Docket #0570 Date Filed: 12/20/2024

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

In re:	)	Chapter 11
VERTEX ENERGY, INC., *et al.*,[1]	)	Case No. 24-90507 (CML)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF VERTEX ENERGY, INC. AND ITS DEBTOR AFFILIATES AND OMNIBUS REPLY TO OBJECTIONS THERETO

[1] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/vertex. The location of Debtor Vertex Energy, Inc.'s corporate headquarters and the Debtors' service address in these chapter 11 cases is 1331 Gemini Street, Suite 250, Houston, Texas 77058.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this memorandum of law (this "Memorandum") in support of confirmation of the *Second Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 564] (as modified, amended, or supplemented from time to time, "Plan"), pursuant to sections 1125, 1126, and 1129, respectively of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"),[2] and in response to the objections thereto (the "Objections").[3] The Debtors believe that they have resolved all Objections to Confirmation except the objection filed by the U.S. Trustee [Docket No. 373] (the "U.S. Trustee Objection").[4] In further support of confirmation of the Plan, the Debtors have filed contemporaneously herewith: (a) the *Declaration of R. Seth Bullock in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* (the "Bullock Declaration"); (b) the *Declaration of Jeffrey S. Stein in Support of Confirmation of the Second Amended Joint Plan of Vertex Energy, Inc. and Its Debtor Affiliates* (the "Stein Declaration"); (c) the *Declaration of Douglas McGovern in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* (the "McGovern Declaration"); and (d) the *Declaration of James Lee Regarding the Solicitation and Tabulation of Votes On the First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* (the "Voting and Opt-In Report," and together with the Bullock Declaration, the Stein Declaration, and the McGovern Declaration,

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[2] Capitalized terms used but not defined in this Memorandum shall have the meanings ascribed to such terms in the Plan or the Disclosure Statement (as defined herein), as applicable.

[3] A summary chart of the filed Objections and the status of each is attached hereto as **Exhibit A** (the "Objection Summary Chart"). The Debtors have also received a number of informal objections and other comments from various parties in interest, all of which have been resolved.

[4] The U.S. Trustee renewed its objection to the Disclosure Statement [Docket No. 373].

the "Declarations"). In support of confirmation of the Plan, and in response to the Objections, the Debtors respectfully state as follows.

PRELIMINARY STATEMENT

1. The Debtors commenced these chapter 11 cases (these "Chapter 11 Cases") nearly three months ago to pursue a value-maximizing transaction, either in the form of a standalone recapitalization transaction or a sale of all, or substantially all, of the Debtors' Assets. In pursuit of a potential sale of the Debtors' Assets, PWP, the Debtors' investment banker, conducted a robust marketing process in accordance with the Bidding Procedures Order. Specifically, the Debtors and their advisors actively engaged with bidders to facilitate the production of diligence, schedule site visits for potential purchasers to visit the Debtors' Mobile refinery and Marrero facility, and facilitate management conferences for potential purchasers to learn more about the Debtors' operations directly from management and operational leadership.[5] As the Qualified Bid deadline approached, the Debtors received multiple bids from various third parties, however, after a fulsome review, the Debtors, in consultation with the Consultation Parties, determined that none of the bids received constituted a Qualified Bid.[6]

2. Simultaneously during the course of the sale and marketing process, the Debtors continued to focus on engaging with (a) the Environmental Protection Agency (the "EPA"), to address the approximately $84.4 million in obligations that the Debtors estimate they will owe through the 2024 compliance period under the federal RFS Program, (b) the Committee and Matheson, to negotiate the terms of the Committee Settlement, (c) Macquarie and Shell, on

[5] *Id.* ¶ 11.

[6] *Id.* ¶ 15.

continuing the Debtors' intermediation facility and related agreements through February 28, 2025, unless the parties agree to extend such date, and (d) the DIP Lenders, on the terms of exit financing.

3. After weeks of hard-fought, arms' length negotiations with each of the EPA, Macquarie, Shell, the DIP Lenders, the Committee, Matheson, and various parties in interest, the Debtors seek to effectuate the Recapitalization Transaction, which will preserve hundreds of jobs, deleverage the Debtors' balance sheet, and provide sufficient liquidity to sustain the Debtors' go-forward enterprise.[7] Specifically, the Recapitalization Transaction contemplated under the Plan provides for: (a) the complete equitization of prepetition debt of approximately $118.1 million and postpetition debt of approximately $280 million in exchange for New Common Stock and potentially new loans under the New Term Loan Facility; (b) $100 million in new money exit financing, providing the Reorganized Debtors with ample liquidity at emergence; (c) the restructuring of the Debtors' existing obligations under the Clean Air Act, whereby the Reorganized Debtors shall retire a total of 18,794,250 unexpired valid RINs by no later than March 31, 2025, in full and final satisfaction of all liability under the Clean Air Act and the renewable fuel standard regulations for the Debtors' 2023-24 RVOs; and (d) the Committee Settlement, which provides a recovery to Holders of Allowed General Unsecured Claims at Debtors Other than Vertex that would not otherwise be entitled to any recovery under the Plan.

4. Due to the Debtors' and their various stakeholders' tireless efforts both before and after the Petition Date, Confirmation is now proceeding with the overwhelming support of the Debtors' key economic stakeholders and the Committee. Specifically, the Plan has been overwhelmingly accepted by all but one of the Debtors' Voting Classes, including Holders of

[7] *See* Bullock Decl. ¶ 23.

100% of the Term Loan Claims, 98.47% of Holders of General Unsecured Claims at Debtors other than Vertex (by amount), and 99.31% of Holders of Other General Unsecured Claims at Vertex (by amount).[8]

5. The only outstanding objection to the Plan comes from the U.S. Trustee, however, as set forth herein and in the Declarations, the Plan satisfies the applicable requirements of the Bankruptcy Code and other applicable law, achieves an extraordinary result that is in the best interests of the Debtors' estates, and should be confirmed. Accordingly, the Debtors request that the Bankruptcy Court enter the Confirmation Order.

BACKGROUND AND VOTING RESULTS

I. Procedural Background.

6. On September 24, 2024 (the "Petition Date"), the Debtors each filed voluntary petitions under chapter 11 of the Bankruptcy Code with the Bankruptcy Court. On the Petition Date, the Debtors filed, among other things, the *Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 21] and the *Disclosure Statement for the Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 22]. Consistent with the RSA, the Plan contemplated a dual-track process, whereby the Debtors were to pursue confirmation of a standalone recapitalization of the Debtors' balance sheet.

7. On the Petition Date, the Debtors also filed a motion to establish procedures to facilitate the postpetition marketing and sale process in accordance with the milestones set forth in the RSA. The Bankruptcy Court entered an order establishing the bidding procedures on September 25, 2024 [Docket No. 55] (the "Bidding Procedures"). The Bidding Procedures established October 23, 2024, as the deadline for interested parties to submit IOIs.

[8] *See* Voting and Opt-In Report.

On October 18, 2024, the Debtors, in consultation with the Consultation Parties, filed the *Notice of Amended Sale Schedule* [Docket No. 210], whereby the Debtors extended the deadline to October 29, 2024, at 12:00 p.m. (prevailing Central Time).

8. On November 5, 2024, the Debtors, in consultation with the Consultation Parties, filed the *Notice of Acceptable Indications of Interest* [Docket No. 384] informing bidders that (i) the Debtors had received at least one acceptable Indication of Interest, (ii) that the deadline by which potential bidders must deliver a binding Qualified Bid (as defined in the Bidding Procedures) is November 22, 2024 at 4:00 p.m., prevailing Central Time, and (iii) an auction (the "Auction"). In accordance with the Bidding Procedures and in consultation with the Consultation Parties, determined that they did not receive more than one Qualified Bid for any particular asset or a portion of assets by the Qualified Bid Deadline and accordingly determined to cancel the Auction.[9] The Debtors further determined, in consultation with the Consultation Parties, that the Debtors did not receive an actionable bid for some or all of the Debtors' Assets and determined to proceed with implementing the Recapitalization Transaction the Plan.[10]

9. On November 17, 2024, the Debtors filed the *First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 425].[11]

10. On November 18, 2024, the Bankruptcy Court entered the *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures With Respect to Confirmation of the Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the*

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[9] *See Notice of Cancellation of Auction* [Docket No. 519].

[10] *See* McGovern Decl. ¶¶ 15–16.

[11] *See Notice of Filing of First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 425].

Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dated With Respect Thereto, and (V) Granting Related Relief [Docket No. 431] (the "Disclosure Statement Order"), which, among other things, (a) approved the adequacy of the Disclosure Statement, (b) scheduled a hearing to consider confirmation of the Plan, and (c) approved (i) the Solicitation and Voting Procedures, (ii) certain notices and certain dates and deadlines in connection with solicitation and confirmation of the Plan, and (iii) the manner and form of the Solicitation Packages and the materials contained therein.

11. On December 13, 2024, the Debtors filed the *Plan Supplement for the Debtors' First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 531] (as amended, supplemented, or modified from time to time, the "Plan Supplement"), which included the (a) Schedule of Retained Causes of Action, (b) New Organizational Documents, (c) the Restructuring Transactions Memorandum, and (d) Identity of the New Board. On December 16, 2024, the Debtors filed the *First Amended Plan Supplement for the Debtors' First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 540], which included the RVO Settlement Agreement. On December 17, 2024, the Debtors filed the *Second Amended Plan Supplement for the Debtors' First Amended Joint Chapter 11 Plan of Reorganization* [Docket No. 544], which included the GUC Trust Agreement. On December 19, 2024, the Debtors filed the *Third Amended Plan Supplement for the First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 553], which included the following exhibits: (a) Assumed Executory Contracts and Unexpired Leases List; (b) Rejected Executory Contracts and Unexpired Leases List; (c) Matheson Mutual Release Agreement; (d) the Restructuring Transactions Memorandum, and (e) the Identity of the New Board. Contemporaneously herewith the Debtors filed the *Fourth Amended Plan Supplement for*

the Second Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates, which included the (a) Exit Intermediation Facility Term Sheet, (b) Exit Term Loan Commitment Letter and Term Sheet, (c) the Identity of the New Board, (d) the Schedule of Assumed Executory Contracts and Unexpired Leases List, (e) the Rejected Executory Contracts and Unexpired Leases List, and (f) the Schedule of Retained Causes of Action.

12. The deadline to file objections to the Plan and for all Holders of Claims entitled to vote on the Plan to cast their ballots was December 18, 2024, at 4:00 p.m., prevailing Central Time. Contemporaneously herewith, the Debtors have submitted a proposed order confirming the Plan (the "Confirmation Order"), which reflects the resolutions the Debtors have reached with the objecting parties.

II. The Restructuring Transactions.

13. As described in the Bullock Declaration and the McGovern Declaration, the Debtors are prepared to implement the Plan through the effectuation of the standalone Recapitalization Transaction, pursuant to which (a) Holders of DIP Claims and Holders of Term Loan Claims will receive 100% of the New Common Stock of Reorganized Vertex and potentially new loans under the New Term Loan Facility and (b) Holders of Allowed General Unsecured Claims at Debtors other than Vertex will receive their *pro rata* share of the GUC Trust Net Assets, a meaningful recovery as described in greater detail below.[12] This is made possible as the result of the settlements incorporated into the Plan, including the Committee Settlement and the Debtors' settlement with the EPA. Together, these settlements will allow the Debtors to emerge from

[12] *See* Bullock Decl. ¶ 23; McGovern Decl. ¶ 16.

chapter 11 positioned for long-term success, with a substantially deleveraged capital structure, and sufficient liquidity to continue operating their businesses.

A. The Committee Settlement.

14. On October 17, 2024, the Committee filed its *Omnibus Objection of the Official Committee of Unsecured Creditors to Debtors' Emergency Motions to Obtain Postpetition Debtor-in-Possession Financing and Continuation of the Intermediation Contracts* [Docket No. 181] and on November 1, 2024, the Committee filed its *Limited Objection and Reservation of Rights of the Official Committee of Unsecured Creditors to the Debtors' Disclosure Statement Approval Motion* [Docket No. 375].

15. On November 16, 2024, the Debtors, the Committee, and the DIP Lenders agreed to the terms of a global settlement, which, among other things, resolved the Committee's objection to the Final DIP Order, Final Intermediation Order, and the Disclosure Statement, as well as the Committee's potential objection to the Plan.

16. The Committee Settlement provides substantial value to the GUC Trust Beneficiaries in the form of the GUC Cash of (i) $2,225,000 in Cash *plus* (ii) to the extent the Debtors do not distribute the entirety of the approximately $34.2 million reserved on account of Trade Claims authorized under the Critical Vendors Order prior to the Effective Date, such remaining undistributed amounts. In addition, the Committee Settlement, among other things, (a) establishes the GUC Trust, to be administered for the benefit of the GUC Trust Beneficiaries, (b) waives any preference claims against (i) the Debtors' contractual counterparties whose agreements are assumed, (ii) go-forward vendors, and (iii) go-forward commercial counterparties, and (c) provides the GUC Trust with the rights to pursue the GUC Causes of Action.

17. Importantly, the Committee Settlement contemplates a resolution with Matheson—the Debtors' largest unsecured creditor. Specifically, in exchange for the Debtors'

entry into the Matheson Mutual Release Agreement, Matheson's inclusion as a Released Party under the Plan, and the assumption of the Matheson Saraland 1 Agreement, Matheson has agreed, in its capacity as a party to the Matheson Agreement and as a member of the Committee, to: (a) waive any recovery on account of Matheson's asserted claim for approximately $246.4 million against the Debtors (the "Matheson Claim"); (b) support the Plan and not file an objection; (c) grant the Third-Party Release under the Plan; and (d) enter into the Matheson Mutual Release Agreement.[13] Separately, in connection with the Matheson Rejection Order, Matheson agreed to dismantle and remove the Matheson Hydrogen Facility from the Debtors' premises at Matheson's sole cost and expense.

18. Reaching a resolution with Matheson provides finality to the Debtors by avoiding the time, uncertainty, and expense of potential litigation. Moreover, the reduction of the Matheson Claim significantly reduces the amount of Claims entitled to receive distributions from the GUC Trust, thereby significantly increasing distributable value available to other Holders of unsecured claims.

19. Since the beginning of these Chapter 11 Cases, discussions with the Committee have been constructive. The Committee Settlement will provide meaningful recoveries to the limited number of creditors that will not have their contracts assumed under the Plan in connection with the Recapitalization Transaction. The Committee Settlement is the product of arm's-length, good-faith negotiations that allow for a value-maximizing resolution of these Chapter 11 Cases.[14] Moreover, the Committee's constituents have voted overwhelmingly in favor of the Plan following

[13] On December 19, 2024, the Debtors filed the Matheson Mutual Release Agreement, attached as Exhibit D to the Plan Supplement [Docket No. 553]. The terms of the Matheson Mutual Release Agreement are acceptable to the Debtors, the Required DIP Lenders, the Required Consenting Term Loan Lenders, and the Committee.

[14] *See* Bullock Dec. ¶ 72.

the consideration provided to holders of General Unsecured Claims as a result of the Committee Settlement, and the recommendation of the Committee in support of the Plan.[15]

20. As set forth in Part IV.A of this Memorandum, the Debtors seek approval of the Committee Settlement through Confirmation of the Plan. The Debtors believe that entry into the Committee Settlement is in the best interest of the Debtors' estates and necessary for the consummation of the value-maximizing Restructuring Transactions contemplated in the Plan.[16]

B. RVO Settlement.

21. Starting on August 1, 2024, the Debtors engaged with the EPA to address the Debtors' approximately $84.4 million in obligations that the Debtors estimate they will owe through the 2024 compliance period under the federal RFS Program.[17] During these discussions, the Debtors made clear that, in the event the Debtors and the EPA were unable to reach a resolution, the Debtors would likely need to pursue either a credit bid sale or a third-party sale and would likely not be able to successfully reorganize as a going concern.[18] Accordingly, over the course of these Chapter 11 Cases the Debtors have worked diligently on the terms of a settlement with the EPA that would provide the Debtors certainty with respect to the RVOs. On December 16, 2024, the Debtors filed the *Consent Decree and Environmental Settlement Agreement* [Docket No. 540] (the "RVO Settlement Agreement") by and between the United States, on behalf of the EPA, and

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[15] *Id.*

[16] *Id.*

[17] *Id* at ¶ 19.

[18] *Id.*

the Debtors, attached as Exhibit J to the Plan Supplement.[19] Following a public notice and comment period, the EPA will file a motion with the Bankruptcy Court seeking approval of the EPA's entry into the RVO Settlement (the "EPA Motion").[20] As set forth in the Plan, the RVO Settlement will go into effect on the Effective Date in accordance with the Plan, subject to the terms of the RVO Settlement Agreement and the Bankruptcy Court's approval of the EPA Motion.

22. Pursuant to the terms of the RVO Settlement, subject to Bankruptcy Court approval, the Debtors agree to (a) retire 18,794,250 unexpired valid RINs no later than March 31, 2025, in full and final satisfaction of the Debtors' 2023-24 RVOs in accordance with the RVO Settlement Agreement and (b) retire RINs in compliance with the RFS Program going forward.[21] In exchange, the EPA covenants not to sue or assert any Claims or Causes of Action against the Debtors or Reorganized Debtors, as applicable, pursuant to the CAA and the RFS Program relating to the Debtors' RVOs for the 2023-2024 RVOs (*i.e.*, all RVOs prior to December 31, 2024). As discussed further herein, resolution of the Debtors' RVOs is an integral component of the Plan and necessary to assure the commercial viability of the Debtors.[22] The RVO Settlement has overwhelming support of the Debtors' key stakeholders, including the DIP Lenders and the

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[19] *See* Plan Supplement [Docket No. 540], Ex. J.

[20] For the avoidance of doubt, notwithstanding Confirmation of the Plan and approval of the Debtors' entry into the RVO Settlement, the EPA's entry into the RVO Settlement remains subject to final Bankruptcy Court approval as set forth in the EPA Motion. Accordingly, approval of the EPA Motion is a condition precedent to the consummation of the Plan.

[21] The foregoing description is meant as a summary of the RVO Settlement Agreement only. To the extent there is any conflict between the foregoing summary and the terms of the RVO Settlement Agreement, the RVO Settlement Agreement shall control.

[22] *See* Bullock Decl. ¶ 74.

Committee.[23] The Debtors believe that entry into the RVO Settlement is a sound exercise of the Debtors' business judgment and necessary for the consummation of the value-maximizing Restructuring Transactions contemplated in the Plan and is in the best interests of the Debtors' estates.[24]

III. Solicitation and Noticing Process.

23. Pursuant to the Disclosure Statement Order, the Debtors caused the Claims and Noticing Agent to distribute the Solicitation Packages[25] to all known Holders of Claims entitled to vote on the Plan as of November 1, 2024 (the "Voting Record Date")—*i.e.*, Holders of Term Loan Claims (Class 3), General Unsecured Claims at Debtors other than Vertex (Class 4), Other General Unsecured Claims at Vertex (Class 5), and 2027 Convertible Notes Claims (Class 6)—by the solicitation deadline, November 20, 2024, and from time to time thereafter.[26] In lieu of a Solicitation Package, on November 20, 2024, the Debtors caused the Claims and Noticing Agent to distribute a Notice of Non-Voting Status and Opt-In Form to all known Holders of Claims or

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[23] *Id.*

[24] Id.

[25] The following materials constituted the solicitation package (the "Solicitation Package"): (a) The Disclosure Statement Order (excluding the schedules, except as set forth herein); (b) the Disclosure Statement, and the exhibits attached thereto, including the Plan; (c) the Solicitation and Voting Procedures; (d) the Confirmation Hearing Notice; (e) the Cover Letter; (f) the applicable form of Ballot for each of the Voting Classes, together with detailed voting instructions and instructions on how to submit the Ballot; and (g) a pre-addressed, postage prepaid reply envelope, if applicable.

[26] Voting and Opt-In Report ¶¶ 5, 10; *see also Certificate of Service* [Docket No. 538]. To accommodate the Debtors' claims bar date of November 27, 2024 (the "General Claims Bar Date"), the Disclosure Statement Order also established a supplemental voting record date applicable to any Holder of a Claim that was subject to the Debtors' General Claims Bar Date and who filed a Proof of Claim after the Voting Record Date but on or before the General Claims Bar Date as the date that such Proof of Claim was filed (any such date, a "Supplemental Voting Record Date"). Accordingly, from time to time after November 20, 2024, the Debtors' Claims and Noticing Agent caused supplemental mailings of the Solicitation Packages to be served upon additional creditors in the Voting Classes who filed a Proof of Claim after the Voting Record Date, but on or before the General Claims Bar Date.

Interests of other Secured Claims (Class 1), Other Priority Claims (Class 2), and Interests in Vertex (Class 10), who were not entitled to vote on the Plan.[27]

24. On November 20, 2024, the Debtors caused the Confirmation Hearing Notice to be served on the Debtors' full creditor matrix and all other parties required to receive such notice pursuant to the Disclosure Statement Order.[28] The Debtors also caused the Confirmation Hearing Notice to be published in the *New York Times* (national edition) on November 22, 2024, in accordance with the Disclosure Statement Order.[29]

25. The deadline for all Holders of Claims entitled to vote on the Plan to cast their ballots and the deadline to file objections to confirmation to the Plan was December 18, 2024, at 4:00 p.m. (prevailing Central Time) (the "Voting Deadline").[30] On December 20, 2024, the Debtors filed the Voting and Opt-In Report, which is summarized below.

26. In compliance with the Bankruptcy Code and the Disclosure Statement Order, only Holders of Claims in Impaired Classes entitled to receive or retain property on account of such Claims were permitted to vote to accept or reject the Plan.[31] Holders of Claims and Interests were not entitled to vote if their rights are (a) Unimpaired under the Plan (in which case such Holders were conclusively presumed to accept the Plan pursuant to section 1126(f) of the Bankruptcy Code) or (b) Impaired and such Holders are not entitled to receive any distribution

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[27] *See* Voting and Opt-In Report ¶ 11; *see also Certificate of Service* [Docket No. 538].

[28] *See* Voting and Opt-In Report ¶ 14; *see also Certificate of Service* [Docket No. 538].

[29] *See Proof of Publication* [Docket No. 452].

[30] *See* Disclosure Statement Order ¶ 4.

[31] *See* 11 U.S.C. § 1126.

under the Plan (in which case such Holders were conclusively deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code).

27. As set forth above and in the Voting and Opt-In Report, Holders of Claims in Classes 3, 4, 5, 6, and 7 were entitled to vote to accept or reject the Plan (each, a "Voting Class" and collectively, the "Voting Classes"). The voting results, as reflected in the Voting and Opt-In Report, are summarized as follows:[32]

Total Ballots Received[33]			
Accept		**Reject**	
Number (% of Number)	Amount (% of Amount)	Number (% of Number)	Amount (% of Amount)
Class 3 – Term Loan Claims			
14 (100.00%)	$118,798,692.60 (100.00%)	0 (0.00%)	$0.00 (0.00%)
Class 4 – General Unsecured Claims at Debtors other than Vertex			
46 (90.20%)	$42,758,273.85 (98.47%)	5 (9.80%)	$663,070.57 (1.53%)
Class 5 – Other General Unsecured Claims at Vertex			
21 (87.50%)	$2,289,840.02 (99.31%)	3 (12.50%)	$15,836.59 (0.69%)
Class 6 – 2027 Convertible Notes Claims			
0 (0.00%)	$0.00 (0.00%)	6 (100.00%)	$14,150,000.00 (100.00%)

28. All Holders of Claims and Interests had notice and opportunity to "opt in" to the Third-Party Release (as defined herein).[34] All Holders of Claims in the Voting Classes had the

[32] *See generally* the Voting and Opt-In Report, ¶ 17. For an additional discussion regarding the solicitation and vote tabulation process, see the Voting and Opt-In Report.

[33] The Debtors did not solicit votes to accept or reject the Plan from any Holders of Term Loan Deficiency Claims in Class 7 because the Class did not have any known Holders of Term Loan Deficiency Claims as of the Voting Record Date.

[34] *See Certificate of Service* [Docket No. 538].

opportunity to "opt in" to the Third-Party Release through their Ballots. Holders of Claims and Interests in the Non-Voting Classes were given the opportunity to "opt in" to the Third-Party Release via the Opt-In Forms they received from the Claims and Noticing Agent. The deadline to opt in to the Third-Party Release was December 18, 2024, at 4:00 p.m. (prevailing Central Time). Ultimately, 120 parties[35] elected to opt in to the Third-Party Release prior to the Opt-In Deadline.[36] The affirmative opt ins received by the Debtors are summarized as follows:

Class	Voting Rights	Total Opt-Ins Received
Unclassified Claims	N/A	3
Class 1 – Other Secured Claims	Not Entitled to Vote (Deemed to Accept)	0
Class 2 – Other Priority Claims	Not Entitled to Vote (Deemed to Accept)	0
Class 3 – Term Loan Claims	Entitled to Vote	14
Class 4 – General Unsecured Claims at Debtors other than Vertex	Entitled to Vote	28
Class 5 – Other General Unsecured Claims at Vertex	Entitled to Vote	12
Class 6 – 2027 Convertible Notes Claims	Entitled to Vote	0
Class 10 – Interests in Vertex	Not Entitled to Vote (Deemed to Reject)	66

IV. The Objections.

29. The Debtors have worked with various parties in interest to resolve their Objections prior the Confirmation Hearing. The Debtors believe that they have resolved all Objections to

[35] Pursuant to the Matheson Mutual Release Agreement, and upon execution thereof, Matheson Tri-Gas, Inc. shall be deemed to opt in to the Third-Party Release.

[36] *See* Voting and Opt-In Report ¶ 19.

Confirmation except the objection filed by the U.S. Trustee [Docket No. 373] (the "U.S. Trustee Objection").[37] The Debtors respond to the U.S. Trustee Objection in Part IV and Part V of this Memorandum.

ARGUMENT

I. The Plan Satisfies Each Requirement for Confirmation.

30. To confirm the Plan, the Bankruptcy Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[38] As set forth herein, the Plan fully complies with all relevant sections of the Bankruptcy Code—including sections 1122, 1123, 1125, 1126, and 1129—as well as the Bankruptcy Rules and applicable nonbankruptcy law.

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

31. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]."[39] The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision also encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan of reorganization, respectively.[40] As set forth below, the Plan satisfies the

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[37] The U.S. Trustee renewed its objection to the Disclosure Statement [Docket No. 373].

[38] *See In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009) (holding that a plan proponent must satisfy its burden of proof that the Plan complies with section 1129(a) of the Bankruptcy Code by a preponderance of the evidence); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003) (same).

[39] 11 U.S.C. § 1129(a)(1).

[40] S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C. C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C. C.A.N. 5963, 6368 (1977); *In re S & W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was most directly aimed at were [s]ections 1122 and 1123."); *In re Nutritional Sourcing*

requirements of section 1129(a)(1) of the Bankruptcy Code because the Plan complies with sections 1122 and 1123 of the Bankruptcy Code.

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

32. The classification requirement of section 1122(a) of the Bankruptcy Code provides, in pertinent part, that "[e]xcept as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[41] For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class.[42] Instead, claims or interests designated to a particular class must be substantially similar to each other.[43] Courts in this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[44]

Corp., 398 B.R. 816, 824 (Bankr. D. Del. 2008) (noting that the legislative history of section 1129(a)(1) confirms that a plan must comply with sections 1122 and 1123 of the Bankruptcy Code).

[41] 11 U.S.C. § 1122(a).

[42] *See In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 860 (Bankr. S.D. Tex. 2001) (recognizing that section 1122 is broadly "permissive of any classification scheme that is not specifically proscribed, and that substantially similar claims may be separately classified").

[43] *In re Vitro Asset Corp.*, No. 11-32600-HDH, 2013 WL 6044453, at *5 (Bankr. N.D. Tex. Nov. 14, 2013) ("[A] plan may provide for multiple classes of claims or interests so long as each claim or interest within a class is substantially similar to other claims or interests in that class.").

[44] Courts have identified grounds justifying separate classification, including: (a) where there are good business reasons for separate classification, and (b) where members of a class possess different legal rights. *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1167 (5th Cir. 1993) (recognizing that "there may be good business reasons to support separate classification"); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (holding that a classification scheme is proper 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"); *see also In re Pisces Energy, LLC*, No. 09-36591-H5-11, 2009 WL 7227880, at *8 (Bankr. S.D. Tex. Dec. 21, 2009) ("[A] plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code provided there is a reasonable basis for the classification scheme and all claims within a

33. 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 ten separate Classes, with Claims and Interests in each Class differing from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria.[45] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

Class 1: Other Secured Claims;

Class 2: Other Priority Claims;

Class 3: Term Loan Claims;

Class 4: General Unsecured Claims at Debtors other than Vertex;

Class 5: Other General Unsecured Claims at Vertex;

Class 6: 2027 Convertible Notes Claims;

Class 7: Term Loan Deficiency Claims;

Class 8: Intercompany Claims;

Class 9: Intercompany Interests; and

Class 10: Interests in Vertex

34. Here, each of the Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests, as applicable, in such Class.[46] The Plan's classification scheme generally corresponds to the Debtors' corporate and capital structure, thereby taking into account the relative priority among Claims and Interests, including the relative

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particular class are substantially similar."); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan.").

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

[46] *See* Bullock Decl. ¶ 30.

priority between secured and unsecured Claims.[47] In addition, valid business, legal, and factual reasons justify the separate classification of particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests.[48] Namely, the Plan separately classifies the Claims or Interests because each Holder of such Claims or Interests may hold (or may have held) rights in the Estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification.[49] For example, Claims (rights to payment) are classified separately from Interests (representing ownership in the business), and Term Loan Claims are classified separately from 2027 Convertible Notes Claims because the Debtors' obligations with respect to the former are secured by collateral.[50] Accordingly, the Plan fully complies with and satisfies section 1122(a) of the Bankruptcy Code, and no party has asserted otherwise.

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

35. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy.[51] The Plan satisfies each of these requirements.

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See* 11 U.S.C. § 1123(a).

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

36. Section 1123(a)(1) of the Bankruptcy Code requires that the Plan designate "classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests."[52] For the reasons set forth above, Article III of the Plan properly designates Classes of Claims and Interests and thus satisfies this requirement of the Bankruptcy Code,[53] and no party has asserted otherwise.

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

37. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan."[54] The Plan meets this requirement by identifying each Class in Article III that is Unimpaired, and no party has asserted otherwise.[55]

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

38. 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."[56] The Plan meets this requirement by setting forth the treatment of each Class in Article III that is Impaired,[57] and no party has asserted otherwise.

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

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[52] *Id.* § 1123(a)(1).

[53] *See* Bullock Decl. ¶ 31.

[54] *Id.* § 1123(a)(2).

[55] Plan, Art. III; *see also* Bullock Decl. ¶ 32.

[56] *Id.* § 1123(a)(3).

[57] Plan, Art. III; *see also* Bullock Decl. ¶ 33.

39. 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."[58] The Plan meets this requirement because Holders of Allowed Claims or Interests will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such Holders' respective Class, except where such Holder has agreed to less favorable treatment,[59] and no party has asserted otherwise.

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

40. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation.[60] The Plan satisfies this requirement, because Article IV of the Plan, as well as the documents and forms of documents, agreements, schedules, and exhibits included in the Plan Supplement (as incorporated into the Plan), provide for the means by which the Plan will be implemented. Among other things, the Plan provides for:

- the general settlement of Claims and Interests, including through the implementation of the Committee Settlement;
- the RVO Settlement;
- the means for implementing the Restructuring Transactions, including the sources of consideration under the Plan and distributions related thereto, the existence of the Reorganized Debtors and the authorization for the Debtors or Reorganized Debtors, as applicable, to take corporate actions necessary to effectuate the Plan;

[58] *Id.* § 1123(a)(4).

[59] Plan, Art. III; *see also* Bullock Decl. ¶ 34.

[60] *See* 11 U.S.C. § 1123(a)(5).

- the cancellation of certain notes, instruments, certificates, and other documents;
- the preservation of certain Causes of Action not transferred to the GUC Trust;
- the vesting of Assets in the Reorganized Debtors; and
- the establishment of the GUC Trust, which shall have the sole power and authority to distribute the GUC Trust Net Assets to Holders of General Unsecured Claims in accordance with the treatment set forth in the Plan for Classes 4, 5, 6, and 7.[61]

41. The precise terms governing the execution of these transactions are set forth in greater detail in the Plan and the Plan Supplement, as applicable. Accordingly, the Plan satisfies section 1123(a)(5) of the Bankruptcy Code, and no party has asserted otherwise.

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

42. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities.[62] Article IV.P of the Plan provides that the New Organizational Documents shall contain a provision prohibiting the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code.[63] The relevant New Organizational Documents similarly reflect such prohibition.[64] Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code, and no party has asserted otherwise.

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[61] *See* Bullock Decl. ¶ 35.

[62] *See* 11 U.S.C. § 1123(a)(6).

[63] Plan, Art. IV.P.

[64] *See* Plan Supplement [Docket No. 531], Ex. E.

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

43. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy."[65] On the Effective Date, the term of the current members of the board of directors of Vertex Energy, Inc. will expire, such current directors will be deemed to have resigned, and all of the directors for the initial term of the New Board will be appointed.[66] The New Board will initially consist of five directors as designated in accordance with the New Organizational Documents.[67] The identities of three of the members of the New Board were disclosed in the Plan Supplement filed with the Bankruptcy Court on December 13, 2024, and the identity of one of the members of the New Board was disclosed in the Plan Supplement filed with the Bankruptcy Court on December 19, 2024.[68] From and after the Effective Date, each of the directors, managers, and officers of each of the Reorganized Debtors shall serve pursuant to the applicable governance documents of such Reorganized Debtor. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code, and no party has asserted otherwise.

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

44. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of

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[65] *See* 11 U.S.C. § 1123(a)(7).

[66] *See* Plan, Art. IV.Q; Plan Supplement [Docket No. 531], Ex. G.

[67] *See* Plan Supplement [Docket No. 531], Ex. E.

[68] *See* Plan Supplement [Docket Nos. 531 & 553], Ex. G.

the Bankruptcy Code.[69] The legislative history to section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[70] 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.

45. 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 summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."[71] Section 1125 of the Bankruptcy Code ensures that parties in interest are fully informed regarding the debtor's condition so they may make an informed decision whether to approve or reject a plan.[72]

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[69] *See* 11 U.S.C. § 1129(a)(2).

[70] S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C. C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C. C.A.N. 5963, 6368 (1977); *In re Lapworth*, No. 97-34529 (DWS), 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); *In re WorldCom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126").

[71] 11 U.S.C. § 1125(b).

[72] *See In re Cajun Elec. Power Co-op., Inc.*, 150 F.3d 503, 518 (5th Cir. 1998) (finding that section 1125 of the Bankruptcy Code obligates a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

46. Section 1125 of the Bankruptcy Code is satisfied here. Before the Debtors solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order.[73] The Bankruptcy Court approved the contents of the Solicitation Packages provided to Holders of Claims entitled to vote on the Plan, the non-voting materials provided to Holders of Claims and Interests not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan. The Debtors, through the Claims and Noticing Agent, complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code.[74] The Debtors also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. Here, the Debtors caused the same Disclosure Statement to be transmitted to all parties entitled to vote on the Plan.[75]

47. Based on the foregoing, the Debtors have complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order.

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

48. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that are entitled to receive or retain property under a plan

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[73] *See* Disclosure Statement Order [Docket No. 431].

[74] *See Certificate of Service* [Docket No. 538].

[75] *See id.*

on account of such claims or equity interests may vote to accept or reject a plan.[76] 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. . . .
>
> * * * *
>
> (f) 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.[77]

49. As discussed above, the Debtors solicited acceptances or rejections of the Plan from Holders of Allowed Claims in Classes 3, 4, 5, and 6—the only Classes entitled to vote on the Plan—in accordance with section 1125 of the Bankruptcy Code. The Debtors did not solicit votes on the Plan from the following Classes: Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), Class 8 (Intercompany Claims), Class 9 (Intercompany Interests), and Class 10 (Interests in Vertex), because Holders of such Claims and Interests are either Unimpaired and conclusively presumed to accept the Plan pursuant to section 1126(f) of the Bankruptcy Code and/or Impaired and conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code, as applicable.[78] The Debtors also did not solicit votes on the Plan from Holders of Class 7 Term Loan Deficiency Claims, if any, because they were not aware of any such Class 7 Term Loan Deficiency Claims as of the Voting Record Date.

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[76] *See* 11 U.S.C. § 1126.

[77] *Id.* §§ 1126(a), (f).

[78] The Debtors also did not solicit votes on the Plan for Holders of Class 7 Term Loan Deficiency Claims, if any, because they were not aware of any Holders of such Class 7 Term Loan Deficiency Claims as of the Voting Record Date.

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

> (c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.
>
> (d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) or this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.[79]

51. As described above, Classes 3, 4, and 5 are Impaired under the Plan and each voted overwhelmingly in favor to accept the Plan.[80] As such, at least one Impaired Class voted to accept the Plan in sufficient number and in sufficient amount to constitute an accepting Class in accordance with section 1126 of the Bankruptcy Code. Based on the foregoing, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code, and no party has asserted otherwise.

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[79] *Id.* §§ 1126(c), (d).

[80] *See* Voting and Opt-In Report. A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under section 1126(e) of the Bankruptcy Code, 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 section 1126 (e), that have accepted or rejected such plan. 11 U.S.C. § 1126(c).

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

52. 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."[81] In assessing good faith, courts in the Fifth Circuit consider whether the plan was proposed with "the legitimate and honest purpose to reorganize and has a reasonable hope of success."[82] 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.[83] 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.[84]

53. The Debtors negotiated, developed, and proposed the Plan in good faith, and the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.[85] The fundamental purpose of chapter 11 is to enable a distressed business to reorganize its affairs to prevent job losses and the adverse economic effects associated with disposing of assets at liquidation value.[86] Here, the Plan

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[81] *See* 11 U.S.C. § 1129(a)(3).

[82] *See In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985).

[83] *E.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000) (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 at 408); *In re Century Glove, Inc.*, No. CIV. A. 90-400-SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

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

[85] *See* Bullock Decl. ¶ 42.

[86] *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528 (1984); *B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) ("[T]he two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start.").

will enable the Debtors to emerge from chapter 11 with a substantially deleveraged capital structure and sufficient liquidity that will position the Reorganized Debtors for long-term success.[87] Moreover, the RSA, the Plan, and all related documents were negotiated, proposed, and entered into by the Debtors and the respective parties in good faith and from arm's-length bargaining positions, without any collusion, fraud, or attempt to take unfair advantage of any party. Indeed, the fact that the Plan is supported by 100 percent of Holders of Term Loan Claims, as well as a majority of the Holders of General Unsecured Claims, is strong evidence that the Plan has a proper purpose and is likely to succeed.[88] Finally, throughout the negotiations related to these Chapter 11 Cases, including the Plan and the RSA, the Debtors have upheld their fiduciary duties to stakeholders and protected the interests of all constituents with an even hand. Accordingly, the Plan and the Debtors' conduct satisfy section 1129(a)(3) of the Bankruptcy Code, and no party has asserted otherwise.

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

54. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan be subject to approval by the Bankruptcy Court, as reasonable.[89] Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the Bankruptcy Court as to their reasonableness.[90] The Fifth Circuit has

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[87] *See* Bullock Decl. ¶ 23.

[88] *See generally* Voting and Opt-In Report.

[89] 11 U.S.C. § 1129(a)(4).

[90] *See In re Cajun Elec. Power Coop.*, 150 F.3d 503, 518 (5th Cir. 1998) (emphasis omitted) (citations omitted) ("Section 1129(a)(4) by its terms requires court approval of any payment made or to be made by the proponent . . .

held this is a "relatively open-ended standard" that involves a case-by-case inquiry and, under appropriate circumstances, does not necessarily require that a bankruptcy court review the amount charged.[91] As to routine legal fees and expenses that have been approved as reasonable in the first instance, "the court will ordinarily have little reason to inquire further with respect to the amount charged."[92]

55. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code. All payments made or to be made by the Debtors to Professionals for services rendered or expenses incurred during these chapter 11 cases (*i.e.*, all Professional Fee Claims) are subject to Court approval and the applicable reasonableness requirements under sections 328 and/or 330 of the Bankruptcy Code.[93] Moreover, Article II.D.1 of the Plan, provides that Professionals shall file all final requests for payment of Professional Fee Claims no later than 45 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Fee Claims.[94] On the Effective Date, the Reorganized Debtors shall establish and fund the Professional Fee Escrow Account with Cash equal to the Professional Fee Amount, and payment of such fees will be made from the Professional Fee Escrow Account as soon as reasonably practicable after Court approval of such Professional Fee Claims.

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for services or for costs and expenses in or in connection with the case."); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

[91] *Cajun Elec.*, 150 F.3d at 517 ("What constitutes a reasonable payment will clearly vary from case to case and, among other things, will hinge to some degree upon who makes the payments at issue, who receives those payments, and whether the payments are made from assets of the estate.").

[92] *Id*.

[93] 11 U.S.C. §§ 328(a), 330(a)(1)(A).

[94] Plan, Art. II.D.1.

56. Further, pursuant to the Plan, the Debtors are obligated to pay the Restructuring Expenses, including the reasonable and documented fees and expenses of (a) the Consenting Term Loan Advisors, the Agent, the DIP Agent, and the DIP Lender Advisors in connection with the Restructuring Transactions and (b) the 2027 Convertible Notes Trustee in an aggregate amount not to exceed $225,000.[95] The Restructuring Expenses are a material inducement for the concessions embodied in the Plan. Specifically, payment of the Restructuring Expenses of the Consenting Term Loan Advisors, the Agent, the DIP Agent, and the DIP Lenders Advisors in connection with the Restructuring Transactions was a condition of the RSA.[96] The payment of the 2027 Convertible Notes Trustee Fees and Expenses is a requirement under the Committee Settlement.[97] Moreover, pursuant to the DIP Order, the Debtors are required to pay the reasonable and documented out-of-pocket fees, costs, and expenses of the Consenting Term Loan Advisors, the Agent, the DIP Agent, and the DIP Lenders.[98] Accordingly, the Debtors have determined in an exercise of their sound business judgment that payment of the Restructuring Expenses is appropriate and in the best interest of the Debtors' estates.[99] For the foregoing reasons, the Plan complies with section 1129(a)(4) of the Bankruptcy Code, and no party has asserted otherwise.

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[95] Plan, Art. II.F.

[96] *See* RSA.

[97] *See* Plan, Ex. A.

[98] *See* Final DIP Order [Docket No. 332] ¶¶ 9, 13(c).

[99] *See* 11 U.S. C. § 363(b) (allowing use of estate property outside of the ordinary course of business after notice and a hearing); *In re ASARCO, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011) ("The business judgment standard in section 363 is flexible and encourages discretion. . . . '[T]he bankruptcy judge should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike.'") (quoting *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986)).

E. The Debtors Have Complied with the Bankruptcy Code's Governance Disclosure Requirement (Section 1129(a)(5)).

57. Section 1129(a)(5)(A) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors, to the extent known, of the reorganized debtors.[100] It further requires that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[101] Lastly, it requires that the plan proponent have disclosed the identity of insiders to be retained by the reorganized debtor and the nature of any compensation for such insider.[102] Courts have held that these provisions ensure that the post-confirmation governance of a reorganized debtor is in good hands.[103]

58. The Debtors have satisfied section 1129(a)(5) of the Bankruptcy Code. As described above, in accordance with Article IV of the Plan, the identifies of the members of the New Board were disclosed in the Plan Supplement.[104] As of the Effective Date, the term of the current members of the board of directors of Vertex shall expire, such current members will be deemed to have resigned, and the members for the initial term of the New Board shall be shall be appointed in accordance with the New Organizational Documents.[105] Each of the directors and

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[100] 11 U.S.C. § 1129(a)(5)(A)(i).

[101] *Id.* § 1129(a)(5)(A)(ii).

[102] *Id.* § 1129(a)(5)(B).

[103] *See In re Landing Assocs.,* 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) ("In order to lodge a valid objection under § 1129(a)(5), a creditor must show that a debtor's management is unfit or that the continuance of this management post-confirmation will prejudice the creditors.").

[104] *See* Plan Supplement [Docket No. 531], Ex. G.

[105] Plan, Art. IV.Q.

officers of the Reorganized Debtors shall serve from and after the Effective Date pursuant to the terms of the New Organizational Documents and other constituent documents of the Reorganized Debtors. The Debtors and their creditors believe control of the Reorganized Debtors by the proposed individuals, or individuals to be appointed in accordance with the New Organizational Documents, will be beneficial to the Reorganized Debtors' business. Therefore, the requirements under section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied.

59. Finally, the Debtors will satisfy section 1129(a)(5)(B) of the Bankruptcy Code because the Debtors will publicly disclose the identity of all insiders that the Reorganized Debtors will employ or retain and the nature of any compensation for such insiders in compliance with the Bankruptcy Code on or immediately prior to the Effective Date in the Plan Supplement.[106] Accordingly the requirements of 1129(a)(5) of the Bankruptcy Code are or will be satisfied, and no party has asserted otherwise.

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

60. 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.[107] No such rate changes are provided for in the Plan.[108] Section 1129(a)(6) of the Bankruptcy Code is therefore inapplicable to these chapter 11 cases.

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[106] *Id*.

[107] 11 U.S.C. § 1129(a)(6).

[108] *See* Bullock Decl. ¶ 46.

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

61. 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 . . . .[109]

62. The best interests test applies to each non-consenting member of an impaired class and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of such debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[110]

63. As set forth in the Disclosure Statement and the Bullock Declaration, the Debtors, with the assistance of A&M prepared a liquidation analysis that estimates recoveries for members of each Class of Allowed Claims and Interests based on the Debtors' assets and liabilities as of August 31, 2024, assumes an orderly liquidation of inventory and certain other assets and subsequent wind-down, amongst other assumptions. The projected recoveries for these Claims

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[109] 11 U.S.C. § 1129(a)(7).

[110] *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Century Glove*, Nos. 90–400–SLR, 90–401–SLR, 1993 WL 239489, at *7 (D. Del. Feb. 10, 1993); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (stating that section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

under the Plan are equal to or in excess of recoveries estimated in a hypothetical chapter 7 liquidation, and no Holders of Claims or Interests would receive more in a hypothetical chapter 7 liquidation than it would receive under the Plan.[111] Notably, in a hypothetical chapter 7 liquidation, all creditors junior to Other Secured Claims would receive no recovery. Accordingly, the Plan complies with section 1129(a)(7) of the Bankruptcy Code and the best interests test,[112] and no party has asserted otherwise.

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

64. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan.[113] If not, the plan must satisfy the "cram down" requirements of section 1129(b) with respect to the claims or interests in that class.[114]

65. As set forth above and as reflected in the Voting and Opt-In Report, Classes 3 (Term Loan Claims), Classes 4 (General Unsecured Claims at Debtors Other than Vertex), and Class 5 (Other General Unsecured Claims at Vertex) overwhelmingly voted to accept the Plan in both amount and number. Class 1 (Other Secured Claims) and Class 2 (Other Priority Claims) are presumed to accept the Plan. Class 7 (Term Loan Deficiency Claims) was vacant as of the Voting Record Date and is, therefore, disregarded for voting purposes. Class 8 (Intercompany Claims)

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[111] Disclosure Statement, Exhibit E.

[112] *See In re Neff*, 60 B.R. 448, 452 (Bankr. N.D. Tex. 1985) *aff'd,* 785 F.2d 1033 (5th Cir. 1986) (stating that "best interests" of creditors means "creditors must receive distributions under the Chapter 11 plan with of that present value at least equal to what they would have received in a Chapter 7 liquidation of the Debtor as of the effective date of the Plan").

[113] 11 U.S.C. 1129(a)(8).

[114] *Id.* § 1129(b).

and Class 9 (Intercompany Interests) are Unimpaired under the Plan and are presumed to accept or deemed to reject the Plan, as applicable. However, Class 6 (2027 Convertible Note Claims) voted to reject the Plan and Class 10 (Interests in Vertex) is Impaired under the Plan and conclusively deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code. Notwithstanding such rejections, the Plan is confirmable nonetheless because it meets the requirement of section 1129(b) of the Bankruptcy Code to "cram down" the rejecting Classes, because at least one impaired Class has voted to accept the Plan, as discussed further below.

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

66. Section 1129(a)(9) of the Bankruptcy Code requires that certain administrative and priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments.[115] In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims.[116] Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—generally domestic support obligations, wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount

[115] *See id.* § 1129(a)(9).

[116] *Id.* § 1129(a)(9)(A).

of such claim on the effective date of the plan (if such class has not accepted the plan).[117] Finally, section 1129(a)(9)(C) of the Bankruptcy Code provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—*i.e.*, priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.[118]

67. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. ***First***, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each Holder of Allowed Administrative Claims receives Cash equal to the amount of such Allowed Administrative Claim on the Effective Date, or as soon as reasonably practicable thereafter, or at such other time defined in Article II.A of the Plan.[119] ***Second***, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no holders of the types of Claims specified by section 1129(a)(9)(B) of the Bankruptcy Code are Impaired under the Plan.[120] ***Third***, Article II.E of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each holder of an Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.[121] Thus, the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code, and no party has asserted otherwise.

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[117] *Id.* § 1129(a)(9)(B).

[118] *Id.* § 1129(a)(9)(C).

[119] *See* Plan, Art. II.A.

[120] *See* Plan, Art. III.A.

[121] *See* Plan, Art. II.E.

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

68. 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.[122] As detailed herein and in the Voting and Opt-In Report, Holders of Claims in Class 3 (Term Loan Claims), Class 4 (General Unsecured Claims at Debtors Other than Vertex), and Class 5 (Other General Unsecured Claims at Vertex)—each of whom are Impaired Classes under the Plan—overwhelmingly voted to accept the Plan, independent of any insiders' votes.[123] Thus, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

K. The Plan Is Feasible and Is Not Likely to Be Followed by the Need for Further Financial Reorganization (Section 1129(a)(11)).

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

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[122] *Id.* § 1129(a)(10).

[123] Class 7 (Term Loan Deficiency Claims) was vacant as of the Voting Record Date and, therefore, disregarded for voting purposes. *See* Voting and Opt-In Report, ¶ 17.

[124] 11 U.S.C. § 1129(a)(11).

demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[125] Rather, a debtor must provide only a reasonable assurance of success.[126] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[127] As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

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

a. the adequacy of the capital structure;

b. the earning power of the business;

c. the economic conditions;

d. the ability of management;

e. the probability of the continuation of the same management; and

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[125] *In re T-H New Orleans Ltd P'ship,* 116 F.3d 790, 801 (5th Cir. 1997) (citations omitted) ("[T]he [bankruptcy] court need not require a guarantee of success . . . [o]nly a reasonable assurance of commercial viability is required."); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Lakeside Glob. II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (noting that the feasibility standard "has been slightly broadened and contemplates whether the debtor can realistically carry out its plan").

[126] *Kane*, 843 F.2d at 649; *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.*, 475 B.R. 34, 115 (D. Del. 2012); *see also Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted) ("The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation."); *accord In re Capmark Fin. Grp. Inc.*, No. 09-13684 (CSS), 2011 WL 6013718, at *61 (Bankr. D. Del. Oct. 5, 2011) (same).

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

f. any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[128]

71. The Plan is feasible as required by section 1129(a)(11) of the Bankruptcy Code and should be confirmed. As set forth in the Bullock Declaration, the Debtors and their advisors have thoroughly analyzed the Debtors' ability to meet their respective obligations under the Plan and continue as a going concern without the need for further financial reorganization of the Debtors or any successor to the Debtors.[129] The Plan will deleverage the Debtors' balance sheets and provide the Debtors with a reasonable assurance of commercial viability upon emergence.[130] In negotiating the Recapitalization Transaction, the Debtors thoroughly analyzed their ability to meet their respective obligations under the Plan and expect to have sufficient funds to meet all the Debtors' obligations under the Plan.[131]

72. To provide support that the Plan satisfies the feasibility standard, the Debtors, with the assistance of A&M, prepared projections of the Debtors' financial performance for fiscal years 2025 through 2028 upon the Debtors' consummation of the Recapitalization Transaction, which were originally attached as Exhibit D and are attached to the Bullock Declaration (the "Financial Projections").[132] The Financial Projections were prepared on a consolidated basis using several assumptions regarding the Debtors' business operations and the terms of the Plan, including the

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[128] *In re M & S Assocs. Ltd.*, 138 B.R. 845, 849 (Bankr. W.D. Tex. 1992).

[129] *See* Bullock Decl. ¶ 58.

[130] *Id.* at ¶¶ 23, 58.

[131] *See* Disclosure Statement Art. II.

[132] *See* Bullock Declaration, Ex. A.

settlement of the Debtors' RVOs.[133] The Financial Projections demonstrate the Reorganized Debtors' go-forward enterprise will maintain profitability through fiscal year 2028.[134]

73. Following emergence, the Financial Projections demonstrate that the Reorganized Debtors are well-positioned to execute on their business plan, service their significantly reduced debt obligations, and successfully operate their businesses in the ordinary course. Moreover, through the Plan, the Debtors will substantially deleverage their balance sheet, thereby providing the Reorganized Debtors a significantly improved liquidity profile. The Plan is therefore feasible, and Confirmation is not likely to be followed by liquidation or need for further financial reorganization of the Debtors or any successor to the Debtors under the Plan.[135] Accordingly, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code, and no party has asserted otherwise.

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

74. 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."[136] 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 status.

75. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because Article XII.C of the Plan provides that all such fees and charges payable, as determined by the

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[133] *See* Bullock Decl. ¶ 59.

[134] *Id*.

[135] *Id*. ¶ 58.

[136] 11 U.S.C. § 1129(a)(12).

Bankruptcy Court, shall be paid by each of the Reorganized Debtors (or disbursing agent on behalf of each of the Reorganized Debtors) for each quarter (including any fraction thereof) until these Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first. No party has asserted otherwise.

M. All Retiree Benefits Will Continue Post-Confirmation (Section 1129(a)(13)).

76. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.[137] The Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code because Article IV.J of the Plan provides that the Debtors shall continue to pay all retiree benefits pursuant to the Pension Plan.[138]

N. Sections 1129(a)(14) through 1129(a)(16) Do Not Apply to the Plan.

77. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations.[139] Since the Debtors are not subject to any domestic support obligations, the requirements of section 1129(a)(14) of the Bankruptcy Code do not apply.

78. Likewise, section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code.[140] Since the Debtors are not individuals, the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply.

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[137] *Id.* § 1129(a)(13).

[138] *See* Plan, Art. IV.J.

[139] *Id.* § 1129(a)(14).

[140] *Id.* § 1129(a)(15).

79. Finally, each of the Debtors are a moneyed, business, or commercial corporation, and therefore, section 1129(a)(16) of the Bankruptcy Code, which provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust be made in accordance with any applicable provisions of nonbankruptcy law,[141] is not applicable to these Chapter 11 Cases.

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

80. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied.[142] To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[143]

81. The Plan satisfies section 1129(b) of the Bankruptcy Code. As noted above, a majority of Holders of Claims in Classes 3, 4, and 5 that cast their Ballots voted to accept the Plan. Holders of Claims in Class 6 (2027 Convertible Notes Claims) voted to reject the Plan. Class 10 (Interests in Vertex) will not receive any recovery and is deemed to reject the Plan. Class 8

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[141] *See id.* § 1129(a)(16).

[142] *Id.* § 1129(b)(1).

[143] *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993); *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'Ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 653 (9th Cir. 1997) ("[T]he Plan satisfies the 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b), which requires that the Plan 'does not discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the Plan.").

(Intercompany Claims) and Class 9 (Intercompany Interests) may be deemed to reject the Plan based on the Debtors' ultimate determination to reinstate or cancel Intercompany Claims and Intercompany Interests. Notwithstanding the fact that certain Impaired Classes have voted to reject the Plan or are or may be deemed to reject the Plan, the Plan satisfies the requirements under section 1129(b) of the Bankruptcy Code with respect to such Classes and is confirmable.[144]

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

82. Although the Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to make the determination.[145] In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so.[146] A threshold inquiry to assessing whether a proposed plan of

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[144] Class 7 is vacant and, thus, disregarded for purposes of section 1129(b) of the Bankruptcy Code. Classes 1 and 2 are Unimpaired and not entitled to vote on the Plan.

[145] *In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *203 N. LaSalle*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"); *In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) ("Courts interpreting language elsewhere in the Code, similar in words and function to § 1129(b)(1), have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination."); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

[146] *See In re Idearc Inc.*, 423 B.R. 138, 171 (Bankr. N.D. Tex. 2009) ("[T]he unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so."); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (finding no unfair discrimination where the interests of objecting class were not similar or comparable to those of any other class).

reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.[147]

83. Here, the Plan's treatment of the non-accepting Impaired Classes is proper because all similarly situated holders of Claims and Interests will receive substantially similar treatment, and the Plan's classification scheme rests on a legally acceptable rationale. Claims and Interests in the non-accepting Impaired Classes are not similarly situated to those in any other Classes given their distinctly different legal character from all other Claims and Interests.[148] The remaining Classes of Claims have either voted to accept the Plan or are deemed to have accepted the Plan, rendering section 1129(b) inapplicable to such Classes.[149] Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code, and the Plan may be confirmed notwithstanding the deemed rejection by the Impaired Classes.

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

84. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule.[150]

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147 *See In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *31 (Bankr. D. Del. May 13, 2010) (citing *In re Armstrong World Indus.*, 348 B.R. at 121).

148 *See* Bullock Decl. ¶ 34.

149 *See* 11 U.S.C. § 1129(b)(1) ("[I]f all of the applicable requirements of subsection (a) of this section other than paragraph (8) 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." (emphasis added)).

150 *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42 (1999) ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

The absolute priority rule provides that an impaired rejecting class of claims or interests must either be paid in full or that a class junior to the impaired rejecting class must not receive any distribution under a plan on account of its junior claim or interest.[151]

85. With respect to Impaired Classes that voted to reject or are deemed to have rejected the Plan, the Plan satisfies the absolute priority rule. The Impaired rejecting Classes are Class 6 (2027 Convertible Notes Claims), which voted to reject the Plan, Class 8 (Intercompany Claims) and Class 9 (Intercompany Interests), which may be deemed to reject the Plan at the Debtors' election, and Class 10 (Interests in Vertex), which is deemed to reject the Plan. As to such Classes, there is no Class of equal priority receiving more favorable treatment, and no Class that is junior to such Classes will receive or retain any property on account of the Claims or Interests in such Class.[152] Class 8 (Intercompany Claims) and Class 9 (Intercompany Interests) may be reinstated, set off, settled, distributed contributed, canceled or released under the Plan, but such treatment is merely a technical preservation of Claims and Interests necessary to preserve the Debtors' corporate structure, does not have any economic substance, and does not enable any junior creditor or interest holder to retain or recover any value under the Plan.[153] Class 7 (Term Loan Deficiency

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[151] *See* 11 U.S.C. § 1129(b)(2)(B)(ii); *see also DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 88 (2d Cir. 2011) (citations omitted) (the absolute priority rule "provides that a reorganization plan may not give 'property' to the holders of any junior claims or interests 'on account of' those claims or interests, unless all classes of senior claims either receive the full value of their claims or give their consent"); *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005) (citations omitted) ("Under the statute, a plan is fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class's claims in full, or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan 'on account of' such claims or interests.").

[152] Bullock Decl. ¶ 64.

[153] *See In re Ion Media Networks, Inc.*, 419 B.R. 585, 600–01 (Bankr. S.D.N.Y. 2009) (overruling an objection that reinstatement of an intercompany interest violates the absolute priority rule because "the retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure").

Claims) is vacant, and therefore, the absolute priority rule does not apply with respect to the treatment of such Claims under the Plan. Further, Class 10 (Interests in Vertex) will be cancelled pursuant to the Plan. The Plan satisfies the absolute priority rule as to these Classes. No Class of equal priority is receiving more favorable treatment than such Classes, and no Class that is junior to such Classes will receive or retain any property on account of the Claims or Interests in such Class.

P. The Plan Complies with the Other Provisions of Section 1129 of the Bankruptcy Code (Sections 1129(c)–(e)).

86. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. Section 1129(c) of the Bankruptcy Code, which prohibits confirmation of multiple plans,[154] is not implicated because there is only one proposed Plan.

87. The Plan was not filed for the purpose of avoidance of taxes or the application of section 5 of the Securities Act of 1933.[155] Rather, the Debtors filed the Plan to accomplish their objective of efficiently and responsibility reorganizing their capital structure, preserving the going-concern value of their business, and maximizing recoveries to their stakeholders. Moreover, no governmental unit, or any other entity, has requested that the Bankruptcy Court decline to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933.[156] Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. Lastly, section 1129(e)

[154] *See* 11 U.S.C. § 1129(c).

[155] Bullock Decl. ¶ 66.

[156] *Id.*

of the Bankruptcy Code is inapplicable because none of the Debtors' Chapter 11 Cases are a "small business case" within the meaning of the Bankruptcy Code.[157]

88. Thus, the Plan satisfies all of the Bankruptcy Code's mandatory chapter 11 plan confirmation requirements.

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

89. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law."[158]

90. The Plan complies with section 1123(d) of the Bankruptcy Code. Article V.C of the Plan provides for the satisfaction of all monetary defaults under each Executory Contract and Unexpired Lease assumed pursuant to the Plan in accordance with section 365 of the Bankruptcy Code by payment of the default amount in Cash on the Effective Date, or as soon as reasonably practicable thereafter, subject to certain limitations set forth in the Plan, or on such other terms as the parties to such Executory Contracts or Unexpired Leases may otherwise agree.[159] In other words, the Plan does not seek to determine Cure costs outside of the underlying agreement and applicable nonbankruptcy law absent consensus. The Debtors, in accordance with the Disclosure Statement Order and the Plan, filed the Plan Supplement with the Assumed Executory Contracts and Unexpired Leases List and served notices of proposed assumptions to the applicable

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[157] *See* 11 U.S.C. § 1129(e); *see also id.* § 101(51D)(B) (A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $3,024,725 (excluding debt owed to 1 or more affiliates or insiders)").

[158] *See* 11 U.S.C. § 1123(d).

[159] Plan, Art. V.C.

counterparties.[160] These notices include procedures for objecting to the Debtors' proposed assumptions of Executory Contracts and Unexpired Leases and proposed Cure amount, as well as a procedures for resolving any disputes. Accordingly, the Plan complies with section 1123(d) of the Bankruptcy Code.

R. Modifications to the Plan Do Not Require Re-Solicitation.

91. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify a plan "at any time" before confirmation.[161] When a plan is modified, all stakeholders that previously accepted a plan are deemed to have accepted such plan as modified.[162] Bankruptcy Rule 3019(a) implements section 1127(d) by providing that such modifications do not require re-solicitation if previously accepting creditors either (a) are not materially adversely affected by such modifications or (b) consent in writing to any materially adverse modifications.[163]

92. Courts consistently interpret Bankruptcy Rule 3019(a) to only require re-solicitation of "materially" adverse modifications not otherwise consented to by previously accepting creditors.[164] A plan modification is not material unless it "so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to

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[160] *See* Plan Supplement [Docket No. 553], Ex. A.

[161] 11 U.S.C. § 1127(a).

[162] 11 U.S.C. § 1127(d).

[163] Fed. R. Bankr. P. 3019(a).

[164] *See In re New Power Co.*, 438 F.3d 1113, 1117–18 (11th Cir. 2006) (explaining that a party's "vote for or against a plan" may be applied "to a modified Plan unless the modification materially and adversely changes" the party's treatment); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 857 (Bankr. S.D. Tex. 2001) (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not require additional disclosure or re-solicitation).

reconsider its acceptance."[165] In short, courts allow plan proponents to make nonmaterial, non-adverse, or consensual changes to a plan without further disclosure. Plan modifications that improve, maintain, or only minimally reduce the recovery of affected creditors do not require re-solicitation. Similarly, creditors' prior acceptances may be enforced without re-solicitation if such creditors agree to their reduced distribution as part of the modification process.[166]

93. The Debtors made certain modifications reflected in the *Second Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Docket No. 564] (the "Modifications"). These Modifications were technical in nature, contemplated under the Plan, and/or do not materially diminish or alter any creditor's substantive rights under the Plan without their consent. Specifically, the Modifications were intended to remove the Asset Sale (given the conclusion of the sale and marketing process), incorporate the terms of the RVO Settlement, and reflect certain transaction mechanics agreed to with the DIP Lenders and Consenting Term Lenders, including with respect to the Exit Term Loan Facility and the New Term Loan Facility, to the extent applicable. Such Modifications do not materially adversely affect any parties' substantive rights and are supported by all of the Debtors' key constituencies including the DIP Lenders, the Consenting Term Loan Lenders, the Committee, Macquarie, and the EPA. Moreover, such Modifications were expressly contemplated in the Disclosure Statement in which the Debtors

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[165] *In re Am. Solar King Corp.*, 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988) ("[T]he statute permits modifications that might technically have a negative impact on claimants where the modifications are not substantial."); *see also In re Sentinel Mgmt. Group, Inc.*, 398 B.R. 281, 302 (Bankr. N.D. Ill. 2008) (holding that one percent reduction of one class's distribution was not sufficiently material to require re-solicitation).

[166] See, e.g., In re Aleris Int'l, Inc., 2010 WL 3492664, at *31–32 (Bankr. D. Del. May 13, 2010) (holding that plan modifications that did not adversely affect any creditor other than consenting parties did not require re-solicitation); In re Pisces Energy, LLC, 2009 WL 7227880, at *10 (Bankr. S.D. Tex. Dec. 21, 2009) (same).

retained the right to modify the Plan without the need for re-solicitation.[167] Accordingly, no additional solicitation or disclosure is required on account of the Modifications. All creditors in the Voting Classes who accepted the Plan should be deemed to have accepted the Plan as modified.

III. The Plan Appropriately Incorporates Settlements of Claims and Interests.

94. As described above, the Plan provides for a general settlement of all Claims and Interests to the extent provided for by the Bankruptcy Code, including the Committee Settlement and RVO Settlement (collectively, the "Plan Settlements"). The Plan Settlements are critical to the Debtors' successful restructuring and are consistent with section 1123(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

95. Section 1123(b)(3) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[168] Specifically, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, debtors may release causes of action held by their estates as consideration for concessions made by their various

[167] *See* Disclosure Statement, Art. XVII.A. (providing that the "the Debtors reserve the right to modify the Plan, whether such modification is material or immaterial, and seek Confirmation consistent with the Bankruptcy Code and, as appropriate, not resolicit votes on such modified Plan.").

[168] 11 U.S.C. § 1123(b)(3)(A).

stakeholders pursuant to the plan.[169] Settlements are favored in chapter 11 because they minimize litigation and expedite the administration of the bankruptcy case.[170]

96. Ultimately, approval of a compromise is within the "sound discretion" of the bankruptcy court.[171] In proposing a settlement, debtors bear a burden of demonstrating that such settlement "falls within the 'range of reasonable litigation alternatives.'"[172] In considering whether a settlement meets this standard, courts in the Fifth Circuit consider whether the settlement is (a) "fair and equitable" and (b) "in the best interests of the estate."[173]

97. The "fair and equitable" requirement generally is interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the

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[169] *See In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (finding that plan release provision "constitutes an acceptable settlement under § 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan by a [creditor]"); *In re Heritage Org., LLC*, 375 B.R. 230, 308 (Bankr. N.D. Tex. 2007) (holding that a proposed settlement resolved potential claims "belonging to the estate, which the plan may unquestionably do under the express authority of § 1123(b)(3)"); *In re Gen. Homes Corp.*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991) ("To the extent that the language contained in the plan purports to release any causes of action against the Bank Group which the Debtor could assert, such provision is authorized by § 1123(b)(3)(A).").

[170] *See In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) ("To minimize litigation and expedite the administration of a bankruptcy estate, [c]ompromises are favored in bankruptcy.") (internal quotations omitted).

[171] *See In re AWECO, Inc.*, 725 F.2d 293, 297–98 (5th Cir. 1984) ("The decision of whether to approve a particular compromise lies within the discretion of the trial judge . . . . The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.") (citations omitted); *see also In re Jackson Brewing, Co.*, 624 F.2d 599, 602–03 (5th Cir. 1980) (same).

[172] *In re Roqumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008) (internal quotations and citations omitted).

[173] *See In re Foster Mortg. Corp.*, 68 F.3d 914, 917 (5th Cir. 1995) ("[T]he court should approve the settlement only when the settlement is fair and equitable and in the best interest of the estate."); *see also Gen. Homes*, 134 B.R. at 861 ("To the extent that the language contained in the plan purports to release any causes of action against the Bank Group which the Debtor could assert, such provision is authorized by § 1123(b)(3)(A), subject to compliance with provisions of the code requiring that the plan be fair and equitable as to creditors and that the plan be proposed in good faith.").

Bankruptcy Code's absolute priority rule.[174] In determining whether a settlement meets the best interests requirement under Bankruptcy Rule 9019, courts within the Fifth Circuit consider: "(1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise."[175] The Fifth Circuit imposes two additional factors that bear on the decision to approve a proposed settlement: (a) "the paramount interest of creditors with proper deference to their reasonable views;" and (b) "the extent to which the settlement is truly the product of arm's-length bargaining, and not of fraud or collusion."[176]

98. Generally, the role of the bankruptcy court is not to decide the individual issues in dispute when evaluating a settlement; instead, the court should determine whether the settlement as a whole is fair and equitable.[177] Courts also afford debtors discretion in determining for

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[174] *See In re Mirant Corp.*, 348 B.R. 725, 738 (Bankr. N.D. Tex. 2006) ("Because 'fair and equitable' translates to the absolute priority rule, in order for a settlement to meet that test it must be consistent with the requirement that dissenting classes of creditors must be fully satisfied before any junior creditor receives anything on account of its claim.") (internal citations omitted); *see also In re MCorp Fin., Inc.*, 160 B.R. 941, 960 (Bankr. S.D. Tex. 1993) (approving a gifting settlement as meeting the "fair and equitable" test, reasoning that "[senior creditors] may share their proceeds with creditors junior to the [junior creditors], as long as the junior [creditors] continue to receive as least as much as what they would without the sharing."); *cf. AWECO*, 725 F.2d at 298 (holding that a settlement must comply with the absolute priority rule).

[175] *In re Roqumore*, 393 B.R. at 479–80 (citing the factors set forth by the court in *Jackson Brewing Co.*, 624 F.2d at 602); *see also In re Age Ref., Inc.*, 801 F.3d 530, 540 (5th Cir. 2015) (same).

[176] *Foster Mortg.*, 68 F.3d at 918–19 (citations omitted).

[177] *See Watts v. Williams*, 154 B.R. 56, 59 (Bankr. S.D. Tex. 1993) ("In considering these factors, the bankruptcy court must review the facts supporting a compromise, yet not decide the merits of individual issues. Rather, the bankruptcy court determines whether the settlement is fair and equitable ***as a whole***.") (emphasis added) (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

themselves the appropriateness of granting plan releases of estate causes of action when doing so is within their sound business judgment.[178]

99. The Debtors believe the Plan Settlements satisfy the above factors. ***First***, as set forth in greater detail in Part I.O.1 of this Memorandum, the Plan (including the Plan Settlements contemplated therein) is "fair and equitable," because it does not violate the absolute priority rule. Furthermore, the Plan (including the Plan Settlements contemplated therein) and Confirmation Order are the product of hard-fought, arm's-length negotiations between the Debtors and their key stakeholders. Accordingly, the Plan satisfies the first prong of the analysis under section 1123(b)(3)(A) and of the Bankruptcy Code and Bankruptcy Rule 9019.

100. ***Second***, the Plan Settlements are in the best interests of the Debtors' Estates. The Committee Settlement was necessary to resolve the Committee's objection to final approval of the DIP Facility and Intermediation Facility, its limited objection to the adequacy of the Disclosure Statement [Docket No. 375], and potential challenges to Confirmation, and is the only means by which Holders of Allowed General Unsecured Claims and Holders of Allowed 2027 Convertible Notes Claims will receive meaningful recoveries.[179] Moreover, the Committee Settlement provides for the settlement of a host of alleged Claims and Causes of Action that would have otherwise led to costly, protracted, and uncertain litigation, including potential Claims and Causes of Action related to Matheson and the construction of the hydrocracker facility.

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[178] *See Gen. Homes*, 134 B.R. at 861 ("The court concludes that such a release is within the discretion of the Debtor."); *see also In re CiCi's Holdings, Inc.*, No. 21-30146 (SGJ), 2021 WL 819330, at *8 (Bankr. N.D. Tex. Mar. 3, 2021) ("In accordance with section 1123(b)(3)(A) of the Bankruptcy Code, the releases of claims and Causes of Action by the Debtors described in [the Plan] represent a valid exercise of the Debtors' business judgment under Bankruptcy Rule 9019.").

[179] *See* Bullock Decl. ¶ 72. In a hypothetical chapter 7, Holders of General Unsecured Claims and 2027 Convertible Notes Claims would receive no recovery. *See* Liquidation Analysis.

101. The Disinterested Director also conducted a fulsome independent investigation with respect to potential Claims or Causes of Actions of the Debtors.[180] After completing their investigation and evaluating potential Claims and Causes of Action with the assistance of the Debtors' legal and other advisors, the Disinterested Director determined that the releases under the Plan, including in connection with the Committee Settlement, are fair and reasonable and in the best interests of the Debtors' estates.[181] Moreover, the Investigation did not uncover any viable estate claims that, if litigated, are likely to produce value for the Debtors' estates.[182] Accordingly, the Debtors' believe that the Committee Settlement is in the best interest of the Debtors' Estates and a sound exercise of the Debtors' business judgment.

102. The RVO Settlement is similarly integral to the Plan and in the best interest of the Debtors' Estates. Absent the RVO Settlement, the Debtors would be subject to approximately $84.4 million in liabilities that would either hinder the Debtors' ability to confirm a Plan or severely impede the Debtors' go-forward business.[183] Indeed, if the Debtors are unable to enter into the RVO Settlement, the Debtors may be forced to pivot from a value-maximizing Recapitalization Transaction to a credit bid sale to the DIP Lenders and the Consenting Term Lenders, pursuant to which the Debtors would be forced to seek to sell all of their assets "free and clear" of any RIN Liabilities. Such a path forward would necessarily involve uncertainty, administrative costs, protracted litigation with the EPA, and significant delay. Meanwhile, the

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[180] *See* Stein Decl. ¶¶ 5-7 (discussing the investigation).

[181] *Id*. at ¶ 7.

[182] *Id.* at ¶ 8.

[183] *See* Bullock Decl. ¶ 19.

RVO Settlement, which is the culmination of months of discussions between the Debtors and the EPA, is supported by all of the Debtors' key stakeholders, and provides a clear path forward that will resolve the Debtors' 2023-2024 RVOs and allow the Debtors to emerge in the coming weeks as a going-concern.[184]

103. The Debtors and their advisors have worked diligently to ensure the Debtors' creditors are receiving the greatest value possible on their Claims or Interests through the Plan, in the best interest of all stakeholders. The Plan Settlements reflect consensual agreements between the Debtors and their key stakeholders after robust, good-faith, and arm's-length negotiations, and were approved by the Committee, the DIP Lenders, the Consenting Term Lenders, and each of the Voting Classes in connection with their acceptance of the Plan. Accordingly, the Plan satisfies the second prong of the analysis under section 1123(b)(3)(A) and of the Bankruptcy Code and Bankruptcy Rule 9019.

104. For these reasons, the Plan Settlements embodied in the Plan reflect a sound exercise of the Debtors' business judgment and satisfies the requirements of section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019. No party has asserted otherwise.

IV. The Plan's Release, Exculpation, and Injunction Provisions Are Appropriate and Comply with the Bankruptcy Code.

105. The Plan includes certain Debtor and third-party releases, an exculpation provision, and an injunction provision. These provisions are proper because they are the product of extensive good faith, arms' length negotiations, comply with the Bankruptcy Code and prevailing Fifth Circuit law, and were material inducements for the parties entry into the RSA and support of the

[184] *See id.* ¶¶ 19-20; 73-74.

Plan. Accordingly, and as set forth more fully below, the Debtors respectfully request that the Bankruptcy Court approve the Plan's release, exculpation, and injunction provisions.

A. The Debtor Release Is Appropriate and Complies with the Bankruptcy Code.

106. Article VIII.C of the Plan sets forth certain releases granted by the Debtors (the "Debtor Release"). The Debtor Release releases, among others, the Debtors, the Reorganized Debtors, the DIP Agent and each DIP Lender, the Committee and each of its members, Matheson, the Consenting Stakeholders, the Intermediation Counterparty, the Hedge Provider, the 2027 Convertible Notes Trustee, all Holders of Claims, all Holders of Interests, and current and former affiliates of the foregoing and certain related parties of the foregoing; *provided* that, as set forth in the Plan, any Holder of a Claim or Interest that elects not to opt in to the Third-Party Release shall not be a Releasing Party.

107. The Debtor Release meets the controlling standard regarding the settlement of Claims and Causes of Action under section 1123(b)(3)(A) of the Bankruptcy Code. As an initial matter, the terms of the Debtor Release are "fair and equitable" and compiles with the Bankruptcy Code's absolute priority rule. While certain Classes rejected or are deemed to have rejected the Plan, the Debtor Release and settlements embodied in the Plan, do not result in any junior Classes receiving or retaining any property on account of junior Claims or Interests. Thus, the Debtor Release is fair and equitable in line with Fifth Circuit precedent.

108. In addition to being fair and equitable, the Debtor Release is in the best interest of the Estates. ***First***, the Debtors and the Debtors' directors, officers, employees, advisors, the Term Loan Lenders, the Committee and each of its members, among other Released Parties, were critical participants in the Plan process, both in terms of negotiating and formulating a consensual deal for the benefit of all stakeholders, voting in favor of the Plan, and/or cooperating with the Disinterested

Directors' Investigation. The Restructuring Transactions embodied in the Plan (including the Debtor Release) were negotiated by sophisticated parties and counsel.[185]

109. ***Second***, the Debtor Release is given in exchange for valuable consideration provided by the Released Parties for the benefit of all parties in interest including, at a minimum, providing a release in return, and in many cases, providing further substantial contributions to the Chapter 11 Cases. The Debtor Release appropriately offers protection to parties that participated in the Debtors' restructuring process, each of whom made significant contributions and concession to these Chapter 11 Cases.[186] Absent the support of the Debtors' key stakeholders, the Debtors would not have been able to secure DIP financing to fund these Chapter 11 Cases, would not have been able to secure a postpetition intermediation facility to facilitate the purchase and sale of feedstock to replenish inventory during these Chapter 11 Cases, would not have been able to run an orderly and robust marketing process, and would not have been able to obtain the votes necessary to confirm the Plan on this expedited timeline.[187] This strong support was in part because the Debtors agreed to provide the Debtor Release contemplated in the Plan, subject to the findings of the Investigation discussed herein.

110. ***Third***, the Debtor Release enjoys the support of all relevant economic stakeholders, including the overwhelming majority of creditors entitled to vote on the Plan. The Plan, including the Debtor Release contained therein, is supported by the Debtors' creditor constituencies, including the Committee.

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[185] *See* Stein Decl. ¶ 8.

[186] *Id.* at ¶ 9.

[187] *Id*.

111. ***Fourth***, as discussed above, the Debtors' Disinterested Director conducted a full investigation and believes the Debtor Release is appropriately tailored, given the carve-out for actual fraud, willful misconduct, and gross negligence, and appropriately offers protection to parties that contributed to, and participated, in the Debtors' restructuring process.[188] Accordingly, the Debtor Release is fair, equitable, and in the best interest of the Debtors' Estates, is justified under the controlling Fifth Circuit standard, and should be approved.

112. Notwithstanding the foregoing, the U.S. Trustee objects to the release and exculpation of lawyers and other professionals and advisors of the Debtors, the DIP Lenders, the Committee, and Intermediation Counterparty (collectively, the "Professionals"),[189] arguing that doing so is "impermissible under Fifth Circuit authority and professional ethical obligations."[190] In making this argument, the U.S. Trustee relies primarily on *In re Dresser Industries, Inc.*, for the premise that the Plan's provisions must wholly comply with federal and state ethics canons.[191] The U.S. Trustee interprets this holding to assert that the Plan's Debtor Release and the Exculpation Provision (as defined herein) must comply with ABA Model Rule of Professional Conduct 1.8(h)(1) and Texas Disciplinary Rule 1.08(g) of Professional Conduct which prohibit lawyer's from making an agreement prospectively limiting the lawyer's liability to a client for malpractice.[192]

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[188] *Id.*

[189] *See* Plan, Art. I.A.168.

[190] U.S. Trustee Obj., ¶ 1(iv).

[191] *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) (holding that a lawyer cannot sue a client they actively represent in another matter).

[192] *See* U.S. Trustee Obj., ¶¶ 37-39.

113. This argument is deeply flawed and entirely without merit. ***First***, ABA Model Rule of Professional Conduct 1.8(h)(1) and Texas Disciplinary Rule 1.08(g) of Professional Conduct provide that counsel shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice "*unless the client is independently represented in making the agreement*."[193] Here, the Debtors' internal counsel has overseen the administration of these Chapter 11 Cases, including the scope and work performed by the Debtors' retained professionals. As set forth in the Stein Declaration, the Debtors are independently represented by their internal counsel, Kirkland & Ellis LLP, as restructuring counsel, and Bracewell LLP, as co-counsel and conflicts counsel for the Debtors, and the Debtors are supportive of the scope of the Debtor Release contained in the Plan.[194] Accordingly, ABA Model Rule of Professional Conduct 1.8(h)(1) and Texas Disciplinary Rule 1.08(g) of Professional Conduct are inapplicable here because the Debtors were independently represented in formulating the Debtor Release .

114. ***Second***, the U.S. Trustee's reliance on *Dresser* is misplaced as *Dresser* is factually and procedurally distinguishable here as *Dresser* addressed whether a law firm may sue a current client in the context of a class action antitrust litigation after the client moved to disqualify the attorney from the matter. The Fifth Circuit's discussion in *Dresser* makes clear that its discussion and application of "ethical norms," is limited to the evaluation of a motion to disqualify in a conflicts case.[195] Nowhere does *Dresser* suggest that an attorney's fiduciary obligations to its

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[193] ABA Model R. of Prof'l Conduct 1.8(h)(1). Texas Disciplinary Rule 1.08(g) of Professional Conduct contains a similar exception, permitting such agreements where a client is "independently represented in making the agreement." Tex. Disciplinary R. 1.08(g) of Prof'l Conduct.

[194] *See* Stein Decl. ¶ 10.

[195] *In re Dresser Industries*, 972 F.2d at 545*; see also In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir.1992) ("disqualification cases are governed by state and national ethical standards adopted by the court. We disagree . . .

client precludes a professional from being included in a consensual plan release. Accordingly, the Debtor Release is justified under the controlling Fifth Circuit standard and should be approved.

B. The Third-Party Release Is Appropriate and Complies with the Bankruptcy Code.

115. In addition to the Debtor Release, Article VIII.D of the Plan contains a third-party release provision (the "Third-Party Release"). It provides that each Releasing Party—including all Holders of Claims and Interests who opt-in to their inclusion as a Releasing Party—shall release any and all Claims and Causes of Action (except for Claims expressly preserved under the Plan) such parties could assert against the Debtors, the Reorganized Debtors, and the Released Parties.[196] As described above, the value-maximizing restructuring contemplated by the Plan would not be possible absent the support of the Released Parties. Thus, the Third-Party Release operates to maximize the Debtors' fresh start by minimizing the possibility of distracting post-emergence litigation or other disputes. Moreover, as set forth below, the Third-Party Release is a permissible consensual release consistent with Fifth Circuit law.

116. The Fifth Circuit has consistently held that the Bankruptcy Code does not preclude a third-party release provisions where "it has been accepted and confirmed as an integral part of a plan of reorganization."[197] Specifically, *Republic Supply* and its progeny[198] stand for the

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that these sources also determine the discretion of a district court applying these rules. That issue is one governed by federal law.").

[196] The foregoing description is meant as a summary of the operative Plan provisions only. Certain of the Releasing Parties are defined as such in multiple capacities. To the extent there is any conflict between the foregoing summary and the definition of "Releasing Party" contained in Article I of the Plan, the Plan shall control.

[197] *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987)

[198] *See, e.g.*, *Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App'x 281, 286–88 (5th Cir. 2016); *FOM Puerto Rico, S.E. v. Dr. Barnes Eyecenter, Inc.*, 255 Fed. App'x 909, 911–12 (5th Cir. 2007); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914, 919 (5th Cir. 2000).

proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of settlement, and given for consideration do not violate" the Bankruptcy Code.[199] At the core of this analysis is whether the third-party release is consensual.

117. Notably, what constitutes a consensual third-party release remains unchanged following the Supreme Court's recent decision in *Harrington v. Purdue Pharma, L.P.*[200] In *Purdue*, the United States Supreme Court held "only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[201] The Supreme Court's holding only applies to nonconsensual releases.[202] While no party disputes an opt-in third-party release to be fully consensual, it is worth noting that the Bankruptcy Court in the Southern District of Texas has continued to approve opt-out third party releases post-*Purdue.*[203]

118. In determining whether a third-party release is consensual, Bankruptcy Courts in Texas focus on process—*i.e.*, whether "notice has gone out, parties have actually gotten it, they've

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[199] *In re Wool Growers*, 371 B.R. 768, 776 (N.D. Tex. 2007) (citing *Republic Supply*, 815 F.2d at 1050); *see also Dr. Barnes Eyecenter*, 255 Fed. App'x at 911–12.

[200] *See generally* 603 U.S. 144 S. Ct. 2071 (2024).

[201] *Purdue*, 144 S. Ct. at 2087.

[202] *Id.* at 2088,

[203] *See In re Diamond Sports Grp.*, No. 23-90116 (CML) (Bankr. S.D. Tex. Nov. 14, 2024) [Docket No. 2671] (confirming chapter 11 plan's opt out third-party releases as consensual); *see also In re Robertshaw US Holding Corp.*, No. 24-90052 (CML) (Bankr. S.D. Tex. Aug. 16, 2024) [Docket No. 959], at 28 ("There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan. . . . Hundreds of chapter 11 cases have been confirmed in this District with consensual third-party releases with an opt-out. . . . *Pursue did not change the law in this Circuit*.").

had the opportunity to look it over, [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[204]

119. Here, the Third-Party Release is dependent upon a Releasing Party "opting in" to the release, and therefore is undoubtedly consensual. The Third-Party Release is being provided by parties who participated in the formulation and negotiation of the Plan, and therefore consented to the scope of the Released Parties, or to the extent a party affirmatively opts in to the release. Thus, the only parties providing the Third-Party Release are creditors that have affirmatively opted in, or otherwise agreed, to such release. All parties have had ample opportunity to evaluate and opt in to the Third-Party Release. The opt-in procedures are each described in clear, plain language in each of the Plan, Disclosure Statement, Ballots, Non-Voting Status Notices, and Confirmation Hearing Notice. In addition, the text used to highlight the opt-in procedures is displayed in an attention-grabbing manner in bold or all caps.

120. The Third-Party Release also satisfies the other factors referenced in *Republic Supply* and its progeny. ***First***, the Third-Party Release is sufficiently specific—listing potential Causes of Action to be released—so as to put the Releasing Parties on notice of the released claims.[205] Notably, the Third-Party Release explicitly excludes (a) any post-Effective Date

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[204] Confirmation Hr'g Tr. at 47:7–11, *In re Energy & Exploration Partners, Inc.*, No. 15 44931 (Bankr. N.D. Tex. April 21, 2016) [Docket No. 730]; see also Confirmation Hr'g Tr. at 42, *In re Southcross Holdings, LP.*, No. 16-20111 (MI) (Bankr. S.D. Tex. Apr. 11, 2016) (release would be approved where debtors provided "extensive notice of the plan and confirmation hearing and no party specifically objected to the plan's release provisions"); *see also* Confirmation Hr'g Tr. at 77:4-13, *In re Seadrill Ltd.*, No. 17-60079 (Bankr. S.D. Tex. Apr. 17, 2018) [Docket No. 1187] ("I think that in order for the Debtor to move forward, it needs all of its resources focused on achieving commercial success, not looking over their shoulder . . . to worry about where's the next indemnification or contribution claim coming from. I do think that the process has been transparent, and that has always been and will remain my primary number one concern is that is the process transparent to someone who wishes to have a voice, have an opportunity to stand up and say, I don't want to be included.").

[205] Plan, Art. VIII.D (specifically describing the nature and type of claims released); Art. I.A (specifically describing the parties released).

Obligations of any party or Entity under the Plan, Confirmation Order, any Restructuring Transactions, or any document, instrument, or Agreement executed to implement the Plan or any Claim or obligation arising under the Plan, and (b) any Claim or Cause of Action against a Released Party arising from an action or omission that is determined by a Final Order to have constituted actual fraud, willful misconduct, or gross negligence.[206]

121. ***Second***, the Third-Party Release is integral to the Plan and a condition of the comprehensive settlement embodied therein.[207] The provisions of the Plan, including the settlements contemplated therein, and the RSA were each heavily negotiated. The Third-Party Release (together with the Debtor Release) are key components of the Debtors' restructuring and was a material inducement to bring stakeholder groups to the bargaining table. Put simply, the Debtors' key stakeholders, likely would not have supported the Plan (or agreed to the Plan Settlements) without the assurance that they and their collateral would not be subject to post-emergence litigation or other disputes related to restructuring. The Third-Party Release therefore not only benefits the non-Debtor Released Parties, but also the Debtors' post-emergence enterprise as a whole.

122. ***Third***, the Third-Party Release was given for consideration. As described above, the Released Parties have made significant contributions to these Chapter 11 Cases in the form of funding, participation, negotiation, and ultimate resolution of these Chapter 11 Cases through the Plan. For example, to facilitate the pursuit of the Restructuring Transactions, the Consenting Term Lenders agreed to provide the Debtors with a $280 million postpetition debtor-in-possession

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[206] *Id.*

[207] *See* Stein Decl. ¶ 11.

financing facility, including $80 million of new money for use during the Chapter 11 Cases. Macquarie, as the Intermediation Counterparty and the Hedge Provider, entered into the Amended Intermediation and Hedge Facility, which has allowed the Debtors to continue purchasing crude oil from the Intermediation Counterparty and, as a result, continue ordinary course operations. Moreover, key pieces of the Plan and Plan Settlements reflect major contributions and, indeed, concessions, from key stakeholders in the Chapter 11 Cases including the equitization of a significant amount of DIP Claims, provision of Exit Financing, and continuation of the Intermediation Facility. Through their contributions, the Released Parties have provided significant benefit to the Debtors and every other Releasing Party because all parties in interest benefit from the transactions contemplated under the Plan. Furthermore, the Third-Party Release is reciprocal and fully supported by consideration in the fact that every party approving the Third-Party Release is both a Released Party and a Releasing Party. The reciprocal releases serve as mutual consideration—this is true even with respect to parties releasing claims of minimal value, a "proverbial peppercorn-for-peppercorn" mutual exchange of releases of unknown claims constitutes adequate consideration to support mutual releases.[208] Accordingly, the Third-Party Release is appropriate and consistent with Fifth Circuit law and should be approved.[209]

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[208] Confirmation Hr'g Tr. at 244:16–18 *In re Cobalt Int'l Energy, Inc.*, No. 17-36709 (MI) (Bankr. S.D. Tex. Apr. 4, 2018) [Docket No. 790] ("I simply find that this is, in effect, the proverbial peppercorn-for-peppercorn and that that is adequate consideration for the release, given its mutuality.")

[209] *See, e.g.*, *In re Genesis Care Pty Limited*, No. 23-90614 (DRJ) (Bankr. S.D. Tex. Nov. 22, 2023) [Docket No. 1192] (granting a release to the Debtors' professionals under the Debtors' chapter 11 plan); *In re Envision Healthcare Corp.*, No. 23-90342 (CML) (Bankr. S.D. Tex. Oct. 11, 2023) [Docket No. 1687] (same); *In re Benefytt Techs., Inc*., No. 23-90566 (CML) (Bankr. S.D. Tex. Aug. 30, 2023) [Docket No. 481] (same); *In re Nielsen & Bainbridge, LLC*, No. 23-90071 (DRJ) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 611] (same); *In re Qualtek Servs., Inc*., No. 23-90584 (CML) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 234] (same); *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350] (same).

C. The Exculpation Provision Is Appropriate and Complies with the Bankruptcy Code.

123. Article VIII.E of the Plan provides that each Exculpated Party—*i.e.*, (a) the Debtors and (b) the Committee and each of its members—shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with these Chapter 11 Cases and certain related transactions, except for acts or omissions that are found to have been the product of actual fraud, willful misconduct, or gross negligence (the "Exculpation Provision").[210] Prior to solicitation of the Plan, the Debtors amended the Plan to address the U.S. Trustee's concerns regarding the definition of "Exculpated Parties" by narrowing the definition to exclude the Debtors' independent director.[211]

124. The Exculpation Provision is intended to prevent collateral attacks against estate fiduciaries that have acted in good faith to help facilitate the Debtors' restructuring. The Exculpation Provision is an integral part of the Plan,[212] and otherwise satisfies the governing standards in the Fifth Circuit. The Exculpation Provision provides necessary and customary protections to estate fiduciaries who have performed valuable services in connection with the Debtors restructuring.

125. Unlike the Third-Party Release, the Exculpation Provision does not affect the liability of third parties *per se*, but rather sets a standard of care of gross negligence or actual fraud in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors'

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[210] The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the forgoing summary and the definition of "Exculpated Party" contained in Article I of the Plan, the Plan shall control.

[211] *See* U.S. Trustee Obj. ¶ 25; Plan, Art. I.A.94. The U.S. Trustee's remaining objections with respect to the Exculpation Provision are addressed in paragraphs [112-114] and Part V.A of this Memorandum.

[212] *See* Stein Decl. ¶ 12.

restructuring.[213] A bankruptcy court has the power to approve an exculpation provision in a chapter 11 plan because a bankruptcy court cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good faith.[214] As such, an exculpation provision represents a legal conclusion that flows inevitably from several different findings a bankruptcy court must reach in confirming a plan.[215] Once the court makes its good faith finding, it is appropriate to set the standard of care of the fiduciaries involved in the formulation of that chapter 11 plan.[216] Exculpation provisions, therefore, appropriately prevent future collateral attacks against fiduciaries of the Debtors' Estates.

126. The Exculpation Provision is consistent with Fifth Circuit law; namely, *Highland Capital*, where the court expressly adopted and applied Fifth Circuit precedent providing qualified immunity to "creditors' committee members for actions within the scope of their statutory duties" and "bankruptcy trustees," which extends to a debtor in possession under section 1107 of the Bankruptcy Code, unless they act with "gross negligence."[217] Case law in this circuit and others is clear that where a bankruptcy trustee is not appointed, a debtor in possession's directors are considered fiduciaries both to the debtor in possession and to the creditors, just as a trustee would

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[213] *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (holding 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").

[214] *See* 11 U.S.C. § 1129(a)(3).

[215] *See id.* § 157(b)(2)(L).

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

[217] *See NexPoint Advisors, L.P., et al. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 437–38 (5th Cir. 2022).

be if one were appointed.[218] The Plan therefore appropriately includes the Debtors as well as the Committee and its members as Exculpated Parties, consistent with *Highland Capital* and this Bankruptcy Court's precedent, for actions taken prior to the Effective Date.

127. Here, the Exculpation Provision in the Plan is an integral component of the Plan and the settlements embodied therein and appropriately limited in scope. The Exculpation Provision was formulated following extensive good-faith, arm's-length negotiations with the Debtor's key stakeholders and is supported by the Consenting Term Lenders and the Committee.[219] The Exculpated Parties have provided valuable services to the Debtors and their Estates throughout these Chapter 11 Cases with the expectation they would be afforded reasonable protections.[220] Specifically, the Exculpation Provision is narrowly tailored to exclude acts of actual fraud, willful misconduct, or gross negligence, and relates only to acts or omissions in connection with, or arising out, of the Debtors' restructuring.

128. Nonetheless, the U.S. Trustee objects to the scope of the Exculpation Provision, asserting that the Plan (a) attempts to predetermine the applicability of the protections under section 1125(e) of the Bankruptcy Code, (b) seeks to allow the Exculpated Parties to reasonably

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[218] *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) ("[I]f a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession."); *see also In re Hous. Reg'l Sports Network, L.P.*, 505 B.R. 468, 481 (Bankr. S.D. Tex. 2014) ("[T]he willingness of courts to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.'"); *In re Schepps Food Stores, Inc.*, 160 B.R. 792, 797 (Bankr. S.D. Tex. 1993) ("Section 1107(a) of the [Bankruptcy] Code enables a debtor to take the place of the trustee, with few exceptions, as a [d]ebtor-in-[p]ossession . . . . Recognizing that corporations are in reality legal fictions, in such instances it is the debtor's management which takes on the heightened fiduciary obligations of the trustee."); *In re Performance Nutrition, Inc.*, 289 B.R. 93, 111 (Bankr. N.D. Tex. 1999) ("The officers and directors of a debtor in possession owe the same fiduciary duties as a trustee in bankruptcy.").

[219] *See* Stein Decl. ¶ 12.

[220] *Id.*

rely on the advice of counsel with respect to their obligations under the Plan, and (c) improperly includes Related Parties in the definition of "1125(e) Exculpated Parties."[221]

129. Section 1125(e) of the Bankruptcy Code states, "[a] person that solicits acceptance or rejection of a plan . . . or that participates . . . in the offer, issuance, sale, or purchase of a security, offered or sold under the plan . . . is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities."[222]

130. Contrary to the U.S. Trustee's position, the Debtors submit that the evidentiary record at Confirmation will demonstrate that the Exculpated Parties and the 1125(e) Exculpated Parties will have each participated in good faith in the solicitation of the Plan in compliance with section 1125 of the Bankruptcy Code. The Exculpation Provision is narrowly tailed by including only those parties actively involved in the negotiation, formulation, and solicitation, of the Plan and implementation thereof and is limited to actions taken on or before the Effective Date. Throughout these Chapter 11 Cases, the Debtors and the Committee, including each of its members, have engaged with Holders of Claims and Interests throughout the Debtors' capital structure and have engaged in hard-fought, good-faith negotiations to formulate the terms of the Plan and make preparations for the implementation of the value-maximizing Restructuring Transactions and settlements contemplated therein. Further, following the Committee Settlement and entry of the Disclosure Statement Order, over the past month, the Debtors and the Committee have worked collaboratively to solicit support for the Plan, including the Committee's

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[221] *See* U.S. Trustee Obj. ¶ 35. The U.S. Trustee's objection to the release and exculpation of professionals under the Plan is addressed in Part V of this Memorandum.

[222] 11 U.S.C. § 1125(e).

recommendation that all Holders of General Unsecured Claims and 2027 Convertible Notes Claims vote to accept the Plan. As the Debtors prepare to emerge from chapter 11, the Exculpated Parties will continue to contribute these Chapter 11 Cases. Accordingly, the Bankruptcy Court's findings of good faith with respect to the Debtors' Chapter 11 Cases and solicitation of the Plan should also extend to the Exculpated Parties.

131. Similarly, the Debtors believe that the inclusion of Related Parties in the definition of "1125(e) Exculpated Parties" is appropriate, particularly here, where the definition is limited to the extent so provided under section 1125 of the Bankruptcy Code. The Related Parties, including, among others, the directors and officers of the Debtors and the professionals to the DIP Lenders and Intermediation Counterparties, were each integral to the formulation, solicitation, and issuance of securities under the Plan in compliance with section 1125 of the Bankruptcy Code. Moreover, the 1125(e) Exculpated Parties would not have been willing to participate in the Debtors' restructuring efforts absent assurances that they would be exculpated for their conduct during these Chapter 11 Cases to the extent they acted in good faith.[223] Courts in this district routinely approve chapter 11 plans that include similar Exculpation Provisions, including with respect to good faith findings and the inclusion of Related Parties.[224]

132. In short, the Exculpation Provision represents an integral piece of the overall settlement embodied in the Plan and is the product of good-faith, arms' length negotiations, and

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[223] *See* Stein Decl. ¶ 12.

[224] *See, e.g.*, *In re Akumin Inc.*, No. 23-90827 (CML) (S.D. Tex. Nov. 30, 2023) (included a finding that (a) the Exculpation Parties "shall be deemed to have, participated in good faith" (b) qualified that Exculpated Parties "shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities" and (c) included "Related Parties" in the definition of "1125(e) Exculpation Parties"); *In re Benefytt Techs., Inc.*, No. 23-90566 (CML) (Bankr. S.D. Tex. Aug. 30, 2023) [Docket No. 481] (same); *In re Venator Materials PLC*, No. 23-90301 (DRJ) (Bankr. S.D. Tex. July 25, 2023) [Docket No. 344] (same).

significant sacrifice by the Exculpated Parties. Accordingly, the Exculpation Provision under Article VIII.E of the Plan is appropriate, and the Debtors respectfully request that the Bankruptcy Court find the Exculpated Parties and 1125(e) Exculpated Parties to have acted in good faith and in compliance with applicable law.

D. The Injunction Provision Is Appropriate and Complies with the Bankruptcy Code.

133. The injunction provision set forth in Article VIII.F of the Plan (the "Injunction Provision") implements the Plan's discharge, release, and exculpation provisions by permanently enjoining all Persons and Entities from commencing or pursuing any Cause of Action against the Debtors, the Post-Effective Date Debtors, the Exculpated Parties, or the Released Parties that relates to or are reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action discharged, released, exculpated, or settled under the Plan.[225] Thus, the Injunction Provision is a necessary part of the Plan precisely because it enforces the discharge, release, and exculpation provisions that are centrally important to the Plan.[226]

134. The Injunction Provision affords the Debtors and their stakeholders (including, among others, the Released Parties and the Exculpated Parties) a greater degree of certainty with respect to these Chapter 11 Cases and the Restructuring Transactions by requiring the Bankruptcy Court's authorization for the parties to commence or pursue Claims or Causes of Action that relate to or are reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action subject to the Debtor Release, the Third-Party Release, or the

[225] Plan, Art. VIII.F.

[226] *See* Stein Decl. ¶ 13.

Exculpation.[227] The Injunction Provision also incorporates a "gatekeeper" provision which is a material and necessary term of the Plan. The gatekeeper provision helps ensure that the Debtors and other Released Parties maintain the benefit of the Third-Party Release and Exculpation Provision by safeguarding against meritless litigation and the possibility that Releasing Parties fail to honor the release they affirmatively and consensually granted in the future.[228]

135. Nonetheless, the U.S. Trustee asserts that the Injunction Provision improperly extends to enforce the Third-Party Release and Exculpation Provision. Specifically, the U.S. Trustee argues that "[i]f the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent irreparable harm to either the estates of the released parties."[229] This argument rests on a false assumption that the relationship between the parties at the time of granting the releases is fixed in perpetuity. The purpose of the Injunction Provision is to bind the agreement between the Debtors and their stakeholders, as embodied in the Plan, with finality, in the event that certain parties may one day change their mind or fail to honor the release that they affirmatively, and consensually, granted.

136. Importantly, the Injunction Provision contained in the Plan is necessary, narrowly tailored, and in line with injunction provisions in chapter 11 plans approved by this Bankruptcy Court. [230] Further, the "gatekeeper" provision of the Injunction Provision requires any party

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[227] *Id.*

[228] *Id.*

[229] U.S. Trustee Obj. ¶ 47.

[230] *See, e.g., In re Genesis Care Pty Limited*, No. 23-90614 (DRJ) (Bankr. S.D. Tex. Nov. 22, 2023) [No. 1192]; *In re Envision Healthcare Corp.*, No. 23-90342 (CML) (Bankr. S.D. Tex. Oct. 11, 2023) [Docket No. 1687]; *In re Benefytt Techs., Inc*., No. 23-90566 (CML) (Bankr. S.D. Tex. Aug. 30, 2023) [Docket No. 481]; *In re Nielsen & Bainbridge, LLC*, No. 23-90071 (DRJ) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 611];

subject to the injunction to seek a determination from the Bankruptcy Court prior to commencing any litigation. To the extent that any stakeholder asserts that they hold a Claim or Cause of Action against the Released Parties and/or Exculpated Parties that is not subject to the Injunction Provision, the Bankruptcy Court will assess the applicability of the Injunction Provision and may issue a ruling permitting pursuit of such Claim or Cause of Action.

137. Finally, the U.S. Trustee's use of non-bankruptcy related case law to support its position regarding injunctive relief is not applicable here.[231] While the Bankruptcy Code may not specifically provide a provision authorizing injunctions to enforce releases or exculpations, such an injunction is permissible under prevailing Fifth Circuit Law so long as such injunction is consensual.[232] Accordingly, to the extent the Bankruptcy Court finds that the Third-Party Release and Exculpation Provision are appropriate, the Bankruptcy Court should approve the Injunction Provision.

V. The Remaining Objections Should be Overruled.

138. The Debtors received four formal and informal objections to confirmation of the Plan, as set forth in **Exhibit A** attached hereto. As of the filing of this Memorandum, the Debtors have resolved all formal and informal Objections except for the U.S. Trustee Objection discussed herein.

In re Qualtek Servs., Inc., No. 23-90584 (CML) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 234]; *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350].

[231] The U.S. Trustee cites two cases that analyze the Patent Act (*eBay*) and the Federal Water Pollution Control Act (*Weinberger*), but do not analyze the Bankruptcy Code. Although each statute may adhere to the same principal of laws, there is no analysis in the bankruptcy context to support the assertion that the Bankruptcy Code itself does not permit such an injunction.

[232] *See, e.g.*, *In re Camp Arrowhead*, 451 B.R. 678, 701–02 (Bankr. W.D. Tex. 2011) ("the Fifth Circuit does allow permanent injunctions *so long as there is consent* . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing") (citations omitted).

139. In addition to the U.S. Trustee's objections with respect to the release, exculpation, and injunction provisions addressed in Part IV of this Memorandum, the U.S. Trustee also requests that the Bankruptcy Court "modify the Plan to clarify that no party shall be released from any causes of action or proceedings brought by any governmental entity in accordance with its regulatory functions, including but not limited to criminal and environmental matters."[233] The Debtors do not believe such a modification is necessary in light of language included in the Confirmation Order the U.S. Trustee's position and the Plan's opt-in mechanism, whereby no Governmental Unit is obligated to release any claims against the Debtors unless such Governmental Unit affirmatively opts in to the Third-Party Release. Accordingly, the Debtors submit that the U.S. Trustee Objection should be overruled.[234]

WAIVER OF BANKRUPTCY RULE 3020(E)

140. To implement the Plan, the Debtors seek a waiver of the 14-day stay of an order confirming a chapter 11 plan under Bankruptcy Rule 3020(e). These Chapter 11 Cases and the Restructuring Transactions contemplated in the Plan have been negotiated in good faith, implemented with a high degree of transparency, and premised on preserving the value of the Debtors as a going concern. The Debtors' swift emergence from chapter 11 is an important component of their restructuring, and requiring the Debtors to pause before confirmation would be prejudicial to all parties in interest that continue to incur the cost and expense of the Debtors' Chapter 11 Cases. For these reasons, the Debtors request a waiver of stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

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[233] U.S. Trustee Obj. ¶ 49.

[234] The Debtors have addressed certain of the U.S. Trustee's objections with respect to the Exculpation Provision (paragraphs 114-116) and Injunction Provision (paragraph 120-121) elsewhere in this Memorandum.

CONCLUSION

141. For all of the reasons set forth herein, and as will be further shown at the Confirmation Hearing, the Debtors respectfully request that the Bankruptcy Court confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the Confirmation Order and granting such other and further relief as is just and proper.

Houston, Texas
December 20, 2024

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Certificate of Service

I certify that on December 20, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Jason G. Cohen
Jason G. Cohen

Exhibit A

Objection Summary Chart

#	Objecting Party[1]	Summary of Objection	Debtors' Response
1	*Kelly S. Mathews LLC* [Docket No. 549]	• Kelly S. Mathews ("KSM") requests that to the extent the Debtors seek to assume the KSM agreement under the Plan, the Debtors must pay cure in the amount of $142,818.75 and any postpetition amounts that remain unpaid as of the Effective Date of the Plan. ¶ 7. • KSM reserves the right to object to the Debtors' right to assume or reject any executory contracts.	• The Debtors and KSM have agreed that KSM's objection is a Cure objection and not an issue for Confirmation. The Debtors will address KSM's objection after Confirmation, and all rights are reserved with respect thereto.
2	*Lexon Insurance Company* [Docket No. 548]	• Lexon Insurance requests that the Plan provide for the treatment of surety bonds and include whether such surety bonds will be replaced, released, or reaffirmed by the Reorganized Debtors. ¶ 19. • Lexon Insurance further requests that they be entitled to approve the transfer or reassignment of the Surety Agreement. ¶¶ 25-26.	• The Debtors resolved this objection by adding language to the Confirmation Order. *See* Confirmation Order, ¶ 121-122.
3	*Atmos Energy Louisiana Industrial Gas, LLC* [Docket No. 543]	• Atmos Energy objects to the Plan to the extent the Debtors seek to limit Atmos Energy's right to setoff or recoupment after the Effective Date. • Atmos requests protective language be added to the Plan which clarifies Atmos Energy's rights with respect to its security deposit. ¶ 10.	• The Debtors resolved this objection by adding language to the Confirmation Order. *See* Confirmation Order, ¶ 130.
4	*Penthol LLC and Penthol C.V.* [Docket No. 542]	• The Plan's discharge provision may inappropriately discharge Penthol's defenses against the Debtors in its pending state court. ¶ 19. • Penthol requests protective language in the Plan, preserving Penthol's defenses in connection with its pending appeal. ¶ 21.	• The Debtors resolved this objection by adding language to the Confirmation Order. *See* Confirmation Order, ¶ 129.

[1] Capitalized terms used but not defined in this Memorandum shall have the meanings ascribed to such terms in the Memorandum or the corresponding Objection, as applicable.

#	Objecting Party[1]	Summary of Objection	Debtors' Response
5	*U.S. Trustee* [Docket No. 373]	• The exculpation provisions of the Plan improperly include the Debtors' Independent Directors. ¶ 26	• The Debtors have revised the definition of "Exculpated Parties" in the Plan, resolving this objection. *See* Plan, Art. 1.A.85.
		• The definition of 1125(e) Exculpated Parties is overly broad because the Debtors have not shown that the Related Parties have participated in good faith in the solicitation of the Plan or any sale. ¶¶ 30-31, 35.	• The Debtors respond to the U.S. Trustee's objection with respect to the 1125(e) Exculpated Parties and finding of good faith in Part IV of the Memorandum.
		• The Plan's definition of 1125(e) Exculpated Parties is overly broad because if the Debtors pursue an asset sale, then exculpating the parties that would only be relevant if there is a recapitalization transaction is improper. ¶ 31.	• The Debtors are not pursuing an Asset Sale, rendering this objection moot.
		• The release and exculpation of professionals under the Plan is impermissible for, among other reasons, because state and federal professional ethical obligations prevent a lawyer from prospectively limiting their malpractice liability. ¶¶ 36-38.	• The Debtors respond to the U.S. Trustee's objection with respect to the release and exculpation of professionals in Part IV of the Memorandum.
		• The permanent injunction improperly and unnecessarily includes enforcement of the Plan's release and exculpation provisions. ¶¶ 43-44.	• The Debtors respond to the U.S. Trustee's objection with respect to the Injunction Provision in Part IV of the Memorandum.
		• There is no statutory authority for non-debtor releases—consensual or otherwise—and the traditional factors governing the award of equitable relief do not favor granting this relief. ¶ 46.	• The Debtors respond to the U.S. Trustee's objection with respect to the Third-Party Release in Part IV of the Memorandum.
		• Granting a discharge if the Debtors pursue an Asset Sale is impermissible because § 1141(d)(3)(A) states confirmation does not discharge a debtor who sells substantially all of their assets. ¶ 48.	• The Debtors are not pursuing an Asset Sale, rendering this objection moot.
		• The Plan lacks an explicit exception to the injunction for the State's police and regulatory power. ¶¶ 50-51.	• The Debtors respond to the U.S. Trustee's objection in Part V of the Memorandum.

#	Objecting Party[1]	Summary of Objection	Debtors' Response
6	*Shell Chemical LP* Informal Comments	• Shell notified the Debtors of an informal objection with respect to the rejection of certain Shell agreements.	• The Debtors resolved this objection by adding language to the Confirmation Order. *See* Confirmation Order, ¶ 125-126.
7	*CP Terminal, LLC* Informal Comments	• CP Terminal, LLC notified the Debtors of an informal objection with respect to the assumption of a certain unexpired lease.	• The Debtors resolved this objection by adding language to the Confirmation Order. *See* Confirmation Order, ¶ 128.
8	*U.S. Environmental Protection Agency / U.S. Department of Justice* Informal Comments	• In connection with the RVO Settlement, the U.S. Environmental Protection Agency and the U.S. Department of Justice requested specific language to be included in the Confirmation Order.	• The Debtors added the requested language to the Confirmation Order. *See* Confirmation Order, ¶¶ 123-124, 135.
9	*Texas Taxing Authorities* Informal Comments	• Certain Texas Taxing Authorities requested specific language to be included in the Confirmation Order.	• The Debtors added the requested language to the Confirmation Order. *See* Confirmation Order, ¶ 127.