Docket #2361 Date Filed: 02/23/2025

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

In re:	)	Chapter 11
ZACHRY HOLDINGS, INC., *et al.*[1]	)	Case No. 24-90377 (MI)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF (I) FINAL APPROVAL OF THE DISCLOSURE STATEMENT AND (II) CONFIRMATION OF THE FURTHER MODIFIED FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF ZACHRY HOLDINGS, INC. AND ITS DEBTOR AFFILIATES

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these Chapter 11 Cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/zhi. The location of the Debtors' service address in these Chapter 11 Cases is: P.O. Box 240130, San Antonio, Texas 78224.

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The above-captioned debtors and debtors in possession (collectively, the "**Debtors**") submit this memorandum of law in support of (i) final approval of the *Disclosure Statement for the Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* [Docket No. 1986] (the "**Disclosure Statement**") and (ii) confirmation of the *Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates*, filed contemporaneously herewith (as it may be amended, modified, or supplemented, the "**Plan**").[1]

Preliminary Statement

1. The Court should confirm the Plan. It is the culmination of months of hard-fought negotiations and represents the type of remarkable outcome for all stakeholders that is possible when a debtor and its professionals use the chapter 11 process to achieve consensus. The Plan pays every creditor in full and was overwhelmingly accepted by voting creditors. It also positions the Debtors for long-term success, allowing them to take advantage of favorable market conditions while continuing to deliver world-class services and groundbreaking projects to their customers.

2. The headwinds faced by the Debtors as these Chapter 11 Cases were filed were daunting, yet the Debtors have achieved the goals they announced at the outset, which were to ensure that their creditors would be made whole and the trades the Debtors rely upon would not suffer because of the Debtors' dispute with the owners of the GPX Project. The chapter 11 filings allowed the Debtors to stabilize their operations and, with the invaluable assistance of Judge Lopez as mediator, reach agreement with Golden Pass, Chiyoda, and CB&I. That agreement allowed the Debtors to exit their role as lead contractor on the GPX Project while simultaneously ensuring that

[1] Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Plan, the Disclosure Statement, or the Disclosure Statement Order, as applicable.

the claims of vendors and subcontractors working on the GPX Project (totaling hundreds of millions of dollars) would be paid in full.

3. The Debtors then turned their focus to a plan of reorganization that would facilitate a quick emergence and a strong reorganized business. Negotiations with the Prepetition Credit Facility Agent and the Committee, at times spirited, were ultimately successful. The result is the Plan.

4. Under the Plan, the Debtors will enter into the A&R Credit Facility on the Effective Date, amending and restating the Prepetition Credit Facility on favorable terms for both the Debtors and Holders of Prepetition Credit Facility Claims. The A&R Credit Facility preserves the Debtors' access to their existing term loan and revolving credit facilities. It also ensures the continued availability of hundreds of millions of dollars of letters of credit that are necessary for the Debtors to win new business. The obligations under the A&R Credit Facility will be secured by substantially all of the Debtors' assets and will mature no later than the three-year anniversary of the Effective Date. All fifteen Prepetition Lenders—Holders of Prepetition Credit Facility Claims—have voted to accept the Plan. The Debtors thank their Prepetition Lenders for their significant efforts in resolving these matters and their support and confidence in the Debtors' businesses and leadership.

5. The Debtors will also issue the GUC Promissory Notes, giving Holders of General Unsecured Claims freely tradeable secured promissory notes with a value equal to the total Allowed amount of their General Unsecured Claims. These notes will mature 91 days after the maturity of the A&R Credit Facility (and no later than June 2028) and bear 15% interest, with 7.5% payable quarterly in cash and 7.5% paid in kind. The Debtors will also release all avoidance actions held by the Estates, including against trade creditors, based on their view that these claims

lack value and creditors are receiving payment in full in any event. Based on this outcome, Holders of General Unsecured Claims have unsurprisingly voted to accept the Plan by overwhelming margins. The Debtors thank their general unsecured creditors for their significant efforts in resolving these matters and their support and confidence in the Debtors' businesses and leadership.

6. There are few objections to confirmation of the Plan. The Debtors expect that only three objections will remain outstanding as of the Combined Hearing: (1) the U.S. Trustee filed its standard post-*Purdue* objection to any plan that contains an opt-out mechanism to obtain consent for a non-debtor release; (2) Integrated Power Company, Inc. asserts that the Plan improperly enjoins it from seeking payment from the Debtors' Sureties for its General Unsecured Claim; and (3) Encina Development Corp, LLC asserts that the Plan improperly disallows all late-filed Proofs of Claim. The Court should overrule these objections, approve the Disclosure Statement on a final basis, and confirm the Plan, in each case for the reasons set forth herein.

Background

I. The Plan

7. The Plan provides that all Allowed Claims against the Debtors will be paid in full and that all Interests in the Debtors will be Reinstated. Plan distributions will be funded from the Debtors' available cash, entry into the A&R Credit Facility, the issuance of new promissory notes to holders of General Unsecured Claims and Sunbelt on account of its Cure Claim, and a capital contribution from the non-Debtor parent of the Debtors. The material terms of the Plan are as follows:

8. ***A&R Credit Facility***. The Prepetition Credit Facility will be amended and restated and deemed binding on the Debtors and the Holders of Prepetition Credit Facility Claims as of the Plan's Effective Date. Because the Holders of Prepetition Credit Facility Claims, as a class, voted to accept the Plan, the terms of the A&R Credit Facility are those set forth in the consensual A&R

Credit Facility Term Sheet included as **Exhibit E** in the Plan Supplement. The consensual A&R Credit Facility Term Sheet provides that, among other things, the Debtors will maintain access to their existing term loan and revolving credit facilities, as well as existing letters of credit, subject to various agreed credit limits. The lenders may issue additional letters of credit for the Debtors' new projects after the Effective Date, again subject to agreed credit limits. The A&R Credit Facility will be secured by first-priority liens on nearly all of the Debtors' assets. The term loan facility will mature by March 31, 2027, and the revolver by March 31, 2028. The proceeds of the A&R Credit Facility will be used to fund working capital needs of the Reorganized Debtors.

9. ***Deferred Compensation Plan Claims***. Deferred Compensation Plan Claims held by employees or retirees will be Reinstated, and the rights of each Holder of such Claims under the Deferred Compensation Plan will be honored by the Reorganized Debtors in accordance with the terms of the Deferred Compensation Plan.

10. ***Convenience Claims***. Allowed General Unsecured Claims of $25,000 or less will be treated as Convenience Claims. Convenience Claims are Unimpaired and will receive a cash distribution of the full Allowed amount of such Claims, up to $25,000. Holders of General Unsecured Claims in excess of $25,000 were permitted to elect on their Ballot to reduce their General Unsecured Claims to $25,000 and receive the Convenience Claims Class treatment.

11. ***General Unsecured Claims***. General Unsecured Claims that are not Convenience Claims will receive GUC Promissory Notes issued by the Debtors on the Effective Date. The terms governing the GUC Promissory Notes are set forth in full in the GUC Note Term Sheet included in the Plan Supplement. The aggregate face amount of the GUC Promissory Notes will equal the value of all Allowed General Unsecured Claims. The GUC Promissory Notes will bear 7.5% cash interest, payable quarterly, and 7.5% PIK interest, accrued quarterly. The GUC

Promissory Notes will mature on the 91st day following the maturity of the A&R Credit Facility (but no later than June 2028). The GUC Promissory Notes will be freely tradeable by holders prior to maturity, subject to contractual limitations. The GUC Promissory Notes also will be secured by a third-priority lien on substantially all of the Debtors' assets, subject to an intercreditor agreement with the A&R Credit Facility Lenders (as senior, first-lien lenders) and Sunbelt (as a senior, second-lien lender), a creditor of the Debtors receiving a secured promissory note in exchange for deferred cash payments on account of its Cure Claims against the Debtors.

12. ***Parent Capital Contribution***. The immediate parent company of the Debtors will make a capital contribution, totaling $53 million, on or prior to the Effective Date. The $53 million contribution will include a cash contribution of $30 million and the forgiveness of $23 million in intercompany liabilities owed by the Debtors to their non-Debtor affiliates.

13. ***Executory Contracts***. The Debtors will assume and cure all executory contracts and unexpired leases that are not otherwise rejected pursuant to the Plan, including through the Rejection List included in the Plan Supplement or a separate motion.

14. ***Zachry Interests***. Interests in Debtor Zachry Holdings, Inc. (the direct or indirect parent of all other Debtors) will be Reinstated, and the legal, equitable, and contractual rights associated with such Interests shall remain unaltered.

15. ***GPX Settlement***. The Plan provides for the final consummation of the GPX Settlement. Following the approval of the GPX Settlement on July 25, 2024, the Debtors and Golden Pass have worked collaboratively and in good faith to identify and reconcile all GPX Claims to be paid by Golden Pass under the GPX Settlement and determine whether the amount of GPX Claims exceeds Golden Pass's direct payment cap under the GPX Settlement. The Debtors and Golden Pass have spent hundreds, if not thousands, of hours, among other things, reviewing

the Debtors' Claims Register, Proofs of Claim, and Pool A and B logs and invoices to identify GPX Claims, requesting all supporting invoices and documentation from vendors and subcontractors on the GPX Project, and analyzing the total claims pool and the calculation of excess claims. The Debtors and Golden Pass then agreed to the GPX Excess Claims Stipulation, which was filed as **Exhibit G** to the Plan Supplement. The GPX Excess Claims Stipulation provides that: (a) all paid, payable, and unreconciled, potential GPX Claims are listed on the schedules to the stipulation; (b) upon paying all GPX Claims in the amounts expressly listed on the schedules, Golden Pass will have fully discharged its payment obligations under the GPX Settlement and shall have no further obligation to pay GPX Claims; (c) the Debtors have no obligation to pay GPX Claims unless a proof of claim asserting a GPX Claim is allowed in an amount other than set forth on the schedules; and (d) the Debtors will pay $1.25 million to Golden Pass as the final determination of the amount of excess claims under the GPX Settlement. The Debtors provided notice to all GPX Project vendors listed on the schedules to the GPX Excess Claims Stipulation of the filing of the stipulation and those parties' remaining GPX Claims, if any.[2] The GPX Excess Claims Stipulation is incorporated into the Plan and the Proposed Confirmation Order,[3] resolves all open workstreams and issues among the Debtors and Golden Pass with respect to the GPX Settlement, and provides that the GPX Settlement has been implemented in its entirety, to provide finality to the GPX Settlement Parties and all vendors and subcontractors asserting GPX Claims.

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[2] *Certificate of Service* [Docket No. 2325], Exs. K-M (affirming service of the GPX Excess Claims Stipulation and scheduled claim amounts).

[3] The "**Proposed Confirmation Order**" means the *Findings of Fact, Conclusions of Law, and Order (I) Approving the Debtors' Disclosure Statement on a Final Basis and (II) Confirming the Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* (as may be amended, modified, or supplemented), filed contemporaneously herewith.

16. The restructuring contemplated in the Plan will enable the Debtors to emerge from these Chapter 11 Cases well-capitalized and poised for long-term growth. Critically, confirmation of the Plan will also preserve thousands of jobs and facilitate payment in full of all obligations owed to vendors and other general unsecured creditors in the ordinary course of business.

II. The Solicitation Process and Plan Supplement

17. On January 24, 2025, the Court entered the *Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Approving the Revised Confirmation Timeline, Solicitation Procedures, Solicitation Package, and Notices, (IV) Establishing Procedures for Objecting to the Disclosure Statement and Modified First Amended Plan, and (V) Granting Related Relief* [Docket No. 1991] (the "**Disclosure Statement Order**"), authorizing the Debtors to solicit votes to accept or reject the Plan.

18. Consistent with the Disclosure Statement Order, on January 24, 2025, the Debtors commenced solicitation of votes on the Plan from Holders of Prepetition Credit Facility Claims in Class 3 and General Unsecured Claims in Class 6 (the "**Voting Classes**") entitled to vote as of January 22, 2025 (the "**Voting Record Date**"). The Debtors, through their claims, noticing, and solicitation agent, Verita Global, LLC (the "**Claims, Noticing, and Solicitation Agent**"), sent solicitation materials to each member of the Voting Classes by first class mail and electronic mail (each, a "**Solicitation Package**").[4] The Solicitation Packages contained the Disclosure Statement (including the Plan and all other exhibits), the Disclosure Statement Order (without exhibits), the applicable Class 3 or Class 6 Ballot, the notice of the Combined Hearing, and a cover letter

[4] *See Certificate of Service* [Docket No. 2100] (the "**Solicitation Affidavit**") (affirming completion of solicitation as required by the Disclosure Statement Order).

encouraging creditors to vote to accept the Plan.[5] Following the commencement of solicitation, the Committee filed a statement and letter in support of confirmation of the Plan, which the Claims, Noticing, and Solicitation Agent served on all Holders of General Unsecured Claims via overnight mail and electronic mail.[6]

19. The Disclosure Statement and Ballots included instructions on how to cast a vote to accept or reject the Plan.[7] This included the requirement to submit each Ballot so that it was actually received by the Claims, Noticing, and Solicitation Agent by February 20, 2025, at 4:00 p.m. (prevailing Central Time) (the "**Voting Deadline**") in order to be counted.[8]

20. As required by the Disclosure Statement Order, on January 24, 2025, the Debtors, through the Claims, Noticing, and Solicitation Agent, mailed a notice (the "**Combined Hearing Notice**") to all parties listed on the creditor matrix, which informed recipients of: (a) the Debtors' commencement of these Chapter 11 Cases on May 21, 2024; (b) the scheduling of the Combined Hearing; (c) the key terms of the Plan, including classification and treatment of Claims and Interests; (d) key dates and information regarding final approval of the Disclosure Statement and Confirmation of the Plan and the Objection Deadline; (e) the multiple methods by which parties could request copies of the Plan and the Disclosure Statement; and (f) the full text of the release, exculpation, and injunction provisions set forth in the Plan.[9] The Combined Hearing Notice also

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5 Disclosure Statement Order ¶ 14.

6 *Statement of the Statutory Unsecured Claimholders' Committee Regarding the Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* [Docket No. 2123]; *see also Certificate of Service* [Docket No. 2325] (affirming service of the Committee's plan support statement and letter on Holders of General Unsecured Claims via overnight and electronic mail).

7 *See* Disclosure Statement Order, Exs. 2, 3.

8 *Id.*; *see also* Disclosure Statement Order ¶ 12.

9 Solicitation Affidavit ¶¶ 16-17, 19 (affirming service of the Combined Hearing Notice as required by the Disclosure Statement Order); *see also Supplemental Certificate of Service* [Docket No. 2297] (affirming supplemental service of the Combined Hearing Notice to postal forwarding addresses of parties whose mailings

informed all parties, including Holders or potential Holders of Claims or Interests in non-voting classes, that they could opt out of, or object to, the Third-Party Release contained in **Article VIII.D** of the Plan.[10] The Debtors further caused a notice of the Combined Hearing and the Objection Deadline to be published in *The New York Times* (National Edition); on January 28, 2025; in *USA Today* (National Edition) and *Beaumont Enterprise* on January 29, 2025; and *Port Arthur News* on February 1, 2025.[11]

21. Holders of Claims and Interests that are either Unimpaired (and therefore presumed to accept the Plan) or Impaired and entitled to no distribution (and therefore presumed to reject the Plan) received a notice of non-voting status and form to opt-out of the Plan's Third-Party Release but were not provided a Solicitation Package.[12] Current employees of the Debtors who do not hold Claims against, or Interests in, the Debtors also received a separate letter explaining that the Plan does not impact their rights and that the Third-Party Release is not binding upon them, as required by the Disclosure Statement Order.[13]

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of the Combined Hearing Notice were returned as undeliverable); Disclosure Statement Order, Ex. 6 (form of the Combined Hearing Notice).

[10] *Id*.

[11] *See Affidavit of Publication of the Notice of (I) Combined Hearing to Consider (A) Final Approval of the Disclosure Statement, (B) Confirmation of the Modified First Amended Joint Chapter 11 Plan, and (C) Opportunity to Opt Out of Third-Party Releases, and (II) Related Voting and Objection Deadlines in the New York Times, USA Today, Beaumont Enterprise and the Porter Arthur News* [Docket No. 2085] (the "**Publication Affidavit**").

[12] Disclosure Statement Order ¶ 17 (providing that the Debtors need not serve Solicitation Packages on Holders of Claims not entitled to vote); Solicitation Affidavit ¶¶ 11-12, 14-15.

[13] Disclosure Statement Order ¶ 26; Solicitation Affidavit ¶ 18.

22. On February 5, 2025, the Debtors filed initial documents in the Plan Supplement.[14] The Debtors completed the Plan Supplement on February 13, 2025, as required by the Plan and the Disclosure Statement Order, and supplemented it on February 19, 2025.[15]

III. Voting Results

23. As of the time of filing this memorandum, the Debtors, through their Claims, Noticing, and Solicitation Agent, are completing the final tabulation of votes following the Voting Deadline. The Claims, Noticing, and Solicitation Agent is reviewing all Ballots received, and the Debtors will file their voting report (the "**Voting Report**") on or before February 25, 2025.[16] Based on the preliminary tabulation of votes, Class 3 (Prepetition Credit Facility Claims) and Class 6 (General Unsecured Claims) have voted to accept the Plan in sufficient numbers and amounts for each Voting Class to accept the Plan under section 1126 of the Bankruptcy Code:

VOTING CLASS	ACCEPT		REJECT	
	AMOUNT (%)	NUMBER (%)	AMOUNT (%)	NUMBER (%)
Class 3 Prepetition Credit Facility Claims	$281,250,000.00 **(100%)**	15 **(100%)**	0 **(0%)**	0 **(0%)**
Class 6 General Unsecured Claims	$123,562,820.19 **(94.91%)**	90 **(84.91%)**	$6,627,254.73 **(5.09%)**	16 **(15.09%)**

[14] *Notice of Filing of the Plan Supplement* [Docket No. 2080] (filing the GUC Note Term Sheet).

[15] *See Notice of Filing of the Second Plan Supplement* [Docket No. 2150] (filing the Assumption List, the Rejection List, the Schedule of Retained Causes of Action, the A&R Credit Facility Term Sheet (including consensual and non-consensual versions of the term sheet), an updated draft of the GUC Note Term Sheet, the GPX Excess Claims Stipulation, and a disclosure that no amendments to the Debtors' Organizational Documents are necessary to implement the Restructuring Transactions on the Effective Date); *Notice of Filing of the Third Plan Supplement* [Docket No. 2316] (filing an updated version of the A&R Credit Facility Term Sheet incorporating agreed terms with the steering committee of Holders of Prepetition Credit Facility Claims).

[16] The Disclosure Statement Order sets February 25, 2025, as the Debtors' deadline to file the Voting Report. Disclosure Statement Order ¶ 3. The Debtors will file the Voting Report prior to that deadline. The Voting Report will show that Classes 3 and 6 voted to accept the Plan; however, the specific amount and number of the votes cast in each accepting Class remain subject to audit by the Claims, Noticing, and Solicitation Agent and may change in the final Voting Report filed by the Debtors.

IV. Plan Objections

24. Prior to the Objection Deadline, the Debtors received informal comments on the Plan from several parties in interest, including the Committee and certain of the Debtors' creditors and contract counterparties. The Debtors resolved all informal comments by incorporating technical modifications into the Plan or agreed language into the Proposed Confirmation Order.

25. Eight parties filed formal objections or reservations of rights with respect to confirmation of the Plan. No party filed an objection to final approval of the Disclosure Statement. The Debtors have resolved, or are in the process of resolving prior to the Combined Hearing, the majority of formal objections to Plan confirmation. The chart attached to this memorandum as **Exhibit A** summarizes the filed objections and the status of their resolution at the time of this filing.

26. The Debtors anticipate that only three objections will remain outstanding at the Combined Hearing. Those objections were filed by: (i) the U.S. Trustee [Docket No. 2321] (asserting the "**U.S. Trustee Objection**"); (ii) Integrated Power Corporation, Inc. [Docket No. 2334] ("**IPC**" asserting the "**IPC Objection**"); and (iii) Encina Development Group LLC [Docket No. 2315] ("**Encina**" asserting the "**Encina Objection**"). Each of these objections lacks merit and should be overruled.

Argument

I. The Court Should Overrule the Objections

A. The U.S. Trustee Objection is Meritless

27. The U.S. Trustee objects to the opt-out mechanism for obtaining consent to the non-debtor releases in the Plan. The U.S. Trustee has pursued virtually identical objections in every complex chapter 11 case in this District since the Supreme Court's decision in *Harrington v.*

Purdue Pharma, L.P.[17] As this Court has repeatedly held, neither *Purdue* nor long-standing Fifth Circuit law prohibits opt-out releases. The Court should overrule the U.S. Trustee Objection.

1. *Purdue* is Inapplicable

28. In *Purdue*, the Supreme Court resolved a circuit split regarding non-consensual third-party releases in chapter 11 plans, holding 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."[18] In doing so, the Supreme Court aligned with Fifth Circuit law, which prohibited non-consensual third-party releases long before *Purdue*.[19]

29. The Supreme Court went no further. It made clear that "[n]othing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan."[20] The Supreme Court also refused to "express a view on what qualifies as a consensual release."[21] And it clarified that its ruling did not apply to any "plan that provides for the full satisfaction of claims against a third-party nondebtor."[22]

30. Those limitations mean *Purdue* is not relevant here. "*Purdue* did not change the law in this Circuit" that permits third-party releases with the consent of creditors.[23] As discussed below, the Third-Party Release is consensual and consistent with "[h]undreds of chapter 11 cases

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17 603 U.S. 204 (2024); *see* U.S. Trustee Obj. ¶ 20 (citing *Purdue*).

18 *Purdue*, 603 U.S. at 227.

19 *See, e.g.*, *In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (collecting Fifth Circuit cases that "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions"); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995) (reversing plan including non-consensual third-party release).

20 *Purdue*, 603 U.S. at 226.

21 *Id.*

22 *Id.*

23 *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024); *In re CJ Holding Co.*, 597 B.R. 597, 608 (S.D. Tex. 2019) (collecting cases confirming plans with consensual opt-out releases).

[that] have been confirmed in this District [before and after *Purdue*] with consensual third-party releases with an opt-out."[24] In addition, creditors will have their Allowed Claims paid in full and completely satisfied under the Plan, regardless of whether they consent to the Third-Party Release—unlike the proposed plan in *Purdue*, which would have forced all creditors to release their claims without anything close to payment in full.[25]

2. The Third-Party Release Is Consensual and Permissible Under Fifth Circuit Precedent

31. To determine whether releases are consensual, courts in the Fifth Circuit consider whether the solicitation process provided interested parties reasonable notice of the third-party release and a reasonable opportunity to opt-out. They focus on whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look over it, [and] the disclosure is adequate so that they can actually understanding what they're being asked to do and the options that they're being given."[26] Under those circumstances, consent to the third-party release can be inferred by parties' receipt of notice and opt-out instructions and their failure to act to opt-out of the release.[27] Courts have confirmed legions of plans with third-party releases where debtors provided parties in interest a reasonable opportunity to opt-out.[28]

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[24] *In re Robertshaw*, 662 B.R. at 323.

[25] *Purdue*, 603 U.S. at 212.

[26] Conf. Hr'g Tr. at 47, *In re Energy & Expl. Partners, Inc.*, No. 15-44931 (RFN) (Bankr. N.D. Tex. Apr. 21, 2016) [Docket No. 730] (approving third-party releases as consensual, over objection of the U.S. Trustee, in light of sufficient notice and opportunity to object); *accord Robertshaw*, 662 B.R. 322-25; *In re CJ Holding Co.*, 597 B.R. at 608-09.

[27] *See In re CJ Holding Co.*, 597 B.R. at 608-09.

[28] *See, e.g.*, *Robertshaw*, 662 B.R. at 322 ("The Plan does not include non-consensual third-party releases like the ones addressed in *Purdue* [and instead] contains consensual ones."); *see also In re Wesco Aircraft Holdings, Inc.*, Case No. 23-90611 (MI) (Bankr. S.D. Tex. Jan. 6, 2025) [Docket No. 2550] (confirming plan with consensual third-party release); *In re Diamond Sports Group, LLC*, Case No. 23-90116 (CML) (Bankr. S.D. Tex. Nov. 14, 2024) [Docket No. 2671] (same); *In re FTX Trading Ltd.*, Case No. 22-11068 (JTD) (Bankr. D. Del. Oct. 8, 2024) [Docket No. 26404] (same); *In re DRF Logistics, LLC*, Case No. 24-90447 (CML) (Bankr. S.D. Tex. Sept. 24, 2024) [Docket No. 276] (same); *In re Eiger BioPharmaceuticals, Inc.*, Case No. 24-80040-SGJ11 (N.D. Tex. Sept. 5, 2024) [Docket No. 639] (same); *In re Gigamonster Networks, LLC*, Case No. 23-10051 (JKS) (Bankr. D. Del. Aug. 30, 2024) [Docket No. 889] (same); *In re Bowflex Inc.*, Case No. 24-12364 (ABA) (Bankr. D.N.J. Aug.

32. For instance, in *Robertshaw*, the court determined that a third-party release was consensual based on the following facts:

> Parties in interest were provided detailed notice about the Plan, the deadline to object to plan confirmation, the voting deadline, and the opportunity to opt out of the third-party releases. The Disclosure Statement included a detailed description about the third-party releases and the opt-out. The Affidavit of Service . . . shows ballots were sent to holders of Claims in voting classes . . . All ballots provided claimants an opportunity to opt out. Non-voting parties . . . received a Notice of Non-Voting Status that offered a chance to opt out too. The ballots and the Notice of Non-Voting Status allowed parties to carefully review and consider the terms of the third-party release and the consequences of electing not to opt-out. Each of the ballots advises in bold, that: if you submit your Ballot without this box checked, or if you do not submit your Ballot by the Voting Deadline, you will be deemed to consent to the releases contained in Article X.C of the Plan to the fullest extent permitted by applicable law. Robertshaw also caused the third-party release language to be published in the Wall Street Journal. The Voting Report shows that over 100 creditors opted out of the third-party releases. Based on the Record, the third-party release language is specific enough to put releasing parties on notice of the types of claims released. And that the opt-out worked. . . . Thus, the third-party releases are consensual.[29]

33. All of those facts are also present in this case. In the Disclosure Statement Order, the Court approved the forms of Ballots, the notice of the Combined Hearing, and the notice of non-voting status (including an opt-out form), which the Debtors served on all of their creditors. The Ballots sent to each voting creditor contained clear, bolded, and conspicuous language advising creditors of the Third-Party Release, instructions for completing the opt-out election on their Ballot, and the consequences of failing to complete the Ballot's opt-out election.[30] At the

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19, 2024) [Docket No. 614] (same); *In re Invitae Corp.*, Case No. 24-11362 (MBK) (Bankr. D.N.J. Aug. 2, 2024) [Docket No. 913] (same); *In re Ultra Petroleum Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017) [Docket No. 1324] (same); Conf. Hr'g Tr. at 14, *In re Warren Res., Inc.*, No. 16-32760 (MI) (Bankr. S.D. Tex. Sept. 14, 2016) [Docket No. 352] (same).

[29] *Robertshaw*, 662 B.R. at 323-24.

[30] The Ballots stated: "**PLEASE TAKE NOTICE THAT, IF YOU FAIL TO CHECK THE 'OPT OUT' BOX BELOW, YOU WILL BE DEEMED A 'RELEASING PARTY,' UNLESS YOU PROPERLY SUBMITTED AN OPT-OUT FORM DURING THE SOLICITATION OF THE DEBTORS' INITIAL PLAN OF REORGANIZATION, IN WHICH CASE SUCH OPT-OUT FORM REMAINS VALID AND EFFECTIVE. AS A 'RELEASING PARTY' UNDER THE PLAN, YOU WILL BE DEEMED TO PROVIDE THE RELEASES CONTAINED IN ARTICLE VIII.D OF THE PLAN, AS SET FORTH**

request of the U.S. Trustee, the Ballots made clear that electing to opt-out would not affect any creditor's distributions under the Plan.[31] Also at the U.S. Trustee's request, voting creditors were served with a statement from the U.S. Trustee advising creditors that "if you do not act, ***you will be considered to consent to th[e Third-Party Release]***."[32] Separately, all non-voting creditors (who are Unimpaired under the Plan) received a notice of non-voting status that appended an opt-out form that contained clear, bolded, and conspicuous language advising those parties of the Third-Party Release, instructions for opting out via the opt-out form, and the consequences of failing to opt-out.[33] The Debtors also published notice of the Combined Hearing, the Third-Party Release, and the requirement to opt-out in *The New York Times* (National Edition), *USA Today* (National Edition), *Beaumont Enterprise*, and *Port Arthur News* advising parties of the Third-Party Release.[34] Following this service, over 220 parties opted-out of the Third-Party Release, as will

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ABOVE. YOU MAY ELECT NOT TO GRANT THE RELEASES CONTAINED IN ARTICLE VIII.D OF THE PLAN ONLY IF YOU (A) CHECK THE BOX BELOW, (B) TIMELY FILE WITH THE BANKRUPTCY COURT ON THE DOCKET OF THE CHAPTER 11 CASES AN OBJECTION TO THE RELEASES CONTAINED IN ARTICLE VIII.D OF THE PLAN THAT IS NOT RESOLVED BEFORE CONFIRMATION, OR (C) PROPERLY SUBMITTED AN OPT-OUT FORM DURING THE SOLICITATION OF THE DEBTORS' INITIAL PLAN OF REORGANIZATION. THE ELECTION TO WITHHOLD CONSENT TO GRANT SUCH RELEASE IS AT YOUR OPTION." Disclosure Statement Order, Ex. 3 at 12; *see also id.* at 1-2 (providing overview of the Third-Party Release on cover page of Ballot).

[31] The Ballots also stated: "**PLEASE BE ADVISED THAT YOUR DECISION TO OPT OUT DOES NOT AFFECT THE AMOUNT OF DISTRIBUTION YOU WILL RECEIVE UNDER THE PLAN. SPECIFICALLY, YOUR RECOVERY UNDER THE PLAN WILL BE THE SAME IF YOU OPT OUT**." *Id.*, Ex. 3 at 12.

[32] *Id.*, Ex. 14.

[33] The notice of non-voting status stated: "**PLEASE TAKE FURTHER NOTICE THAT ARTICLE VIII OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS. ALTHOUGH YOU ARE NOT ENTITLED TO VOTE TO ACCEPT OR REJECT THE PLAN, THE OPT-OUT FORM ATTACHED HERETO PROVIDES YOU WITH THE OPTION TO NOT GRANT THE VOLUNTARY THIRD-PARTY RELEASE CONTAINED IN ARTICLE VIII.D OF THE PLAN. PLEASE BE ADVISED THAT YOUR FAILURE TO RETURN THE FULLY COMPLETED OPT-OUT FORM, DESIGNATING YOUR DECISION TO OPT OUT OF GRANTING THE RELEASES DESCRIBED IN ARTICLE VIII, WILL RESULT IN YOUR DESIGNATION AS A "RELEASING PARTY" UNDER THE PLAN, UNLESS YOU PROPERLY SUBMITTED AN OPT-OUT FORM DURING THE SOLICITATION OF THE DEBTORS' INITIAL PLAN OF REORGANIZATION, IN WHICH CASE SUCH OPT-OUT FORM REMAINS VALID AND EFFECTIVE**." *Id.*, Ex. 4 at 2.

[34] The publication notice stated: "**ARTICLE VIII OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS AND ARTICLE VIII.D CONTAINS A THIRD-PARTY RELEASE.**

be set forth in the Voting Report. As in *Robertshaw*, the fact that so many parties elected to opt-out suggests that the "the opt-out worked," and parties had a reasonable opportunity to manifest their consent (or rejection) of the Third-Party Release.[35]

34. The U.S. Trustee argues that any creditor's failure to opt-out during the solicitation of the Plan cannot be evidence of its consent to the Third-Party Release and that state contract law governs the effectiveness of the Third-Party Release—displacing sections 1123, 1125, 1126, 1129, and 1141 of the Bankruptcy Code and Bankruptcy Rule 3018.[36] And, according to the U.S. Trustee, silence cannot manifest consent to the Third-Party Release under applicable state law.[37]

35. This Court recently rejected this same argument, holding that "there is no requirement to comply with state law" when determining whether creditors consented to a third-party release.[38] To the contrary, "federal law can allow for consequences as a result of default [and not responding]."[39] That ruling is consistent with holdings from other courts determining that consent to a third-party release is a matter of notice under the Bankruptcy Code rather than state contract law,[40] and that parties may suffer legal consequences if they fail to respond to materials

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THUS, YOU ARE ADVISED TO REVIEW AND CONSIDER THE PLAN CAREFULLY BECAUSE YOUR RIGHTS MIGHT BE AFFECTED THEREUNDER. . . . FAILURE TO (A) ELECT TO OPT OUT OF THE RELEASE CONTAINED IN ARTICLE VIII.D OF THE PLAN IN ACCORDANCE WITH THE ABOVE OR (B) TIMELY OBJECT TO THE RELEASES CONTAINED IN ARTICLE VIII OF THE PLAN AND SUCH OBJECTION IS NOT RESOLVED BEFORE CONFIRMATION WILL RESULT IN SUCH HOLDER BEING DEEMED TO HAVE EXPRESSLY, UNCONDITIONALLY, GENERALLY, INDIVIDUALLY, AND COLLECTIVELY CONSENTED TO THE RELEASE AND DISCHARGE OF ALL CLAIMS AND CAUSES OF ACTION AGAINST THE DEBTORS AND THE RELEASED PARTIES." *Id.*, Ex. 7 at 2.

35 *Robertshaw*, 662 B.R. at 324.

36 U.S. Trustee Obj. ¶¶ 21-56.

37 *Id*.

38 Conf. Hr'g, *In re Wesco Aircraft Holdings, Inc.*, Case No. 23-90611 (MI) (Bankr. S.D. Tex. Dec. 16, 2024) [Docket No. 2489] at 2:31:45-2:35:59.

39 *Id*. at 2:33:29-2:33:38.

40 *See In re Mallinckrodt PLC*, 639 B.R. 837, 879 (Bankr. D. Del 2022) ("The notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system. . . . There is no reason why this principle should not be applied in the same manner to properly

appropriately served upon them in a judicial process.[41] The Court should adhere to that ruling in these Chapter 11 Cases as well.[42]

36. The remainder of the U.S. Trustee's objections should be summarily rejected. The U.S. Trustee asserts that the Plan improperly requires the Related Parties of the principal Releasing Parties to give the Third-Party Release without receiving any notice.[43] But the Related Parties are only Releasing Parties to the extent a principal Releasing Party "is legally entitled to bind such Related Party to the releases contained in the Plan under applicable law," and there is no question that the principal Releasing Parties have received notice under the Disclosure Statement Order.[44] The U.S. Trustee also contends the Plan's injunction provision is overbroad, unnecessary, and does not meet the standard factors for entry of a preliminary injunction by a civil court.[45] The Plan's injunction simply prohibits parties in interest from violating the terms of the Plan;[46] it is consistent

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noticed releases within a plan of reorganization."); *see also* Conf. Hr'g Tr. at 80-81, *In re Extraction Oil & Gas Inc.*, No. 20-11548-CSS (Bankr. D. Del. Dec. 22, 2020) [Docket No. 1534] ("I have repeatedly ruled that you can imply consent by failing opt out or respond to a plan, either through a ballot or on the docket, that calls for a release. I don't believe is necessarily a contractual point . . . as much as it is a point of notice under the Bankruptcy Code and the Bankruptcy Rules . . . .")

41 For instance, the Supreme Court held in *Phillips Petroleum Co. v. Shutts* that opt-out mechanisms, when they are accompanied by sufficient notice, procure consent of plaintiffs to be joined to a class settlement. 472 U.S. 797, 813-14 (1985). There is no principled argument why an opt-out mechanism can procure consent in the class action context but not in appropriate analogous circumstances in chapter 11 bankruptcies.

42 Even if state law somehow applied to confirmation of the Plan's Third-Party Release, Texas courts have held that silence operates as consent when "the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction." *Union Carbide Corp. v. Jones*, Case No. 14-00574-CV, 2016 WL 1237825, at *6 (Tex. App. Mar. 29, 2016) (emphasis omitted) (quoting Restatement (Second) of Contracts § 69(1)(b) (Am. L. Inst. 1981)). Further, "[p]rolonged silence or inaction in not asserting a known right is conduct that may amount to waiver." *Hooks v. Samson Lone Star, Ltd. P'ship*, 457 S.W.3d 52, 66 (Tex. 2015) (quoting *Ohrt v. Union Gas Corp.*, 398 S.W.3d 315, 329 (Tex. App. 2012)); *Safeco Ins. Co. of Am. v. Clear Vision Windshield Repair, LLC*, 564 S.W.3d 913, 920 (Tex. App. 2018) ("A party's silence or inaction for a period of time long enough show an intention to yield the known right is also enough to establish waiver."). Here, the solicitation materials—including the U.S. Trustee's own statement—made clear that parties would be bound by the Third-Party Release if they failed to act. Parties may be bound by the consequences of their own inaction under Texas state law.

43 U.S. Trustee Obj. ¶ 20.

44 Plan, Art. I.A.131.

45 U.S. Trustee Obj. ¶¶ 74-77.

46 Plan, Art. VIII.F (prohibiting parties from taking actions in violation of the Plan).

with plan injunctions routinely approved in this District;[47] and it is an "appropriate" provision that may be included in the Plan to enforce section 1141(a) of the Bankruptcy Code and this Court's exclusive jurisdiction over the Debtors' assets and plan confirmation.[48] Finally, the U.S. Trustee asserts that there is "no statutory authority" for the exculpation provision contained in the Plan.[49] But the Plan's exculpation is modeled after the exculpation provision that this Court recently approved in *Wesco* (over the U.S. Trustee's objection) and is authorized by the Fifth Circuit's decision in *Highland Capital*.[50]

B. The Integrated Power Objection Is Meritless

37. IPC objects to the discharge of claims against the Debtors' Sureties and project bonds. IPC argues that, because it has opted out of the Third-Party Release, it should not be barred from pursuing any claims against the Sureties or bonds on account of its General Unsecured Claim against the Debtors.[51] It also argues that section 524(e) of the Bankruptcy Code prohibits the discharge and injunction of claims against the Sureties and bonds.[52] Neither argument has merit.

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47 *See, e.g.*, *In re Wesco Aircraft Holdings, Inc.*, Case No. 23-90611 (MI) (Bankr. S.D. Tex. Jan. 6, 2025) [Docket No. 2550] (confirming plan with substantially similar plan injunction provision); *In re Robertshaw US Holding Corp.*, Case No. 24-90052 (CML) (Bankr. S.D. Tex. Aug. 16, 2024) [Docket No. 960] (same); *In re McDermott Int'l, Inc.*, Case No. 20-30336 (Bankr. S.D. Tex. Mar. 14, 2020) [Docket No. 684] (same).

48 *See, e.g.*, 11 U.S.C. § 1123(b)(6) (providing that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title"); 11 U.S.C. § 1141(a) (providing that "the provisions of a confirmed plan bind the debtor . . . and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan"); 28 U.S.C. § 1334(a)-(d) (providing the Bankruptcy Court "exclusive jurisdiction" over these Chapter 11 Cases and the Debtors' estates); 28 U.S.C. § 157(b)(2)(L) (providing that plan confirmation is a core proceeding over which the Bankruptcy Court may issue final orders binding on all parties in interest).

49 U.S. Trustee Obj. ¶ 78.

50 *Compare In re Wesco Aircraft Holdings, Inc.*, Case No. 23-90611 (MI) (Bankr. S.D. Tex. Jan. 6, 2025) [Docket No. 2550] ¶¶ 28, 31 (confirming plan with exculpation provision protecting the debtors, the committee, and the committee's members), *with* Plan, Arts. VIII.E, VIII.G (same); *see also NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419 (5th Cir. 2022).

51 IPC Obj. ¶¶ 9-12.

52 *Id.* ¶ 9.

38. The Plan provides that, "in exchange for full and final satisfaction" of all General Unsecured Claims, Holders of such Claims will receive GUC Promissory Notes equal to the total aggregate Allowed amount of such Claims.[53] It then provides that "the discharge provided herein shall discharge, release, and extinguish any right of any Holder of any Claim to file, assert, levy, or attach any Liens or initiate any claim against any bonds or the Sureties on account of any Claims against any of the Debtors that are discharged, *satisfied*, or released pursuant to this Plan, *including on account of General Unsecured Claims that are satisfied in full under this Plan*, or otherwise enforce, collect, or recover on account of any such Claims other than as expressly permitted under this Plan."[54] To implement that discharge of satisfied claims, the Plan's injunction provision further enjoins any party from "filing, asserting, levying, or attaching any Liens against any bonds or the Sureties on account of any Claims against any of the Debtors that are discharged, *satisfied*, or released pursuant to this Plan, *including on account of General Unsecured Claims that are satisfied in full under this Plan*, and enforcing, collecting, or recovering on account of any such Liens."[55]

39. Under applicable non-bankruptcy law, the liability of a surety or a guarantor is derivative of the principal's liability, such that the surety's liability cannot exist without any liability of the principal.[56] As a result, any action that "discharges the principal from his obligation

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53 Plan, Art. III.C.6.

54 Plan, Art. VIII.A (emphasis added).

55 Plan, Art. VIII.F.5 (emphasis added).

56 *See Page v. Liberty Plantation, LLC*, 2021 Tex. App. LEXIS 6790, at *6-7 (Tex. App. Aug. 18, 2021) ("The liability of a surety is derivative in nature and depends on the principal's liability. . . Thus, unless a cause of action exists against the principal, it cannot exist against the surety."); *BBVA USA v. Francis*, 642 S.W.3d 932, 938 (Tex. App. 2022) (noting that a "guarantor's liability on a debt is normally measured by the principal's liability"); *Amwest Sur. Ins. Co. v. Cardenas*, 2013 U.S. Dist. LEXIS 151335, at *20 (N.D. Tex. Oct. 22, 2013) (explaining that the "liability of a surety is derivative in nature" and that "[s]uch liability depends on the principal's liability").

also exonerates the surety."[57] The Fifth Circuit has also recognized that bankruptcy courts have authority to "limit a creditor's claim against third-party guarantors—not by discharging the guaranty but by determining the source and value of payments satisfying the guaranteed debt."[58]

40. Here, IPC's General Unsecured Claim, to the extent Allowed, will be paid in full and satisfied through the Plan's distribution to IPC of a GUC Promissory Note with a value totaling the entire Allowed amount IPC is owed by the Debtors. IPC does not dispute that the Plan proposes to pay all Allowed General Unsecured Claims in full. As a result, the Plan's discharge and injunction provisions restate what is already true under applicable non-bankruptcy law: the distributions IPC will receive under the Plan in complete satisfaction of its Allowed Claim exonerate the Sureties of any secondary liability they may owe related to the Debtors. If the Court grants IPC the carve-out from the Plan's discharge and injunction provisions that it requests, the Court will improperly allow IPC to receive a double recovery. IPC would be paid in full on the Effective Date through its receipt of a GUC Promissory Note and IPC could also demand payment from the Sureties for the same amount. That outcome is contrary to applicable non-bankruptcy law. And it ignores this Court's authority to "determine[e] the source and value of payments satisfying the guaranteed debt" and to bar any actions violating the Plan once confirmed.[59]

41. For the same reasons, section 524(e) is not implicated here. That provision states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the

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[57] *Metze v. Entman*, 584 S.W.2d 512, 514 (Tex. Civ. App. 1979)*; see also Bridges v. Phillips*, 17 Tex. 128 (1856) ("The release of the principle debtor operates as a discharge of his sureties . . . for there cannot be a surety without a principal debtor."); *see also Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 426 (Tex. App. 1990) ("The liability of a surety is derivative in nature. Such liability depends on the principal's liability.").

[58] *Matter of LaHaye*, 17 F.4th 513, 519 (5th Cir. 2021) ("A bankruptcy plan, then, can limit a creditor's claim against third-party guarantors—not by discharging the guaranty *but by determining the source and value of payments satisfying the guaranteed debt.* Indeed, the bankruptcy court has broad discretion to determine how a debt will be settled, including through the sale or transfer of 'all or any part of the property of the [bankrupt entity's] estate.'") (emphasis added).

[59] *Id.*; *see also* 11 U.S.C. § 1141(a).

property of any other entity for, such debt."[60] IPC's claims against the Sureties and bonds are not being extinguished on account of the Plan's general discharge of the Debtors. Instead, they are deemed released under applicable law upon the satisfaction—on the Effective Date—of IPC's Allowed General Unsecured Claim with a GUC Promissory Note satisfying the full value of that Claim. The Plan simply enforces that generally applicable principle under state law.

C. The Encina Objection is Meritless

42. Encina objects to the Plan's automatic disallowance of untimely claims filed after the Bar Date. Encina argues that automatic disallowance of late-filed claims without an objection violates due process and is inconsistent with the Bankruptcy Rules.[61] That is incorrect.

43. Section 502(b)(9) of the Bankruptcy Code provides that when a proof of claim is filed after the bar date, it should be disallowed.[62] Bankruptcy Rule 3003(c), in turn, requires courts in chapter 11 cases to fix the time within which proofs of claim or interest may be filed and further provides that a creditor who is required to file a proof of claim but fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.[63] Consistent with these provisions, on July 26, 2024, the Court entered the Bar Date Order, which approved the Bar Date and provided, among other things, that any creditor that was required but failed to file a Proof of Claim prior to the Bar Date shall have no claims against the Debtors and shall further be forever barred, estopped, and enjoined from asserting such claims against the Debtors and their Estates.[64] The Bar Date Order further provided that any such creditor shall be prohibited from

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60 11 U.S.C. § 524(e).

61 Encina Obj. ¶ 8.

62 11 U.S.C. § 502(b)(9).

63 Fed. R. Bankr. P. 3003(c).

64 Bar Date Order ¶ 18.

voting on the Debtors' Plan or participating in any distribution in these Chapter 11 Cases on account of such claim.[65]

44. The Plan, in turn, provides that untimely claims shall be deemed automatically disallowed on the Effective Date "without any further notice to or action, Order, or approval of the Bankruptcy Court, and Holders of such Claims may not receive any distributions on account of such Claims, unless the Bankruptcy Court shall have determined by a Final Order, on or before the Confirmation Hearing, that cause exists to extend the Claims Bar Date as to such Proof of Claim on the basis of excusable neglect."[66] This provision is a natural extension of the Bar Date Order's prohibition on late-filed Proofs of Claim, which ensures certainty in the claims reconciliation and plan distribution processes for the benefit of the Debtors and all their stakeholders, including creditors who complied with the Bar Date or timely moved to vindicate their rights after learning of any failure to file a proof of claim by the Bar Date. It is unsurprising that courts in this District consistently approve chapter 11 plans of reorganization containing similar provisions automatically disallowing late-filed claims on the effective date.[67]

45. The Plan's late-filed claims provision does not violate any party's due process rights or the Bankruptcy Rules, as Encina argues.[68] Courts have held that a late-filed proof of claim may be allowed if the claimant shows excusable neglect.[69] In line with that precedent, the

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65 *Id.* ¶ 19.

66 Plan, Art. VII.E.

67 *See In re Novvi, LLC*, Case No. 23-90906 (CML) (Bankr. S.D. Tex. Jan. 25, 2024) [Docket No. 104]; *In re KP Engineering, LP*, Case No. 19-34698 (DRJ) (Bankr. S.D. Tex. June 12, 2020) [Docket No. 575]; *In re Sanchez Energy Corp.*, Case No. 19-34508 (MI) (Bankr. S.D. Tex. Apr. 30, 2020) [Docket No. 1212]; *In re Vanguard Natural Resources, Inc.*, Case No. 19-31786 (DRJ) (Bankr. S.D. Tex. July 9, 2019) [Docket No. 582].

68 Encina Obj. ¶ 8.

69 *In re Eagle Bus Manufacturing, Inc.*, 62 F.3d 730, 736 (5th Cir. 1995) (holding that a bankruptcy court may permit a claimant to file a late proof of claim if the claimant's failure to file the proof of claim timely was the result of excusable neglect); *see also Unit Corp. v. Gilmore*, No. 4:21-CV-435, 2022 WL 956226 (S.D. Tex. Mar. 30, 2022) (same).

Plan expressly provides, as Encina itself highlights, that the Bar Date may be extended by the Court as to a late-filed Proof of Claim if it determines that the failure to timely file the Proof of Claim was the result of excusable neglect.[70] The Plan, therefore, expressly reserves Encina's right to seek allowance of its late-filed Proof of Claim. Indeed, Encina has already exercised that right by filing *Encina Developments Groups, LLC's Emergency Motion to Permit Filing Proof of Claim After Bar Date* [Docket No. 2120], which is scheduled for a hearing on the same date as the Combined Hearing.[71] Encina cannot complain that it is deprived of due process when it will have its day in court and an opportunity to demonstrate why its failure to file a timely proof of claim may be excusable, including due to any notice issues.

II. The Disclosure Statement Should Be Approved on a Final Basis

A. Creditors Received Sufficient Notice of the Combined Hearing and the Objection Deadline

46. Under Bankruptcy Rule 3017(a), a hearing on the adequacy of a disclosure statement generally requires twenty-eight (28) days' notice.[72] Similarly, Bankruptcy Rule 2002(b) provides that parties in interest should receive twenty-eight (28) days' notice of the objection deadline and the hearing to consider approval of the disclosure statement.[73] Courts in the Fifth Circuit and elsewhere have adopted the general rule that due process requires that "notice be 'reasonably calculated, under all the circumstances, to inform interested parties of the pendency'

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[70] Plan, Art. VII.E.

[71] The Debtors have objected to Encina's emergency motion. *See Debtors' Objection to Encina Development Group, LLC's Emergency Motion to Permit the Filing of a Late Proof of Claim* [Docket No. 2348]. The Debtors reserve all rights in connection therewith.

[72] Fed. R. Bankr. P. 3017(a) ("[T]he court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest . . . to consider the disclosure statement and any objections or modifications thereto.").

[73] Fed. R. Bankr. P. 2002(b).

of a proceeding."[74] When evaluating whether notice was sufficient, courts will consider "[f]irst, whether the notice apprised the claimant of the pendency of the action, and second, whether it was sufficiently timely to permit the claimant to act."[75] Whether a particular method of notice is reasonably calculated to inform interested parties is determined on a case-by-case basis.[76]

47. Here, the Debtors provided sufficient notice of the Combined Hearing and the Objection Deadline as approved and required under the Disclosure Statement Order. On January 23, 2025, the Court entered the Disclosure Statement Order, which, among other things, scheduled the Combined Hearing, set the Objection Deadline, and approved the form and manner of notice of the Combined Hearing Notice.[77] The Combined Hearing Notice informed recipients of the date and time of the Objection Deadline, the date and time set for the Combined Hearing, and the Third-Party Release and instructions to opt-out. The Debtors, through the Claims, Noticing, and Solicitation Agent, completed service of the Combined Hearing Notice on all entities listed on the Debtors' creditor matrix as approved and required under the Disclosure Statement Order.[78] In addition, the Debtors caused the Publication Notice to be published in *The New York Times* (National Edition), *USA Today* (National Edition), and *Beaumont Enterprise* by January 30, 2025, and in *Port Arthur News* on February 1, 2025, which, among other things, disclosed the date of the Combined Hearing, the Objection Deadline, and the Third-Party Release.[79] Each of the

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[74] *In re Placid Oil Co.*, 753 F.3d 151, 154 (5th Cir. 2014) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

[75] *In re Tex. Tamale Co., Inc.*, 219 B.R. 732, 739-40 (Bankr. S.D. Tex. 1998) (citing *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 518 (5th Cir. 1994)) (applying two-part test).

[76] *See In re Hunt*, 146 B.R. 178, 182 (Bankr. N.D. Tex. 1992) ("Whether a particular method of notice is reasonably calculated to reach interested parties depends upon the particular circumstances of each case.").

[77] Disclosure Statement Order ¶¶ 3, 17.

[78] Solicitation Affidavit ¶ 17.

[79] *See* Publication Affidavit.

Combined Hearing Notice and the Publication Notice also included instructions on how to obtain the Plan and the Disclosure Statement free of charge through the Claims, Noticing, and Solicitation Agent's website.

48. Given the ample notice the Debtors provided to parties in interest regarding the Objection Deadline and the Combined Hearing, the Debtors have satisfied the requirements of the Bankruptcy Rules and due process in compliance with the Disclosure Statement Order.

B. The Disclosure Statement Contains Adequate Information

49. Section 1125 of the Bankruptcy Code requires the proponent of a chapter 11 plan to provide "adequate information" regarding that plan to holders of impaired claims entitled to vote on the plan.[80] Section 1125(a)(1) of the Bankruptcy Code provides, in relevant part, as follows:

> "[A]dequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.[81]

50. The primary purpose of a disclosure statement is to provide all material information that creditors and interest holders affected by a proposed plan need to make an informed decision

[80] *See* 11 U.S.C. § 1125(b).

[81] 11 U.S.C. § 1125(a)(1).

regarding whether or not to vote for the plan.[82] Congress intended that such informed judgments would be needed to both negotiate the terms of, and vote on, a plan of reorganization.[83]

51. "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[84] Determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code is within the broad discretion of the court.[85] Accordingly, the determination of whether a disclosure statement contains adequate information must be made on a case-by-case basis, focusing on the unique facts and circumstances of each case.[86]

52. In determining whether a disclosure statement contains adequate information as required by section 1125 of the Bankruptcy Code, courts typically look for disclosures related to topics such as:

a) the events that led to the filing of a bankruptcy petition;

b) the relationship of the debtor with its affiliates;

c) a description of the available assets and their value;

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82 *See, e.g.*, *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote."); *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985) ("The primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan.").

83 *Century Glove*, 860 F.2d at 100.

84 11 U.S.C. § 1125(a)(1); *see also Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination of what is adequate information is subjective and made on a case by case basis."); *In re Divine Ripe, LLC*, 554 B.R. 395, 400-01 (Bankr. S.D. Tex. 2016) (discussing factors used to determine the adequacy of information in a disclosure statement); S. Rep. No. 95-989, at 121 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5907 ("The information required will necessarily be governed by the circumstances of the case.").

85 *See, e.g.*, *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 518 (5th Cir. 1998) ("The legislative history of § 1125 indicates that, in determining what constitutes 'adequate information' with respect to a particular disclosure statement, 'both the kind and form of information are left essentially to the judicial discretion of the court' and that 'the information required will necessarily be governed by the circumstances of the case.'") (internal citations omitted), *cert. denied*, 526 U.S. 1144 (1999); *Tex. Extrusion Corp.*, 844 F.2d at 1157 (finding that a determination of what constitutes adequate information "is largely within the discretion of the bankruptcy court"); *see also In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (listing factors for determining the sufficiency of "adequate information").

86 *See In re Phx. Petrol., Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001).

d) the company's anticipated future;

e) the source of information stated in the disclosure statement;

f) the debtor's condition while in chapter 11;

g) claims asserted against the debtor;

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

i) the future management of the debtor;

j) the chapter 11 plan or a summary thereof;

k) financial information, valuations, and projections relevant to a creditor's decision to accept or reject the chapter 11 plan;

l) information relevant to the risks posed to creditors under the plan;

m) the actual or projected realizable value from recovery of preferential or otherwise avoidable transfers;

n) litigation likely to arise in a nonbankruptcy context; and

o) tax attributes of the debtor.[87]

53. The Disclosure Statement contains adequate information in sufficient detail to permit voting creditors to make an informed judgment about the Plan, and it was previously approved on a conditional basis by the Disclosure Statement Order.[88] The Disclosure Statement contains many categories of information that courts consider "adequate information," including: (a) the Debtors' corporate history, structure, and business overview (Art. IV); (b) the events leading to the commencement of the Chapter 11 Cases (Art. V); (c) significant events in the Chapter 11 Cases (Art. VI); (d) the classification and treatment of Claims and Interests (Art. II);

[87] *See In re U.S. Brass Corp.*, 194 B.R. 420, 424-25 (Bankr. E.D. Tex. 1996); *Metrocraft Pub. Servs., Inc.*, 39 B.R. at 568 (listing the factors courts have considered in determining the adequacy of information provided in a disclosure statement). Disclosure regarding all topics is unnecessary in every case. *See U.S. Brass*, 194 B.R. at 424; *Phx. Petrol.*, 278 B.R. at 393 ("[C]ertain categories of information which may be necessary in one case may be omitted in another; no one list of categories will apply in every case.").

[88] *See* Disclosure Statement Order ¶ 1.

(e) the source of consideration for Plan distributions and the means for implementing the Plan (Art. VII.E); (f) treatment of executory contracts and unexpired leases (Art. VII.L); (g) provisions governing distributions (Art. VII.M); (h) procedures for resolving disputed claims (Art. VII.O); (i) information relating to releases, injunctions, and related provisions which are conspicuously displayed in accordance with Bankruptcy Rule 3016(c) (Art. VII.O); (j) the statutory requirements for confirmation (Art. IX); (k) risk factors related to the Plan (Art. X); and (l) certain U.S. federal tax consequences arising from the implementation of the Plan (Art. XII).[89] In addition, the Debtors have discussed the Disclosure Statement with key parties, including the Prepetition Lenders, the Committee, Golden Pass, Chiyoda, and CB&I and have incorporated feedback received from such parties. The information provided in the Disclosure Statement is sufficiently detailed, and the Disclosure Statement contains adequate information to allow the Holders of Claims in the Voting Classes to make an informed decision regarding whether to vote to accept or reject the Plan.

54. The Disclosure Statement contains "adequate information" (as such term is defined in section 1125(a) of the Bankruptcy Code and used in section 1126(b)(2) of the Bankruptcy Code) with respect to the Debtors, the Plan, and the transactions contemplated by the Plan, and should be approved on a final basis. The Disclosure Statement also contains sufficient information of a kind necessary to satisfy the disclosure requirements of all applicable non-bankruptcy laws, rules, and regulations.

C. The Disclosure Statement and the Plan Provide Sufficient Notice of the Injunction, Release, and Exculpation Provisions in the Plan.

55. Bankruptcy Rule 3016(c) requires that, if a plan provides for an injunction against conduct not otherwise enjoined under the Bankruptcy Code, the plan and the disclosure statement

[89] *See In re Divine Ripe, L.L.C.*, 554 B.R. at 401-02 (citing *Metrocraft Pub. Serv., Inc.*, 39 B.R. at 567-68).

must describe, in specific and conspicuous language, the acts to be enjoined and the entities subject to the injunction.[90] Similarly, Bankruptcy Rule 2002(c) requires that such disclosure be provided for the notice of the time fixed for filing objections and the hearing to consider confirmation of the chapter 11 plan.[91]

56. **Article VIII.F** of the Plan describes in detail the entities subject to an injunction under the Plan and the acts that they are enjoined from pursuing. The language in **Article VIII** of the Plan is in bold, making it conspicuous to anyone who reads it. **Articles VIII.C** and **VIII.D** describe in detail the entities subject to or providing a release under the Plan and the Claims and Causes of Action so released. Moreover, **Article VIII.E** of the Plan describes in detail the parties entitled to exculpation under the Plan. Each of **Articles VIII.C**, **VIII.D**, and **VIII.E** are set forth conspicuously in bold typeface.

57. Finally, the Ballots and the Combined Hearing Notice describe in detail and in conspicuous, bold typeface the entities that are subject to or providing a release under the Plan and the Claims and Causes of Action that are so released under the Plan. Each of the Disclosure Statement, Ballots, Combined Hearing Notice, Non-Voting Status Notice, and Opt-Out Form conspicuously states that any party who does not specifically opt-out or object to its inclusion as a Releasing Party will be bound by the Plan's Third-Party Release, unless such party is otherwise excepted from the Third-Party Release (*e.g.*, current employees). The Disclosure Statement complies with Bankruptcy Rule 3016(c) by conspicuously describing the conduct and parties enjoined, released, or exculpated by the Plan, and the Combined Hearing Notice complies with

[90] Fed. R. Bankr. P. 3016(c).

[91] Fed. R. Bankr. P. 2002(c).

Bankruptcy Rule 2002(c) by conspicuously describing the nature and entities subject to the Plan's release provisions.

D. The Debtors' Solicitation of Votes Complied with the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order

58. On January 24, 2025, the Debtors commenced distribution of Solicitation Packages to Holders of Claims entitled to vote on the Plan and solicited votes to accept or reject the Plan, in accordance with sections 1125 and 1126 of the Bankruptcy Code. Bankruptcy Rule 3017(d) sets forth the materials that must be provided to Holders of Claims for the purpose of soliciting their votes to accept or reject a plan of reorganization. As set forth in more detail below, the Solicitation Procedures complied with the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order.

59. The solicitation was undertaken in accordance with sections 1125 and 1126 of the Bankruptcy Code. In addition, Bankruptcy Rule 3017(d) enumerates those materials that must be provided to holders of claims and interests for the purpose of soliciting votes to accept or reject a plan of reorganization.[92] As set forth in more detail below, the solicitation complied with the Bankruptcy Code and the Bankruptcy Rules.

1. The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Bankruptcy Rules

60. Bankruptcy Rule 3017(d) requires debtors to distribute a ballot that conforms substantially to Official Form No. 314 only to "creditors and equity security holders entitled to vote on the plan."[93] Bankruptcy Rule 3018(c) provides that "[a]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity

[92] Fed. R. Bankr. P. 3017(d).

[93] *Id*.

security holder or an authorized agent, and conform to the appropriate Official Form."[94] The Ballots conformed to Official Form No. 314 and were modified to address the facts of these Chapter 11 Cases and to be appropriate for each Voting Class, in each case as approved by the Disclosure Statement Order. These modifications included bold and capitalized language regarding the Plan's Third-Party Releases and the procedures for opposition to such releases. The Ballots were approved by the Court in the Disclosure Statement Order, and no party has objected to the sufficiency of the Ballots. The Debtors have satisfied Bankruptcy Rules 3017(d) and 3018(c).

2. The Voting Record Date Complied with the Bankruptcy Rules and the Disclosure Statement Order

61. Bankruptcy Rule 3017(d) provides that, for the purposes of soliciting votes in connection with the confirmation of a plan, "creditors and equity security holders shall include holders of stocks, bonds, debentures, notes, and other securities of record on the date the order approving the disclosure statement is entered or another date fixed by the court, for cause, after notice and a hearing."[95] Bankruptcy Rule 3018(a) contains a similar provision regarding determination of the record date for voting purposes.[96] The Disclosure Statement Order, the Disclosure Statement, and the Ballots clearly identify January 22, 2025 as the Voting Record Date for purposes of determining which Holders of Claims were entitled to vote on the Plan. The Court approved the Voting Record Date in the Disclosure Statement Order, and no party in interest has objected to the Voting Record Date. The Debtors complied with the Disclosure Statement Order

[94] Fed. R. Bankr. P. 3018(c).

[95] Fed. R. Bankr. P. 3017(d).

[96] Fed. R. Bankr. P. 3018(a).

and satisfied the applicable requirements of the Bankruptcy Rules with respect to the Voting Record Date.

3. The Debtors' Solicitation Period Complied with the Disclosure Statement Order

62. The Debtors, through the Claims, Noticing, and Solicitation Agent, (a) distributed the Solicitation Packages and solicited votes on the Plan in compliance with the Solicitation Procedures; (b) received, tabulated, and reported on Ballots; and (c) responded to inquiries regarding the solicitation and voting process, including all matters related thereto. Further, the Claims, Noticing, and Solicitation Agent will file the Voting Report with the Court on February 25, 2025, consistent with the deadlines set forth in the Disclosure Statement Order.

63. The Solicitation Procedures set the Debtors' solicitation deadline as January 30, 2025, and the voting deadline as February 20, 2025—affording creditors twenty-one (21) days to vote on the Plan. The solicitation period complied with the Disclosure Statement Order and the Bankruptcy Rules.

4. The Debtors' Vote Tabulation Was Appropriate and Complied with the Disclosure Statement Order

64. As described in the Disclosure Statement, the Debtors, through the Claims, Noticing, and Solicitation Agent, used standard tabulation procedures in tabulating votes from Holders of Claims in the Voting Classes. The Claims, Noticing, and Solicitation Agent reviewed all Ballots received through the Voting Deadline and tabulated valid Ballots in accordance with the procedures described in the Debtors' motion seeking conditional approval of the Disclosure Statement, the Disclosure Statement, and the Disclosure Statement Order. The Claims, Noticing, and Solicitation Agent's tabulation of votes will confirm that Class 3 (Prepetition Credit Facility Claims) and Class 6 (General Unsecured Claims) each voted in sufficient number and amount to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code.

5. Waiver of Certain Solicitation Package Mailings Was Reasonable and Appropriate and Complied with the Disclosure Statement Order

65. Certain Holders of Claims and Interests were not provided a Solicitation Package because such Holders are Unimpaired under the Plan (and therefore conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code) or are Impaired and not entitled to receive a distribution under the Plan (and therefore conclusively presumed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code), each as of the Voting Record Date. Bankruptcy Rule 3017(d) requires transmission of a court-approved disclosure statement to, among other parties, classes of unimpaired creditors and equity security holders unless the court orders otherwise.[97] Through the Disclosure Statement Order, the Court approved the Combined Hearing Notice, the Non-Voting Status Notice, and the Opt-Out Form sent to stakeholders not entitled to vote on the Plan, which apprised them of the Objection Deadline, the Combined Hearing, and the opportunity to opt-out of the Plan's Third-Party Release.[98]

66. Waiver of any applicable requirement to mail Solicitation Packages to certain Holders of Claims and Interests was reasonable and appropriate, complied with the Disclosure Statement Order, and did not impact those parties' substantive rights with respect to the Plan in light of other notices provided to those parties.

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

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

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[97] Fed. R. Bankr. P. 3017(d).

[98] Disclosure Statement Order ¶¶ 16, 17.

rule, or regulation governing solicitation of acceptance or rejection of a plan."[99] Section 1125(e) of the Bankruptcy Code "provides a safe harbor for the disclosure and solicitation process of a bankruptcy."[100] Courts in this District frequently enter confirmation orders with protections based on section 1125(e) of the Bankruptcy Code.[101]

68. The Debtors and their Related Parties solicited the Plan in accordance with the requirements of the Disclosure Statement Order and pursuant to section 1125(e) of the Bankruptcy Code.

III. The Plan Satisfies the Bankruptcy Code's Requirements for Confirmation

69. To obtain confirmation of the Plan, the Debtors must demonstrate by a preponderance of the evidence that the Plan satisfies section 1129 of the Bankruptcy Code.[102] For the reasons set forth below, the Plan satisfies the applicable requirements of section 1129 of the Bankruptcy Code and complies with all other applicable sections of the Bankruptcy Code, the Bankruptcy Rules, and the Bankruptcy Local Rules. The Court should confirm the Plan.

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99 11 U.S.C. § 1125(e).

100 *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995).

101 *See, e.g.*, *In re Talen Energy Supply, LLC*, No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 20, 2022) [Docket No. 1760] (approving the protection of the debtors, the directors, managers, and officers of any debtor entity, the parties to the restructuring support agreement, the official committee of unsecured creditors and its members, the DIP agent and DIP lenders, and certain settling parties, among others, pursuant to section 1125(e) of the Bankruptcy Code); *In re Altera Infrastructure L.P.*, No. 22-90130 (MI) (Bankr. S.D. Tex. Nov. 4, 2022) [Docket No. 533] (approving protection of the debtors' and certain other plan proponents' affiliates, directors, officers, members, managers, employees, and advisors pursuant to section 1125(e) of the Bankruptcy Code); *In re Sungard AS New Holdings, LLC*, No. 22-90018 (DRJ) (Bankr. S.D. Tex. Oct. 17, 2022) [Docket No. 763] (approving protection of the debtors' and other plan proponents' affiliates, agents, representatives, members, principals, equity holders (regardless of whether such interests are held directly or indirectly), officers, directors, managers, employees, advisors, and attorneys relating to the offer, issuance, sale, and purchase of securities offered and sold under the plan); *see also In re Fieldwood Energy LLC*, No. 20-33948 (MI), 2021 WL 2853151, at *10 (Bankr. S.D. Tex. June 25, 2021) ("Debtors and their directors, officers, employees, members, agents, advisors, and professionals have acted in 'good faith' within the meaning of section 1125(e) of the Bankruptcy Code . . . in connection with all their respective activities relating to the solicitation of acceptances or rejections of the Plan and their participation in the activities . . . and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the exculpation provisions set forth in . . . the Plan.").

102 *See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("[P]reponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.").

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

70. Under section 1129(a)(1) of the Bankruptcy Code, a plan must comply with the applicable provisions of the Bankruptcy Code.[103] This provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and interests and the contents of the plan, respectively.[104]

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

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

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.[105]

72. 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.[106] Instead, claims or interests placed in a particular class need only be substantially similar to each other.[107] Courts in

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[103] 11 U.S.C. § 1129(a)(1).

[104] *See, e.g.*, *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 260 (Bankr. S.D. Tex. 2015) ("Courts interpret [section 1129(a)(1)] to mean that a plan must meet the requirements of Bankruptcy Code Sections 1122 and 1123.") (citing, *inter alia*, *Springs Alliance, Inc. v. WSI (II)-COS, L.L.C. (In re Save Our Springs (S.O.S.) All., Inc.)*, 632 F.3d 168, 174 (5th Cir. 2011)); H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978).

[105] 11 U.S.C. § 1122(a).

[106] *See, e.g.*, *Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (Bankr. D. Del. 2006) ("Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class if such claim or interest is substantially similar to the other claims or interests of such class. A classification structure satisfies section 1122 of the Bankruptcy Code when a reasonable basis exists for the structure, and the claims or interests within each particular class are substantially similar.").

[107] *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").

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.[108]

73. The Plan classifies substantially similar claims in the same class, satisfying section 1122(a) of the Bankruptcy Code. The Plan provides for nine Classes of Claims and Interests: (a) Class 1 (Other Secured Claims); (b) Class 2 (Other Priority Claims); (c) Class 3 (Prepetition Credit Facility Claims); (d) Class 4 (Deferred Compensation Plan Claims); (e) Class 5 (Convenience Claims); (f) Class 6 (General Unsecured Claims); (g) Class 7 (Intercompany Claims); (h) Class 8 (Intercompany Interests); and (i) Class 9 (Zachry Interests).[109]

74. The classification scheme set forth in the Plan complies with section 1122(a) of the Bankruptcy Code because each Class contains only Claims and Interests that are substantially similar to each other. Other Secured Claims, Other Priority Claims, Prepetition Credit Facility Claims, Deferred Compensation Plan Claims, Convenience Claims, General Unsecured Claims, and Intercompany Claims have each been classified separately because of the secured or unsecured status of the underlying obligation, the specific collateral (if any) securing such Claims, and the nature and priority of the underlying obligation. The Plan's classification scheme was not proposed to manufacture a consenting impaired class to manipulate voting.[110] Further, Claims

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[108] Courts have identified grounds justifying separate classification, including: (a) where members of a class possess different legal rights and (b) where there are good business reasons for separate classification. *See In re Briscoe Enters.*, 994 F.2d at 1167 (recognizing that "there may be good business reasons to support separate classification") (citing *Matter of Greystone*, 948 F.2d 134 (5th Cir.1991)); *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 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.").

[109] Plan, Art. III.

[110] *Matter of Greystone*, 948 F.2d 134, 139 (5th Cir.1991).

(rights to payment) are also classified separately from Interests (representing ownership in the business).

75. The separate classification of Deferred Compensation Plan Claims, Convenience Claims, and General Unsecured Claims is supported by valid business, legal, and factual reasons.[111] Holders of Deferred Compensation Plan Claims include current employees vital to the Reorganized Debtors' success. Reinstatement of those Claims will allow the Debtors and the Reorganized Debtors to preserve their relationships with, and demonstrate their commitment to, their employees and attract and retain highly skilled talent in order to emerge as a strong and competitive company.[112] Reinstatement of Deferred Compensation Plan Claims will, in turn, facilitate satisfaction of the Reorganized Debtors' obligations under the Plan, including servicing post-emergence debt.

76. The Convenience Class will ease the Debtors' administrative burden of having to distribute GUC Promissory Notes to hundreds of creditors holding small claims.[113] The Convenience Claim Amount was set at the threshold necessary to satisfy that goal and is in line with convenience class amounts approved in other cases in this Circuit.[114]

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111 *In re Save Our Springs (S.O.S.) All., Inc.*, 388 B.R. 202, 234 (Bankr. W.D. Tex. 2008).

112 *See, e.g.*, *In re City of Detroit*, 524 B.R. 147, 257 (Bankr. E.D. Mich. 2014) (finding no unfair discrimination in favor of a pension claims class under section 1129(b)(1) and stating: "[The City's] employees and retirees are and were the backbone of the structures by which the City fulfills its mission. The City, therefore, has a strong interest in preserving its relationships with its employees, in enhancing their motivation, and in attracting skilled new employees, consistent with its financial resources. The City has reasonably and properly concluded that the discrimination in favor of the pension claims in its plan is necessary to its mission.").

113 *Cf. In re DBSD N. Am., Inc.*, 419 B.R. 179, 204 n.107 (Bankr. S.D.N.Y. 2009), *aff'd in part, rev'd in part on other grounds*, 634 F.3d 79 (2d Cir. 2010) (noting that separate classification of large and small unsecured claims was "easy . . . to understand and approve" where the "plan provided for the delivery of common stock and warrants to the holders of larger claims, and doing so for unsecured creditors with the much smaller claims that would put them in the convenience class would result in the issuance of fractional shares and warrants").

114 *See, e.g.*, *In re Genesis Care Pty Ltd.*, Case No. 23-90614 (MI) (Bankr. S.D. Tex. Nov. 21, 2023) [Docket No. 1192] (confirming a plan of reorganization with a $100,000 convenience class threshold); *In re Neiman Marcus Grp.*, No. 20-32519 (DRJ) (Bankr. S.D. Tex. Sep. 4, 2020) [Docket No. 1795] (confirming a plan of reorganization with a $50,000 convenience class threshold); *In re Highland Capital Management, L.P.*, Case No. 19-34054 (SGJ) (Bankr. N.D. Tex. Feb. 22, 2021) [Docket No. 1943] (confirming a plan of reorganization with

77. Because each Class consists of only similar Claims and Interests and because the Debtors had valid business, legal, and factual reasons to separately classify certain Claims, the Court should approve the classification scheme of the Plan as consistent with section 1122 of the Bankruptcy Code. No party in interest has asserted otherwise.

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

78. The Plan complies with all applicable subsections of section 1123(a) of the Bankruptcy Code, which sets forth seven requirements that every non-individual chapter 11 plan must satisfy.[115]

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

79. For the reasons set forth above, the Plan properly designates Classes of Claims and Interests in accordance with section 1122 of the Bankruptcy Code and thus satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.[116] The Plan complies with section 1123(a)(1) by classifying Claims and Interests in **Article III.A** of the Plan such that each Class consists of substantially similar Claims or Interests, and no party has asserted otherwise.

b. Specification of Unimpaired Classes – § 1123(a)(2)

80. 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."[117] The Plan meets this requirement by

a $1,000,000 convenience class threshold); *In re Offshore Marine Contractors, Inc.*, No. 19-13253, 2020 WL 4551309, at *3 (Bankr. E.D. La. Aug. 6, 2020) (confirming a plan of reorganization with a $50,000 convenience class threshold).

[115] 11 U.S.C. § 1123(a). Section 1123(a)(8) does not apply in these Chapter 11 Cases because the Debtors are not individuals.

[116] 11 U.S.C. § 1123(a)(1).

[117] 11 U.S.C. § 1123(a)(2).

identifying each Unimpaired Class in **Article III.C** of the Plan, and no party has asserted otherwise.

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

81. 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."[118] The Plan meets this requirement by setting forth the treatment of each Impaired Class in **Article III.C** of the Plan, and no party has asserted otherwise.

d. Equal Treatment Within Classes – § 1123(a)(4)

82. 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."[119] The Plan meets this requirement because the Allowed Claims or Interests in each Class will receive the same treatment as the other Allowed Claims or Interests within such Class unless the Holder of such Claim or Interest has agreed to less favorable treatment, and no party has asserted otherwise.

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

83. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation.[120] The Plan satisfies this requirement because **Article IV** of the Plan, as well as other Plan provisions, provide the means by which the Plan will be implemented. Among other things, **Article IV** of the Plan:

a) constitutes a good faith compromise and settlement of all Claims and Interests and controversies resolved pursuant to the Plan, including all General Unsecured Claims and GPX Claims;

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[118] 11 U.S.C. § 1123(a)(3).

[119] 11 U.S.C. § 1123(a)(4).

[120] 11 U.S.C. § 1123(a)(5).

b) authorizes the Debtors and/or the Reorganized Debtors to take all actions necessary to effectuate the Plan, including those actions necessary or appropriate to effectuate the Restructuring Transactions;

c) authorizes the Reorganized Debtors to enter into the A&R Credit Facility Documents, the GUC Note Documents, the Parent Capital Contribution, and all related documents;

d) authorizes the Reorganized Debtors to adopt and re-affirm the Organizational Documents;

e) provides for the continuation of the current directors and officers of each respective Debtor at each Reorganized Debtor;

f) preserves the Debtors' corporate existence following the Effective Date (except as otherwise provided in the Plan);

g) provides for the vesting of Estate assets in the Reorganized Debtors;

h) provides for the preservation and vesting of Claims and Causes of Action not released pursuant to the Plan in the Reorganized Debtors;

i) provides for the assumption of the Deferred Compensation Plan and Other Employee Obligations;

j) authorizes the Reorganized Debtors to issue, execute, and assume certain contracts and other agreements, including certain agreements with the Debtors' employees and management;

k) provides for the cancellation of existing securities and agreements (except as otherwise provided in the Plan);

l) authorizes and approves all corporate actions contemplated under the Plan; and

m) authorizes the Debtors or Reorganized Debtors to take all actions necessary or appropriate to effectuate the Plan.

84. The precise terms governing the execution of many of these transactions are set forth in greater detail in the documents included in the Plan Supplement. The Plan satisfies section 1123(a)(5), and no party has asserted otherwise.

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

85. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities.[121] The Proposed Confirmation Order prohibits the Debtors from issuing non-voting equity securities. Accordingly, section 1123(a)(6) is satisfied, and no party has asserted otherwise.

g. Disclosure of New Directors and Officers – § 1123(a)(7)

86. 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."[122] Pursuant to **Article IV.K** of the Plan, the directors and officers of each Reorganized Debtor shall consist of the current directors and officers of each respective Debtor.[123] Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code, and no party has asserted otherwise.

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

87. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases;

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121 11 U.S.C. § 1123(a)(6).

122 11 U.S.C. § 1123(a)(7).

123 *See In re Am. Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) ("The debtor's inability to specifically identify future board members does not mean that the debtor has fallen short of the requirement imposed in subsection (a)(5)(A)(i), because the debtor *at this point* has no particular individuals whom it proposes should serve, after confirmation, as a director, officer, or voting trustee, other than those whom it has already identified on the record . . . If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i).") (emphasis in original); *see also In re Charter Commc'ns*, 419 B.R. 221, 260 n.30 (Bankr. D. Del. 2011) ("Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at [confirmation] of the identities of the known directors.").

(c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[124] The Plan is consistent with section 1123(b) of the Bankruptcy Code.

a. Impaired and Unimpaired Classes – § 1123(b)(1)

88. Under **Article III** of the Plan, Classes 1 (Other Secured Claims), 2 (Other Priority Claims), 4 (Deferred Compensation Plan Claims), 5 (Convenience Claims), and 9 (Zachry Interests), are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of, or otherwise provides treatment in accordance with section 1124 to, the Holders of Claims within such Classes.[125] On the other hand, Classes 3 (Prepetition Credit Facility Claims) and 6 (General Unsecured Claims) are Impaired because the Plan modifies the rights of the Holders of Claims within such Classes as contemplated by section 1123(b)(1) of the Bankruptcy Code.[126] Additionally, Classes 7 (Intercompany Claims) and 8 (Intercompany Interests) are either Unimpaired or Impaired because the Plan provides that, at the option of the Debtors, the legal, equitable, and contractual rights of Holders of such Claims and Interests will either be unaltered or they will otherwise receive treatment in accordance with section 1123(b) of the Bankruptcy Code, or be canceled and released without any distribution in accordance with section 1123(b) of the Bankruptcy Code.[127]

b. Assumption or Rejection of Executory Contracts and Unexpired Leases – § 1123(b)(2)

89. As set forth in section 1123(b)(2) of the Bankruptcy Code, a plan may provide for the assumption, rejection, or assignment of any executory contract or unexpired lease not

[124] 11 U.S.C. § 1123(b)(1)-(3), (6).

[125] Plan, Art. III.C.

[126] *Id.*

[127] *Id*.

previously rejected.[128] Pursuant to **Article V.A** of the Plan, as of the Effective Date, each Debtor shall be deemed to have assumed each Executory Contract and Unexpired Lease to which it is a party, unless such contract or lease: (a) is identified on the Rejection List; (b) previously expired or terminated pursuant to its own terms; (c) was previously assumed or rejected by the Debtors, including pursuant to the GPX Settlement; (d) is the subject of a motion or notice to reject pending as of the Effective Date; or (e) has an effective date of rejection that is after the Effective Date.[129] The Plan provides that entry of the Confirmation Order by the Bankruptcy Court shall constitute approval of such assumptions and rejections pursuant to sections 365 and 1123 of the Bankruptcy Code as of the Effective Date.[130] By specifying how Executory Contracts and Unexpired Leases will be assumed or rejected, the Plan complies with section 1123(b)(2), and no party has asserted otherwise.

c. The Plan Appropriately Incorporates Settlements of Claims and Causes of Actions – § 1123(b)(3)

90. Section 1123(b)(3) provides that a plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[131] Courts may approve settlements under a plan if they are "fair, equitable, and in the best interest of the estate."[132] In particular, Fifth Circuit courts apply a five-factor test for considering motions to approve bankruptcy settlements, weighing: "(1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of the

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128 11 U.S.C. § 1123(b)(2).

129 Plan, Art. V.A.

130 *Id.*

131 11 U.S.C. § 1123(b)(3)(A).

132 *See Matter of Assadi*, No. 22-50452, 2022 WL 17819599, at *1 (5th Cir. Dec. 20, 2022) (citing *Am. Can Co. v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 605, 608 (5th Cir. 1980)); Fed R. Bankr. P. 9019.

litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any, to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the settlement is truly the product of arms'-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise."[133]

91. Although a debtor bears the burden of establishing that a settlement is fair and equitable based on the balance of the above factors, "the [debtor's] burden is not high."[134] A court need only determine that the settlement does not "fall beneath the lowest point in the range of reasonableness."[135]

92. The settlements embodied in the Plan are fair and equitable and satisfy the Bankruptcy Rule 9019 factors as applied in this jurisdiction. **Article IV.A** of the Plan provides for a general settlement of Claims against and Interests in the Debtors. In consideration for the classification, distributions, releases, and other benefits provided under the Plan, all Claims and Interests and controversies, including all Prepetition Credit Facility Claims, General Unsecured Claims and GPX Claims, will be considered resolved pursuant to the Plan.[136]

93. The Plan resolves a host of alleged Claims and Causes of Action in exchange for payment in full, which, if not consensually resolved through the Plan, could have potentially caused extensive delay, cost, and uncertainty in these Chapter 11 Cases, while adversely affecting the Debtors' businesses and operations. The Plan settlements are the result of arms'-length

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133 *Matter of Assadi*, No. 22-50452, 2022 WL 17819599, at *1 (citing *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010)).

134 *See In re Roqumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008).

135 *See In re Idearc, Inc.*, 423 B.R. 138, 182 (Bankr. N.D. Tex. 2009); *In re Roqumore*, 393 B.R. at 480 ("The Trustee need only show that his decision falls within the 'range of reasonable litigation alternatives.'") (citations omitted).

136 Plan, Art. IV.A.

negotiations and are in the best interests of creditors and all parties in interest, as set forth in the declaration of Mohsin Y. Meghji (the "**Meghji Declaration**") and the declaration of Jason New (the "**New Declaration**"), which will be filed prior to the Combined Hearing. No party has objected to the settlements embodied in the Plan, and the Court should approve them.

d. The Plan's Release, Exculpation, and Injunction Provisions Comply With the Bankruptcy Code

94. The Plan includes a Debtor Release, a Third-Party Release, an exculpation provision, and injunction provisions.[137] These provisions comply with the Bankruptcy Code and applicable law because, among other things, these provisions are: (i) fair and equitable, (ii) given for valuable consideration, (iii) the product of extensive good faith, arms'-length negotiations to enter into the GPX Settlement, and (iv) in the best interests of the Debtors and their Estates. In addition, the Plan's Third-Party Release is consensual[138] and consistent with Fifth Circuit precedent. None of the Plan's release, exculpation, or injunction provisions are inconsistent with the Bankruptcy Code and, thus, these provisions are confirmable under section 1123(b)(6) of the Bankruptcy Code.[139]

i. The Debtor Release Complies With the Bankruptcy Code and Is Appropriate

95. **Article VIII.C** of the Plan provides for a release by the Debtors and the Estates in favor of the Released Parties of Causes of Action accruing prior to the Effective Date (the "**Debtor Release**").[140] The Bankruptcy Code supports the inclusion of debtor releases in a chapter 11 plan. Section 1123(b)(3)(A) of the Bankruptcy Code states that a chapter 11 plan may provide for "the

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[137] *See* Plan, Art. VIII.C (Debtor Release), Art. VIII.D (Third-Party Release), Art. VIII.E (Exculpation), Art. VIII.F (Injunction).

[138] Plan, Art. VIII.D (providing the opportunity to opt-out of the Third-Party Release).

[139] 11 U.S.C. § 1123(b)(6).

[140] Plan, Art. VIII.C.

settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[141] This provision allows the Debtors to release the Estates' Causes of Action as consideration for concessions made by their various stakeholders pursuant to the Plan.[142]

96. In considering the appropriateness of such releases, courts in the Fifth Circuit generally consider whether the release is (a) "fair and equitable" and (b) "in the best interests of the estate."[143] The "fair and equitable" prong is generally interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule.[144] Courts generally determine whether a release is "in the best interests of the estate" by reference to the following factors:

a) the probability of success of litigation;

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

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

d) the extent to which the settlement is truly the product of arms'-length negotiations; and

e) all other factors bearing on the wisdom of the compromise.[145]

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141 11 U.S.C. § 1123(b)(3)(A).

142 *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (finding that plan release provision "constitute[d] an acceptable settlement under [section] 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"); *In re Heritage Org.*, 375 B.R. at 289; *In re Mirant Corp.*, 348 B.R. 725, 730-39 (Bankr. N.D. Tex. 2006); *In re Gen. Homes Corp. FGMC*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991).

143 *In re Mirant Corp.*, 348 B.R. at 738; *see also In re Heritage Org.*, 375 B.R. at 259.

144 *See In re Mirant Corp.*, 348 B.R. at 738.

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

97. Courts afford a debtor some discretion in determining for itself the appropriateness of granting plan releases of estate causes of action.[146]

98. The Debtor Release meets the controlling standard for approval. As an initial matter, the terms of the Debtor Release are fair and equitable because they comply with the Bankruptcy Code's absolute priority rule. While certain Classes may be deemed to have rejected the Plan, as discussed in greater detail below, the Debtor Release does not result in any junior Classes improperly receiving or retaining any property on account of junior Claims or Interests. Thus, the Debtor Release is fair and equitable and in line with Fifth Circuit precedent.

99. In addition to being fair and equitable, the Debtor Release is in the best interest of the Estates. As will be set forth in the Meghji Declaration, based on their review, the Debtors are not aware of any claims being released that might reasonably be expected to yield material value for their Estates. The Debtors and their advisors conducted a comprehensive analysis of prepetition transfers made by the Debtors to insiders and other non-Debtor third parties to determine if any viable causes of action exist to avoid and recover such transfers under the Bankruptcy Code or applicable state law. Based on the analysis, no viable causes of action exist to avoid and recover the prepetition transfers made by the Debtors. The Debtors and their advisors have concluded that the prepetition transfers were made without fraudulent intent, for reasonably equivalent value, and/or in the ordinary course of business, or are likely subject to additional, specific defenses precluding their avoidance and recovery.

100. Moreover, each Released Party has played an integral role in the Chapter 11 Cases, made substantial concessions that underpin the consensual resolution of the Chapter 11 Cases that

[146] *See In re Gen. Homes*, 134 B.R. at 861 ("The court concludes that such a release is within the discretion of the Debtor.").

will allow the Debtors to expeditiously exit bankruptcy, and may be unwilling to support the Plan without the Debtor Release. In addition, the Plan, including the Debtor Release, was negotiated by sophisticated entities that were represented by able counsel and financial advisors. Finally, the overwhelming majority of voting creditors voted to accept the Plan, which includes the Debtor Release; and no party in interest objected to the Debtor Release. The Debtor Release for the Debtors' Related Parties is also appropriate because the Debtors' Related Parties share an identity of interest with the Debtors, supported the Plan and these Chapter 11 Cases, and actively participated in meetings, negotiations, and implementation during these Chapter 11 Cases, and have provided other valuable consideration to the Debtors to facilitate the Debtors' reorganization.

101. The Debtor Release is fair, equitable, and in the best interests of the Estates, and is justified under the controlling Fifth Circuit law.

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

102. **Article VIII.D** of the Plan contains a third-party release provision (the "**Third-Party Release**"). The Third-Party Release provides that each Releasing Party—including all Holders of Claims that do not specifically opt out of or timely object to the Third-Party Release—shall release any and all Causes of Action (including a list of specifically enumerated claims) that such Releasing Parties could assert against the Debtors, the Reorganized Debtors, and the Released Parties, except for acts or omissions that are found to have been the product of actual fraud, willful misconduct, or gross negligence.[147]

103. As set forth above in response to the U.S. Trustee Objection, the Third-Party Release is consensual, permissible under Fifth Circuit law.

[147] Plan, Art. VIII.D.

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

104. **Article VIII.E** of the Plan provides that each Exculpated Party—*i.e.*, the Debtors, the Committee, and the members of the Committee— shall be released and exculpated from any Claim or Cause of Action that is in any way related to the Chapter 11 Cases or the Debtors' restructuring from the Petition Date to the Effective Date, except to the extent "related to any act or omission that is determined in a Final Order to have constituted willful misconduct, gross negligence, or actual fraud" (the "**Exculpation Provision**").[148] The Exculpation Provision limits the liability of Exculpated Parties to a standard of care of willful misconduct, gross negligence, or actual fraud in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors' restructuring.

105. A bankruptcy court may approve an exculpation provision in a chapter 11 plan because a bankruptcy court cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good faith.[149] As such, an exculpation provision represents a legal conclusion resulting from certain findings a bankruptcy court must reach in confirming a plan.[150] 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.[151] Exculpation provisions appropriately prevent future collateral attacks against the Debtors and are commonly included in chapter 11 plans in this jurisdiction.[152] Accordingly, the Exculpation Provision in the Plan is appropriate because

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148 Plan, Art. VIII.E.

149 *See* 11 U.S.C. § 1129(a)(3); *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000).

150 *See* 11 U.S.C. § 1129(a)(3); *see also* 28 U.S.C. § 157(b)(2)(L).

151 *Highland Cap.*, 48 F.4th at 437-38; *In re PWS Holding*, 228 F.3d at 246 (observing that creditors and professionals providing services to the debtors are entitled to a "limited grant of immunity" for actions within the scope of their duties).

152 *See Highland Cap.*, 48 F.4th at 437-39; *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350] ¶ 39; *In re Pipeline Health Sys., LLC,* No. 22-90291 (MI) (Bankr. S.D. Tex. Jan. 13, 2023)

it provides protection to the Debtors, the Committee, and the Committee's members, who served as fiduciaries during the restructuring process.

106. 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 "bankruptcy trustees," which extends to a debtor in possession under section 1107 of the Bankruptcy Code.[153] The Plan therefore appropriately includes the Debtors as Exculpated Parties, consistent with *Highland Capital* and this Court's precedent, for actions taken prior to the Effective Date. Similarly, the Committee and each of its members owe fiduciary duties to the Debtors' Estates and are appropriately exculpated under *Highland Capital*.[154]

107. The Exculpation Provision is an integral component of the global settlement embodied in the Plan and is the product of good faith, arms'-length negotiations. The Exculpation Provision is narrowly tailored to the Debtors, the Committee, and each member of the Committee, and excludes acts of willful misconduct, gross negligence, and actual fraud, and relates only to acts or omissions in connection with or arising out of the administration of the Chapter 11 Cases or the Debtors' restructuring. Accordingly, the Exculpation Provision is appropriate under the circumstances.

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

108. The injunction provision set forth in **Article VIII.F** of the Plan (the "**Injunction Provision**") is a necessary part of the Plan because it enforces the discharge, release, and

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[Docket No. 1041] ¶¶ 44-45; *In re Talen Energy Supply, LLC, et al.*, No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 15, 2022) [Docket No. 1760] ¶ 37; *In re Altera Infrastructure L.P.*, No. 22-90130 (MI) (Bankr. S.D. Tex. Nov. 4, 2022) [Docket No. 533] ¶¶ 42-43.

153 *Highland Cap.*, 48 F.4th at 437-39.

154 *Id.*

exculpation provisions that are critically important to the Plan. 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 the Chapter 11 Cases and the Restructuring Transactions implemented by the Plan by requiring the Court's authorization for 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 Exculpation Provision.[155]

109. The Injunction Provision is an integral component of the Plan, appropriate and necessary under the circumstances, consistent with the Bankruptcy Code, narrowly tailored, compliant with the applicable case law and precedent in the Fifth Circuit, and should be approved.

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

110. Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a plan comply "with the applicable provisions of this title."[156] Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent under the Bankruptcy Code.[157] In determining whether a plan proponent has complied with this section, courts focus on whether the proponent

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[155] *See Highland Cap.*, 48 F.4th at 439 ("Courts have long recognized bankruptcy courts can perform a gatekeeping function. . . . We . . . affirm the inclusion of the injunction and the gatekeeper provisions in the Plan."); *see also In re Party City Holdco Inc.*, No. 23-90005 (DRJ) (Bankr. S.D. Tex. Sept. 6, 2023) [Docket No. 1711] ¶¶ 43-46 (confirming chapter 11 plan that included an injunction and gatekeeper provision); *In re Cineworld Grp. PLC*, No. 22-90168 (MI) (Bankr. S.D. Tex. June 28, 2023) [Docket No. 1982] ¶¶ 52-53 (same); *In re Serta Simmons Bedding, LLC*, No. 23-90020 (DRJ) (Bankr. S.D. Tex. June 14, 2023) [Docket No. 1071] ¶ 37 (same); *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350] ¶ 39 (same); *In re Talen Energy Supply, LLC*, No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 20, 2022) [Docket No. 1760] ¶ 37 (same).

[156] 11 U.S.C. § 1129(a)(2).

[157] *See* 7 COLLIER ON BANKR. ¶ 1129.02[2] (Richard Levin & Henry J. Sommer eds., 16th ed.).

has adhered to the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code.[158]

111. As set forth above and as evidenced by the Solicitation Affidavit and the Publication Affidavit, the Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. In addition, the Debtors and their professionals acted in good faith in all respects in connection with the solicitation of votes on the Plan and the tabulation of such votes. The Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.[159]

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

112. Section 1129(a)(3) of the Bankruptcy Code provides that the court shall confirm a plan of reorganization only if the plan has been "proposed in good faith and not by any means forbidden by law."[160] Section 1129(a)(3) of the Bankruptcy Code does not define good faith, but courts generally find that a plan is proposed in good faith if there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.[161] "The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a [c]hapter 11 plan, keeping in mind the purpose

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

159 *See In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (holding section 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to Plan).

160 11 U.S.C. § 1129(a)(3).

161 *See Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997).

of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start."[162] 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.[163]

113. The plan proponent must also show that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success.[164] Whether a plan is proposed for honest and good reasons depends on "whether the debtor intended to abuse the judicial process, whether the plan was proposed for ulterior motives, or if no realistic probability for effective reorganization exists."[165]

114. The Plan satisfies section 1129(a)(3) of the Bankruptcy Code. As will be set forth in the Meghji Declaration, once effective, the Plan will provide the Reorganized Debtors with sufficient liquidity to continue providing first-class services to their customers, while also ensuring the Debtors' long-term viability. Under the Plan, the Debtors will restructure their Prepetition Credit Facility on favorable terms, fully satisfy their obligations to general unsecured creditors, preserve thousands of jobs, and emerge with sufficient capital to operate the reorganized businesses, positioning the Reorganized Debtors for future growth and success. Moreover, the Plan is the product of extensive arms'-length negotiations among the Debtors, the Prepetition

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[162] *In re Cajun Elec. Power Coop.*, 150 F.3d at 519 (quoting *In re T-H New Orleans*, 116 F.3d at 802); *see also Brite v. Sun Country Dev. (In re Sun Country Dev.)*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999) ("The good faith standard requires that the plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.'") (citations omitted).

[163] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").

[164] *See In re T-H New Orleans*, 116 F.3d at 802 (finding that a court may only confirm a plan for reorganization if the plan has been proposed in good faith and not by any means forbidden by law and that where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied).

[165] *In re W.R. & Grace Co.*, 475 B.R. 34, 88 (D. Del. 2012).

Lenders, the Committee, and other key stakeholders. Finally, the Plan complies with bankruptcy and applicable non-bankruptcy law. These facts are the hallmarks of good faith.[166] By proposing a plan in honesty and with good intentions and a reasonable hope of success, the Debtors have satisfied the good faith requirement of 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 – § 1129(a)(4)

115. 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 court as reasonable. Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the court as to their reasonableness.[167]

116. All Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code.[168] **Article II.B** of the Plan, moreover, provides that Professionals shall reasonably estimate their unpaid Professional Fee Claims and other unpaid fees and expenses incurred in rendering services to the Debtors or the Debtors' Estates before and as of the Effective Date, and shall deliver

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[166] *See In re Lincolnshire Campus, LLC*, 441 B.R. 524, 530 (Bankr. N.D. Tex. 2010) (holding that a plan was proposed in good faith where plan was developed and negotiated at arms'-length among representatives of debtors and other major parties in interest); *In re Chemtura Corp.*, 439 B.R. 561, 608-09 (Bankr. S.D.N.Y. 2010) (finding that a plan was proposed in good faith where, among other things, the debtor negotiated and reached agreements with several parties in interest to put forward a chapter 11 plan which "in the aggregate" demonstrated "a good faith effort on the part of the debtor to consider the needs and concerns of all major constituencies" in the case).

[167] 11 U.S.C. § 1129(a)(4); *see In re Cajun Elec. Power Coop.*, 150 F.3d at 518 ("Section 1129(a)(4) by its terms requires court approval of any payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case.") (internal citations omitted); *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").

[168] Plan, Art. II.B; *see also* 11 U.S.C. § 328(a); 11 U.S.C. § 330(a)(1)(A).

such estimate to the Debtors no later than three (3) Business Days before the Effective Date, thereby providing a reasonable opportunity for interested parties to review such Professional Fee Claims.[169] For these reasons, the provisions in the Plan comply with section 1129(a)(4) of the Bankruptcy Code, and no party has asserted otherwise.

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

117. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors.[170] Section 1129(a)(5)(B) of the Bankruptcy Code further requires a plan proponent to disclose the identity of an "insider" (as defined in section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider.[171] Additionally, section 1129(a)(5)(A)(ii) of the Bankruptcy Code provides that the appointment or continuance of such officers and directors must be consistent with the interests of creditors and equity security holders and with public policy.[172]

118. These requirements direct the Court to ensure that the post-confirmation governance of the Reorganized Debtors is in good hands. In evaluating compliance with section 1129(a)(5) of the Bankruptcy Code, courts look to whether: (a) the identified directors and officers of the reorganized debtors have experience in the reorganized debtors' business and industry;[173] (b) the identified directors and officers have experience in financial and management

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169 Plan, Art. II.B.

170 11 U.S.C. § 1129(a)(5).

171 *Id.*

172 *Id.*

173 *See In re Landing Assocs., Ltd.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) ("In order to lodge a valid objection under [section] 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."); *In re Rusty Jones, Inc.*, 110 B.R. 362, 372, 375

matters;[174] (c) the debtors and creditors believe control of the entity by the proposed directors and officers will be beneficial;[175] and (d) the identified directors and officers are not likely to "perpetuate[] incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor."[176] The "public policy requirement would enable [a court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[177]

119. The Debtors have satisfied section 1129(a)(5) of the Bankruptcy Code. As set forth in **Article IV.K** of the Plan, as of the Effective Date the directors and officers of each Reorganized Debtor shall consist of the current directors and officers of each respective Debtor.[178] As will be set forth in the Meghji Declaration, the directors and officers of the Debtors have ample experience in the EPC industry as well as financial and management matters. Additionally, the directors and officers possess extensive institutional knowledge of the Debtors, enabling them to effectively guide the business upon emergence. No creditor has expressed concern with management remaining in their roles. The requirements of section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied.

(Bankr. N.D. Ill. 1990) (holding that 1129(a)(5) was not satisfied where management had no experience in the debtor's line of business).

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

175 *See, e.g.*, *In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990).

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

177 7 COLLIER ON BANKR. ¶ 1129.02[5][b].

178 *See In re Landing Assocs.*, 157 B.R. at 817 ("Under § 1129(a)(5) the plan proponent must disclose the identity of the individuals that will manage the business post-confirmation, and the participation of these individuals in the debtor's business must be consistent with the interests of creditors."); *see also In re Armstrong World Indus.*, 348 B.R. at 165 (finding disclosure of identities and nature of compensation of persons to serve as directors and officers on the effective date sufficient for section 1129(a)(5) of the Bankruptcy Code).

120. The Debtors will also satisfy section 1129(a)(5)(B) of the Bankruptcy Code. Although the nature and terms of the Debtors' officers and directors' go-forward relationship with the Reorganized Debtors remain subject to ongoing discussions, it is expected that the compensation for these officers and directors will be on terms substantially similar to their current compensation. Accordingly, section 1129(a)(5) of the Bankruptcy Code is satisfied, and no party has objected to the Plan on these grounds.

F. The Plan Does Not Require Governmental Regulatory Approval for Any Rate Changes – § 1129(a)(6)

121. 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.[179] Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

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

122. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity holders. This "best interests" test focuses on individual dissenting creditors, rather than classes of claims.[180] The best interests test requires that each holder of a claim or equity interest either accept the plan or receive or retain property under the plan having a present value, as of the effective date of the plan, of not less than the amount such holder would receive or retain if the debtor was liquidated under chapter 7 of the Bankruptcy Code.[181]

123. Class 6 (General Unsecured Creditors) has voted to accept the Plan, and all Holders of Claims and Interests in all Impaired Classes will recover at least as much under the Plan as they

[179] 11 U.S.C. § 1129(a)(6).

[180] *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St P'ship*, 526 U.S. 433, 441 n.13. (1999).

[181] 11 U.S.C. § 1129(a)(7).

would in a hypothetical chapter 7 liquidation.[182] As set forth in the Liquidation Analysis attached as **Exhibit C** to the Disclosure Statement and as will be discussed in the Meghji Declaration, the Debtors, with the assistance of their advisors, estimated recoveries for Holders of Claims under the Plan. The projected recoveries under the Plan as set forth in the Disclosure Statement greatly exceed the recoveries estimated in a hypothetical chapter 7 liquidation of the Debtors, as reflected in the Liquidation Analysis.[183] In addition, no party that rejected the Plan has asserted that the Plan violates the best interests test. The Plan complies with section 1129(a)(7) of the Bankruptcy Code.

H. Plan Acceptance by Each Impaired Voting Class – § 1129(a)(8)

124. Subject to section 1129(b) of the Bankruptcy Code, section 1129(a)(8) requires that each class of claims and interests either accept or be unimpaired under the plan of reorganization. A class of claims or interests that is not impaired under a plan is "conclusively presumed" to have accepted the plan and need not be further examined under section 1129(a)(8) of the Bankruptcy Code.[184] As relevant here, a class of claims accepts a plan if the holders of at least two-thirds (2/3) in dollar amount and more than one-half (1/2) in the number of claims in the class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan.[185]

125. As will be set forth in the Voting Report, Class 3 (Prepetition Credit Facility Claims) and Class 6 (General Unsecured Claims) each voted to accept the Plan. Classes 1 (Other

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[182] *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 a present value at least equal to what they would have received in a Chapter 7 liquidation of the Debtor as of the effective date of the Plan."); *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("Section 1129(a)(7)(A) requires a determination whether 'a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.'") (citations omitted).

[183] Disclosure Statement, Ex. C.

[184] *See* 11 U.S.C. § 1126(f).

[185] *See* 11 U.S.C. § 1126(c).

Secured Claims), 2 (Other Priority Claims), 4 (Deferred Compensation Plan Claims), 5 (Convenience Claims), and 9 (Zachry Interests) are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Classes 7 (Intercompany Claims) and 8 (Intercompany Interests) may be conclusively deemed to accept or reject the Plan at the election of the Debtors. Regardless, the Plan may still be confirmed under section 1129(b) of the Bankruptcy Code, as set forth further below.

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

126. The Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code, which requires that persons holding priority claims under the Bankruptcy Code receive specified cash payments.[186] The treatment of Administrative Claims (**Article II.A**), Professional Fee Claims (**Article II.B**), Priority Tax Claims (**Article II.C**), and Restructuring Expenses (**Article II.D**) under the Plan is, in each case, consistent with section 1129(a)(9) of the Bankruptcy Code.

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

127. Section 1129(a)(10) of the Bankruptcy Code requires that, to the extent there is a class of Impaired Claims under the Plan, at least one Impaired Class of Claims must accept the plan, excluding the votes of any insiders.[187] As will be evidenced by the Voting Report, Classes 3 (Prepetition Credit Facility Claims) and 6 (General Unsecured Claims), which are Impaired, voted to accept the Plan by the requisite number and amount of Claims under section 1126 of the Bankruptcy Code, determined without including any acceptance of the Plan by any Insider (as

[186] 11 U.S.C. § 1129(a)(9). Under section 1129(a)(9), unless otherwise agreed, a plan must provide that all administrative and priority creditors be paid in full.

[187] 11 U.S.C. § 1129(a)(10).

defined in section 101(31) of the Bankruptcy Code). Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

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

128. Section 1129(a)(11) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[188] To establish that a plan is feasible, "the [bankruptcy] court need not require a guarantee of success . . . [o]nly a reasonable assurance of commercial viability is required."[189] Indeed, "[a]ll the bankruptcy court must find is that the plan offer[s] 'a reasonable probability of success.'"[190] While a debtor bears the burden of proving plan feasibility, the applicable standard is by a preponderance of the evidence, which means presenting proof that a given fact is "more likely than not."[191]

129. Courts have fashioned a series of factors that may be considered when evaluating whether a plan is feasible. These factors traditionally include: (a) the adequacy of the debtor's capital structure; (b) the earning power of its business; (c) existing economic conditions; (d) the abilities of the debtor's management; (e) the probability of the continuation of the same management; and (f) other related matters affecting successful performance under the provisions of the plan.[192]

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188 11 U.S.C. § 1129(a)(11).

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

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

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

192 *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 226-27 (Bankr. D.N.J. 2000) (citing *In re Temple Zion*, 125 B.R. 910, 915 (Bankr. E.D. Pa. 1991)); *In re Toy & Sports Warehouse*, 37 B.R. 141, 151 (Bankr. S.D.N.Y. 1984) (citing *In re Landmark at Plaza Park*,

130. The Financial Projections attached as **Exhibit B** to the Disclosure Statement demonstrate that the Plan is feasible. The Financial Projections demonstrate that the Debtors will have sufficient earnings to meet their obligations under the Plan.[193] Although the Debtors' business operates in a competitive industry and it is impossible to predict with certainty the precise future profitability of the Debtors' business and markets in which the Debtors operate, confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtors. As will be set forth in the Meghji Declaration, the Plan, negotiated in good faith between the Debtors and their major creditor constituencies, has more than a reasonable likelihood of success because the transactions contemplated under the Plan will enable the Debtors to continue their current operations while simultaneously generating positive free cash flow and satisfying deferred cash payments on all Impaired Claims under the Plan. Because the Plan right-sizes the Debtors' capital structure and extinguishes certain legacy liabilities, including those related to the GPX Project, the Reorganized Debtors will be better positioned to service ongoing debt obligations and generate cash flow to reinvest in their business.

131. The Plan provides for a workable reorganization, with more than a reasonable likelihood of success, and no party has asserted otherwise. The Plan is feasible and 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 – § 1129(a)(12)

132. 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

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

[193] Disclosure Statement, Ex. B.

the hearing on confirmation of the plan."[194] 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.[195]

133. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because **Article XII.D** of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid for each quarter (including any fraction thereof) until these Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first. No party, including the U.S. Trustee, has asserted otherwise.

M. The Plan Provides for Post-Effective Date Payment of Retiree Benefits – § 1129(a)(13)

134. Section 1129(a)(13) requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.[196] **Article IV.L** of the Plan provides that, as of the Effective Date, all retiree benefits (as such term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid in accordance with applicable law. The Plan satisfies the requirements of section 1129(a)(13), and no party has asserted otherwise.

N. Sections 1129(a)(14) to 1129(a)(16) of the Bankruptcy Code Do Not Apply to the Plan

135. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations.[197] 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.

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[194] 11 U.S.C. § 1129(a)(12).

[195] 11 U.S.C. § 507(a)(2).

[196] 11 U.S.C. § 1129(a)(13).

[197] 11 U.S.C. § 1129(a)(14).

136. 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.[198] Because no Debtor is an "individual," the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply.

137. Finally, section 1129(a)(16) of the Bankruptcy Code 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 non-bankruptcy law.[199] Because each Debtor is a moneyed, business, or commercial corporation, section 1129(a)(16) of the Bankruptcy Code is not applicable.

O. Non-Consensual Confirmation – § 1129(b)

138. As discussed above, 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), a plan may be confirmed so long as the requirements set forth in section 1129(b) are satisfied.[200] To confirm a plan that has not been accepted by all impaired classes, 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.[201]

139. Here, only Classes 7 (Intercompany Claims) and 8 (Intercompany Interests), both to the extent Impaired under the Plan at the Debtors' discretion, are deemed to reject the Plan. The Plan may nonetheless be confirmed over the rejection by such Classes pursuant to section 1129(b)

198 11 U.S.C. § 1129(a)(15).

199 11 U.S.C. § 1129(a)(16).

200 11 U.S.C. § 1129(b)(1).

201 *Id.*; *see also 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 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b). . . requires that the [p]lan 'does not discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the [p]lan.").

of the Bankruptcy Code because the Plan does not discriminate unfairly and is fair and equitable with respect to such Classes.

140. ***First***, the Plan does not unfairly discriminate against Class 7 or 8. Under the Plan, all similarly situated Holders of Claims and Interests will receive substantially similar treatment. Additionally, the Plan's classification scheme rests on a legally acceptable rationale because it separates substantively dissimilar Claims into separate Classes. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code.

141. ***Second***, the Plan is fair and equitable with respect to Classes 7 and 8. To the extent those Classes are deemed to reject the Plan, no holder of a junior Claim or Interest at that Debtor will receive or retain property under the Plan. The Plan provides that on the Effective Date, all Intercompany Claims shall, at the option of the applicable Debtor or Reorganized Debtor, be Reinstated, converted to equity, or otherwise set off, settled, distributed, contributed, canceled, or released, and all Intercompany Interests shall, at the option of the applicable Debtor, be Reinstated or set off, settled, addressed, distributed, contributed, merged, cancelled, or released.[202] To the extent Reinstated, Intercompany Interests and Intercompany Claims are Unimpaired solely to preserve the Debtors' corporate structure and internal business operations, and holders of such Intercompany Interests shall not otherwise receive or retain any property on account of such Intercompany Interests. The option to Reinstate these Intercompany Interests and Intercompany Claims is designed to allow the Debtors to preserve their holding company structure and business operations instead of having to reconstitute a new one or recreate their internal business operations and relationships.

[202] Plan, Art. III.C.

142. Courts have explained that this type of "technical preservation of equity" does not violate the absolute priority rule because it is simply a "means to preserve the corporate structure that 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."[203] This reasoning similarly applies to the preservation of intercompany claims between debtors and other debtors and their non-debtor affiliates, as the sole purpose of maintaining such claims is to preserve the corporate structure and the intercompany business relationships therein.

143. For these reasons, the Plan satisfies section 1129(b) of the Bankruptcy Code, and the Court may confirm the Plan notwithstanding the rejecting Impaired Classes.

P. The Debtors Have Complied with Section 1129(d) of the Bankruptcy Code

144. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code, and no party has asserted otherwise.

Q. Modifications to the Plan

145. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as the modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code.[204] When the proponent of a plan files the plan with modifications with the court, "the plan as modified becomes the plan."[205] Bankruptcy

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[203] *See In re MPM Silicones, LLC*, 531 B.R. 321, 331 n.8 (S.D.N.Y. 2015), *aff'd in part, rev'd in part on other grounds*, 874 F.3d 787 (2d Cir. 2017) ("The 'technical preservation of equity is a means to preserve the corporate structure that does not have any economic substance and that does not enable any junior creditor or interest holder to retain or recover any value under the Plan. The Plan's 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.'") (quoting *In re Ion Media Networks, Inc.*, 419 B.R. 585, 601 (Bankr. S.D.N.Y. 2009)).

[204] 11 U.S.C. § 1127(a).

[205] *Id.*

Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder.[206] Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[207]

146. The Debtors have made certain technical modifications to the Plan (collectively, the "**Technical Modifications**") after solicitation in response to informal comments from certain parties in interest and negotiations with the Prepetition Lenders and the Committee.[208] The Technical Modifications are either immaterial or do not adversely impact the way creditors or other stakeholders are treated, and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. Accordingly, no additional solicitation or disclosure is required on account of the Technical Modifications, and the Technical Modifications should be deemed accepted by all creditors that previously accepted the Plan.

Waiver of Stay of Effectiveness Is Appropriate

147. Bankruptcy Rule 3020(e) provides that "[u]nless the court orders otherwise, a confirmation order is stayed for 14 days after its entry."[209] Bankruptcy Rules 6004(h) and 6006(d)

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206 Fed. R. Bankr. P. 3019.

207 *See, e.g.*, *In re Am. Solar King Corp.*, 90 B.R. at 823 (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not require additional disclosure or resolicitation); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 857 (Bankr. S.D. Tex. 2001) (same); *see also In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation).

208 The Debtors have filed a redline showing the limited Technical Modifications contemporaneously with the filing of this memorandum.

209 Fed. R. Bankr. P. 3020(e).

provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code.[210] Each rule also permits modification of the imposed stay upon court order.[211]

148. As will be set forth in the Meghji Declaration good cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the Confirmation Order will be effective immediately upon its entry. The restructuring contemplated in the Plan was extensively negotiated among sophisticated parties and the Committee (as fiduciary for Holders of General Unsecured Claims). The Plan is premised on preserving the value of the Debtors as a going concern and paying all creditors in full. The Court should allow the Plan to go effective as soon as possible to expedite distributions to creditors, including general unsecured creditors that have not received payment for the nine months these Chapter 11 Cases have been pending. In addition, to the extent necessary to facilitate closing of the Restructuring Transactions, the Debtors require the ability to immediately begin making payments required under the Plan.[212]

149. Accordingly, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

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[210] Fed. R. Bankr. P. 6004(h); Fed. R. Bankr. P. 6006(d).

[211] *Id.*

[212] The U.S. Trustee asserts that "no exigencies" exist to justify waiving the automatic stay of the Confirmation Order. U.S. Trustee Obj. ¶ 79. As set forth herein and in the Meghji Declaration, good cause exists to waive the stay.

Conclusion

150. The Debtors respectfully request that the Court approve the Disclosure Statement on a final basis and confirm the Plan by entering the Confirmation Order and granting such other and further relief as is just and proper.

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Dated: February 23, 2025
Houston, Texas

/s/ Charles R. Koster

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Certificate of Service

I certify that on February 23, 2025, 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/ Charles R. Koster
Charles R. Koster

Exhibit A
Summary of Objections to the Plan and the Debtors' Responses

	Objecting Party	Objection	Status/Debtors' Response
1.	U.S. Trustee [Docket No. 2321]	• The opt-out Third-Party Release is not "consensual" and therefore is not permitted under *Purdue* and the Bankruptcy Code. • The Plan contains Third-Party Releases by "Related Parties" that are not identified, are not provided notice, and will not be asked for their consent to the releases. • The Injunction Provision and the Exculpation Provision in the Plan violate the Supreme Court's decision in *Purdue*, and the Debtors have not met the standard for entry of an injunction.	**Not Resolved** — For the reasons set forth in Part I.A of the Memorandum, the U.S. Trustee Objection should be overruled: • *Purdue* is only applicable to nonconsensual third-party releases. It does not apply in these Chapter 11 Cases because the Third-Party Release is consensual. • The opt-out mechanism has been approved by the Fifth Circuit and is consistently approved in this Court. An opt-out mechanism is proper for purposes of manifesting consent to a third-party release. • Related Parties are only Releasing Parties to the extent a principal Releasing Party may bind such parties to the release under applicable law. • The Injunction Provision and the Exculpation Provision are appropriate under section 1123(b)(6) of the Bankruptcy Code and consistent with provisions regularly approved by this Court.
2.	Integrated Power Co. [Docket No. 2334]	• The Plan's injunction language prevents creditors from pursuing claims against the Sureties.	**Not Resolved** — For the reasons set forth in Part I.B the Memorandum, the Integrated Power Objection should be overruled: • Under applicable non-bankruptcy law, the liability of a surety or a guarantor is derivative of the principal's liability, such that the surety's liability cannot exist without any liability of the principal.

	Objecting Party	Objection	Status/Debtors' Response
			As a result, any action that discharges the principal from his obligation also exonerates the surety. • The distributions IPC will receive under the Plan in complete satisfaction of its Allowed Claim exonerate the Sureties of any secondary liability they may owe related to the Debtors.
3.	Encina Development Group LLC [Docket No. 2315]	• The language in the Plan that disallows Proofs of Claim filed after the Bar Date without an objection by the Debtors violates due process and is inconsistent with the Federal Rules of Bankruptcy Procedure.	**Not Resolved** — For the reasons set forth in Part I.C of the Memorandum, the Encina Objection should be overruled: • Pursuant to the Bankruptcy Code, late filed claims may be disallowed absent a finding of excusable neglect. • The Plan contains language that provides that if the Court were to find that Encina failed to file a timely Proof of Claim due to excusable neglect, the Court may determine Encina's Proof of Claim is timely filed. • The language in the Plan is standard, consistent with the provisions in the Bar Date Order, and has been approved by courts in numerous cases in this District.
4.	Texas Comptroller of Public Accounts, Revenue Accounting Division and Texas Workforce Commission [Docket No. 2326]	• The Plan improperly restricts the setoff rights of State Taxing Authorities and other creditors, seeks to prevent creditors from asserting their appropriate setoff rights as affirmative defenses post-confirmation, includes improper default language and procedures upon occurrence of a default, and does not clearly disclose that the State Taxing Authorities are entitled to post-confirmation interest	**Resolution Expected** — The Debtors are negotiating agreed language for the Proposed Confirmation Order. The Debtors expect the objection to be resolved prior to the Combined Hearing.

	Objecting Party	Objection	Status/Debtors' Response
		at applicable statutorily interest rates on their Allowed Claims if the Claims are paid over time.	
5.	Consolidated Pipe and Supply Company, Inc., d/b/a High Country Fusion [Docket No. 2337]	• The Plan and/or the GPX Excess Claims Stipulation seek to limit the ability of Consolidated Pipe to recover the full amount of its Claims, including GPX Claims.	**Resolution Expected** — The Debtors are working with Consolidated Pipe and Golden Pass to reconcile the claim amount and are negotiating agreed language for the Proposed Confirmation Order. The Debtors expect the objection to be resolved prior to the Combined Hearing.
6.	Yelina Martinez (Individually and as Estate Representative) [Docket No. 2318]	• The Plan does not preserve or grant Martinez, and similarly situated claimants, the right to trial by jury of their Claims with respect to third-party resources, in violation of section 1129(a) of the Bankruptcy Code. • The Plan's Injunction Provision prohibits claimants from pursuing their Causes of Action against insurance and third-party resources.	**Resolved** — The Debtors and Martinez resolved the objection through inclusion of agreed language in the Proposed Confirmation Order.
7.	Cheyanne Adams, Wendy Adams, and James Adams [Docket No. 2328]	• The Adams plaintiffs filed a reservation of rights to preserve their rights to adjudicate their Claims outside the Chapter 11 Cases, collect against applicable liability insurance policies, and collect any deficiency through the bankruptcy process, noting that the Debtors have agreed to include protective language in the Proposed Confirmation Order.	**Resolved** — The Debtors and the Adams plaintiffs resolved the objection through the inclusion of agreed language in the Proposed Confirmation Order.
8.	D. Reynolds Company d/b/a The Reynolds Company [Docket No. 2239]	• Reynolds filed a protective objection to preserve its rights against non-Debtor third parties, noting that the Debtors have agreed to include protective language in the Confirmation Order.	**Resolved** — The Debtors and The Reynolds Company resolved the objection through the inclusion of agreed language in the Proposed Confirmation Order.