Docket #0162 Date Filed: 06/27/2025

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MOLECULAR TEMPLATES, INC., *et al.*,	Case No. 25-10739 (BLS)
Debtors.[1]	(Jointly Administered)
	Re: D.I. 159

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE REVISED COMBINED DISCLOSURE STATEMENT AND JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR MOLECULAR TEMPLATES, INC. AND ITS AFFILIATED DEBTOR

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June 27, 2025

[1] The Debtors in these chapter 11 cases, along with the Debtors' federal tax identification numbers, are: Molecular Templates, Inc. (9596) and Molecular Templates OpCo, Inc. (6035). The Debtors' mailing address is: 124 Washington Street, Ste. 101 Foxboro, MA 02035.

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INTRODUCTION

1. The debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors") submit this (a) memorandum of law (this "Memorandum") in support of their request for entry of an order, substantially in the form filed concurrently herewith (as may be amended, modified and/or supplemented, the "Confirmation Order"), (a) granting final approval of the adequacy of disclosure under section 1125 of the Bankruptcy Code, and (b) confirming and approving the *Revised Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization for Molecular Templates, Inc. and its Affiliated Debtor* [D.I. 159-1] (as may be amended, modified and/or supplemented, the "Combined Disclosure Statement and Plan" or the "Plan").[2]

2. In further support of the Plan, the Debtors have filed concurrently herewith the: (a) *Declaration of Craig Jalbert in Support of Confirmation of the Revised Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization for Molecular Templates, Inc. and its Affiliated Debtor* [D.I. 161] (the "Jalbert Declaration"); (b) the *Declaration of Adam J. Gorman of Kurtzman Carson Consultants, LLC dba Verita Global Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Revised Combined Disclosure Statement and Chapter 11 Plan of Reorganization for Molecular Templates, Inc. and its Affiliated Debtor* [D.I. 160] (the "Voting Declaration"); and (c) the certificate of service filed by Kurtzman Carson Consultants LLC dba Verita Global (the "Voting Agent") in connection with the solicitation of the Combined Disclosure Statement and Plan [D.I. 146, 149].

[2] Capitalized terms used but not otherwise defined shall have the meanings ascribed to such terms in the Plan.

PRELIMINARY STATEMENT

3. The Debtors commenced these Chapter 11 Cases less than two and a half months ago with the goal of preserving their innovative technology platform and therapeutic candidates for the treatment of various diseases. This strategy was the foundation of these proceedings and critical to maximizing the value of their assets. Due to the coordinated efforts of the Debtors and their professionals, these Chapter 11 Cases have achieved this goal by implementing the comprehensive restructuring support agreement term sheet (the "RSA Term Sheet") with K2 HealthVentures LLC ("K2"). As part of the chapter 11 plan process, under the RSA Term Sheet, the Debtors will restructure their existing debt and effectuate a debt-for-equity transaction with K2, who agreed to fund these Chapter 11 Cases. The Plan before the Court represents the culmination of these efforts, maximizes of the value of the Debtors' assets, and results in meaningful recoveries to creditors.

4. As set forth in the Voting Declaration and as detailed below, the Classes entitled to vote on the Plan (Class 3 Prepetition Secured Claims and Class 4 General Unsecured Claims, the "Voting Classes") overwhelmingly voted in favor of the Plan with 100 percent of Holders of Class 3 Prepetition Secured Claims and 100 percent of Holders of Class 4 General Unsecured Claims voting in favor of the Plan.

5. The Plan is the best available option for maximizing recoveries to the Debtors' creditors. If confirmed, the Plan will provide (a) for the reorganization of the Debtors, (b) funding to pay all amounts required under the Plan, including payment in full of all Allowed Administrative Claims, Allowed Tax Claims and Allowed Other Priority Claims, and (c) for the establishment of a Liquidating Trust to oversee Distributions required to be made under the Plan and payment of expenses and costs of administering the Liquidating Trust.

6. As set forth in further detail below, the Plan satisfies the requirements of the Bankruptcy Code, the Bankruptcy Rules, and all other applicable law, and should therefore be confirmed. Accordingly, the Debtors will seek entry of the Confirmation Order at the hearing on **July 1, 2025, at 10:00 a.m. (ET)** and move to consummate the Plan shortly thereafter.

BACKGROUND

I. GENERAL BACKGROUND.

7. On April 20, 2025 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. The factual background relating to the Debtors' commencement of these Chapter 11 Cases is set forth in the *Declaration of Craig Jalbert in Support of Debtors' Chapter 11 Petitions and First Day Motions* [D.I. 15], which is incorporated herein by reference.

II. COMBINED DISCLOSURE STATEMENT AND PLAN.

9. The Debtors filed their initial Combined Disclosure Statement and Plan [D.I. 25] on April 20, 2025. On April 23, 2025, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Approving the Combined Disclosure Statement and Chapter 11 Plan of Reorganization of Molecular Templates, Inc. and Its Affiliate Debtor on an Interim Basis; (II) Establishing Solicitation and Tabulation Procedures; (III) Approving the Form of Ballots and Solicitation Materials; (IV) Establishing the Voting Record Date; (V) Fixing the Date, Time, and Place for the Confirmation Hearing and the Deadline for Filing Objections Thereto; and (VI) Granting Related Relief* [D.I. 51] (the "Solicitation Procedures Motion"). Additionally, on May 18, 2025, the Debtors filed the *Reply to U.S. Trustee's Objection* to the Solicitation Procedures Motion [D.I. 93] (the "Solicitation Procedures Reply"), which is incorporated herein

by reference. Then, on May 27, 2025, the Court entered an order approving the Solicitation Procedures Motion [D.I. 122] (the "Solicitation Procedures Order") and the Debtors filed the *Revised Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization of Molecular Templates, Inc. and Its Affiliate Debtor* [D.I. 124]. The Debtors commenced solicitation of the Plan on May 30, 2025.

10. On June 17, 2025, the Debtors filed their plan supplement [D.I. 147 and 150] (including all exhibits thereto and as amended, modified, and/or supplemented from time to time, the "Plan Supplement"), which included (i) the Liquidating Trust Agreement, (ii) the Assumption Schedule, (iii) the identity of the Liquidating Trustee, (iv) the amended and restated certificates of incorporation for the respective Reorganized Debtors, (v) the amended and restated bylaws for Reorganized Debtor Molecular Templates, Inc., and (vi) the identity of the Reorganized Debtors' sole member and officer appointment.

11. The overall purpose of the Plan is to provide for the reorganization of the Debtors in a manner designed to maximize recovery to stakeholders by, among other things, restructuring the Debtors' existing debt to effectuate a debt-for-equity transaction with K2, and funding the Liquidating Trust to pay all Allowed Claims as necessary to confirm the Plan and wind-down the Chapter 11 Cases.

12. Specifically, the Combined Disclosure Statement and Plan provides for:[3]

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

b. Holders of Allowed General Unsecured Claims to receive a Pro Rata Share of Cash to be distributed from the

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

Liquidating Trust after payment of all Liquidating Trust Expenses and all senior Allowed Claims;

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

d. Distributions under the Plan to be funded from the Retained Assets, including Cash on hand.

III. PLAN SOLICITATION AND VOTING RESULTS.

13. On May 30, 2025, the Debtors began soliciting votes on the Plan by distributing the Combined Disclosure Statement and Plan and related materials to Holders of Class 3 Claims and Holders of Class 4 Claims, who were entitled to vote under the Plan, as required by the Solicitation Procedures Order. Specifically, the Debtors transmitted: (a) the *Notice of (I) Interim Approval of Combined Disclosure Statement and Plan; and (II) the Hearing to Consider (A) Final Approval of the Combined Disclosure Statement and Plan as Containing Adequate Information and (B) Confirmation of the Combined Disclosure Statement and Plan* [D.I. 127] (the "Confirmation Hearing Notice"); (b) the Combined Disclosure Statement and Plan, with all exhibits; (c) a copy of the Solicitation Procedures Order; (d) form of ballots (the "Ballots"); and (e) a pre-paid, pre-addressed return envelope to all known Holders in the Voting Classes.

14. In addition, the Debtors caused to be served the (i) Confirmation Hearing Notice on the parties listed in the creditor matrix and all other parties entitled to receive such notice pursuant to the Solicitation Procedures Order; (ii) Notice of Non-Voting Status and Confirmation Hearing on Holders of Claims or Interests in Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), Class 5 (Intercompany Claims), and Class 6 (Existing Equity Interests), (together, the "Non-Voting Classes"); and (iii) the Opt-Out Election Form on Classes 1 and 2.

15. The deadline to object to the Plan was June 27, 2025, at 4:00 p.m. (ET). The only objection the Debtors received to confirmation of the Plan was filed by the U.S. Trustee

on June 26, 2025 [D.I. 156]. The deadline to vote on the Plan was June 24, 2025. As stated *supra*, the Confirmation Hearing is scheduled for July 1, 2025.

16. The Voting Declaration sets forth the dollar amounts of Claims and the number of Holders of Class 3 Claims and Class 4 Claims voting in favor of the Plan, with respect to the votes actually cast, which is summarized in the chart below:

Class	Class Description	Total Dollars Voted	Dollars Accepted	Dollars Rejected	% of Dollars Accepted	% of Dollars Rejected
3	Prepetition Secured Claims	$25,666,747.07	$25,666,747.07	$0.00	100%	0%
4	General Unsecured Claims	$1,771,177.26	$1,771,177.26	$0.00	100%	0%

Class	Class Description	Total Number Voted	Number Accepted	Number Rejected	% of Voters Accepted	% of Voters Rejected
3	Prepetition Secured Claims	1[4]	1	0	100%	0%
4	General Unsecured Claims	6	6	0	100%	0%

17. Accordingly, the Voting Classes have unanimously voted in favor of confirmation of the Plan, and it should be confirmed.

ARGUMENT

I. THE COURT HAS JURISDICTION AND NOTICE WAS PROPER.

A. Jurisdiction and Venue.

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

[4] K2 submitted two separate Ballots, one for Molecular Templates, Inc. and the second for Molecular Templates OpCo., Inc. Both of K2's Ballots voted to accept the Plan, even though K2 submitted two Ballots they are summarized as one vote because under Section 2.1 of the Plan, for purposes of voting and distribution under the Plan, the Estates shall be deemed merged and consolidated, and treated as a single Estate

B. Adequate Notice of Confirmation Hearing.

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

II. FINAL APPROVAL OF THE DISCLOSURE STATEMENT IS WARRANTED AND THE DEBTORS COMPLIED WITH THE SOLICITATION PROCEDURES ORDER.

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

20. The primary purpose of a disclosure statement is to provide material information, or "adequate information," that allows parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[5] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[6] Courts within the Third Circuit and elsewhere acknowledge that determining what constitutes "adequate

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

[6] 11 U.S.C. § 1125(a)(1) ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records…."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case."); *First Am. Bank of N.Y. v. Century Glove, Inc.*, 81 B.R. 274, 279 (D. Del. 1988) (noting that adequacy of disclosure for a particular debtor will be determined based on how much information is available from outside sources), *aff'd in part*, 860 F.2d 94 (1988).

information" for the purpose of satisfying section 1125 of the Bankruptcy Code resides within the broad discretion of the court.[7]

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

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

(b) a description of the available assets and the value the present condition of a debtor while in chapter 11;

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

(d) the source of information stated in the disclosure statement;

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

(f) the future management of a debtor;

(g) the chapter 11 plan or a summary thereof;

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

(i) the information relevant to the risks posed to claimants under the plan;

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

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

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

(l) the tax attributes of a debtor.[8]

22. The Combined Disclosure Statement and Plan provides "adequate information" to allow Holders of Claims in the Voting Classes to make an informed decision about whether to vote to accept or reject the Plan. The Combined Disclosure Statement and Plan contains a number of categories of information that courts consider "adequate information," among other things, descriptions and summaries of: (i) the classification and treatment of claims and interests under the Plan, including who is entitled to vote and how to vote on the Plan; (ii) the Debtors' corporate history and corporate structure, business operations, and prepetition capital structure and indebtedness; (iii) events leading to these Chapter 11 Cases; (iv) certain important effects of confirmation of the Plan; (v) the releases and exculpations contemplated by the Plan; (vi) certain financial information about the Debtors, including a liquidation analyses; (vii) the statutory requirements for confirming the Plan; and (viii) certain risk factors Holders of Claims should consider before voting to accept or reject the Plan and information regarding alternatives to confirmation of the Plan.

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

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

B. The Debtors Complied with the Solicitation Procedures Order.

24. As set forth above, on May 27, 2025, the Court entered the Solicitation Procedures Order and approved, among other things, the Confirmation Hearing Notice, voting record date, voting deadline, solicitation procedures, form of ballots, the opt-out election form (the "Opt-Out Election Form"), and the voting tabulation procedures.[9]

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

25. The Debtors satisfied the notice requirements set forth in the Solicitation Procedures Order, Bankruptcy Rule 3017, and Local Rule 3017-1. On May 30, 2025, the Debtors' Voting Agent mailed the solicitation materials (by first class US mail and electronically), which included the Combined Disclosure Statement and Plan, Confirmation Hearing Notice, Solicitation Procedures Order, Ballots, Notice of Non-Voting Status and the Opt-Out Election Form, as applicable.[10] Further, the Confirmation Hearing Notice included instructions on how to obtain the Combined Disclosure Statement and Plan without a fee through the Debtors' restructuring website, veritaglobal.net/MolecularTemplates. In addition, no party complained about the lack of service.

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

26. The Ballots complied with the Bankruptcy Rules and were approved by the Court pursuant to the Solicitation Procedures Order.[11] No party has objected to the sufficiency of

[9] *See* Solicitation Procedures Order ⁋⁋ 4-15.

[10] *See* Certificate of Service [D.I. 146].

[11] *See* Solicitation Procedures Order ¶ 6.

the Ballots. Based on the foregoing, the Debtors submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(c).

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

27. The Debtors' solicitation period complied with the Solicitation Procedures Order and Bankruptcy Rule 3018(a). *First*, as demonstrated above, the Combined Disclosure Statement and Plan was transmitted to all Holders of Claims entitled to vote on the Plan. *Second*, the solicitation period complied with the Solicitation Procedures Order[12] and was adequate under the particular facts and circumstances of these cases. Accordingly, the Debtors submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(a).

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

28. The Debtors request that the Court find that the Debtors' tabulation of votes complied with the Solicitation Procedures Order. The Voting Agent reviewed all Ballots received in accordance with the procedures described in the Solicitation Procedures Order.[13] Because the Voting Agent complied with the solicitation procedures, the Debtors respectfully submit that the Court should approve the Debtors' tabulation of votes confirming that Class 3 and Class 4, the only Classes entitled to vote on the Plan, received the requisite majorities in amount and number of Claims voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code.

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[12] *See generally* Voting Declaration.

[13] *See id.*

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

29. Section 1125(e) of the Bankruptcy Code provides that "a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan.

30. As demonstrated by the Debtors' compliance with the Solicitation Procedures Order, the Debtors took appropriate actions in connection with the solicitation of the Plan in compliance with section 1125 of the Bankruptcy Code. Therefore, the Debtors respectfully request that the Court grant the parties the protections provided under section 1125(e) of the Bankruptcy Code.

III. THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE AND SHOULD BE CONFIRMED.

31. To confirm the Plan, the Court must find that the provisions of section 1129 of the Bankruptcy Code have been satisfied by a preponderance of the evidence.[14] The Debtors submit that based on the record of these Chapter 11 Cases, the Jalbert Declaration, the Voting Declaration, and the Debtors' arguments set forth herein, the applicable burden is clearly satisfied and the Plan complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of

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

sections 1122, 1123, and 1129 of the Bankruptcy Code. Each of these requirements is addressed below.

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

32. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan.[15] Consequently, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the Bankruptcy Code. As explained below, the Plan complies with sections 1122 and 1123 in all respects.

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

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

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.[16]

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

[16] 11 U.S.C. § 1122(a).

34. The Third Circuit "permits the grouping of similar claims in different classes" as long as those classifications are reasonable.[17] The classifications, however, cannot be "arbitrarily designed" to secure the approval of an impaired class when "the overwhelming sentiment of the impaired creditors [is] that the proposed reorganization of the debtor would not serve any legitimate purpose."[18] Accordingly, the Third Circuit has held that the only requirement for classification is that it be "reasonable."[19] Separate classes of similar claims are reasonable when each class represents "a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed."[20] Courts have recognized that this gives both the debtor and the bankruptcy court considerable discretion in determining whether similar claims may be separately classified.[21] Furthermore, if it is evident based on the voting results that the debtor would have an impaired accepting class regardless of the chosen classification scheme, then any challenge to the classification scheme is moot because the plan would have been accepted even if the classes were constituted differently.

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

[18] *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (holding that, as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *In re Mallinckrodt PLC*, 639 B.R. 837, 858 (Bankr. D. Del. 2022) (permitting the separate classification of unsecured noteholders where the two groups had divergent debt structuring rights); *Jersey City Med. Ctr.*, 817 F.2d at 1061 (approving classification of general unsecured creditors into different classes: doctors' indemnification claims, medical malpractice claims, employee benefit claims and trade claims); *In re ECE Winddown LLC*, No. 22-10320 (JTD) (Dec. 21, 2022) [D.I. 520] (approving plan with separate classification of general unsecured claims); *In re Masten Space Sys., Inc.*, No. 22-10657 (BLS) (Nov. 9, 2022) [D.I.. 226] (same); *In re Insys Therapeutics, Inc., et al.*, No. 19-11292 (KG) (Bankr. D. Del. Dec. 4, 2019) [D.I. No. 1115] (same).

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

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

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

35. Here, the Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Interests into separate classes, with Claims and Interests in each class differing from the Claims and Interests in each other class in a legal or factual way or based on other relevant criteria. Specifically, the Plan provides for the separate classification of Claims and Interests into the following classes:

(a) Class 1: Other Secured Claims;

(b) Class 2: Other Priority Claims;

(c) Class 3: Prepetition Secured Claims;

(d) Class 4: General Unsecured Claims;

(e) Class 5: Intercompany Claims; and

(f) Class 6: Existing Equity Interests.

36. The remaining Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of the particular claims or interests into the classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests. Namely, the Plan separately classifies the Claims because each Holder of such Claims or Interests may hold (or may have held) rights in the Debtors' estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification.

37. Accordingly, the Claims or Interests assigned to each particular Class under the Plan are substantially similar to the other Claims or Interests in each such Class and the distinctions among Classes are based on valid business, factual, and legal distinctions. The Debtors submit that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code.

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

38. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. Here, the Plan satisfies the seven mandatory requirements of sections 1123(a)(1) through (7).

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

39. Section 1123(a)(1) of the Bankruptcy Code requires that a chapter 11 plan designate classes of claims and equity interests, subject to section 1122 of the Bankruptcy Code. As discussed *supra*, the Plan designates six Classes of Claims and Interests, not including Claims of the kinds specified in sections 507(a)(2), (a)(3) and (a)(8) of the Bankruptcy Code.[22] Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

b. Classes That are Not Impaired (§ 1123(a)(2)).

40. Section 1123(a)(2) of the Bankruptcy Code requires that a chapter 11 plan specify which classes of claims or equity interests are unimpaired under the plan. The Plan meets this requirement by setting forth the treatment of each Class in Article VII that is Unimpaired.

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

41. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan."[23] The Plan meets this requirement by setting forth the treatment of each Class in Article VII that is Impaired.

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[22] Plan, Art. VII.

[23] 11 U.S.C. § 1123(a)(3).

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

42. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[24] The Plan meets this requirement because Holders of Allowed Claims will receive the same rights and treatment as other Holders of Allowed Claims within such Holders' respective class, except to the extent otherwise agreed to by the Debtors and any such Holder.

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

43. Section 1123(a)(5) of the Bankruptcy Code requires a plan provide "adequate means" for its implementation.[25] Article IX of the Plan sets forth the means for implementation of the Plan in accordance with section 1123(a)(5), which the Debtors submit are adequate. The implementation mechanisms in the Plan include, among other things:

a) effectuating the Debt-for-Equity Transaction, whereby all existing Interests in the Debtors shall be cancelled and discharged, and the Debtors shall issue new equity interests in Molecular Templates, Inc. (the "New MTEM Common Equity") to K2 in exchange for $15 million of the Prepetition Secured Claims; *provided, however*, that for the avoidance of doubt, this cancellation shall not apply to the equity interest of Molecular Templates, Inc. in its subsidiary and affiliated debtor Molecular Templates OpCo, Inc.;

b) establishing a Liquidating Trust to govern the wind-down of the estates and Retained Assets following the Effective Date; and

c) appointment of the Liquidating Trustee to administer the liquidation of the Retained Assets and Distribution of

[24] *Id.* § 1123(a)(4).

[25] *Id.* § 1123(a)(5).

recoveries to Holders of Allowed Claims in accordance with the Plan.

44. Further, the Debtors will have sufficient Cash to make all payments required upon the Effective Date pursuant to the terms of the Plan. Thus, the Debtors believe that the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

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

45. Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of non-voting equity securities and requires amendments to a debtor's corporate governance documents to so provide. The Plan is a plan of reorganization pursuant to which the Retained Assets will be transferred to the Liquidating Trust, as set forth in Section 9.3 of the Plan. Further, on the Effective Date, all existing Interests in the Debtors shall be cancelled and discharged, and the Debtors shall issue the New MTEM Common Equity to K2 to effectuate the Debt-for-Equity Transaction; *provided, however*, that for the avoidance of doubt, this cancellation shall not apply to the equity interest of Molecular Templates, Inc. in its subsidiary and affiliated debtor Molecular Templates OpCo, Inc. The New MTEM Common Equity being issued does not consist of non-voting equity securities. As such, the Plan does not provide for the issuance of non-voting equity securities, and the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

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

46. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any director, officer or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy."[26] Pursuant to Section 9.11 of the Plan, on the Effective Date, each of the Debtors'

[26] *Id.* § 1123(a)(7).

directors and officers shall be discharged from their duties and terminated automatically without the need for any corporate action or approval and without the need for any corporate filings, and, unless subject to a separate agreement with the Liquidating Trustee, shall have no continuing obligations to the Debtors following the occurrence of the Effective Date. Moreover, pursuant to Section 9.6(a) of the Plan and the Liquidating Trust Agreement, on the Effective Date, the Liquidating Trustee shall be appointed. The Debtors disclosed the identity of the Liquidating Trustee as part of the Plan Supplement, which is consistent with the interest of creditors and with public policy. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

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

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

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

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

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

(d) in accordance with section 1123(b)(3)(B) of the Bankruptcy Code, Sections 9.5(c) and (d) of the Plan provide that, among other things, except with respect to the Released Parties or any other beneficiary of the releases, injunctions, and exculpations contained in Article X of the Plan, the Liquidating Trustee shall have, retain, reserve and be entitled

to assert all Avoidance Actions that the Debtors had immediately prior to the Effective Date;

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

(f) in accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with applicable provisions of the Bankruptcy Code.

48. Under section 1123(b)(2) of the Bankruptcy Code, "a plan may, subject to section 365, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected."[27] Section 365(a) of the Bankruptcy Code provides that a debtor, subject to the court's approval, may assume or reject any executory contract or unexpired lease. Bankruptcy courts generally approve a debtor's decision to assume, assume and assign, or reject executory contracts or unexpired leases where such decision is made in the exercise of such debtor's sound business judgment and benefits its estate.[28] The business judgment standard requires that the court approve the debtor's business decision unless that judgment is the product of bad faith, whim or caprice.[29]

49. Section 11.1 of the Plan provides that each Executory Contract and Unexpired Lease not previously rejected, assumed, or assumed and assigned (including any Executory Contract or Unexpired Lease assumed and assigned in connection with the Sale) shall be deemed automatically rejected pursuant to sections 365 and 1123 of the Bankruptcy Code,

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[27] *Id.* § 1123(b)(2).

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

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

unless such Executory Contract or Unexpired Lease: (i) as of the Effective Date, is subject to a pending motion to assume such Unexpired Lease or Executory Contract; (ii) is a D&O Policy or an insurance policy; or (iii) is identified for assumption on the Assumption Schedule included in the Plan Supplement. The Assumption Schedule was filed and served as part of the Plan Supplement [D.I. 147]. Previously, the Debtors purchased a prepaid Side A tail policy, Primary D&O Liability (Side A) Policy with National Union Fire Insurance Company of Pittsburgh (PA01-426-31-75) (the "D&O Tail Policy"), which will become effective as of the Effective Date. Upon the Effective Date, the D&O Tail Policy term will begin and continue until its end. With respect to all other insurance policies, they have either expired or will expire on their own terms on or before August 1, 2025, and neither the Reorganized Debtors, Debtors, nor Liquidating Trust will seek to renew any of these insurance policies.[30] The Reorganized Debtors, Debtors and the Liquidating Trustee and anyone covered under these policies, shall retain the right to any coverage or benefit arising from the aforesaid polices, included but not limited to the D&O Insurance Policy and the D&O Tail Policy, and these policies shall be treated as executory contracts and assumed to the extent necessary under applicable law.

50. The Debtors believe that such relief is appropriate as the Debtors are in the process of winding down their estates and will have no need for the vast majority of their remaining contracts and leases after the Effective Date, which will continue to be an unnecessary expense on the estates, if not rejected.[31] The Plan provides that parties with Claims arising from the rejection of executory contracts or unexpired leases pursuant to the Plan will have thirty (30) days after the after the date of notice of the entry of an order rejecting such executory contract or unexpired lease,

[30] *See generally* Jalbert Decl. ¶ 12(c).

[31] *See* Jalbert Decl. ¶ 12(b).

which may include, the Confirmation Order, to file a proof of claim relating to rejection damages. The Debtors believe that confirmation of the Plan is a sufficient forum to address the rejection of the Debtors' Executory Contracts and Unexpired Leases, and that the notice of the Confirmation Order will provide sufficient notice to all counterparties of the deadline to file claims against the Debtors for rejection damages.

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

4. The Plan's Release, Injunction and Exculpation Provisions are Appropriate and Should be Approved.

52. Article X of the Plan provides for:

a) Releases in Section 10.6 of the Plan by the Debtors, the Estates and the Liquidating Trust in favor of the Released Parties[32] (collectively, the "Debtor Releases");

b) Releases in Section 10.7 of the Plan in favor of the Released Parties by Holders of Claims or Interests who (a) are deemed to accept the Plan but who have not formally or informally objected to the Plan; (b) vote to accept the Plan and do not elect to opt out of the release on the Ballot; (c) were solicited but did not vote to accept or reject and did not opt out of the voluntary releases; or (d) vote, or are deemed to reject the Plan, and do not opt out of the voluntary releases (the "Third-Party Releases"); and

[32] "**Released Party**," as defined in Section 1.104 of the Plan, means collectively, and in each case, solely in their respective capacities as such: (i) the Debtors and each of the Debtors' Estates; (ii) the DIP Secured Parties; (iii) any other Releasing Party; (iv) each current and former Affiliate of each entity in clauses (i) through clause (iii); and (v) each Related Party of each entity in clauses (i) through clauses (iii); provided that in each case, an entity shall not be a Released Party if it: (a) elects to opt out of the releases provided by the Plan, (b) is deemed to reject the Plan, or (c) timely objects to the releases provided by the Plan through a formal objection filed on the docket of these Cases that is not resolved before the hearing on confirmation of the Plan. Notwithstanding the foregoing, any party who is a Released Party shall also be a Releasing Party and any party who is a Releasing Party shall also be a Released Party.

c) An exculpation provision in Section 10.5 of the Plan in favor of (a) the Debtor, (b) current and former directors and officers who served at any time between the Petition Date and the Effective Date and (iii) Debtors' attorneys, financial advisors, consultants, or other professionals or advisors.[33]

53. As set forth in full detail in the Plan, these provisions comply with the Bankruptcy Code and applicable non-bankruptcy law and are necessary and integral components of the Plan. The releases in the Plan are in exchange for, and are supported by, fair, sufficient, and adequate consideration provided by the parties receiving such releases and are a good faith compromise of the Claims released. These provisions are proper because, among other things, they are reasonable, in the best interests of the Debtors and their Estates, the product of good faith, arm's-length negotiations, in exchange for substantial consideration from various parties, including the Released Parties, and critical to obtaining the support of various constituencies for the Plan.[34]

a. Debtor Releases are Permissible and Should be Approved.

54. The Debtor Releases pursuant to Section 10.6 of the Plan provide for the release and waiver of any and all Claims, Causes of Action, Avoidance Actions, obligations, suits, judgments, damages, debts, rights, remedies and liabilities that could have been asserted by or on behalf of the Debtors or their estates against any Released Party. The Debtor Releases are narrowly

[33] "**Exculpated Parties**," as defined in Section 1.56 of the Plan means collectively, and in each case, in its capacity as such: (i) the Debtors; (ii) the Debtors' directors and officers that have served on or after the Petition Date; (iii) the Debtors' attorneys, financial advisors, consultants, or other professional or advisors; and (iv) solely to the extent they are or are acting as agents for Estate fiduciaries at any time between the Petition Date and the Effective Date, the successors and assigns, subsidiaries, members, employees, partners, officers, directors, agents, attorneys, advisors, accountants, financial advisors, investment bankers, consultants, and other professionals of or for any of the Persons identified in (i) through (iii) above on or after the Petition Date solely in their capacity as such.

[34] *See* Jalbert Decl. ¶ 14.

tailored, and the Debtors have proposed the Debtor Releases based on their business judgment and submit that the Debtor Releases are reasonable and satisfy the standard that courts generally apply when reviewing these types of releases.

55. Section 1123(b) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[35] Furthermore, a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[36]

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

(a) a substantial contribution to the debtor's reorganization;

(b) the necessity of the release to the debtor's reorganization;

(c) an agreement by a substantial majority of creditors to support the release;

(d) an identity of interest between the debtor and the third party; and

[35] 11 U.S.C. § 1123(b)(2); *see In re Coram Healthcare Corp.*, 315 B.R. 321, 334–35 (Bankr. D. Del. 2004) (holding that standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019). Generally, courts in the Third Circuit approve a settlement by the debtors if the settlement "exceed[s] the lowest point in the range of reasonableness." *See, e.g.*, *In re Exaeris, Inc.*, 380 B.R. 741, 746–47 (Bankr. D. Del. 2008) (internal citation omitted); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (examining whether settlement "fall[s] below the lowest point in the range of reasonableness") (alteration in original) (internal citation omitted); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (settlement must be within reasonable range of litigation possibilities).

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

(e) a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release.[37]

57. No one factor is dispositive, nor is a plan proponent required to establish each factor for the release to be approved.[38]

58. Here, the Debtors submit that the Debtor Releases meet the applicable standard because they are fair, reasonable and in the best interests of the Debtors' estates. *First*, each of the Released Parties has made a substantial contribution to the Debtors' estates, including with respect to the Debtors' negotiation of the Wind-Down Budget and implementation of the plan of reorganization (the primary source of cash anticipated to be available for creditor recoveries in these cases), negotiating and formulating the Plan and facilitating the progress made during these Chapter 11 Cases. Such efforts include the following, among others:

Released Party	Consideration Provided
Current and Former Directors, Officers, Agents, Members of Management and Other Employees of the Debtors	• Significant efforts in connection with negotiating the Final DIP Order, Combined Disclosure Statement and Plan, and Wind-Down Budget. In particular, the Debtors' directors, officers and management were critical to maintaining and preserving the value of the Debtors' assets—the cornerstone of the anticipated recoveries to creditors in these cases. Such efforts included negotiating the terms of the Combined Disclosure Statement and Plan and Wind-Down Budget to maximize recoveries to Holders of Allowed Claims. • Ensuring the uninterrupted operation of the Debtors' business during these Chapter 11 Cases.

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

[38] *See, e.g.*, *Wash. Mut.*, 442 B.R. at 346 ("These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the [c]ourt's determination of fairness."); *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that *Zenith* factors are not exclusive or conjunctive requirements); *In re Caribbean Petroleum Corp.*, 512 B.R. 774, 778 (Bankr. D. Del. 2014) (finding "no question" that release of the Debtors' claims was proper because non-debtor "provided Debtors with substantial consideration in exchange for the releases, providing the justification for the Court approving the releases.").

Released Party	Consideration Provided
	• Attending Court hearings and numerous board meetings, including meetings on short notice related to these Chapter 11 Cases and the reorganization process.
Professionals of the Debtors	• Active participation, negotiation and documentation of the transactions during the prepetition and postpetition periods.
DIP Secured Parties	• Engaging in extensive prepetition negotiations regarding strategic alternatives, including prepetition marketing of assets, additional capital raises through private placement equity offerings, state law dissolution, and other wind-down alternatives. • Agreeing to serve as the plan sponsor under a comprehensive restructuring support agreement to restructure the existing debt and effectuate the Debt-for-Equity Transaction. • Funding the $12 million DIP Budget under the Final DIP Order, which provided for the payment of other secured claims, administrative expense claims, fee claims, and priority claims, and agreeing to the Debtors' consensual use of its cash collateral. • Agreeing to fund the Wind-Down Budget as part of confirmation of the plan of reorganization, which is expected to provide for a distribution to Holders of Allowed General Unsecured Claims, and agreeing to fund the Liquidating Trust with the Retained Assets and Avoidance Actions.

59. *Second*, the Debtor Releases are essential to the Debtors' Plan because they constitute an integral term of the Plan. Moreover, the Debtor Releases are narrowly tailored and limited in scope. As is customary, the releases do not extend to claims arising out of or relating to any act or omission of a Released Party that constitute willful misconduct, actual fraud or gross negligence. The Debtor Releases are necessary to the Debt-for-Equity Transaction, successful reorganization of the Debtors, and confirmation of the Plan. The Debtor Releases are an integral part of the DIP Secured Parties' agreement to fund the Plan.[39] Moreover, they are necessary to the

[39] *See generally In re Zenith Elecs.*, 241 B.R. at 111.

Reorganized Debtors because they will assure that moving forward the Reorganized Debtors will not be distracted by estate related litigation.[40] With respect to the Professionals of the Debtors, the Debtor Releases are similarly an integral part of their participation in counseling and advising the Debtors regarding the DIP Loan Facility, RSA Term Sheet, and Combined Disclosure Statement and Plan. Furthermore, the Professionals of the Debtors are expected to represent the Liquidating Trust and advise the Liquidating Trustee regarding the wind-down of the Retained Assets and distributions of the Liquidating Trust Assets, they cannot afford to be distracted by defending against meritless litigation regarding their service to the Debtors during the Chapter 11 Cases. They need to focus their attention on winding down the estates and making distributions consistent with the Plan and Liquidating Trust Agreement.

60. *Third*, as evidenced by the Voting Declaration, 100% of the Holders of Claims in the Voting Classes voted in support of the Plan. The overwhelming support evidences the Debtors' key stakeholders' support for the Debtors Releases and the Plan. The Debtor Releases are critical to the Plan as a whole and represent valid and appropriate settlements of claims the Debtors may have against the Released Parties.

61. *Fourth*, in consideration for the Debtor Releases, the Debtors and their estates will receive mutual releases from each of the Released Parties. An identity of interest exists between the Debtors and the parties to be released. The Professionals of the Debtors and DIP Secured Parties all share an identity of interest with the Debtors. The Professionals of the Debtors were instrumental in formulating and prosecuting the Plan, while the DIP Secured Parties funded

[40] *Id.*

these Chapter 11 Cases and served as the plan sponsor, and both share an identity of interest with the Debtors in seeing that the Plan succeed and company reorganize.[41]

62. *Fifth*, the Plan provides a distribution to creditors in exchange for the Debtor Releases. The liquidation analysis annexed as Exhibit A to the Combined Disclosure Statement and Plan (the "Liquidation Analysis") establishes that the anticipated distributions to be made under the Plan would not be available in a chapter 7 liquidation. Absent support from the DIP Secured Parties, the Debtors would have no choice but to liquidate.[42] Notably, the possible recoveries to Holders of Allowed General Unsecured Claims are due to the efforts of the Professionals of the Debtors, who engaged in arm's-length negotiations with the DIP Secured Parties regarding the Wind-Down Budget. Furthermore, the Debtors do not believe they are releasing any material claims. Pursuing non-material claims against the Released Parties would not be in the best interests of the Debtors' various constituencies as the cost involved would likely outweigh any potential benefit of pursuing such claims. In light of these facts, it is a valid exercise of the Debtors' business judgment to conclude that the pursuit of any claims which no party to date has been able to identify would be unlikely to benefit their estates and parties in interest, as the costs of pursuing and prosecuting such claims would almost certainly outweigh any potential benefit to the Debtors, their estates and parties in interest.

63. The Debtor Releases satisfy section 1123(b)(3)(A) of the Bankruptcy Code. The Debtors submit that the Debtor Releases are fair, reasonable and in the best interests of the

[41] *See generally id.* at 110.

[42] *See generally id.*

Debtors' estates. Therefore, the Debtor Releases should be approved as a valid exercise of the Debtors' business judgment.[43]

b. The Third-Party Releases are Consensual and Therefore Should be Approved.

(i) The Third-Party Releases are Consensual Because the Releasing Parties Had a Right to Opt Out or Object to the Third-Party Releases.

64. The Plan also provides for tailored Third-Party Releases by certain non-debtors. Section 10.7 of the Plan provides a limited consensual release in favor of the Released Parties only by and among the Releasing Parties[44], which are comprised of: (i) the Released Parties; (ii) all holders of claims that vote to accept the Plan but do not opt out of the voluntary releases contained in Section 10.7 of the Plan by checking the "opt out" box on the ballot and returning it in accordance with the instructions set forth thereon; (iii) all holders of claims that are deemed to accept the Plan and who do not do not affirmatively execute and timely return a

[43] *See Spansion, Inc.*, 426 B.R. at 142 (approving as a valid exercise of business judgment the debtor's releases of, among others, the debtor's current directors, officers and employees, the debtor's current and former professionals, secured creditors and their advisors, the debtor and their affiliates, and their officers, directors, employees, and advisors and senior noteholders and their advisors).

[44] "**Releasing Parties**," as defined in Section 1.105 of the Plan, means each of, and in each case in its capacity as such: (i) the Debtors and each of the Debtors' Estates; (ii) the DIP Secured Parties; (iii) all holders of claims that vote to accept the Plan and do not opt out of the voluntary release contained in Section 10.7 of the Plan by checking the "opt out box" on the ballot and returning it in accordance with the instructions set forth thereon; (iv) all holders of claims that are deemed to accept the Plan and who do not affirmatively execute and timely return a release opt-out form; (v) all holders of claims whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan and do not opt out of the voluntary release contained in Section 10.7 of the Plan by checking the "opt out box" on the ballot and returning it in accordance with the instructions set forth thereon; (vi) all holders of claims that vote to reject the Plan and do not opt out of the voluntary release contained in Section 10.7 of the Plan by checking the "opt out box" on the ballot and returning it in accordance with the instructions set forth thereon; and (vii) each Related Party of each Entity in clauses (i) through clause (vi) solely to the extent such Related Party may assert Claims or Causes of Action on behalf of or in a derivative capacity by or through an Entity in clause (i) through clause (vi); provided, that, in each case, an entity shall not be a Releasing Party if it: (a) elects to opt out of the third party release, (b) is deemed to reject the Plan, or (c) timely objects to the third party release through a formal objection filed on the docket of the Cases that is not resolved before the hearing on confirmation of the Plan. Notwithstanding the foregoing, any party who is a Released Party shall also be a Releasing Party and any party who is a Releasing Party shall also be a Released Party.

release opt-out form; (iv) all holders of claims whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan and do not opt out of the voluntary release contained in Section 10.7 of the Plan by checking the "opt out box" on the ballot and returning it in accordance with the instructions set forth thereon; and (v) each Related Party of each Entity in clauses (i) through (iv), solely to the extent such Related Party may assert Claims or Causes of Action on behalf of or in a derivative capacity by or through an Entity in clause (i) through (iv); provided, in each case, an entity shall not be a Releasing Party if it: (a) elects to opt out of the third party release, (b) is deemed to reject the Plan, or (c) timely objects to the third party release through a formal objection filed on the docket of the Cases that is not resolved before the hearing on confirmation of the Plan.[45]

65. The Third-Party Releases are consensual, appropriate, integral, and consistent with established precedent. Courts in this District allow releases of third-party claims where there is express consent of the party giving the release.[46] Where parties receive sufficient notice of a plan's release provisions and have an opportunity to object to or opt out of the release and fail to do so, the releases are consensual.[47]

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[45] Plan § 1.105.

[46] *See In re Alpha Latam Mgmt., LLC*, No. 21-11109 (JKS) (Bankr. D. Del. Mar. 14, 2022) [D.I. 652]; *In re PBS Brand Co.*, No. 20-13157 (Bankr. D. Del. Apr. 28, 2021) [D.I. 552]; *In re Furniture Factory Holding, L.P.* No. 20-12816 (Bankr. D. Del. Sept. 21, 2021) [D.I. 507]; June 13, 2019 Hr'g Tr.48:9-11, *In re Z Gallerie, LLC*, No. 19-10488 (LSS) (Bankr. D. Del. 2019) [D.I. 384] ("With respect to third-party releases I'm prepared to find that they are consensual because of opt-out box in the ballots"); *In re EV Energy Partners, L.P.*, No. 18-10814 (CSS) (Bankr. D. Del. May 16, 2018) [D.I. 252]; Oct. 2, 2018 Hr'g Tr. 62:10-14, *In re Gibson Brands*, No. 18-11025 (CSS) (Bankr. D. Del. 2018) [D.I. 873] ("I have ruled numerous times that 'check the box' isn't required for a creditor to be deemed – to have been deemed to consent to something, that it's sufficient to say, here's your notice, this is what's going to happen and if you don't object, you'll have been deemed to consent").

[47] *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved."); *see also In re Alpha Latam Mgmt., LLC*, 21-11109

66. Each of the Releasing Parties has consented to the Third-Party Releases by either: (a) choosing not to opt out of the Third-Party Releases despite being provided with the opportunity to do so, or (b) are Holders of Claims that are treated as Unimpaired under the Combined Disclosure Statement and Plan and fail to formally or informally object in writing to the Combined Disclosure Statement and Plan.

(ii) The Debtors Provided Sufficient Notice of the Third-Party Releases.

67. In accordance with the Solicitation Procedures Order, the Disclosure Statement and Plan, the Ballots, the Opt-Out Election Form, and the Confirmation Hearing Notice, the Debtors provided recipients with timely, sufficient, appropriate, and prominent notice of the proposed Third-Party Releases and the scope of the Releasing Parties. The Ballots sent to the Voting Classes and the Opt-Out Election Form sent to the Non-Voting Classes deemed to accept the Plan included the full language of the Third-Party Releases as well as clear instructions on how to opt out. Specifically, the Opt-Out Election Form included the following disclaimers:

a) "You may choose to opt out of the Release by Holders of Claims set forth in Section 10 of the Disclosure Statement and Plan by following the instructions set forth in this Opt Out Election Form."

b) "**IF YOU WISH TO OPT OUT OF THE RELEASE SET FORTH IN ARTICLE X OF THE PLAN**:" (which was followed by the directions on how to complete the Opt-Out Election Form that were in bold and capitalized).

c) "**PLEASE BE ADVISED THAT BY CHECKING THE BOX ABOVE YOU ELECT NOT TO GRANT THE**

(JKS) (Bankr. D. Del. Mar. 14, 2022) [D.I. 651 at 11:6–22] ("Importantly, I find the third-party releases are consensual. . . The ballot contained an opt out election box and holders had the right to opt out of the releases. Unimpaired holders in non-voting classes were provided with a notice of non-voting status that included the proposed third-party releases, prominent instructions on the right to object to the releases, and conspicuous disclaimers that the releases would be binding on holders if they did not timely object to the plan. As I have previously ruled, an opt-out mechanism is a valid means of obtaining consent. The court can imply consent from a creditor, not opting out or objecting to releases contained in a plan.").

> **RELEASES BY HOLDERS OF CLAIMS AGAINST EACH PARTY THAT IS A "RELEASED PARTY" AS THAT TERM IS DEFINED IN THE PLAN. YOU MUST AFFIRMATIVELY CHECK THE BOX ABOVE IN ORDER TO OPT OUT OF THE RELEASES BY HOLDERS OF CLAIMS.**"

68. The Opt-Out Election Form and the full text of the Third-Party Releases were also published on the Debtors' claims agent website. The Debtors also published the Confirmation Hearing Notice in the Wall Street Journal, which clearly and conspicuously advised all parties in interest to carefully review and consider the Combined Disclosure Statement and Plan, including the Releases [D.I. 154]. The Confirmation Hearing Notice published in the Wall Street Journal contained the following statement:

> "**ARTICLE X OF THE DISCLOSURE STATEMENT AND PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS. YOU ARE ADVISED TO REVIEW AND CONSIDER THE DISCLOSURE STATEMENT AND PLAN CAREFULLY, PARTICULARLY SECTIONS 10.4-10.9 THEREOF, BECAUSE YOUR RIGHTS MIGHT BE AFFECTED THEREUNDER**."[48]

69. In addition to the foregoing, the Confirmation Notice and Notice of Non-Voting Status included the full text of the Releases and conspicuously clarified that the Releases would bind all Holders of Claims and Interests if confirmed.

70. Therefore, the Debtors submit that proper notice of the Releases—and instructions for opting out of them—were proper.[49]

71. Impaired Claims. A holder of a claim, including a claim that is impaired under a plan, may be deemed to consent to a third party release if the holder is provided with ample

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[48] *See* D.I. 154.

[49] As noted in the Voting Declaration (*see* Exhibit B thereto), two parties that received notice of the Releases in fact submitted the Opt-Out Election Form, thereby further demonstrating that parties that received such notice in fact exercised the right to opt out of the Releases.

notice of the third party release and is provided with an opportunity to opt out of the third party release—even if a creditor abstains from voting.[50] Here, Holders of Claims in Class 3 and in Class 4 are Impaired and entitled to vote to accept or reject the Combined Disclosure Statement and Plan. As detailed *supra*, each such Holder was provided with ample notice and had an opportunity to affirmatively opt out of releases by checking the opt out box on the Opt-Out Election Form sent to each Holder.

72. Unimpaired Claims. The Holders of Claims in the Non-Voting Classes deemed to accept (Classes 1 and 2) are being paid in full and are deemed to have accepted the Releases if they did not object or opt out. Unimpaired creditors can be bound to third party releases when they have not objected to the plan or opted out, as their silence constitutes consent. Courts in this District have routinely recognized that third party releases are consensual and appropriate where holders of unimpaired claims or interests are provided with detailed instructions on how to object to releases but nevertheless do not do so.[51]

73. As stated above, the Non-Voting Classes deemed to accept received the Notice of Non-Voting Status and Confirmation Hearing, which included the Third-Party Releases

[50] *See Indianapolis Downs*, 486 B.R. at 306; *see also Spansion, Inc*. 426 B.R. at 144 (finding that returning a ballot is not essential to demonstrating consent to a release by unimpaired class); *In re DBSD N. A., Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV. 10156 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part on other grounds*, 627 F.3d 496 (2d Cir. 2010) (determining that adequate notice of the proposed release was given to impaired creditors, and the ballots set forth the effect of abstaining without opting out of the release).

[51] *See, e.g., In re Spansion, Inc*., 426 B.R. at 144 (finding that a release was not overreaching to the extent it bound unimpaired classes deemed to have accepted the plan as those creditors had not objected to the release, were being paid in full, and had received adequate consideration for the release); see also In re Indianapolis Downs, LLC, 486 B.R. at 306 ("In this case, the third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases."); *see also In In re Alpha Latam Mgmt., LLC*, 21-11109 (JKS) (Bankr. D. Del. Mar. 14, 2022) [D.I. 651 at 11:22–24] ("The court can imply consent from a creditor, not opting out or objecting to releases contained in a plan. Creditors have an obligation to read their mail and respond if appropriate. This procedure is not unique and it's routinely utilized in the law.").

and prominent instructions on how to object to the Combined Disclosure Statement and Plan, including the releases therein. As such, the silence of the Holders of Claims in the Non-Voting Classes deemed to accept should constitute consent to be bound by the Releases.

c. The Plan's Exculpation Provisions are Permissible and Should be Approved.

74. Exculpation provisions that apply only to estate fiduciaries, and are limited to claims not involving actual fraud, willful misconduct, or gross negligence, are customary and generally approved in this district under appropriate circumstances.[52] Unlike third-party releases, exculpation provisions do not affect the liability of third parties *per se*, but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtors' chapter 11 cases.[53]

75. As such, the customary exculpation provisions found in Section 10.5 of the Plan should be approved. They are narrowly tailored and limited to parties who served in a fiduciary capacity in connection with the Chapter 11 Cases. The exculpation provisions exculpate certain estate fiduciaries from claims arising out of or related to, among other things, the administration of these Chapter 11 Cases, the DIP Facility loan documents, the pursuit of the Combined Disclosure Statement and Plan, and the administration and implementation of the Plan, or the distribution of property under the Plan.

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

[53] *See In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (finding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code"); *see also In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *10 (Bankr. D. Del. Apr. 29, 2010) (approving a similar exculpation provision as that provided for under the Plan); *In re Spansion, Inc.*, No. 09-10690 (KJC), 2010 WL 2905001, at *16 (Bankr. D. Del. Apr. 16, 2010) (same).

76. The exculpation provisions are appropriate under both the applicable law and the facts of these Chapter 11 Cases. Courts in the Third Circuit have approved exculpation provisions for estate fiduciaries for acts taken in connection with the Debtors' restructuring efforts, and do not extend to fraud, gross negligence and willful misconduct.[54] Furthermore, no party has objected to or opposed the Plan's exculpation provisions.

77. Here, the scope of the exculpation provision is appropriately limited to the Debtors and other estate fiduciaries that participated in the Debtors' Chapter 11 Cases and in the negotiation and implementation of the DIP Facility and the Plan and has no effect on liability that results from fraud, gross negligence or willful misconduct.

78. Accordingly, under the circumstances, it is appropriate for the Court to approve the exculpation provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[55]

d. The Plan's Injunction Provisions are Permissible and Should be Approved.

79. The injunction provisions set forth in Section 10.4 of the Plan (the "Plan Injunction") implement the Plan's release, discharge, and exculpation provisions, in part, by permanently enjoining all entities from commencing or maintaining any action against the Debtors, the Debtors' Estates, the Liquidating Trust or the Liquidating Trustee or taking any action which would interfere with the implementation or Consummation of the Plan.

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

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

80. Thus, the Plan Injunction is a key provision of the Plan because it enforces the release and exculpation provisions that are centrally important to the Plan. As such, to the extent the Court finds that the exculpation and release provisions are appropriate, the Debtors respectfully submit that the Plan Injunction provision must also be appropriate. Moreover, this injunction provision is narrowly tailored to achieve its purpose and is not opposed by any party. Thus, the injunction provision should be approved.

81. The Plan Injunction is a key component of the liquidation of the Estates and is similar to those previously approved in this District.[56] Accordingly, the Debtors submit that the Plan Injunction should be approved.

B. The Plan Complies with Section 1123(d) of the Bankruptcy Code.

84. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and nonbankruptcy law."

85. The Plan complies with section 1123(d) of the Bankruptcy Code. Section 11.3 of the Plan provides for the satisfaction of any cure amounts associated with Executory Contracts to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. In accordance with Section 11.3 of the Plan and section 365 of the Bankruptcy Code, the Debtors will satisfy any monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan on the Effective Date or on such other terms as the parties to such Executory Contract or Unexpired Lease may otherwise agree.

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

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

86. The Debtors have complied with the applicable provisions of the Bankruptcy Code in accordance with section 1129(a)(2) of the Bankruptcy Code. A principal purpose of section 1129(a)(2) is to ensure that plan proponents have complied with the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[57] As discussed above, the Debtors have complied with all notice, solicitation and disclosure requirements set forth in the Bankruptcy Code and the Bankruptcy Rules in connection with the Combined Disclosure Statement and Plan. As discussed below, the Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code regarding disclosure and solicitation of the Plan.

1. The Debtors Complied with Section 1125 of the Bankruptcy Code.

87. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan of reorganization "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."[58]

88. As discussed above, the Debtors complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code. Before the Debtors solicited votes on the

[57] S. Rep. No. 95-989, at 126 (1978); H.R. Rep. No. 95-595, at 412 (1977) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code"); *In re Lapworth*, No. 97-34529 (DWS), 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2).").

[58] 11 U.S.C. § 1125(b).

Plan, the Court approved the Combined Disclosure Statement and the Plan on an interim basis.[59] The Court also approved the contents of the solicitation materials provided to Holders of Claims entitled to vote on the Plan, the non-voting materials provided to parties not entitled to vote on the Plan, and the relevant dates for voting and objecting to the Plan and final approval of the Disclosure Statement.[60] Following the Solicitation Procedures Order, the Debtors caused the Disclosure Statement to be transmitted to both Voting Classes and Non-Voting Classes.

2. The Debtors Complied with Section 1126 of the Bankruptcy Code.

89. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Specifically, under section 1126 of the Bankruptcy Code, only holders of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> b) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.[61]

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

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[59] *See* Solicitation Procedures Order.

[60] *See generally id.*

[61] 11 U.S.C. § 1126(a), (f).

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

92. Additionally, Holders of Claims and Interests in Classes 5 and 6 are deemed to reject the Plan because they will receive no Distribution on account of their Claims or Interests. Thus, pursuant to section 1126(a) of the Bankruptcy Code, only Holders of General Unsecured Claims in Class 3 and in Class 4 were entitled to vote to accept or reject the Plan.[62]

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

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

94. As described above, the Class of Claims voting to accept the Plan did so in sufficient number and by sufficient amounts as required by the Bankruptcy Code.[63] Based upon

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[62] *See* Plan, Art. IV.

[63] *See* Voting Declaration. In determining whether a Class of impaired claims has voted to accept or reject a chapter 11 plan, only creditors that actually submit ballots are counted. *See, e.g.*, *In re Trenton Ridge Invs., LLC*, 461 B.R. 440, 457 (Bankr. S.D. Ohio 2011) ("[n]on-voting creditors are deemed neither to have accepted the plan nor rejected it; they are simply bound by the result produced by those who vote.").

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

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

95. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law."[64] In the Third Circuit, "good faith" requires that a "plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and the purposes of the Bankruptcy Code.'"[65] Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[66] To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[67]

96. The Debtors developed and proposed the Plan in accordance with section 1129(a)(3) of the Bankruptcy Code. Here, the Plan is designed to reorganize the Debtors and establish a Liquidating Trust to maximize stakeholder recoveries, which complies with the objectives and the mechanisms of the Bankruptcy Code.[68] Further, the Plan will enable the

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64 11 U.S.C. § 1129(a)(3).

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

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

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

68 *See* Jalbert Decl. ¶ 25.

Holders of Class 3 Prepetition Secured Claims and Holders of Class 4 General Unsecured Claims to recover on account of such Allowed Claims.

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

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

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

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.[69]

This section of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the bankruptcy court as reasonable.[70] Section 6.2 of the Plan contains procedures for filing applications for final allowance of Fee Claims and procedures for the payment of such Fee Claims upon approval by the Bankruptcy Court.[71] Further, all such Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 and 330 of the Bankruptcy Code.[72] Section 6.2(c) of the Plan, moreover, provides that the Professionals shall file all final requests for payment of Fee Claims no later than forty-five (45) days after the Effective Date, thereby providing an adequate period of time for interested

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[69] 11 U.S.C. § 1129(a)(4).

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

[71] *See* Jalbert Decl. ¶ 26.

[72] 11 U.S.C. §§ 328(a), 330(a)(1)(A).

parties to review such Fee Claims. Further, the Debtors' ordinary course professionals will be paid in the ordinary course as Holders of Allowed Administrative Claims consistent with the *Order Authorizing the Retention and Employment of Professionals Used in the Ordinary Course Effective as of the Petition Date* [D.I. 91]. Therefore, the Debtors submit that the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

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

99. Section 1129(a)(5)(A) of the Bankruptcy Code requires that the plan proponent disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor to the debtor under the plan," and requires a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy."[73] Section 1129(a)(5)(B) of the Bankruptcy Code further requires a plan proponent to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider."[74]

100. The Debtor has satisfied the foregoing requirements. As set forth in the Plan and Plan Supplement, Craig Jalbert will serve as the sole member and officer of each Reorganized Debtor. Further, the Liquidating Trustee will be authorized to take all actions necessary to monetize the Liquidating Trust Assets and close the Chapter 11 Cases. Further, the Plan Supplement identifies the Liquidating Trustee and outlines that the Liquidating Trustee's fees and expenses will be paid from the Liquidating Trust Assets pursuant to the terms of the Plan and

[73] 11 U.S.C. § 1129(a)(5)(A)(i)–(ii).

[74] *Id.* § 1129(a)(5)(B).

the Liquidating Trust Agreement. Finally, pursuant to the Liquidating Trust Agreement and the Plan, the Liquidating Trustee shall act in fiduciary capacities on behalf of the interests of all Holders of Claims that will receive Distributions from the Liquidating Trust.

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

101. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change provided for in the plan. Section 1129(a)(6) of the Bankruptcy Code is not applicable to the Plan because the Plan does not provide for rate changes subject to the jurisdiction of any governmental regulatory commission.

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

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

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

103. This "best interests" test, focusing on potential individual dissenting creditors, requires that each holder of a claim or interest either accept the plan or receive or retain

property under the plan that is not less than the amount such holder would receive or retain in a chapter 7 liquidation.[75]

104. Under the best interest analysis, "the court must measure what is to be received by rejecting creditors . . . under the plan against what would be received by them in the event of liquidation under chapter 7."[76] Accordingly, the Court is required to "take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation."[77] In evaluating the liquidation analysis, the Court must remain cognizant of the fact that "[t]he hypothetical liquidation entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to chapter 7."[78] Under section 1129(a)(7), the liquidation analysis applies only to non-accepting holders of impaired claims or equity interests.[79]

105. The Liquidation Analysis demonstrates that the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code and that under a chapter 7 liquidation Holders of Claims and Interests would receive less than what is projected under the Plan.[80]

106. The uncontroverted assumptions and estimates in the Liquidation Analysis are appropriate in the context of these Chapter 11 Cases and are based upon the knowledge and expertise of the Debtors' professionals and personnel who have extensive knowledge of the

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

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

[77] *See id.*

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

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

[80] *See* Jalbert Decl. ¶ 31.

Debtors' business and financial affairs as well as relevant industry and financial experience. In light of the foregoing, the Plan satisfies the requirements of section 1129(a)(7).

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

108. The Liquidation Analysis is sound and reasonable and incorporates justified assumptions and estimates regarding the Debtors' assets and claims, such as (i) the additional costs and expenses that would be incurred by the Debtors as a result of a chapter 7 trustee's fees and retention of new professionals, (ii) the delay and erosion of value that would be caused to the Debtors' assets, (iii) the reduced recoveries available to Holders of Allowed General Unsecured Claims because K2 will not fund the Wind-Down Budget as part of a chapter 7 case, and (iv) other potential claims that may arise in a chapter 7 liquidation. The estimates regarding the Debtors' assets and liabilities that are incorporated into the Liquidation Analysis are based upon the knowledge and familiarity of the Debtors' advisors with the Debtors' business and their relevant experience in chapter 11 proceedings. As such, the Debtors' Liquidation Analysis should be afforded deference.[81]

[81] *See id*.

109. Here, as set forth in the Liquidation Analysis and the Jalbert Declaration, all rejecting Holders of Impaired Claims or Interests will receive or retain property value, as of the Effective Date, in an amount that is at least equal to the value of what they would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.[82]

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

110. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either (a) has accepted the plan or (b) is not impaired by the plan. A class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half in the number of claims in the class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan.[83] Moreover, a class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan.[84] Conversely, a class is deemed to have rejected a plan if such plan provides that the claims or interests in a class do not receive or retain any property under the plan on account of such claims or interests.[85]

111. Here, Class 1 (Other Secured Claims) and Class 2 (Other Priority Claims) are unimpaired under the Plan and therefore are deemed to have accepted the Plan. In addition, as set forth in the Voting Declaration, in accordance with the tabulation procedures in the Interim Disclosure Statement Order, Class 3 (Prepetition Secured Claims) and Class 4 (General Unsecured

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82 *See id*.

83 *See* 11 U.S.C. § 1126(c).

84 *See id.* § 1126(f).

85 *See id.* § 1126(g).

Claims) unanimously voted to accept the Plan within the meaning of section 1126 of the Bankruptcy Code. Accordingly, the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to all of the foregoing Classes.

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

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

113. As required by section 1129(a)(9) of the Bankruptcy Code, except to the extent that a Holder of a particular Claim has agreed to a different treatment of such Claim, Section 6.1 of the Plan provides for payment in full of Allowed Administrative Claims, Section 6.4 of the Plan provides for payment in full of Allowed Tax Claims, and Section 7.2 of the Plan provides for payment in full of Other Priority Claims.

114. The treatment of Allowed Administrative Claims, Allowed Tax Claims, and Allowed Other Priority Claims satisfies the requirements of, and complies in all respects with, section 1129(a)(9) of the Bankruptcy Code. Therefore, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

K. At Least One Impaired Class of Claims that was Entitled to Vote Has Accepted the Plan (Section 1129(a)(10)).

115. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either

accept the plan or be unimpaired under the plan."[86] As evidenced by the Voting Declaration, Class 3 (Other Secured Claims) and Class 4 (General Unsecured Claims) is each Impaired and voted to accept the Plan, and neither includes votes of any insider. Thus, the Plan has been accepted by at least one voting Class holding non-insider Claims and as such, section 1129(a)(10) of the Bankruptcy Code is satisfied as to each Debtor.

L. The Plan is Feasible (Section 1129(a)(11)).

116. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that a plan is feasible as a condition precedent to confirmation and "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[87] Finding "feasibility" of a chapter 11 plan does not require a guarantee of success by the debtor.[88] Rather, a debtor must demonstrate only a reasonable assurance of success.[89] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[90] Bankruptcy courts in this District have approved plans that were subject to uncertain and contingent future events.[91] As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

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86 *Id.* § 1129(a)(10).

87 *Id.* § 1129(a)(11).

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

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

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

91 *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 298–99 (finding plan feasible despite being conditioned on regulatory approval to operate a casino); *In re Wash. Mut. Inc.*, 461 B.R. 200, 252 (Bankr. D. Del. 2011) (finding plan feasible despite lack of regulatory approval for securities exemption); Jan. 15, 2015 Hr'g Tr. 88-89, *In re Seegrid*

117. As set forth in the Jalbert Declaration, the Plan provides for the reorganization of the Debtors, the Debtors estimate that there will be sufficient available Cash to ensure that Holders of Allowed Claims under the Plan receive the Distributions required under the Plan and the Debtors will otherwise satisfy the financial obligations under the Plan.[92] In addition, the Debtors estimate that the Liquidating Trust will have sufficient funding to meet its obligations under the Plan to administer post-Effective Date responsibilities and wind down the Estates.

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

M. All Statutory Fees Have Been or Will be Paid (§ 1129(a)(12)).

119. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan."[93] Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses.[94]

120. The Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code because Section 6.1 of the Plan provides for the payment of all fees due and payable by the Debtors under 28 U.S.C. § 1930.

Corp., No. 14-12391 (BLS) (Bankr. D. Del.) (finding, due to the confidence of the debtor's witnesses, that a startup company's Plan was feasible despite no evidence on balance sheet of ability to repay unsecured debt).

92 *See* Jalbert Decl. ¶ 35.

93 11 U.S.C. § 1129(a)(12).

94 11 U.S.C. § 507(a)(2)

N. Sections 1129(a)(13)-(16) of the Bankruptcy Code are not Applicable to the Plan.

121. Section 1129(a)(13) of the Bankruptcy Code requires that all "retiree benefits", as defined in section 1114 of the Bankruptcy Code, continue to be paid post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.[95] Section 1114 of the Bankruptcy Code defines "retiree benefits" as those payments made for the purpose of providing or reimbursing payments for retired employees, their spouses and their dependents for medical benefits.[96] The Debtors do not provide retiree benefits within the meaning of section 1114 of the Bankruptcy Code. Therefore, section 1129(a)(13) of the Bankruptcy Code does not apply to the Plan.

122. Section 1129(a)(14) of the Bankruptcy Code requires domestic support obligations to be paid, if required by judicial or administrative order or statute, which first become payable after the date of filing the petition.[97] The Debtors do not owe any domestic support obligations. Therefore, section 1129(a)(14) of the Bankruptcy Code does not apply to the Plan.

123. Section 1129(a)(15) of the Bankruptcy Code requires that an individual chapter 11 debtor, in a case in which the holder of an allowed unsecured claim objects to plan confirmation, either pay all unsecured claims in full or that the debtor's plan devote an amount equal to five years' worth of the debtor's disposable income to unsecured creditors.[98] None of the Debtors is an "individual" as contemplated by this section of the Bankruptcy Code. Therefore, section 1129(a)(15) of the Bankruptcy Code does not apply to the Plan.

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95 *See* 11 U.S.C. § 1129(a)(13).

96 *See* 11 U.S.C. § 1114(a).

97 *See id.* § 1129(a)(14).

98 *See id*. § 1129(a)(15).

124. Section 1129(a)(16) of the Bankruptcy Code conditions confirmation of a plan on the fact that all transfers under the plan will be made in accordance with applicable provisions of "nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust."[99] None of the Debtors is a nonprofit corporation or trust as contemplated by this section of the Bankruptcy Code. Therefore, section 1129(a)(16) of the Bankruptcy Code does not apply to the Plan.

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

125. Section 1129(b) of the Bankruptcy Code allows a debtor to confirm a plan even though all impaired classes and interests have not accepted the plan. The mechanism for obtaining confirmation over dissenting classes of claims and interests is known as a "cram down."[100] 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.[101]

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

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99 *See id*. § 1129(a)(16).

100 *See id.* § 1129(b)(1); *Zenith*, 241 B.R. at 105; *In re Johns-Manville Corp.*, 68 B.R. 618, 650 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, *In re Johns-Manville Corp*., 78 B.R. 407 (S.D.N.Y. 1986), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

101 *See* 11 U.S.C. § 1129(b)(1).

Here, the Plan does not discriminate unfairly and is fair and equitable to the non-accepting impaired classes.

1. The Plan Does Not Discriminate Unfairly with Respect to Impaired Rejecting Classes.

127. The unfair discrimination standard of section 1129(b)(1) of the Bankruptcy Code ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes.[102] Accordingly, as between two classes of claims or two classes of interests, there is no unfair discrimination if (a) the classes are comprised of dissimilar claims or interests,[103] or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[104]

128. The Plan does not discriminate unfairly against the impaired Classes that are deemed to have rejected the Plan (i.e., Classes 5 and 6). Section 1129(b) of the Bankruptcy Code does not prohibit differences in treatment between the Classes. To the contrary, the very premise of any chapter 11 plan with multiple impaired classes is to differentiate among classes.

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

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

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

Section 1129(b) of the Bankruptcy Code thus permits a debtor's chapter 11 plan to provide for unequal treatment of separately classified creditors with similar legal rights, so long as the discriminatory treatment of the impaired dissenting class is not "unfair."[105]

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

2. The Plan is Fair and Equitable with Respect to the Rejecting Classes.

130. For a plan to be "fair and equitable" with respect to an impaired class of unsecured claims or interests that rejects a plan (or is deemed to reject a plan), the plan must follow the "absolute priority rule" and satisfy the requirements of section 1129(b)(2) of the Bankruptcy Code.[106] Generally, this requires that the impaired rejecting class of claims or interests either be paid in full or that any class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[107] In addition, for a plan to be "fair and equitable,"

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

[106] *See* 11 U.S.C. §§ 1129(b)(2)(B)(ii), (b)(2)(C)(ii); *see also Bank of Am. Nat'l Tr. & Sav. Ass'n*, 526 U.S. at 441-42.

The "fair and equitable" requirement may also be met: (a) with respect to a dissenting impaired class of unsecured claims if the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim, and (b) with respect to a dissenting impaired class of interests, if the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, and fixed redemption price to which such holder is entitled, or the value of such interest. *See* 11 U.S.C. § 1129(b)(2)(B)(i), (C)(i). However, such subsections need not be invoked in this instance because the Plan meets other applicable requirements of the "fair and equitable" standard as set forth herein.

[107] *See id.*

no class of claims or interests senior to the impaired dissenting class is permitted to receive more than the full value of its senior claims or interests under the plan.[108]

131. Here, the Plan satisfies the absolute priority rule with respect to the rejecting Classes. *First*, no Class of Claims or Interests junior to such Classes will receive or retain any property under the Plan. *Second*, no Class of Claims or Interests will receive or retain property under the Plan that has a value greater than 100% nor has any party asserted as such. Accordingly, the Plan satisfies the requirements of sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) and, therefore, is fair and equitable with respect to Classes 5 and 6.[109]

P. Section 1129(c) of the Bankruptcy Code is Satisfied.

132. Section 1129(c) of the Bankruptcy Code provides that the bankruptcy court may confirm only one plan.[110] Because the Plan is the only plan before the Court, section 1129(c) of the Bankruptcy Code is satisfied.

Q. The Principal Purpose of the Plan is not Tax Avoidance (Section 1129(d)).

133. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act of 1933. The Plan has been proposed in good faith and not for the avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act of 1933.[111] Moreover, no federal, state or local government unit, or any other party has raised any objection to the Plan on these or any other grounds, and all Allowed Tax Claims will be paid in full pursuant to the Plan.

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

[109] *See* Jalbert Decl. ¶ 38.

[110] *See* 11 U.S.C. § 1129(c).

[111] *See* Jalbert Decl. ¶ 39.

The Debtors therefore submit that the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

R. Modifications to the Plan.

134. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code.[112] Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan.[113] Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder.[114] Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[115]

135. Pursuant to section 1127 of the Bankruptcy Code, the modifications to the Plan included in the *Revised Combined Disclosure Statement and Joint Chapter 11 Plan of*

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[112] 11 U.S.C. § 1127(a).

[113] *Id.*

[114] Bankruptcy Rule 3019.

[115] *See, e.g.*, *In re Federal–Mogul Glob. Inc.*, 2007 WL 4180545, *18 (Bankr. D. Del. 2007) (additional disclosure under section 1125 is not required where plan "modifications do not materially and adversely affect or change the treatment of any Claim against or Equity Interest in any Debtor"); *Beal Bank, S.S.B. v. Jack's Marine, Inc. (In re Beal Bank, S.S.B.)*, 201 B.R. 376, 380 n. 4 (E.D. Pa. 1996) (further disclosure and solicitation not required under section 1127(b) and (c) where modifications to the plan were immaterial); *In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation); *In re Burns & Roe Enters., Inc., No. 08-4191 (GEB)*, 2009 WL 438694, at *23 (D. N.J. Feb. 23, 2009) (confirming plan as modified without additional solicitation or disclosure because modifications did "not adversely affect creditors").

Reorganization for Molecular Templates, Inc. and its Affiliated Debtor, filed on June 27, 2025 [D.I. 159-1], and any additional modifications to the Plan described or set forth in the Confirmation Order or in any Plan filed prior to the entry of the Confirmation Order (collectively, the "Plan Modifications") constitute technical or clarifying changes, changes with respect to particular Claims by agreement with Holders of such Claims, or modifications that do not otherwise materially and adversely affect or change the treatment of any other Claim or Interest under the Combined Disclosure Statement and Plan. These Plan Modifications are consistent with the disclosures previously made pursuant to the Combined Disclosure Statement and Plan and the solicitation materials served pursuant to the Solicitation Procedures Order, and notice of these Plan Modifications was adequate and appropriate under the facts and circumstances of these Chapter 11 Cases. None of the modifications adversely affect the treatment of any party-in-interest without their consent.

136. In accordance with Bankruptcy Rule 3019, the Plan Modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or the re-solicitation of votes under section 1126 of the Bankruptcy Code, and they do not require that Holders of Claims or Interests be afforded an opportunity to change previously cast acceptances or rejections of the Combined Disclosure Statement and Plan. Accordingly, the Combined Disclosure Statement and Plan, as modified, is properly before this Court and all votes cast with respect to the Combined Disclosure Statement and Plan prior to such modification shall be binding and shall apply with respect to the Combined Disclosure Statement and Plan.

S. Good Cause Exists to Waive the Stay of the Proposed Confirmation Order.

137. 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."[116] Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

138. 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.[117] As noted above, these Chapter 11 Cases and the related transactions have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information.[118] Additionally, each day the Debtors remain in chapter 11, it incurs significant administrative and professional costs that directly reduce the amount of distributable value for creditors.[119]

139. 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.

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[116] Bankruptcy Rule 3020(e).

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

[118] *See* Jalbert Decl. ¶ 25.

[119] *Id*. at 40.

CONCLUSION

For all the foregoing reasons, the Debtors respectfully request that the Court enter the Confirmation Order approving the Disclosure Statement on a final basis and confirming the Plan.

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Wilmington, Delaware

Respectfully submitted,

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