. 2009) ("A chapter 11 plan of reorganization or liquidation then settles the estate's causes of action or retains those causes of action for enforcement by the debtor, the trustee, or a representative of the estate appointed for the purpose of enforcing the retained claims."); *Rossco Holdings, Inc. v. McConnell*, 613 F. App'x 302, 306 (5th Cir. 2015) (per curiam) ("Before confirmation of a [c]hapter 11 plan, the debtor-in-possession generally has the power to pursue these causes of action on behalf of the estate as if it were a trustee."). "A grant of derivative standing does not strip a debtor of ownership of the Claims and, accordingly, the Debtors continue

to have the right, subject to Court approval, to settle the Claims." *In re Centaur*, 2010 WL 4624910, at *7; *In re Adelphia Commc'ns Corp.*, 371 B.R. 660, 670-71 (S.D.N.Y. 2007) ("[A] debtor-in-possession may assert control over an adversary proceeding notwithstanding a committee's derivative standing, where that standing was granted for reasons other than debtor misconduct."). The debtor's exclusive power to pursue and settle claims on behalf of their estates exists even when a Court grants an unsecured creditors committee standing to pursue claims based on a debtors' unjustifiable refusal to pursue those claims. *See, e.g.*, *In re Centaur*, 2010 WL 4624910, at *7 (granting Committee's standing motion in part to authorize Committee to prosecute certain claims, but denying standing motion to the extent it sought exclusive authority to settle the claims).

333. By requesting exclusive authority to settle estate claims, the Committee seeks to override important provisions of the Bankruptcy Code and the Bankruptcy Rules. *First*, Bankruptcy Rule 9019 permits only a debtor or trustee to propose a settlement or compromise. Bankruptcy Rule 9019(a) provides, in pertinent part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a) (emphasis added). And the Supreme Court has held that authority granted by the Bankruptcy Code solely to a trustee is limited, by its terms, to a trustee or a debtor in possession. *See Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.*, 530 U.S. 1, 6-7 (2000) (holding that individual creditors cannot employ the power of "the trustee" to surcharge a secured creditor under section 506(c) of the Bankruptcy Code). Accordingly, the trustee or debtor in possession has the express—and exclusive—right to settle claims in a chapter 11 case.

334. *Second*, granting the Committee authority to settle claims would also undermine many aspects of the Debtors' restructuring, including their exclusive right to propose and solicit

votes for the Plan, which already addresses each of the claims put forward by the Committee. *See Smart World Techs.*, 423 F.3d at 175 (finding that "the debtor's duty to wisely manage the estate's legal claims is implicit in the debtor's role as the estate's only fiduciary"). This result is fundamentally inconsistent with the Bankruptcy Code and should be denied.

335. The Committee has wholly failed to satisfy the standards for derivative standing by all measures. Granting the relief requested in the Committee Motions will threaten any prospects of swift emergence from chapter 11 and pose a grave risk to the Debtors' business. The bankruptcy scheme has not broken down here. The Debtors, have and continue to, work towards a value maximizing restructuring for the benefit of all stakeholders.

336. As described above, this has resulted in a Plan that has been accepted by the vast majority of voting creditors, including General Unsecured Creditors. As described in the beginning of this Brief, the Debtors' creditors have spoken and overwhelmingly support confirmation of the Plan. The Committee ignores the wishes of its own constituents. Permitting the Committee to derail the Plan and the value maximizing restructuring it provides, solely for the benefit of a subset of unsecured creditors, in pursuit of meritless and valueless claims is a foolish endeavor. Accordingly, the Committee Motions should be denied.

CONCLUSION

337. For all of the reasons set forth herein, in the confirmation declarations, and the Vote Certification, and as will be further shown at the Confirmation Hearing, the Debtors respectfully request that the Court confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the Proposed Confirmation Order, denying the Committee's request for standing, and granting such other and further relief as is just and proper.

Dated: December 5, 2025
Houston, Texas

Respectfully submitted,

/s/ Timothy A. ("Tad") Davidson II

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CERTIFICATE OF SERVICE

I certify that on December 5, 2025, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices.

/s/ Timothy A. ("Tad") Davidson II
Timothy A. ("Tad") Davidson II

<u>Exhibit A</u>

<u>Summary Of Objections And Comments</u>

Objecting Party	Objection/Comment	Status
Formal Objections and Comments		
Chubb (ACE American Insurance Company and Federal Insurance Company) [Docket No. 819]	Objection relates to the treatment of insurance programs and opt-out mechanism in the Plan.	**<u>RESOLVED</u>** This objection is resolved by the inclusion of agreed language in ¶ 25 of the Confirmation Order.
Endurance American Specialty Insurance Company [Docket No. 808]	Objection relates to treatment of insurance programs.	**<u>EXPECT TO RESOLVE</u>** The Debtors expect to resolve this objection through agreeing language that can be included in a revised Confirmation Order.
Humana Inc. [Docket No. 818]	Objects to the any impairment treatment of setoff rights under existing contracts with Debtors.	**<u>EXPECT TO RESOLVE</u>** The Debtors expect to resolve this objection through agreeing language that can be included in a revised Confirmation Order.
MaryBeth Duran, as Personal Representative of the Estate of Richard Chavez [Docket No. 812]	Lack of a mechanism in the Plan to adjudicate personal-injury/wrongful-death claims outside bankruptcy and imposes insurance terms that condition and cap recoveries based on insurer and Debtor discretion (including Self-Insured Retention limits).	**<u>EXPECT TO RESOLVE</u>** The Debtors expect to resolve this objection either through a stipulation or by agreeing language that can be included in a revised Confirmation Order.
United States Trustee [Docket No. 810]	Objection to (a) Plan opt-out mechanism, (b) releases, (c) permanent injunction, gatekeeper, and exculpation provisions, (d) failure to preserve governmental and regulatory claims, and (e) waiver of 14-day stay under Bankruptcy Rule 3020(e).	**<u>PARTIALLY RESOLVED</u>** This objection is partially resolved by the inclusion of agreed language in ¶ 29 of the Confirmation Order.

Objecting Party	Objection/Comment	Status
		The remainder of the objection is addressed in Confirmation Brief, ¶¶ 209-223.
Unsecured Creditors Committee [Docket No. 820]	Various issues raised.	*See* Confirmation Brief, ¶¶ 78-108.
Informal Objections and Comments		
ASIC/Applied Surety	Requested the addition of certain language in the Confirmation Order.	**RESOLVED** This objection is resolved by the inclusion of agreed language in ¶ 21 of the Confirmation Order.
Chubb Surety	Requested the addition of certain language in the Confirmation Order.	**RESOLVED** This objection is resolved by the inclusion of agreed language in ¶¶ 22-24 of the Confirmation Order.
Missouri Department of Revenue	Requested the addition of certain language in the Confirmation Order.	**RESOLVED** This objection is resolved by the inclusion of agreed language in ¶ 26 of the Confirmation Order.
Texas Comptroller	Requested the addition of certain language in the Confirmation Order.	**RESOLVED** This objection is resolved by the inclusion of agreed language in ¶ 27 of the Confirmation Order.
Texas Taxing Authorities	Requested the addition of certain language in the Confirmation Order.	**RESOLVED** This objection is resolved by the inclusion of agreed language in ¶ 28 of the Confirmation Order.