

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:

FLAGSHIP RESORT DEVELOPMENT
CORPORATION,

Debtor.¹

Chapter 11

Case No. 25-15047 (JNP)

(Jointly Administered)

**DEBTOR'S (I) MEMORANDUM OF LAW IN SUPPORT OF (A) FINAL APPROVAL
OF THE DISCLOSURE STATEMENT AND (B) CONFIRMATION OF THE PLAN,
AND (II) OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION OF THE PLAN**

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Dated: September 8, 2025

¹ The Debtor in this case, along with the last four digits of the Debtor's federal tax identification number is: Flagship Resort Development Corporation, a New Jersey corporation (1067). The location of the Debtor's service address is: 60 North Maine Avenue, Atlantic City, NJ 08401.

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INTRODUCTION

The above-captioned debtor and debtor-in-possession (the “Debtor”) submits this memorandum of law (the “Memorandum”) in support of (i) final approval of the *Second Amended Disclosure Statement for the Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 272] (as further modified, revised, supplemented and amended, the “Disclosure Statement”), pursuant to section 1125 of title 11 of the United States Code (as amended or modified, the “Bankruptcy Code”) and (ii) confirmation of the *First Amended Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 273] (as further modified, revised, supplemented and amended including all attachments and exhibits thereto, the “Plan”),¹ pursuant to section 1129 of the Bankruptcy Code. In addition, as set forth herein, the Debtor requests a waiver of the 14-day stay of the order confirming the Plan imposed by Rule 3020(e) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In further support of confirmation of the Plan, the Debtor has filed the (i) *Declaration of Stanislav Kesler of Kroll Restructuring Administration, LLC Regarding Solicitation and Tabulation of Ballots Cast on the First Amended Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 310] (the “Voting Declaration”), (ii) the *Declaration of Cherie Parks in Support of (A) Final Approval Of The Disclosure Statement And (B) Confirmation Of The Plan, And (II) Omnibus Reply To Objections To Confirmation Of The Plan* filed simultaneously herewith (the “Parks Declaration”); and (iii) the *Declaration of John Madden in*

¹ All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Declaration of Cherie Parks in Support of Debtor’s Chapter 11 Petition and First Day Motions* [Docket No. 16] (the “First Day Declaration”), Plan, or Disclosure Statement, as applicable. See *Notice of Non-Material Modifications to First Amended Plan of Liquidation* [Docket No. 302] for further revision of the Plan.

Support of (A) Final Approval Of The Disclosure Statement And (B) Confirmation Of The Plan, And (II) Omnibus Reply To Objections To Confirmation Of The Plan (the “Emerald Declaration”).

PRELIMINARY STATEMENT

1. Since the May 10, 2025 (the “Petition Date”) commencement of this bankruptcy case (the “Chapter 11 Case”), the Debtor and its professionals have worked extensively with its major stakeholders in an effort to confirm a consensual chapter 11 plan. After finalizing a consensual settlement memorialized in the *Order Granting Motion to Approve Compromise under Rule 9019* [Docket No. 268] (the “9019 Settlement”), the terms of the Plan are supported by a majority of voting parties, including the pre-petition and post-petition lenders and the Official Committee of Unsecured Creditors (the “Committee”). The Debtor believes that it has resolved, or will resolve by the Confirming Hearing, the majority of comments from the Office of the United States Trustee for the District of New Jersey (the “U.S. Trustee”) with respect to the Disclosure Statement and Plan and the Proposed Confirmation Order (as defined below) being filed simultaneously herewith, with few remaining objections left unresolved.

2. Following a successful sale process, and just over four (4) months after commencing this Chapter 11 Case, the Debtor now seeks confirmation of the Plan. The Debtor will consummate the Sale Transaction via the Plan, which will provide for the satisfaction of Administrative Expenses, Professional Fees, Priority Tax Claims, Priority Non-Tax Claims, BOC Prepetition Secured Claims, Colebrook Prepetition Secured Claims and Other Secured Claims, and provides necessary funding for the Plan Administrator to monetize all remaining Assets and pursue any or all Retained Causes of Action, distribute the proceeds thereof, as applicable, to Holders of Allowed General Unsecured Claims, complete the Debtor’s obligations under the Asset Purchase Agreement with the Buyer, and wind-down the Debtor’s estate and close the Chapter 11 Case at

the appropriate time. If confirmed, the Plan will fairly and appropriately distribute the Debtor's remaining assets and provide for the orderly wind down of the Estate.

3. After a hearing on August 8, 2025, the Disclosure Statement was approved on an interim basis [Docket No. 266] (the "Disclosure Statement Order").² On September 5, 2025, the U.S. Trustee filed an objection to the Plan [Docket No. 306], which incorporates the DS Objection and asserts several other miscellaneous objections to the Plan (collectively, the "UST Objection").

4. On September 5, 2025, plaintiffs in the (i) *Keona Palmer, et al, vs. Flagship Resort Development Corporation*, Docket No. ATL-1515-19 litigation ("Palmer Plaintiffs"), (ii) *Alicia Castellanos vs. Flagship Resort Development Corporation*, Docket No. ATL-L-379-23 litigation ("Castellanos Plaintiffs"), and (iii) the certified class members in the *Michael Lantych, Sherman and Dorothy Norman v. Flagship Resort Development Corporation*, Docket No. ATL-L-744-23 litigation (the "Lantych Plaintiffs," and collectively with the Palmer Plaintiffs and the Castellanos Plaintiffs, the "Lawsuit Plaintiffs"), filed an objection to the Plan [Docket No. 307] (the "Lawsuit Plaintiffs' Objection," and together with the UST Objection, the "Objections").

5. The Lawsuit Plaintiffs³ object to the Plan on the following grounds: (a) the Third-Party Releases violate applicable law; (b) the Third-Party Releases to insiders are inappropriate; (c) the liquidation analysis does not address whether creditors are better off in the chapter 11 than they would be in a chapter 7; and (d) the Plan was not proposed with "honesty and good intentions." Each of these objections are plainly without merit.

² The only formal objection to the Disclosure Statement was an objection filed by the U.S. Trustee [Docket No. 225] (the "DS Objection"), which objected to the Disclosure Statement on several grounds, including that the Plan is unconfirmable because it contains non-consensual third-party releases and an overbroad exculpation provision. The Debtor addressed the DS Objection through its reply [Docket No. 233] (the "Debtor's DS Reply").

³ Notably, the Lawsuit Plaintiffs include a former member of the Committee that participated in the negotiation of the 9019 Settlement, among other aspects of this bankruptcy case.

6. The Objections inappropriately rely on outdated caselaw that is inconsistent with Third Circuit jurisprudence to incorrectly categorize the Third-Party Release as “non-consensual.” The Third-Party Release is consensual and structured similarly to others that are regularly approved in this jurisdiction, and includes an additional \$150,000 contribution from the Management Companies and insiders Roxanne Passarella and Kevin Jones.⁴ Additionally, the Lawsuit Plaintiffs’ assertion that unsecured creditors would achieve a greater recovery in a chapter 7 proceeding rests on misplaced assumptions, is unsupported by evidence, and disregards the facts of the case—particularly the straightforward liquidation analysis. Finally, the Lawsuit Plaintiffs’ Objection inappropriately raises allegations that are irrelevant to the Chapter 11 Case and has no bearing on the validity of the Third-Party Release provisions.

7. Importantly, the Plan is supported by the Committee. See Exhibit A to Disclosure Statement. Class 1 (BOC Prepetition Secured Claims), Class 2 (Colebrook Prepetition Secured Claims), and Class 6 (Continuing Trade Vendor Claims) also voted overwhelmingly to accept the Plan. See Voting Declaration, ¶9. With such, the Plan has been approved by 100% of the voting creditors other than the Litigation Plaintiffs in Class 7. The liquidation analysis attached to the Plan Supplement further indicates that unsecured creditors would receive zero recovery in a chapter 7 scenario. See Plan Supplement, Exhibit A thereto. Accordingly, the Lawsuit Plaintiffs’ Objection does not represent the position of the majority of stakeholders and does not reflect the reality of a chapter 7 scenario.

8. As set forth herein, in the Parks Declaration, Emerald Declaration, Voting Declaration, and as the testimony at the confirmation hearing will establish, the Disclosure

⁴ This contribution is being made in connection with the Plan insofar as the 9019 Settlement incorporates a comprehensive resolution of all sale and plan-related issues, and the Sale Transaction will be consummated via the Plan.

Statement and Plan meet all applicable elements of section 1129 of the Bankruptcy Code and otherwise comply with the applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and non-bankruptcy law. Accordingly, the Debtor requests that all the Objections be overruled, the Disclosure Statement be approved on a final basis, and the Plan be confirmed.

STATEMENT OF FACTS

I. GENERAL BACKGROUND REGARDING THE CHAPTER 11 CASE

9. On the Petition Date, the Debtor commenced the case by filing a petition for relief under chapter 11 of the Bankruptcy Code. The factual background regarding the Debtor, including its business operations, capital and debt structure, and the events leading to the filing of the Chapter 11 Case, is set forth in the First Day Declaration.

10. The Debtor continues to manage and operate its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

11. On May 30, 2025, the U.S. Trustee appointed the Committee pursuant to section 1102(a) of the Bankruptcy Code [Docket No. 86]. No trustee or examiner has been appointed in the Chapter 11 Case.

II. THE PLAN AND THE DISCLOSURE STATEMENT

12. The original Plan and Disclosure Statement were filed on July 1, 2025. *See* Docket Nos. 174 and 175. The First Amended Disclosure Statement was filed on August 8, 2025. *See* Docket No. 261. The second amended version of the Disclosure Statement and First Amended Plan were filed on August 9, 2025. *See* Docket No. 272 and 273. On September 4, 2025, the Debtor filed the *Notice of Non-Material Modifications to First Amended Plan*. *See* Docket No. 302.

13. The Disclosure Statement is the product of the Debtor's extensive review and analysis of its business, assets and liabilities, and circumstances leading to the Chapter 11 Case. It

provides information regarding: (a) the terms of the Plan, including a summary of the classifications and treatment of all Classes of Claims and Interests; (b) the distributions to holders of Allowed Claims; (c) the effect of the Plan on holders of Claims and Interests and other parties in interest thereunder; (d) the estimated amount of Claims that ultimately will be Allowed; (e) certain risk factors to consider that may affect the Plan; (f) certain tax issues related to the Plan and distributions; and (g) the means for implementation of the Plan. See Disclosure Statement.

14. The Plan classifies holders of Claims and Interests into certain Classes for all purposes, including with respect to voting rights, if any, as follows⁵:

Class	Claim/Interest	Status	Voting Rights
1	BOC Prepetition Secured Claims	Impaired	Entitled to Vote
2	Colebrook Prepetition Secured	Impaired	Entitled to Vote
3	Secured Tax Claims	Unimpaired	Deemed to Accept
4	Other Secured Claims	Unimpaired	Deemed to Accept
5	Other Priority Claims	Unimpaired	Deemed to Accept
6	Continuing Trade Vendors Claims	Impaired	Entitled to Vote
7	Other General Unsecured Claims	Impaired	Entitled to Vote
8	Interests	Impaired	Deemed to Reject

15. As set forth in the chart above, Class 1 (BOC Prepetition Secured Claims), Class 2 (Colebrook Prepetition Secured Claims), Class 6 (Continuing Trade Vendor Claims), and Class 7 (Other General Unsecured Claims) are the only classes of Claims or Interests entitled to vote on the Plan (the “Voting Class”). All other holders of Claims or Interests were not entitled to vote on the Plan because each such holder holds a Claim or Interest presumed to accept or deemed to reject the Plan. As such, the Debtor did not solicit votes from holders of Claims or Interests in Classes 3-5 and 8.

⁵ See Plan, Art. III. B.

16. On August 29, 2025, the Debtor filed the Plan Supplement [Docket No. 300] (as further amended, revised, updated or supplemented, the “Plan Supplement”), which identifies the Plan Administrator, attaches the proposed Plan Administration Agreement, sets forth the proposed compensation structure for the Plan Administrator, identifies the retained causes of actions, and any contracts to be assumed under the Plan.

17. The deadline to object to confirmation of the Plan and final approval of the adequacy of the Disclosure Statement was September 5, 2025, at 4:00 p.m. (prevailing Eastern Time). The only two objections to confirmation of the Plan were the U.S. Trustee's Objection and the Lawsuit Plaintiffs’ Objection.

18. The combined hearing on final approval of the Disclosure Statement and confirmation of the Plan is scheduled for September 12, 2025, at 10:00 a.m. (prevailing Eastern Time) (the “Confirmation Hearing”). Concurrently with this Memorandum, the Debtor submitted the proposed *Findings of Fact, Conclusions of Law, and Order (I) Approving the Disclosure Statement on a Final Basis and (II) Confirming the Amended Plan of Liquidation of Flagship Resort Development Corp. Pursuant to Chapter 11 of the Bankruptcy Code* (the “Proposed Confirmation Order”), which contemplates, among other things, confirmation of the Plan.

III. THE NOTICE AND SOLICITATION OF THE PLAN

19. On July 1, 2025, the Debtor filed the *Debtor’s Motion for Entry of an Order (I) Approving the Disclosure Statement on an Interim Basis; (II) Scheduling a Combined Hearing on Final Approval of the Disclosure Statement and Plan Confirmation and Deadlines Related Thereto; (III) Approving the Solicitation, Notice and Tabulation Procedures and the Forms Related Thereto; and (IV) Granting Related Relief* [Docket No. 176] (the “Disclosure Statement Motion”), which sought, among other things, approval of the Disclosure Statement on an interim

basis, noticing of the Confirmation Hearing, certain procedures for soliciting votes to accept or reject the Plan, and certain procedures to opt out of the third-party releases.

20. On August 8, 2025, the Court entered the Disclosure Statement Order.

21. The Debtor solicited votes on the Plan from the Voting Class in accordance with the Disclosure Statement Order. *See* Voting Declaration, ¶5-6. The deadline for the Voting Class to cast their ballots was September 5, 2025, at 4:00 p.m. (prevailing Eastern Time). Out of the Voting Classes, Class 1 (BOC Prepetition Secured Claims), Class 2 (Colebrook Prepetition Secured Claims), and Class 6 (Continuing Trade Vendors Claims) voted overwhelmingly to accept the Plan; Class 7 (Other General Unsecured Claims) voted to reject the Plan. *See* Voting Declaration, ¶9.

22. As set forth below, the stakeholders in the Voting Classes had notice and opportunity to “opt out” of the Third-Party Release (defined below) by checking the appropriate box on the ballots. *See* Disclosure Statement Order, Exhibit C. All non-voting stakeholders were also given the opportunity to opt out of the Third-Party Release and received notice and instructions for doing so in their applicable Non-Voting Status Notice. *See* Disclosure Statement Order, Exhibit B. Such stakeholders could opt out by checking the appropriate box on the Non-Voting Status Notice or objecting on or before the applicable confirmation objection deadline on September 5, 2025 at 4:00 p.m. (prevailing Eastern Time). Eight (8) parties opted out of the releases. *See* Voting Declaration, ¶11.

**THE DISCLOSURE STATEMENT CONTAINS “ADEQUATE INFORMATION” AS
REQUIRED BY SECTION 1125 OF THE BANKRUPTCY CODE, AND THE DEBTOR
COMPLIED WITH APPLICABLE NOTICE REQUIREMENTS**

I. THE DISCLOSURE STATEMENT CONTAINS ADEQUATE INFORMATION

23. The Debtor requests that the Court approve the Disclosure Statement as containing “adequate information” in accordance with section 1125 of the Bankruptcy Code on a final basis. Section 1125(b) of the Bankruptcy Code states that “[a]n acceptance or rejection of a plan may not be solicited . . . unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.” 11 U.S.C. § 1125(b). In turn, section 1125(a) of the Bankruptcy Code defines “adequate information” as:

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, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a).

24. The primary purpose of a disclosure statement is to provide information that is “reasonably practicable” to permit an “informed judgment” by creditors and interest holders entitled to vote on the plan. *See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *see also Century Glove, Inc. v. First Am. Bank 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.”)

25. Bankruptcy courts have broad discretion in determining whether a disclosure statement contains adequate information based on the unique facts and circumstances of each case. *See Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) (“From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case.”); *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 507 (D.N.J. 2005), *aff’d*, 241 Fed. App’x. 1 (3d Cir. Aug. 2, 2007) (“Section 1125 affords the Bankruptcy Court substantial discretion in considering the adequacy of a disclosure statement.”); *see also In re Bucks Hosp.*, 488 B.R. 303, 317 (E.D. Pa. 2013), *aff’d*, 571 F. App’x 139 (3d Cir. 2014) (holding that what constitutes “adequate information” is “determined on a case-by-case basis, with the ultimate determination within the discretion of the bankruptcy court”). In making a determination as to whether a disclosure statement contains adequate information as required by section 1125 of the Bankruptcy Code, courts look for disclosures in topics such as:

- (i) the events which led to the filing of a bankruptcy petition;
- (ii) the relationship of a debtor with the affiliates;
- (iii) a description of the available assets and their value;
- (iv) the anticipated future of the company;
- (v) the source of information stated in the disclosure statement;
- (vi) the present condition of a debtor while in chapter 11;
- (vii) the claims asserted against a debtor;
- (viii) the estimated return to creditors under a chapter 7 liquidation;
- (ix) the future management of a debtor;
- (x) the chapter 11 plan or a summary thereof;
- (xi) the financial information, valuations, and projections relevant to the claimants’ decision to accept or reject the chapter 11 plan;
- (xii) the information relevant to the risks posed to claimants under the plan;
- (xiii) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;
- (xiv) the litigation likely to arise in a nonbankruptcy context; and
- (xv) the tax attributes of a debtor.

In re U.S. Brass Corp., 194 B.R. 420 at 424–25 (Bankr. E.D. Tex. 1996) (listing factors courts have considered in determining the adequacy of information provided in a disclosure statement); *Westland Oil Dev. Corp. v. MCorp Mgmt. Sols., Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993) (same);

In re Scioto Valley Mortg. Co., 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (same). Disclosure regarding all topics “is not necessary in every case.” *In re U.S. Brass Corp.*, 194 B.R. at 425; see also *In re Phx. Petroleum*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) (“[C]ertain categories of information which may be necessary in one case may be omitted in another . . .”).

26. Here, the Disclosure Statement contains adequate information and was previously approved by the Disclosure Statement Order on a conditional basis on August 8, 2025 [Docket No. 266]. The Disclosure Statement contains descriptions and summaries of, among other things:

Category	Description	Location in Disclosure Statement
Debtor’s Background	A description and summary of the Debtor’s corporate history, structure, business operations, and prepetition capital structure and indebtedness.	Article II
Debtor’s Prepetition Restructuring Efforts	An overview of Debtor’s prepetition restructuring efforts.	Article II
Events Leading to the Chapter 11 Case	An overview of the events leading to the Chapter 11 Case.	Article II
Pleadings Filed in the Chapter 11 Case	An overview of the significant pleadings filed in the Chapter 11 Case and certain relief granted by the Bankruptcy Court in connection therewith.	Article III
Treatment of Claims and Interests	An overview of the classification and treatment of Claims and Interests under the Plan, including identification of the holders of Claims entitled to vote on the Plan, the procedures for voting, and projected recoveries.	Article IV
Means for Implementation of the Plan	An overview of the means of implementing the provisions of the Plan.	Article V
Methods of Distribution	An overview of the method of distribution of any recoveries that may be available to holders of Claims pursuant to the Plan, the process for resolving Disputed Claims, and other significant aspects of the Plan.	Article VI

Releases	An overview of the releases contemplated by the Plan that are integral to the overall settlement of Claims pursuant to the Plan.	Article VIII
Tax Consequences	An overview of certain United States federal income tax consequences of the Plan	Article XIII
Risk Factors	An overview of certain risk factors that holders of Claims should consider before voting to accept or reject the Plan and information regarding alternatives to Confirmation of the Plan	Article XIV

See Parks Decl. ¶ 3.

27. The sole objection to the Disclosure Statement was filed by the U.S. Trustee, who contends that it fails to provide adequate information regarding the scope and effect of the proposed third-party releases—specifically, who will be deemed to grant the releases, who will benefit from them, which claims are subject to release, the value of those claims, and the consideration to be received in exchange. *See* UST Objection, ¶ 1(a).

28. The Disclosure Statement and Plan provides a sufficiently detailed description of the Released Parties and Releasing Parties. *See* Plan, Art. I.A (126-128).⁶ Any Causes of Action and claims to be released are also similarly described, as they must be based on or relate to the Debtor, the Estate, the Chapter 11 Case, the sale of the Debtor’s Assets, or other transactions or events giving rise to a Claim or Interest under the Plan, and expressly exclude the “Retained Causes of Action.” The Disclosure Statement includes a description of the consideration being provided in exchange for the releases—that is, the Released Parties’ contributions to implementing the Plan, including but not limited to the Purchaser Contribution, and the Receivables Lenders’ guaranty of \$250,000.00 in Unused Funds for benefit of unsecured creditors. *See* Disclosure Statement Art III.I. This approach as to the description and scope of releases is frequently approved by

⁶ Additionally, the scope of a “Releasing Party” is limited insofar as Releasing Parties cannot bind their “Related Parties” unless they are legally entitled to bind such Related Party under applicable law. *See* Plan, Art. I.A(128).

bankruptcy courts in this district. *See e.g. In re Sam Ash*, No. 24-14727 (SLM), Docket No. 460 (Bankr. D.N.J. Aug. 15, 2024); *In re Invitae Corporation*, No. 24-11362 (MBK), Docket No. 913 (Bankr. D.N.J. Aug. 2, 2024); *In re Careismatic Brands, LLC*, No. 24-10561 (VFP), Docket No. 775, (Bankr. D.N.J. May 30, 2024); *In re Cyxtera Techs., Inc.*, No. 23 14853 (JKS), Docket No. 718 (Bankr D.N.J. Nov. 17, 2023).

29. As discussed above, section 1125(a) of the Bankruptcy Code requires only “adequate information” sufficient for parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan. Accordingly, the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code and should be approved on a final basis.

II. SOLICITATION OF THE PLAN COMPLIED WITH THE BANKRUPTCY CODE AND WAS IN GOOD IN FAITH

30. In addition to conditionally approving the adequacy of the Disclosure Statement, the Disclosure Statement Order granted final approval of, among other things: (a) certain opt out, solicitation, and voting procedures; (b) the Confirmation Hearing notice (the “Combined Hearing Notice”) and the Non-Voting Status notice; (c) the solicitation package; and (d) certain dates and deadlines with respect to the Plan and Disclosure Statement.

31. Section 1125(e) of the Bankruptcy Code provides that “a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable” on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan. 11 U.S.C. § 1125(e). As demonstrated by the Debtor’s compliance with the Disclosure Statement Order, the Debtor at all times conducted the solicitation process in good faith and in compliance with section 1125 of the Bankruptcy Code and the Court-approved solicitation and voting procedures. Therefore, the

Debtor requests that the Court grant the protections provided under section 1125(e) of the Bankruptcy Code.

THE PLAN MEETS ALL APPLICABLE CONFIRMATION REQUIREMENTS

32. To obtain confirmation of the Plan, the Debtor must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See In re TCI 2 Holdings, LLC*, 428 B.R. 117, 148 (Bankr. D.N.J. 2010) (“The plan proponent bears the burden to show by a preponderance of the evidence that the proposed Chapter 11 plan has a reasonable probability of success, and is more than a visionary scheme”) (citing *In re Wiersma*, 227 F. App’x 603, 606 (9th Cir. 2007)) (internal quotation marks omitted); *In re Premier Int’l Holdings, Inc.*, 2010 WL 2745964, at *4 (Bankr. D. Del. Apr. 29, 2010) (holding that the plan proponent must prove each element of section 1129(a) and 1129(b) of the Bankruptcy Code by a preponderance of the evidence). As set forth below and based on the record and filings in these Chapter 11 Case and as will be demonstrated at the Confirmation Hearing, the Plan meets all applicable requirements of section 1129 of the Bankruptcy Code and should be confirmed.

I. SECTION 1129(A) OF THE BANKRUPTCY CODE

A. Section 1129(a)(1) of the Bankruptcy Code

33. The Plan complies with section 1129(a)(1) of the Bankruptcy Code, which provides that a plan may be confirmed only if “[t]he plan complies with the applicable provisions of this title.” 11 U.S.C. § 1129(a)(1); *see also In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 270-73 (S.D. Ohio 1996) (examining each requirement of chapter 11 to demonstrate that section 1129(a)(1) of the Bankruptcy Code was satisfied).

34. The legislative history of section 1129(a)(1) of the Bankruptcy Code indicates that the primary focus of this requirement is to ensure that a plan complies with sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and interests and the contents of a

plan, respectively. *See* S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977); *see also In re G-1 Holdings Inc.*, 420 B.R. 216, 258 (D.N.J. 2009); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 233 (Bankr. D.N.J. 2000).

1. Section 1122 of the Bankruptcy Code – Classification of Claims and Interests

35. Section 1122 of the Bankruptcy Code provides that the claims or interests within a given class must be “substantially similar” to the other claims or interests in that class. *See* 11 U.S.C. § 1122(a) (“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.”). Courts consistently have held that section 1122(a) of the Bankruptcy Code is satisfied so long as similar claims are classified together. *See, e.g., In re Armstrong World Indus., Inc.*, 348 B.R. 136, 160 (D. Del. 2006) (holding that section 1122(a) of the Bankruptcy Code was satisfied where similar claims were classified together); *Eagle-Picher Indus.*, 203 B.R. at 270 (same).

36. Courts have found that 1122(a) “does *not* provide that *all* similar claims must be placed in the same class.” *In re Tribune Co.*, 476 B.R. 843, 855 (Bankr. D. Del 2012) (emphasis in original); *see also In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (“[W]e agree with the general view which permits the grouping of similar claims in different classes”).

37. The Plan classifies Claims and Interests in accordance with section 1122(a) of the Bankruptcy Code, as each of the Plan’s Classes contains Claims or Interests that share the same priority status, contractual rights, and enforcement rights against the Estate. In particular, Article

III. A of the Plan segregates the holders of claims into eight (8) separate Classes:⁷ Class 1 (BOC Prepetition Secured Claims), Class 2 (Colebrook Prepetition Secured Claims), Class 3 (Secured Tax Claims), Class 4 (Other Secured Claims), Class 5 (Other Priority Claims), Class 6 (Continuing Trade Vendor Claims), Class 7 (Other General Unsecured Claims), and Class 8 (Interests). See Plan, Art. III. A. The number of Classes in the Plan reflects the diverse characteristics of the Claims and Interests classified in the various Classes, and the legal rights under the Bankruptcy Code of each of the holders of Claims or Interests within a particular Class are substantially similar to other holders of Claims or Interests within the same Class.⁸

38. Valid business, factual and legal reasons exist for the separate classification of Claims and Interests. The Plan separates Claims from Interests and Priority Claims from both Secured Claims (including BOC Prepetition Secured Claims, Colebrook Prepetition Secured Claims, Secured Tax Claims and Other Secured Claims) and General Unsecured Claims (including Continuing Trade Vendor Claims and Other General Unsecured Claims).⁹ Specifically, the Continued Trade Vendor Claims being separately classified into Class 6 is reasonable in light of the Debtor's need to maintain relationships with continuing trade vendors for the purpose of ensuring a competitive sale process.¹⁰

39. Accordingly, the classification of Claims and Interests under the Plan is appropriate and should be approved.

⁷ In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims and Priority Tax Claims have not been classified. See Plan, Art. II.

⁸ See *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (D.Del.2006) (holding that it was reasonable to separately classify the Asbestos personal injury claims and general unsecured claims despite their equal priority status).

⁹ See Parks Decl., ¶6.

¹⁰ Id.

2. Compliance with Section 1123(a) of the Bankruptcy Code – Mandatory Contents of the Plan

40. Section 1123(a) of the Bankruptcy Code requires that a chapter 11 plan: (a) designate classes of claims and interests; (b) specify unimpaired classes of claims and interests; (c) specify treatment of impaired classes of claims and interests; (d) provide for equality of treatment within each class; (e) provide adequate means for the plan's implementation; (f) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and (g) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors. *See* 11 U.S.C. § 1123(a).

41. The Plan fully complies with each requirement of section 1123(a) of the Bankruptcy Code. As previously noted with respect to the Plan's compliance with section 1122 of the Bankruptcy Code, Article III of the Plan designates eight (8) separate Classes of Claims and Interests, as required by section 1123(a)(1) of the Bankruptcy Code.¹¹ Article III.B of the Plan specifies that the Claims in Classes 3-5 are Unimpaired under the Plan, as required by section 1123(a)(2) of the Bankruptcy Code.¹² Article III.B further specifies that the Claims or Interests in Classes 1-2 and 6-8 are Impaired and Article III.C describes the treatment of each such Class in accordance with section 1123(a)(3) of the Bankruptcy Code.¹³ Further, as required by section 1123(a)(4) of the Bankruptcy Code, the treatment of each Claim or Interest within a Class either is (i) the same as the treatment of each other Claim or Interest in such class or (ii) otherwise consistent with the legal rights of such claimant.¹⁴

¹¹ Id., ¶7 (i).

¹² Id., ¶7 (ii).

¹³ Id., ¶7 (iii).

¹⁴ Id., ¶7 (iv).

42. In accordance with the requirements of section 1123(a)(5) of the Bankruptcy Code, the Plan provides adequate means for its implementation through Article IV and various other provisions. Specifically, the Plan provides for, among other things¹⁵:

- a. the cancellation of all existing securities and related documents of the Debtor;
- b. the dissolution of the existing board of directors of the Debtor;
- c. the appointment of the Plan Administrator as the Debtor's sole officer and director consistent with the Plan Administration Agreement; and
- d. the exemption from certain transfer taxes.

43. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate organizational documents prohibit the issuance of nonvoting equity securities.¹⁶ The Plan does not contemplate reorganization or amended organizational documents and therefore this provision is not applicable to the Plan¹⁷.

44. Finally, section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, directors, or trustee under the plan" 11 U.S.C. § 1123(a)(7).¹⁸ This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which directs the scrutiny of the court to the methods by which the management of the reorganized corporation is to be chosen to provide adequate representation of those whose investments are involved in the reorganization — *i.e.*, creditors and equity holders.¹⁹ See 7 Alan N. Resnick et al., COLLIER ON BANKRUPTCY ¶ 1123.01[7] (16th ed. rev. 2010).

¹⁵ Id., ¶7 (v).

¹⁶ Id., ¶7 (vi).

¹⁷ Id.

¹⁸ Id., ¶7 (vii).

¹⁹ Id.

45. The Plan appoints the Plan Administrator as the Debtor's sole officer and director following the Effective Date. The Plan Administrator was selected by the Official Committee of Unsecured Creditors in its sole discretion. *See* Plan at Art. IV(d)(i). This appointment is consistent with the interests of creditors and equity security holders as the Debtor is liquidating and the remaining matters for the Post-Effective Date Debtor will involve implementing the Plan transactions, including the Sale Transaction, monetizing the Debtor's remaining assets for the benefit of creditors, and winding down the Debtor's affairs and closing the Chapter 11 Case.

3. Section 1123(b) of the Bankruptcy Code – Discretionary Contents of the Plan

46. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. §§ 1123(b)(1)-(2). A plan also may provide for (a) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;" (b) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;" (c) "the sale of all or substantially all of the property of the estate;" and (d) "the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. §§ 1123(b) (1-4), (6).

47. The Plan includes various provisions that fall under the broad spectrum of section 1123(b) of the Bankruptcy Code. For instance, the Plan impairs Classes 1-2 and 6-8, leaving Classes 3 through 5 Unimpaired. *See* Plan Art. III. The Plan further provides for approval of the treatment of executory contracts and unexpired leases to which the Debtor is a party. *See* Plan Art. VI. Moreover, the Plan empowers the Plan Administrator to, among other things, monetize any

remaining estate assets, including litigation claims, and distribute the proceeds of the Debtor's estate to creditors. See, e.g., Plan at Art. IV(D)(2).

48. In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes other provisions designed to ensure its implementation that are consistent with the Bankruptcy Code, including the provisions of Article X, regarding retention of jurisdiction by the Court over certain matters after the Effective Date. The Debtor believes each of these provisions is appropriate under applicable law, including sections 1123(b)(1), (3) and (6) of the Bankruptcy Code.²⁰

B. Section 1129(a)(2) of the Bankruptcy Code

49. The Plan complies with section 1129(a)(2) of the Bankruptcy Code. Section 1129(a)(2) requires that a plan proponent comply with applicable provisions of the Bankruptcy Code. The primary purpose of this section is to ensure compliance with the disclosure and solicitation requirements set forth in section 1125 of the Bankruptcy Code. See *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000) (“[Section] 1129(a)(2) [of the Bankruptcy Code] requires that the plan proponent comply with the adequate disclosure requirements of § 1125.”); *Official Comm. of Unsecured Creditors v. Michelson (In re Michelson)*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) (“Compliance with the disclosure and solicitation requirements is the paradigmatic example of what Congress had in mind when it enacted Section 1129(a)(2).”).

50. The Debtor has complied with the applicable provisions of the Bankruptcy Code, including the provisions of section 1125 regarding disclosure and plan solicitation. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan from holders of claims or interests “unless, at the time of or before such solicitation, there is transmitted

²⁰ See Parks Declaration ¶ 8.

to such holder the plan or summary of the plan, and a written disclosure statement approved . . . by the court as containing adequate information.” 11 U.S.C. § 1125(b). In the instant case, after the Court approved the Disclosure Statement for solicitation on an interim basis, the Debtor solicited votes to accept the Plan from Class 1 (BOC Prepetition Secured Claims), Class 2 (Colebrook Prepetition Secured Claims), Class 6 (Continued Trade Vendor Claims), and Class 7 (Other General Unsecured Claims) as such Classes were Impaired. The Debtor did not solicit votes from Classes 3-5 and 8, as such Classes are either presumed to accept or deemed to reject the Plan. See Voting Declaration, ¶5-6, *see also Affidavit of Service of Solicitation Materials* (and any supplements thereto), dated September 4, 2025 [Docket No. 304].

51. Pursuant to the Disclosure Statement Order, the Court determined on an interim basis that the Disclosure Statement contained adequate information within the meaning of section 1125 of the Bankruptcy Code. *See Disclosure Statement Order* ¶ 2. The Court further approved the form of notices of (i) the Combined Hearing Notice and (ii) the Non-Voting Status Notice. The Court also required that the Debtor serve creditors the Combined Hearing Notice and/or the Non-Voting Status Notice, as applicable, pursuant to the Disclosure Statement Order.

52. The Debtor has complied with the Disclosure Statement Order and caused the mailing of the Combined Hearing Notice and the Non-Voting Status Notice to occur in accordance with the requirements of the Disclosure Statement Order. *See Affidavit of Service of Solicitation Materials* (and any supplements thereto), dated September 4, 2025 [Docket No. 304]. The Debtor further complied with all applicable provisions of the Bankruptcy Code, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018.²¹ Accordingly, the Plan satisfies the requirements of section 1129(a)(2) of the Bankruptcy Code.

²¹ See Parks Decl., ¶9.

C. Section 1129(a)(3) of the Bankruptcy Code

53. The Plan satisfies section 1129(a)(3) of the Bankruptcy Code, which requires that a plan be “proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1129(a)(3); *see also In re Diocese of Camden, New Jersey*, No. 20-21257 (JNP), 2023 WL 5605156, at *25 (Bankr. D.N.J. Aug. 29, 2023) (citing *In re PWS Holding Corp.*, 228 F.3d at 242)); *In re TCI 2 Holdings*, 428 B.R. at 134. Bankruptcy Courts, including courts in the Third Circuit, have found that where a plan aims to maximize the value of the debtor’s estate and the recoveries of creditors, in light of the totality of the circumstances, the good faith standard is satisfied. *See, e.g., In re PWS Holding Corp.*, 228 F.3d at 242 (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P’ship (In re T-H New Orleans Ltd. P’ship)*, 116 F.3d 790, 802 (5th Cir. 1997) (quoting *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985)); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

54. Here, the Debtor has proposed the Plan with the goal of maximizing value, providing recoveries to creditors, and maximizing the value of the Debtor’s Estate.²² The Plan represents the culmination of collaborative efforts between the Debtor, its secured lenders, the Committee, and each of their respective advisors.²³ In addition, the Plan contains no provisions that are contrary to state or other laws nor is there any indication the Debtor lacks the ability to consummate the Plan.²⁴ As discussed in Section I.G. and II.C herein, the Lawsuit Plaintiffs’ allegations that the Plan does not comport with 1129 because the Plan is not proposed for the best

²² *See Parks Decl.*, ¶10.

²³ *Id.*

²⁴ *Id.*

interests of the creditors and the Exculpation is improper are without merit and should be overruled.

55. Accordingly, the Plan has been proposed in good faith and not by any means forbidden by law as required by section 1129(a)(3) of the Bankruptcy Code.²⁵

D. Section 1129(a)(4) of the Bankruptcy Code

56. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Bankruptcy Court as reasonable. 11 U.S.C. § 1129(a)(4). Courts have interpreted this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the Bankruptcy Court as to their respective reasonableness. *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 503 (Bankr. D.N.J. 2005) (“Pursuant to § 1129(a)(4), a [p]lan should not be confirmed unless fees and expenses related to the [p]lan have been approved, or are subject to the approval, of the Bankruptcy Court.”), *aff’d*, 241 F. App’x 1 (3d Cir. 2007); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, “there must be a provision for review by the Court of any professional compensation”).

57. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code.²⁶ Pursuant to the Plan and other orders of the Court, all Professional Fee Claims are subject to Court approval. *See* Plan, Art. II.A.2. Accordingly, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

²⁵ *Id.*

²⁶ *See* Parks Decl., ¶11.

E. Section 1129(a)(5) of the Bankruptcy Code

58. The Bankruptcy Code requires the plan proponent to disclose the affiliation of any individual proposed to serve as a director or officer of the debtor or successor to the debtor under the plan. 11 U.S.C. § 1129(a)(5)(A)(i). Section 1129(a)(5)(A)(ii) further requires that the appointment or continuation of such officers and directors be consistent with the interests of creditors and equity holders with and with public policy. 11 U.S.C. § 1129(a)(5)(A)(ii).

59. The Plan satisfies section 1129(a)(5)(A) because the Debtor has disclosed the identity of the Plan Administrator as the Debtor's sole officer and director as well as the responsibilities and compensation of the Plan Administrator in the Plan Supplement. Moreover, the Plan Administrator was chosen by the Committee in its sole discretion – not the Debtor or an insider Debtor. Therefore, the requirements under section 1129(a)(5) of the Bankruptcy Code are satisfied, and no party has asserted otherwise.

F. Section 1129(a)(6) of the Bankruptcy Code

60. Section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Debtor, as it requires that “[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.” 11 U.S.C. § 1129(a)(6). This provision is inapplicable the Debtor's business is not one that involves the establishment of rates over which any regulatory commission has jurisdiction or will have jurisdiction after the Plan's confirmation. Accordingly, section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Debtor.

G. Section 1129(a)(7) of the Bankruptcy Code

62. The “best interests test” of section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a present value, as of

the effective date of the plan, of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time. *See Armstrong*, 348 B.R. at 16566; *see also In re Tranel*, 940 F.2d 1168, 1172 (8th Cir. 1991) (considering evidence supporting best interests of creditors test outcome); *Eagle-Picher Indus.*, 203 B.R. at 266 (best interest of creditors test must be met even in cramdown situation).

63. The best interests test is satisfied where the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation are less than or equal to the estimated recoveries for a holder of an impaired claim or interest under the debtor's chapter 11 plan that rejects the plan. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 428 (Bankr. S.D. Tex. 2009) ("This provision is known as the 'best-interest-of-creditors-test' because it ensures that reorganization is in the best interest of individual claimholders who have not voted in favor of the plan.").

64. Substantially all of the assets of the Debtor's business will be liquidated through the Sale Transaction on the terms approved in the Sale Order (the "Sale Transaction"), and the Plan effects a wind down of the Debtor's remaining assets not otherwise acquired in the Sale Transaction, and the Plan provides for procedures to distribute such assets to its creditors.²⁷ In a chapter 7 liquidation, a sale of the Debtor's assets under the same or better terms as the Sale Transaction is extremely remote; indeed, the Debtor's assets were subject to a comprehensive market test through this Chapter 11 Case, and no offers comparable to the terms of the Sale Transaction were made.²⁸ If the Sale Transaction does not close, it is unlikely that another

²⁷ Parks Decl., ¶15.

²⁸ *Id.*

potential purchaser would materialize on the same or better terms, including the assumption of the Debtor's obligations to the Prepetition Secured Parties.²⁹ Additionally, the terms of the Global Settlement that the Debtor reached with the Committee and the Prepetition Secured Parties provides for (i) additional DIP financing; (ii) capped professional fees; (iii) unused budgeted funds (based on the capped professional fees) to be contributed to a Plan Administrator Wind-Down and Expense Reserve pursuant to the Plan; (iv) backstopping of \$250,000 by the secured lenders with respect to the Plan Administrator Wind-Down and Expense Reserve; (v) waiver of certain Debtor claims / Committee challenge deadline; (vi) Plan funding mechanics; (vii) Stalking Horse Bidder funding commitments post Sale Effective Date (and related Management Company guarantees); (viii) sale or release of claims or waiver of claims via the Plan against insiders in exchange for a \$150,000 contribution; (ix) Plan treatment of the secured lender claims; (x) Committee agreement to support the Plan (provided that the Plan is consistent with the Global Settlement term sheet); and (xi) incorporation of the Global Settlement into the Plan Documents and Sale Order/Stalking Horse APA.³⁰

65. Even if a chapter 7 trustee would be able to move forward with the current sale transaction (which the Debtor and its professionals believe to be unlikely to impossible), a chapter 7 trustee would incur the following costs not present in a chapter 11 scenario: (i) uncapped professional fees from the chapter 11 cases; (ii) chapter 7 trustee fees; (iii) other professional costs associated with a sale transaction; and (iv) transfer taxes totaling approximately \$250,000.³¹ Additionally, the prepetition lenders would have unpaid secured claims and superpriority administrative expense claims for the aggregate diminution in the value of their respective interests

²⁹ Id.

³⁰ Id.

³¹ Id., ¶16.

in the prepetition collateral (“Diminution Claims”), which would be payable from and have recourse to, among other things, the Debtor’s unencumbered collateral and all proceeds thereof.³² Although a chapter 7 liquidation may achieve substantially the same goal as that set out in the Plan, recoveries by Creditors and Interest Holders in a chapter 7 liquidation would be significantly lower given the additional expenses that would be incurred in a chapter 7 proceeding.³³ Specifically, as set forth in the hypothetical liquidation analysis filed in the Plan Supplement as Exhibit A (the “Liquidation Analysis”), the estimated recoveries for the Debtor’s stakeholders in a hypothetical chapter 7 liquidation are significantly less than the estimated recoveries for a holder of an impaired claim or interest under the Plan, with general unsecured claims receiving zero distribution.³⁴

66. The Lawsuit Plaintiffs allege that the Plan is not in the best interests of the creditors based on mistaken assumptions – indeed, they do not provide any evidentiary basis for their position. See Lawsuit Plaintiffs’ objection, ¶¶74-83. Contrary to the Lawsuit Plaintiffs’ position, the chapter 11 process provides significantly more for creditors than in a chapter 7 scenario.

67. On August 8, 2025, this Court entered the *Order Granting Debtor’s Motion Seeking Entry of an Order Approving a Settlement Pursuant to Federal Rule of Bankruptcy Procedure 9019 and 11 U.S.C. 105(a) and Granting Related Relief* (the “9019 Order”). The global settlement approved by the 9019 Order (the “Global Settlement”) is premised upon confirmation of a chapter 11 plan in this bankruptcy proceeding. Indeed, the attached Global Settlement term sheet provides, in relevant part: “the Parties believe that the Settlement embodies the best outcome for all of the concerned constituencies by facilitating the transfer of Debtor’s assets for appropriate fair market

³² See Emerald Declaration, at ¶15.

³³ Id.

³⁴ Plan Supplement, Exhibit A.

value and ensuring the confirmation of a Plan that will result in a return for unsecured creditors, outcomes which would not be possible in the event of a litigious, contested sale and confirmation process, and certainly would not occur if the case were converted to a chapter 7 liquidation.”

68. The Global Settlement provides for: (i) additional DIP financing; (ii) capped professional fees; (iii) unused budgeted funds (based on the capped professional fees) to be contributed to a Plan Administrator Wind-Down and Expense Reserve pursuant to the Plan; (iv) backstopping of \$250,000 by the secured lenders with respect to the Plan Administrator Wind-Down and Expense Reserve; (v) waiver of certain Debtor claims and the Committee’s challenge deadline; (vi) Plan funding mechanics; (vii) Stalking Horse Bidder funding commitments post Sale Effective Date (as defined in the Global Settlement term sheet)(and related Management Company guarantees); (viii) the sale or release of claims or waiver of claims via the Plan against insiders in exchange for a \$150,000 contribution; (ix) Plan treatment of the secured lender claims; (x) Committee agreement to support the Plan (provided that the Plan is consistent with the Global Settlement term sheet); and (xi) incorporation of the Global Settlement into the Plan Documents and Sale Order/Stalking Horse APA.

69. The Litigation Plaintiffs’ view of the case presupposes that the Sale Transaction would be consummated, and the Debtor’s estate would receive all of the benefits of the Global Settlement without providing the related consideration. To the contrary, if the case is converted to chapter 7, there is a high likelihood that (i) the Sale Transaction would not close, and (ii) the DIP Lenders and Receivables Lenders could exercise remedies against the Debtor’s estate upon the occurrence of a default under the DIP Facility and Receivables Facilities. The DIP Lenders and Receivable Lenders specifically negotiated that the conversion of the case to chapter 7 would constitute an event of default under the DIP Facility and the Receivable Facilities. Moreover, if

the Confirmation Order is not entered by September 15, 2025, a default under the facilities will occur on September 16, 2025. In such a scenario, substantially all of the Debtor's assets are subject to the DIP Liens and/or the Receivables Liens and would provide no benefit to unsecured creditors.

70. Further, to the extent that this case converts to a chapter 7, there would be:

- a. Increased Professional fees because the caps embodied in the Global Settlement would not apply. Moreover, upon a DIP default, the DIP Lenders would likely cease funding under the DIP Facility, meaning these increased professional fees would become unpaid chapter 11 administrative expenses that would have priority over general unsecured claims in a chapter 7 proceeding; (no cap);
- b. If the Sale Transaction is not consummated pursuant to the terms of the Asset Purchase Agreement, the estate would be liable for the Receivables Super priority Claims in the amount of ~\$2.5mm which would have priority over general unsecured claims in a chapter 7 proceeding;
- c. The Receivables Lenders will not backstop \$250,000 for the benefit of unsecured creditors and, indeed, no funds would likely be contributed to a Plan Administrator Wind-Down Budget and Expense Reserve;
- d. The Buyer would not make the \$150,000 Purchaser Contribution for benefit of Unsecured Creditors; and
- e. The chapter 7 estate would be required to bear the cost of any transfer or stamp taxes associated with the transfer of the Debtor's assets, which the Debtor estimates to be approximately \$250,000.00.

See Emerald Decl., at 12.

71. The Debtor also believes that it would be highly unlikely that the Stalking Horse Bidder would move forward with the current Sale Transaction, given that the sale and Plan were intended to incorporate the Global Settlement terms.³⁵ If the Confirmation Order is not entered by,

³⁵ See Stalking Horse APA, Docket No. 94 (A condition to closing is that the "Sale Order shall not have been reversed, stayed **or modified in any material respect prior to the Closing Date**")(emphasis added). Sale Order at ¶ 45 ("Subsequent Plan Provisions. Unless otherwise provided herein, nothing contained in any chapter 11 plan confirmed in the Debtor's case or any order confirming any such plan or any other order in the Debtor's case (including any order entered after any conversion of any of these cases into a case under chapter 7 of the Bankruptcy Code) shall alter, conflict with, or derogate from, the provisions of the Asset Purchase Agreement or this Sale Order and, to the extent of any such conflict, subject to this paragraph, the terms of this Sale Order and the Asset Purchase Agreement shall control. Notwithstanding the foregoing, to the extent the Settlement Term Sheet [Docket No. 249, Exhibit 1] (the "Term Sheet") is inconsistent with (i) this Sale Order, (ii) the Sale, or (iii) the Asset Purchase Agreement, the Term Sheet shall control and govern."). Even if a chapter 7 trustee would be able to move forward with the current sale transaction (which the Debtor and its professionals believes to be unlikely to impossible), a chapter 7 trustee would incur the following costs not present in a chapter 11 scenario: (i) uncapped professional fees from the chapter 11 cases; (ii) chapter 7 trustee fees; (iii) other professional costs associated with a sale transaction; and (iv) transfer taxes totaling approximately \$250,000.

September 15, 2025, the Debtor would be in default under the DIP Milestones, in which case the Debtor would likely be unable to pay, and would be left with, significant administrative claims (e.g., professional fees and superpriority receivables claim (currently outstanding in the amount of \$1,322,025)), with the unsecured creditors left with no recovery whatsoever. *See* Plan Supplement, at Exhibit A ((i) “DIP Lenders to fund the remaining DIP draws only under the Chapter 11 Plan scenario; will not fund in a Chapter 7 conversion scenario”; and (ii) “[i]n accordance with the sale in a Chapter 11 Plan, the buyer assumes all DIP and Secured Note liabilities, as reflected in the ‘source of proceeds.’”).

72. The Lawsuit Plaintiffs’ allege that the funds to wind-down the Estate in the Chapter 11 Case are not budgeted for, but that is incorrect. *See* Emerald Declaration, at ¶14. The Liquidation Analysis includes \$1.44 million in unpaid administrative and priority Claims, which include all necessary payments to the office of the U.S. Trustee, and the only funds available to pay these claims come from the DIP Loan. *Id.* Further, without access to the DIP Loan, the \$250,000 of Cash for unsecured creditors would not be available for unsecured creditors. *Id.* Thus, the Lawsuit Plaintiffs’ assumptions are fundamentally flawed and do not account for the loss in access to DIP Financing.

73. Additionally, the “Carve-Out” (as defined in the Final DIP Order) only provides a chapter 7 trustee with \$25,000 to pay chapter 7 administrative expenses. If the Chapter 11 Case were to convert to chapter 7, a chapter 7 trustee would not have the funding or operations to liquidate or monetize the unsold inventory, notes receivable, and other similar assets, thereby making the 30-60% assumed recovery in a chapter 7 scenario realistic, as opposed to the guaranteed recovery currently anticipated under the Debtor’s Plan. *See* Emerald Declaration, at ¶9. The Lawsuit Plaintiffs’ presume that the Sale Transaction can still occur in a chapter 7

scenario, however, it is highly unlikely that the Sale Transaction would close in a chapter 7 scenario. *Id.* This means that a chapter 7 trustee would have to retain professionals to remarket and sell the Debtor's assets. *Id.* The Liquidation Analysis appropriately accounts for these costs. *Id.* The Debtor and its advisors ran a robust marketing process, and no other prospective purchaser was willing submit a "Qualified Bid" (as defined in the Court approved Bid Procedures, see ECF No. 125). *Id.*

74. Still, even if the case were to be converted immediately, the Sale Transaction were to close with the Purchaser Contribution included, and the chapter 7 case was prosecuted with little to no cost, the conversion would cut off the Debtor's access to DIP Financing and remove the backstopped \$250,000 in the DIP Budget to fund the Plan Administrator Wind-Down and Expense Reserve as contemplated in the Global Settlement. *See* Emerald Declaration, at ¶12. The unavoidable reality is that the reserved cash for unsecured creditors would simply not exist in a chapter 7 scenario. *See* Emerald Declaration, at ¶11.

75. Further, the conversion to chapter 7 would also require entry of a new bar date for filing claims that would be more than ninety (90) days following conversion of the case to chapter 7. *See* Fed. R. Bankr. P. 1019(2); 3002(c).³⁶ Thus, the amount of Claims ultimately filed and Allowed against the Debtor could materially increase, thereby further reducing creditor recoveries versus those available under the Plan.³⁷

76. Accordingly, there is no valid basis to assert that unsecured creditors would receive more in a hypothetical chapter 7 liquidation than they would receive under the Plan. Accordingly,

³⁶ Parks Decl., ¶17.

³⁷ *Id.*

the Debtor submits that the Plan complies with and satisfies all of the requirements of section 1129(a)(7) of the Bankruptcy Code, and no party has asserted otherwise.³⁸

H. Section 1129(a)(8) of the Bankruptcy Code

77. Section 1129(a)(8) Bankruptcy Code requires that “with respect to each class of claims or interests — (A) such class has accepted the plan or (B) such class is not impaired under the Plan.” 11 U.S.C. § 1129(a)(8). Pursuant to section 1126(c) of the Bankruptcy Code, a class of claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class vote to accept the plan. *See id.* § 1126(c). Pursuant to section 1126(d) of the Bankruptcy Code, a class of interests accepts a plan if at least two-thirds in amount of allowed interests in that class vote to accept the plan. *See id.* § 1126(d).

78. As set forth above, the Holders of Claims in Classes 3 through 5 are Unimpaired under the Plan and, pursuant to section 1126(f) of the Bankruptcy Code, conclusively presumed to have voted to accept the Plan. Thus, the requirements of section 1129(a)(8) have been satisfied as to each of Classes 3 through 5.³⁹

79. As set forth above and in the Voting Declaration, the Holders of Claims in Class 1, 2, and 6 voted overwhelmingly to accept the Plan. *See* Voting Decl., ¶ 9. Thus, as to the Impaired and Accepting Class 1, 2 and 6, the requirements of section 1129(a)(8) of the Bankruptcy Code likewise have been satisfied.⁴⁰

80. Holders of Claims in Class 8 (Interests) are not entitled to receive or retain any property from the Debtor’s Estate under the Plan on account of their Claims and Interests and, therefore, are deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code. The

³⁸ *Id.*, ¶18.

³⁹ *Id.*, ¶19.

⁴⁰ Parks Decl., ¶19.

Holders of Claims in Class 7 voted to reject the Plan. See Voting Decl., ¶9. The Plan nonetheless may be confirmed under the “cram down” provisions of section 1129(b) of the Bankruptcy Code, as discussed below.

I. Section 1129(a)(9) of the Bankruptcy Code

81. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code, which requires that a chapter 11 plan provide for the payment of certain priority claims in full on the effective date in the allowed amount of such claims. Under Bankruptcy Code § 1129(a)(9)(A), unless otherwise agreed by the holder, holders of claims of a specific kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive cash equal to the allowed amount of such claims on the effective date of a plan. 11 U.S.C. § 1129(a)(9)(A). It further requires that the holders of claims of a kind specified in sections 507(a)(1) and 507(a)(4) through (7) of the Bankruptcy Code (generally, wage and employee benefit claims and consumer deposits that are entitled to priority) must receive: (a) if the class in which such claimants are members has accepted the plan, deferred cash payments of a value equal to the allowed amount of these claims or, (b) if the class in which such claimants are members has not accepted the plan, cash equal to the allowed amount of these claims on the effective date of a plan. *See Id.* § 1129(a)(9)(B). Finally, sections 1129(a)(9)(C) and (D) of the Bankruptcy Code provide for the payment of priority tax claims, including secured claims that would otherwise meet the requirements of section 507(a)(8) of the Bankruptcy Code absent the secured status of such claims, in cash in regular installments. *See id.* § 1129(a)(9)(C) and (D).

82. In accordance with section 1129(a)(9)(A) of the Bankruptcy Code, Article II of the Plan provides that, unless otherwise agreed by the holder of an Administrative Claim, each holder of an Allowed Administrative Claim shall be paid in full in Cash on the earlier of the date that is (a) on or as soon as reasonably practicable after the Effective Date if such Administrative Claim

is Allowed as of the Effective Date or (b) on or as soon as reasonably practicable after the date such Administrative Claim is Allowed, if such Administrative Claim is not Allowed as of the Effective Date. Similarly, each Allowed Professional Fee Claim shall be paid in full promptly after entry of a Final Order approving the application for such Professional Fee Claim.

83. In accordance with section 1129(a)(9)(B) of the Bankruptcy Code, Article II.D of the Plan provides that each holder of an Allowed Priority Tax Claim shall receive, in full satisfaction, settlement, and release of such Allowed Priority Tax Claim, one of the following treatments: (i) Cash in an amount equal to the amount of such Allowed Priority Tax Claim, plus interest at the rate determined under applicable non-bankruptcy law and to the extent provided for by section 511 of the Bankruptcy Code; or (ii) such other treatment as may be agreed upon by such holder and the Debtor or otherwise determined upon an order of the Bankruptcy Court.

84. In accordance with section 1129(a)(9)(C) of the Bankruptcy Code, Article III.C.5 of the Plan provides that each holder of an Allowed Other Priority Claim shall receive payment in full in Cash of such holder's Allowed Other Priority Claim from the Plan Administrator or such other treatment rendering such holder's Allowed Other Priority Claim Unimpaired.

85. Accordingly, the Plan satisfies the requirements set forth in section 1129(a)(9) of the Bankruptcy Code.⁴¹

J. Section 1129(a)(10) of the Bankruptcy Code

86. Section 1129(a)(10) of the Bankruptcy Code provides the following:

If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

⁴¹ Parks Decl., ¶21.

11 U.S.C. § 1129(a)(10); *see also In re Martin*, 66 B.R. 921, 924 (Bankr. D. Mont. 1986) (holding that acceptance by three classes of impaired creditors, exclusive of insiders, satisfied requirement of section 1129(a)(10) of the Bankruptcy Code). As set forth in the Voting Declaration, Class 1, 2, and 6 voted overwhelmingly to accept the Plan. *See* Voting Decl., ¶9. Accordingly, the Debtor submits that the requirements of section 1129(a)(10) of the Bankruptcy Code are satisfied.⁴²

K. Section 1129(a)(11) of the Bankruptcy Code

87. The Plan satisfies section 1129(a)(11) of the Bankruptcy Code, which provides that a court may confirm a plan only if “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need further financial reorganization, of the debtor or any successor to the debtor under the plan.” 11 U.S.C. § 1129(a)(11). A debtor must demonstrate the feasibility of the plan by a preponderance of the evidence. Feasibility is a relatively low threshold. *See, e.g., In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that “[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility”) (internal citations omitted); *Berkley Fed. Bank & Trust v. Sea Garden Motel & Apartments (In re Sea Garden Motel & Apartments)*, 195 B.R. 294, 305 (D.N.J. 1996); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *overruled in part on other grounds*, 464 B.R. 208 (Bankr. D. Del. 2011).

88. The Bankruptcy Court need not require a guarantee of success to find the Plan feasible. *Crestar Bank v. Walker (In re Walker)*, 165 B.R. 994, 1004 (E.D. Va. 1994) (noting that the “plan must present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success”). Instead, the Bankruptcy Court must find that the “plan

⁴² Parks Decl., ¶22.

offers a reasonable expectation of success.” *See In re G–I Holdings Inc.*, 420 B.R. at 267 (“[The] key element of feasibility is whether there is a reasonable probability the provisions of the Plan can be performed.”).

89. Since the Plan expressly provides for the liquidation of the Debtor’s assets, section 1129(a)(11) of the Bankruptcy Code is satisfied.⁴³ *See In re Revco*, 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (holding that “[s]ection 1129(a)(11) is satisfied as the plan provides that the property of [the] Debtors shall be liquidated”). As a result, confirmation of the Plan is not likely to be followed by a further financial reorganization of the Debtor.⁴⁴ Accordingly, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

L. Section 1129(a)(12) of the Bankruptcy Code

90. The Plan complies with section 1129(a)(12) of the Bankruptcy Code, which requires that, as a condition precedent to the confirmation of a plan, “[a]ll fees payable under Section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.” 11 U.S.C. § 1129(a)(12). The Plan specifically provides that all fees payable pursuant to Section 1930 of Title 28 of the United States Code will be paid on or prior to the Effective Date. *See* Plan, Art. II.E. Based on the review of the Debtor’s books and records, the Debtor has adequate means to make such payments.⁴⁵ As such, the Plan complies with section 1129(a)(12) of the Bankruptcy Code.⁴⁶

M. Section 1129(a)(13) through (a)(16) of the Bankruptcy Code Do Not Apply

⁴³ Parks Decl., ¶22.

⁴⁴ Parks Decl., ¶23.

⁴⁵ Parks Decl., ¶24.

⁴⁶ *Id.*

91. Section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Plan, as it requires that a plan of reorganization provide for the continuation of all retiree benefits at the level established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code at any time prior to confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits. The Debtor has no obligations to pay retiree benefits after the Effective Date and, as such, section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Plan.⁴⁷

92. Section 1129(a)(14) of the Bankruptcy Code is inapplicable because the Debtor is not subject to any domestic support obligations. 11 U.S.C. § 1129(a)(14). Section 1129(a)(15) of the Bankruptcy Code is inapplicable to the Plan because the Debtor is not an “individual” as that term is defined in the Bankruptcy Code. 11 U.S.C. § 1129(a)(15). Section 1129(a)(16) of the Bankruptcy Code is also inapplicable because the Plan does not provide for any property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. 11 U.S.C. § 1129(a)(16).⁴⁸

II. SECTION 1129(B) OF THE BANKRUPTCY CODE

93. Section 1129(b)(1) of the Bankruptcy Code allows for confirmation of a plan in cases where all requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) (*i.e.*, the plan has not been accepted by all impaired classes of claims or interests), by allowing a court to “cram down” the plan notwithstanding objections or deemed rejections as long as the court determines that the plan is “fair and equitable” and does not “discriminate unfairly” with respect to the rejecting classes. 11 U.S.C. § 1129(b)(1).

⁴⁷ Parks Decl., ¶25.

⁴⁸ Parks Decl., ¶26.

94. As noted above, Class 1, 2, and 6 voted in favor of the Plan. However, Class 7 voted to reject the Plan and the deemed rejecting Class 8 (Interests) are deemed to have rejected the Plan. See Voting Decl., ¶9. Nonetheless, the Debtor meets the “cram down” requirements of section 1129(b) of the Bankruptcy Code to confirm the Plan over the deemed rejection by Classes 7 and 8 because the Plan is fair and equitable and does not discriminate unfairly with respect to holders of Claims and Interests in that rejecting Classes.

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

95. A plan is “fair and equitable” with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the “absolute priority” rule. *Bank of Am. Nat. Trust & Sav. Ass’n*, 526 U.S. at 441–42 (“As to a dissenting class of impaired unsecured creditors, such a plan may be found to be ‘fair and equitable’ only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if ‘the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,’ § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the ‘absolute priority rule.’”). This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired accepting class not receive any distribution under a plan on account of its junior claim or interest. 11 U.S.C. § 1129(b)(2)(B)(ii).

96. The Plan satisfies section 1129(b) of the Bankruptcy Code. Notwithstanding the fact that the Class 7 (Other General Unsecured Creditors) and Class 8 (Interests) have rejected the Plan, the Plan is confirmable. There is no class receiving more than a 100 percent recovery and no junior class is receiving a distribution under the Plan until all senior classes have received a 100 percent recovery or agreed to receive a different treatment under the Plan. More specifically, the Plan does not provide any recovery from the Estate for any claims or interests junior to Class 7

(Other General Unsecured Claims). Accordingly, the Plan is fair and equitable with respect to holders of Class 7 Claims and Class 8 Interests.

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

97. Although the Bankruptcy Code does not provide a standard for determining when “unfair discrimination” exists, courts typically examine the facts and circumstances of the particular case to make the determination. *See In re TCI 2 Holdings, LLC*, 428 B.R. at 158 (neglecting to apply a set standard or test to ascertain whether a plan unfairly discriminates, instead opting to consider “various standards” for a general analysis of unfair discrimination including whether the discrimination is “supported by a reasonable basis” and is “proposed in good faith”); *In re S B Bldg. Assocs.*, 621 B.R. 330, 375 (Bankr. D.N.J. 2020) (considering the unique factual circumstances to determine whether the requirements of section 1129(b) are satisfied); *Hargreaves v. Nuverra Env’t Sols., Inc. (In re Nuverra)*, 590 B.R. 75, 93 (D. Del. 2018), *aff’d*, 834 F. App’x 729 (3d Cir. 2021), *as amended* (Feb. 2, 2021) (“As unfair discrimination is not defined in the Bankruptcy Code, courts must examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.”).

98. In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so. *See, e.g., See In re Ocean View Motel, LLC*, No. 20-21165-ABA, 2022 WL 243213, at *1 (Bankr. D.N.J. Jan. 25, 2022) (stating that “[u]nder 1129(b)(1), a plan unfairly discriminates when it treats similarly situated classes differently without a reasonable basis for the disparate treatment”) (internal citations omitted); *In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (citing cases and noting that separate classification and treatment of claims is acceptable if

the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business). A threshold inquiry in assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to the class allegedly receiving more favorable treatment. *See Armstrong*, 348 B.R. at 121.

99. The Claims and Interests in Class 6 (Continued Trade Vendor Claims) and Class 7 (Other General Unsecured Claims) are all subordinate to the priority of the Claims in Classes 1 through 5, which holds secured claims and priority claims. The Plan provides for the separate classification by the Debtor of holders of Claims in Class 6 (Continued Trade Vendor Claims) and Class 7 (Other General Unsecured Claims), which is reasonable in light of the Debtor's need to maintain relationships with continuing trade vendors for purposes of a competitive sale process. *See In re Armstrong World Indus., Inc.*, 348 B.R. at 159 (holding that it was reasonable to separately classify the Asbestos personal injury claims and general unsecured claims despite their equal priority status). Class 8 (Interest) is subordinated to the Claims of Class 6-7 as required by the absolute priority rule. Accordingly, the Plan should be confirmed even if Class 7 and Class 8 reject the Plan.

III. SECTION 1129(C) OF THE BANKRUPTCY CODE

100. The Plan satisfies section 1129(c) of the Bankruptcy Code, which provides that, with a limited exception, a bankruptcy court may only confirm one plan. The Plan is the only plan that has been filed in this Chapter 11 Case and is the only plan that satisfies the requirements of subsections (a) and (b) of section 1129 of the Bankruptcy Code.⁴⁹ Accordingly, the requirements of section 1129(c) of the Bankruptcy Code are satisfied.

⁴⁹ See Parks Decl. ¶ 27.

IV. SECTION 1129(D) OF THE BANKRUPTCY CODE

101. The Plan satisfies section 1129(d) of the Bankruptcy Code, which provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act of 1933. Here, the Plan’s principal purpose is not the avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933, and there has been no filing by any governmental agency asserting the contrary.⁵⁰ Accordingly, the Plan complies with section 1129(d) of the Bankruptcy Code.

V. SECTION 1129(E) OF THE BANKRUPTCY CODE

102. Section 1129(e) of the Bankruptcy Code is inapplicable because the Debtor’s Chapter 11 Case is not a “small business case.”

OTHER PLAN PROVISIONS ARE NECESSARY AND APPROPRIATE

I. THE PLAN APPROPRIATELY INCORPORATES SETTLEMENTS OF CLAIMS AND INTERESTS

103. Article VII.A. of the Plan provides for a general settlement of all Claims and Interests to the extent provided under the Bankruptcy Code or applicable law. The standards for approval of a settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019. *See In re S B Bldg.*, 621 B.R. at 380 (“The standards for approving a settlement are the same under both Bankruptcy Rule 9019 and section 1123(b)(3).”). Generally, courts in the Third Circuit will approve a settlement by the debtor if the settlement “exceed[s] the lowest point in the range of reasonableness.” *In re TCI 2 Holdings*, 428 B.R. at 136 (citation omitted); *Will v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006) (“Settlements are favored, but the unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them.”).

⁵⁰ See Parks Decl. ¶ 28

104. The Third Circuit has provided the following criteria that a bankruptcy court should consider when approving a settlement pursuant to Bankruptcy Rule 9019: (a) the probability of success in litigation; (b) the likely difficulties in collection; (c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (d) the paramount interest of creditors. *See In re WebSci Technologies, Inc.*, 234 Fed. Appx. 26, 29 (3d. Cir. 2007) (quoting *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)). In addition, the court must determine whether the proposed settlement is fair and equitable, and in the best interests of the estate. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (“Under the ‘fair and equitable’ standard, we look to the fairness of the settlement to other persons, i.e., the parties who do not settle.”).

105. The Debtor believes the settlements embodied by the Plan satisfy the above factors. The Plan and Proposed Confirmation Order embody a settlement of Claims and Interests between the Debtor and certain other parties in interest, including (i) the Debtor’s officers and directors and officers and the Committee, and (ii) the Debtor’s secured lenders and the Committee. These settlements avoided protracted litigation between, *inter alia*, the Committee, the Debtor’s officers and directors and the Debtor’s secured lenders, which litigation would have had an uncertain outcome for the Debtor’s estate. Instead, the Plan is guaranteed to provide \$400,000 for unsecured creditors, with upside to \$480,000, for distribution or use to fund litigation of Retained Causes of Action. For these reasons, the settlements embodied in the Plan and the Proposed Confirmation Order are fair and equitable and consistent with the Bankruptcy Code.

106. The Debtor and its advisors worked diligently to propose a Plan that is in the best interest of its Estate and which creditors are receiving the greatest value possible on their claims. If the Debtor was forced to litigate the issues necessary to resolve Claims and Interests outside of

the Plan, such litigation would be costly, protracted, inherently uncertain, and would likely leave the Debtor and its stakeholders in a substantially worse off position. Litigation would prolong the Debtor's bankruptcy process and drain the Estate's assets. Moreover, any litigation between the Debtor's estate and the Debtor's secured lenders would constitute a default under the DIP Facility and Receivables Facility, which would limit the Debtor's access to liquidity necessary to prosecute this Chapter 11 Case. Without the settlements, it is doubtful that General Unsecured Creditors would receive anything on account of their Claims. By contrast, as reflected by the significant support of creditors for the Plan, the settlements embodied by the Plan are in the best interests of creditors and all parties in interest.

II. THE PLAN'S RELEASES, EXCULPATION, AND INJUNCTION PROVISIONS ARE APPROPRIATE AND SHOULD BE APPROVED

107. The Objections object to the Third-Party Releases on the following grounds: first, that the Plan's Third-Party Releases are non-consensual and therefore barred under the *Purdue* ruling; second, that the Plan's exculpation provision allegedly contravenes Third Circuit precedent; and third, as to the Lawsuit Plaintiffs' Objection, the insiders have not made any meaningful consideration in return for the Third-Party Releases. *See* UST Objection; Lawsuit Plaintiffs' Objection. However, as set forth in the Debtor's DS Reply and below, multiple post-*Purdue* decisions have rejected similar arguments, holding that such provisions remain permissible. Moreover, the Third-Party Releases to the insiders are appropriate since: (i) the insiders have provided value to the estate, including the Purchaser Contribution, providing guaranties necessary to effectuate the Sale Transaction, and ensuring the Debtor is administratively solvent through the Effective Date; (ii) the Third-Party Releases are consensual, and (iii) the Third-Party Releases are essential to the Plan. *In re Invitae Corporation*, No. 24-11362 (MBK), Docket No. 913 (Bankr. D.N.J. Aug. 2, 2024).

108. Article VII.D.1 of the Plan provides for the releases by the Debtor of the Released Parties (the “Debtor Release”) and Article VII.D.2 of the Plan provides for the releases by all holders of Claims and Interests other than those persons and entities who (i) opted-out of the Third-Party Release, (ii) did not receive a ballot due to same being returned as undeliverable, and (iii) timely objected to the Third-Party Release in connection with Plan confirmation that is not resolved before confirmation (the “Third-Party Release,” and together with the Debtor Release, the “Releases”). The Plan also includes: (a) in Article VII.C a customary exculpation and limitation of liability provision (the “Exculpation Provision”) and (b) in Article VII.E a bifurcated injunction provision which provides for a temporary injunction as to the Debtor through the date which all of the Debtor’s remaining assets will be liquidated and distributed pursuant to the terms of the Plan and a permanent injunction for other Released Parties (the “Injunction Provision”).

A. The Debtor Release

109. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for “the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.” *See In re S B Bldg*, 621 B.R. at 380 (“The standards for approving a settlement are the same under both Bankruptcy Rule 9019 and section 1123(b)(3).”). Generally, courts in the Third Circuit will approve a settlement by the debtors if the settlement “exceed[s] the lowest point in the range of reasonableness.” *In re TCI 2 Holdings, LLC*, 428 B.R. at 136 (citation omitted); *Will v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006) (“Settlements are favored, but the unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them.”). Additionally, the Third Circuit has held that, to approve a settlement pursuant to Rule 9019, the court must balance: ““(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and

the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors.’’ *In re WebSci Techns., Inc.*, 234 Fed. Appx. 26, 29 (3d Cir. 2007) (quoting *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)). Further, a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code “if the release is a valid exercise of the debtor’s business judgment, is fair, reasonable, and in the best interests of the estate.” *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (internal citation omitted); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) (“In making its evaluation [whether to approve a settlement], the court must determine whether the compromise is fair, reasonable, and in the best interest of the estate.”) (internal citation omitted).

110. Courts in this jurisdiction and elsewhere generally analyze five factors when determining the propriety of a debtor release, commonly known as the *Zenith* or *Master Mortgage* factors. *See In re Indianapolis Down*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) (citing *In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999)); *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994). The *Master Mortgage* factors have been adopted by the Third Circuit, including application by the Bankruptcy Court of the District of New Jersey as “neither exclusive nor conjunctive requirements, but . . . guidance in the Court’s determination of fairness.” *See In re 710 Long Ridge Rd. Operating Co., II, LLC*, No. 13-13653 (DHS), 2014 WL 886433, at *14 (Bankr. D.N.J. Mar. 5, 2014) (citing *In re Wash. Mut.*, 442 B.R. at 346). The analysis includes an inquiry into whether there is: (1) identity of interest between the debtor and non-debtor; (2) contribution to the plan by the non-debtor; (3) the necessity of the release to the plan; (4) overwhelming acceptance of the plan and release by creditors and interest holders; and (5) payment of all or substantially all of the claims of the creditors and interest holders. *See In re Wash. Mut.*, 442 B.R. at 346 (citing *In re Zenith Elecs. Corp.*, 241 B.R. at 110; *In re Master Mortg.*,

168 B.R. at 937). These factors are “neither exclusive nor conjunctive requirements” but rather serve as guidance to courts in determining fairness of a debtor’s releases. *Id.* at 346 (citing *In re Master Mortg.*, 168 B.R. at 935). The Debtor Release easily meets the applicable standard and should be approved.

111. As set forth in the Disclosure Statement, after the Petition Date, the Committee engaged in an investigation with respect to certain prepetition insider transaction as related to current officers and directors of the Debtor and any potential claims against BOC and Colebrook (the “Investigation”). See Disclosure Statement, Art. III. E. Specifically, the Committee reviewed, investigated, analyzed, evaluated and considered any Claims or potential Claims that the Debtor’s estate may possess, including but not limited to any Claims or potential Claims that may involve or otherwise impact the Debtor’s directors, officers, managers, shareholders, subsidiaries or other affiliates, lenders, or other constituents, as well as reviewed the secured parties’ collateral packages and perfection issues. As a result of this Investigation, the Debtor does not believe that there are any viable claims against the current officers and directors of the Debtor or against BOC and Colebrook. Additionally, the Debtor’s CCRO, Edward Phillips of Getzler Hennirch, who was charged with investigating any insider dealings of the Debtor has not raised any issues with respect to the proposed releases for current officers and directors of the Debtor.⁵¹

112. Accordingly, the Debtor has determined that (a) the Debtor Release would not extinguish valuable claims worth pursuing, and (b) the Debtor Release is necessary to confirmation because it would allow the company to emerge from chapter 11 proceedings without diverting substantial resources to claims that are unlikely to succeed and that would create additional and highly costly financial burdens for the Debtor’s Estate.⁵² Further, the Debtor concluded that

⁵¹ Parks Decl. ¶ 30.

⁵² Parks Decl., ¶ 31.

pursuit of the Plan, containing the Debtor Release, among other things, is in the best interests of the Debtor's Estate because it allows the Debtor to proceed with its winddown efforts without lengthy, complex, and value-destructive litigation.⁵³ The Debtor believes that preserving the Debtor's claims against the Released Parties would neither promote the expeditious and final resolution of the Debtor's Estate nor maximize recoveries for creditors.⁵⁴ Instead, pursuit of these claims would drastically increase expenses and professional fees to the detriment of the projected creditor recoveries set forth in the Plan.⁵⁵ Accordingly, the Debtor concluded the Debtor Release is appropriate and should be approved. The Plan, in its current form, provides recoveries for unsecured creditors well in excess of any reasonable litigation scenario, even if such litigation were successful.⁵⁶

113. In addition, the Debtor satisfies the *Zenith* or *Master Mortgage* factors.

114. First, based on the Debtor's operating and governance documents, an identity of interest exists between the Debtor and the officers and directors to be released under the Plan.⁵⁷ With respect to the releases of the Debtor's current and former directors and officers, there is a clear identity of interest supporting the releases because the Debtor has a duty to indemnify those parties under the Debtor's operating and governance documents. *Id.*; see also *In re Indianapolis Downs*, 486 B.R. at 303 ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the nondebtor receiving the release.")

115. Each Released Party, as a stakeholder and critical participant in the Plan process, also shares a common goal with the Debtor in seeing the Plan succeed, and would have been highly

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*, ¶ 32.

⁵⁷ Parks Decl., ¶ 34.

unlikely to participate in the negotiations and compromises that led the ultimate formulation of the Plan (or participate in the ultimate implementation of it) without the Debtor Release. The Debtor Release further provides finality to those parties critical to effectuating the Sale Transaction and wind down efforts of the Debtor, underpins the compromise of issues achieved by the Plan, maximizes value for creditors, and permits the Debtor's Estate to consummate the Plan.⁵⁸ Therefore, the inclusion of the Debtor Release inures to the benefit of all the Debtor's stakeholders, and the Debtor and the directors and officers share an identity of interest.⁵⁹

116. Second, the officers and directors, BOC and Colebrook have each made substantial contributions to the Chapter 11 Case. *See Su v. Offshore Inv. Ltd. (In re Vantage Drilling Int'l)*, 603 B.R. 538, 548 n.5 (D. Del. 2019) (“[A] person receiving a release generally must have provided something of value in return, such as by . . . facilitating the debtor’s reorganization.”); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (finding non-debtor parties had substantially contributed where (a) officers and directors made substantial contributions by designing and implementing the operational restructuring and negotiating the financial restructuring and (b) plan sponsor funded the plan and agreed to compromise its claim); *In re Hercules Offshore, Inc.*, 565 B.R. 732, 757–58 (Bankr. D. Del. 2016) (holding that a release of the debtors’ officers, directors, and professionals was appropriate where the record reflected an “intensive and thoughtful effort by management and the special committee,” with the advice and assistance of its hired professionals, “to respond to the market challenges” and who “chose the option that they believed would conserve the value of the [e]states and maximize recovery for all stakeholders, including equity holders”).

⁵⁸ Id.

⁵⁹ Id.

117. The substantial contributions by the officers and directors are plainly apparent. In this Chapter 11 Case, and in addition to their day-to-day roles, the Debtor's directors and officers, among other things, prepared the Debtor's bankruptcy schedules, negotiated with stakeholders, oversaw the Company's disposition strategy, met with vendors and customers, and endeavored to finalize the terms of a value-maximizing Sale Transaction.⁶⁰ The Debtor's directors and officers played a crucial role in the sale process as well, by responding to significant diligence requests, meeting with potential purchasers, preparing for, assisting, and attending the auction, and assisting on the integration of the Debtor's business with the buyer.⁶¹ In the absence of these parties' contributions, the transactions contemplated by the Plan would not be possible.⁶²

118. Similarly, BOC and Colebrook were instrumental to the success of the Chapter 11 Case. BOC and Colebrook (i) provided significant assistance in the negotiation and drafting of the material filings in this Chapter 11 case, including the DIP Motion, Receivables Motion, Plan, Disclosure Statement, Bid Procedures Motion and Global Settlement; (ii) have agreed to backstop a minimum of \$250,000 for benefit of unsecured creditors under the Plan; (iii) consented to use of cash collateral during the case; and (iv) provided vital financing to support the Debtor's operations during this Chapter 11 Case and, when the originally contemplated financing proved insufficient, agreed to provide the Debtor with an additional \$602,000 to ensure the success of this Chapter 11 Case.⁶³ *In re Hercules Offshore, Inc.*, 565 B.R. 732, 763 (Bankr. D. Del. 2016) (finding a debtor release in favor of secured lenders appropriate when, *inter alia*, the lenders guaranteed a recovery

⁶⁰ Parks Decl., ¶ 35.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Parks Decl., ¶ 36.

for unsecured creditors and facilitated a successful restructuring by, among other things, consenting to use of cash collateral).

119. Third, the Debtor Release is essential to the success of the Debtor's Plan. As described above, the Debtor's directors and officers and secured lenders contributed substantial value to this Chapter 11 Case with the understanding that they would receive the Debtor Release. Absent the releases, it is highly unlikely the Debtor would have been able to build the consensus with respect to the Plan and implementation of the Plan. Further, the Debtor does not believe they are releasing any material claims. As such, pursuing non-material claims against the Released Parties is not in the best interests of the Debtor's stakeholders as the costs involved would outweigh any potential benefits from pursuing such claims. This Court, and courts in this Circuit, have recently approved liquidating plans with similar Debtor Release. *See e.g. In re Sam Ash*, No. 24-14727 (SLM), Docket No. 460 (Bankr. D.N.J. Aug. 15, 2024) (confirming a similar release language); *In re Invitae Corporation*, No. 24-11362 (MBK), Docket No. 913 (Bankr. D.N.J. Aug. 2, 2024); *In re BlockFi Inc.*, No. 22 19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023) (confirming liquidating chapter 11 plan with debtor releases); *In re Cyxtera Techs., Inc.*, No. 23 14853 (JKS) (Bankr D.N.J. Nov. 17, 2023) (same); *In re Bed Bath & Beyond Inc.*, No. 23 13359 (VFP) (MBK) (Bankr. D.N.J. Sept. 14, 2023) (same). The Debtor Release, therefore, is essential to the Debtor's wind-down efforts.

120. Fourth, as evidenced by the Voting Declaration and as discussed herein, the Debtor's stakeholders overwhelmingly support the Plan. Notably, Class 1, 2, and 6 voted to accepted the Plan. *See* Voting Declaration, Exhibit A.

121. Fifth, the Plan provides for meaningful recoveries for creditors, including 100 percent recoveries to Administrative Claims, DIP Claims, Priority Tax Claims, Secured Tax Claims, Other Secured Claims and Other Priority Claims.

122. Lastly, as demonstrated by the Liquidation Analysis, the ranges of recoveries for those Holders of General Unsecured Claims are higher under the Plan than they would have been in a chapter 7 liquidation scenario. *See* Plan Supplement, Exhibit A. The Plan was prepared to maximize value and provide meaningful recoveries for all stakeholders, and these recoveries are achievable because the Debtor has agreed, among other things, to give up potential claims that they believe have no value. Therefore, the Debtor Release is worth the significant benefits the Debtor will receive in exchange.

123. Based on the above, the *Zenith* factors support approval of the Debtor Release and the Debtor has easily satisfied the business judgment standard in granting the Debtor Release under the Plan. The Debtor Release is fair, reasonable, supported by the requisite amount of creditors, and is in the best interests of the Debtor's Estate⁶⁴. For these reasons, the Debtor's agreement to provide the Debtor Release is in the best interests of creditors and all stakeholders, is an integral part of the Plan, and should be approved.⁶⁵

B. The Third-Party Release Is Consensual and Appropriate

124. The Third-Party Release is consensual, fair, and reasonable, and consistent with Third Circuit precedent and, therefore, should be approved. The Third-Party Release is consensual since all parties in interest had ample opportunity to evaluate and opt out of the Third-Party Release. Moreover, the Third-Party Release is appropriately tailored to the specific circumstances at issue in this particular case, and is consistent with previous decisions of this Court. *See In re*

⁶⁴ Parks Decl., ¶ 37.

⁶⁵ *Id.*

Sam Ash, No. 24-14727 (SLM) (Bankr. D.N.J. Aug. 15, 2024) (approving nearly identical language regarding proposed third party releases); *In re Invitae Corporation*, No. 24-11362 (MBK) (Bankr. D.N.J. Aug. 2, 2024); *In re Thrasio Holdings, Inc.*, No. 24-11840 (CMG) (Bankr. D.N.J. June 13, 2024); *In re Careismatic Brands, LLC*, No. 24-10561 (VFP) (Bankr. D.N.J. May 30, 2024); *In re WeWork, Inc.*, No. 2319865 (JKS) (Bankr. D.N.J. May 30, 2024); *In re DirectBuy Home Improvement, Inc.*, No. 23-19159 (SLM) (Bankr. D.N.J. Apr. 19, 2024); *In re Cyxtera Techs., Inc.*, No. 23-14853 (JKS) (Bankr. D.N.J. Nov. 17, 2023); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. Sept. 14, 2023); and the Supreme Court’s recent decision in the *Purdue Pharma* case. *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024) (“Purdue Pharma”).

125. The Releases in the Plan are appropriately tailored and consensual. The Plan provides for a typical “opt out” mechanism for the consensual Third-Party Releases, including to Non-Voting Classes, which is fully disclosed in the Plan. All Holders of Claims and Interests, including Holders of Claims and Interests in the Non-Voting Classes, received broad, actual and constructive notice of the Releases as well as an opportunity to decide whether to opt out of the Releases.

126. Courts in the Third Circuit routinely approve such release provisions if, as here, they are consensual and appropriately tailored. *See, e.g., In re Cyxtera Techs., Inc.* No. 23-14853 (JKS) (Bankr. D.N.J. Nov. 17, 2023); *In re Indianapolis Downs*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party release that applied to unimpaired holders of claims deemed to accept the plan as consensual where parties received detailed instructions on how to opt out and had the opportunity to do so). The determination as to whether a third-party release is consensual depends on the particular circumstances of each case. *See In re Indianapolis Downs*, 486 B.R. at

305. For a third-party release to be consensual, affirmative consent is not required. Rather, a third-party release is consensual against non-debtor parties where the releasing parties have the opportunity to opt out of the release but fail to do so. *Id.* at 305–06.

127. Despite the U.S. Trustee and the Lawsuit Plaintiffs’ assertions to the contrary, Purdue does not change this analysis. The majority opinion in that case specifically stated that the decision was narrowly confined to the question presented. *Purdue Pharma*, at 207-8. The U.S. Trustee’s assertions to the contrary ignore the overwhelming support in the Third Circuit both pre- and post-Purdue that releases that use an opt-out mechanism are consensual. *See In re Sam Ash*, No. 24-14727 (SLM) (Bankr. D.N.J. Aug. 15, 2024) (confirming plan post-Purdue over objection of U.S. Trustee which included an opt-out mechanism for consensual third-party release); *In re Invitae Corporation*, No. 24-11362 (MBK) (Bankr. D.N.J. Aug. 2, 2024) (same); *In re Cyxtera Techs., Inc.*, No. 23 14853 (JKS) (Bankr D.N.J. Nov. 17, 2023) (confirming plan pre-Purdue over objection of U.S. Trustee which included an opt-out mechanism for consensual third-party release); *In re Bed Bath & Beyond, Inc.*, No. 23-13359-VFP (MBK), Docket No. 2172 (Bankr. D.N.J. Sept. 14, 2023) (confirming plan pre-Purdue finding that holders of claims or interests who fail to affirmatively opt out, whether rejecting the plan, deemed to reject, or abstain are deemed to consent to the releases).

128. In support of its position, the U.S. Trustee and the Lawsuit Plaintiffs rely on a non-binding decision that is inconsistent with Purdue and distinguishable. In *Smallhold*, Judge Goldblatt concluded that a consensual third-party release requires some level of affirmative step to indicate consent, i.e., returning a ballot. There, where non-voting creditors were only provided a form of notice of the confirmation hearing, were not solicited, and were not given the opportunity to “opt out,” the court found that such creditors did not affirmatively express consent to the

releases. *In re Smallhold, Inc.*, 665 B.R. 704, 723 (Bankr. D. Del. 2024). Here, the Debtor provided all Non-Voting Classes, both Impaired and Unimpaired, the opportunity to “Opt-Out” via service of an Opt-Out Form.

129. Importantly, in *Rite Aid Corp.*, though the U.S. Trustee’s Objection regarding the third-party release and opt out mechanism was ultimately mooted, the Bankruptcy Court still confirmed that:

“[t]he Court will not address at length the objections raised with respect to third-party releases, the debtors’ release, the gatekeeping function. The Court’s views on these issues, as noted by the U.S. Trustee, are well known and apparently well documented. I keep reading them. The Court sees no reason to deviate from its position as to the appropriateness of these tools and mechanisms, even taking into account the Supreme Court’s recent pronouncement in *Purdue*.” (referencing *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071 (2024)).

In re Rite Aid Corp., Hr’g Tr. at 93:7-14 (Bankr. D.N.J. Sept. 26, 2023).⁶⁶

130. Here, the Releases are identical to established precedent. All parties in interest had ample opportunity to evaluate and opt out of the Third-Party Release and the Third-Party Release applies **only** to those holders of Claims or Interests that did not elect to exercise an opt out. The Debtor provided the holders of Claims and Interests with clear and conspicuous notice of the Third-Party Release via the Ballots and the Opt Out Form. See Disclosure Statement Order, Exhibit B and Exhibit C. The opportunity to opt out was plain to all Releasing Parties under the Plan.

131. All stakeholders in the Voting Classes had notice and an opportunity to “opt out” of the Third-Party Release by checking the appropriate box on the ballots or objecting on or before the confirmation objection deadline. The Debtor clearly and explicitly included the full text of the Third-Party Release in the ballots of the Voting Classes, which ballots explicitly alerted such

⁶⁶ A copy of the cited pages to the Transcript can be provided upon request.

parties (i) of the deadlines to vote on and object to the Plan and (ii) that unless a party expressly opts out or objects, it shall be deemed a Releasing Party under the Plan. Notably, the acceptance/rejection selection and opt out box were located on the same page in close proximity so that there could be no confusion that separate responses were required.

132. Moreover, in connection with the ballots, the Debtor included conspicuous language in caps which provided: **OPTIONAL RELEASE ELECTION. YOU MAY ELECT TO OPT OUT OF THE RELEASE CONTAINED IN ARTICLE VII.D.2 OF THE PLAN ONLY IF YOU CHECK THE BOX BELOW:**

☐ **By checking this box, you elect to opt OUT of the Third-Party Release**

133. Similarly, all non-voting stakeholders were given the opportunity to opt out of the Third-Party Release and received notice and instructions for doing so in their applicable Notice of Non-Voting Status Notice. Such stakeholders could opt out by checking the appropriate box on the Non-Voting Status Notice or objecting on or before the applicable noticed deadline. Over eight (8) parties exercised their right to opt out of the Third-Party Release, so these notice measures clearly demonstrate due process was afforded. See Voting Declaration, ¶ 11.

134. The Objections' contention that the Third-Party Release is not consensual is contradicted by the plain language of the Plan, the service of the Court-approved Opt Out Forms to Holders of Claims and Interests alerting them to the Third-Party Release and the procedures for exercising their right to opt out; and the fact that eight (8) parties in interest have availed themselves of the opt out mechanism to opt out of the Third-Party Release. The clear and conspicuous text of the Confirmation Hearing Notice, the Non-Voting Status Notice, and the Ballots, which explicitly include the full text of the releases and indicate that failure to opt out will

bind such parties to the Third-Party Release, should provided all claimants, including abstaining parties, with ample notice and an opportunity to opt out of the Third-Party Release.⁶⁷ As set forth above, courts in this jurisdiction, including this Court, have overruled similar objections by the U.S. Trustee in several recent cases. *See, e.g., In re Sam Ash*, No. 24-14727 (SLM) (Bankr. D.N.J. Aug. 15, 2024); *In re Invitae Corporation*, No. 24-11362 (MBK) (Bankr. D.N.J. Aug. 2, 2024); *In re DirectBuy Home Improvement, Inc.*, No. 23-19159 (SLM) (Bankr. D.N.J. Apr. 19, 2024); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. Sept. 14, 2023).

135. The Released Parties, including the Committee and BOC and Colebrook, have provided more than adequate consideration to the Chapter 11 Case through the negotiation of the Global Settlement and the terms provided therein. Each of the parties that will benefit from the release, including insiders, are stakeholders and critical participants in the Debtor's Chapter 11 Case and the Plan process, and share a common goal with the Debtor in seeing the Plan succeed. Moreover, in exchange for the Third-Party Release (and Debtor Release), the non-debtor third-parties are providing an additional \$150,000.00 to the Sale Transaction purchase price as a Purchaser Contribution—additional consideration that would otherwise be unavailable as a recovery to the Debtor's estate.⁶⁸ See Plan Supplement, Exhibit A.

136. In particular, in addition to BOC and Colebrook's contribution and funding of the Plan Administrator Wind-Down and Expense Reserve, the BOC and Colebrook extended the maturity date of the DIP Facility and increased borrowings thereunder, thereby ensuring that the Debtor's estate remains administratively solvent and the Debtor can confirm the Plan.⁶⁹ Without

⁶⁷ Parks Decl., ¶ 39.

⁶⁸ Parks Decl., ¶ 40.

⁶⁹ Parks Decl., ¶ 41.

their efforts and contributions, the Debtor would have been unlikely to fund a successful conclusion of the Chapter 11 Case, to the detriment of all stakeholders.

137. In conclusion, the Third-Party Release is consensual, warranted under the circumstances, clearly permitted by the applicable law, and should be approved as contemplated.⁷⁰ For these reasons, and as this Court and the Third Circuit have held, the objections should be overruled and the Third-Party Release should be approved as consensual as to all creditors and interest holders who did not opt out or object to the Plan.

C. The Exculpation Provision

138. The Exculpation Provision in Art. VII.C of the Plan provides for the exculpation of the Debtor and Post-Effective Date Debtor, the Committee, and its current and former members, and various entities and persons affiliated with the foregoing (collectively, the “Exculpated Parties”). The U.S. Trustee objects to the Plan’s Exculpation provision, arguing that it contravenes precedent because it is not limited to estate fiduciaries by including the Post-Effective Date Debtor and the Committee. However, courts regularly approve similar provisions so long as they are limited to claims not involving a criminal act, actual fraud, willful misconduct, or gross negligence. *See Sam Ash*, No. 24-14727 (SLM) (Bankr. D.N.J. Aug. 15, 2024) (confirming plan that included post-effective date debtors and the creditors’ committee); *In re Wash. Mut., Inc.*, 442 B.R. at 350–51 (holding that an exculpation clause that encompassed “the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors’ directors and officers” was appropriate); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023) (confirming plan where exculpation provision covered the debtors and wind down debtors, the creditors’ committee, and related parties, including current and former

⁷⁰ Parks Decl., ¶ 42.

control persons and professionals); *In re Bed Bath & Beyond Inc.*, No. 23-13359-VFP (MBK) (Bankr. D.N.J. Sept. 14, 2023) (same).

139. Courts generally evaluate the appropriateness of exculpation provisions based on a number of factors, including whether the plan was proposed in good faith, whether liability is limited, and whether the exculpation provision was necessary for plan negotiations. *See In re Congoleum Corp.*, 362 B.R. 167, 195–97 (Bankr. D.N.J. 2007) (evaluating the appropriateness of the plan’s exculpation provisions based on whether the parties played a significant role in the negotiations that led to the plan and whether the exculpation is necessary to the plan).

140. Unlike third party releases, exculpation provisions do not affect the liability of third parties *per se* but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an “Exculpated Party” for acts arising out of the Debtor’s restructuring. *See In re PWS Holding Corp.*, 228 F.3d at 245 (finding that an exculpation provision “is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code”); *see also In re Nickels Midway Pier*, No. 03-49462, 2010 WL 2034542, at *14 (Bankr. D.N.J. May 21, 2010) (citing *PWS Holding Corp.*); *In re Premier Int’l Holdings*, 2010 WL 2745964, at *10 (approving a similar exculpation provision as that provided for under the Plan).

141. Here, same as the Release provisions, the Exculpation is limited in scope to Causes of Action or claims related to, in connection with, or arising out of the Chapter 11 Case, including the implementation of the Plan and distribution of Property under the Plan. The Exculpation also specifically “does not exculpate any Claim relating to any post-Effective Date obligations of any party or Entity under the Plan, any Sale Transaction, or any document, instrument, or agreement

(including the other documents, instruments and agreements set forth in the Plan Supplement) executed to implement the Plan.” See Plan, Art. VII.C.

142. Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtor, and they should be entitled to protection from exposure to any lawsuits related to this chapter 11 process filed by unsatisfied parties.⁷¹ Further, the inclusion of the Exculpation provision was a critical component of the negotiations over the terms of the Plan.⁷² Moreover, the Exculpation Provision and the liability standard it sets represent a conclusion of law that flows logically from certain findings of fact that the Bankruptcy Court must reach in confirming the Plan as it relates to the Debtor. As discussed above, this Court must find, under section 1129(a)(2) of the Bankruptcy Code, that the Debtor has complied with applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3) of the Bankruptcy Code, that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtor and, by extension, to the Debtor’s officers, directors, employees, and professionals. Further, these findings imply that the Plan was negotiated at arm’s length and in good faith. *See Sam Ash*, No. 24-14727 (SLM) (Bankr. D.N.J. Aug. 15, 2024) (approving nearly identical language regarding proposed exculpation and a finding of good faith for such parties).

143. Here, the Debtor, along with its officers, directors, and professionals actively negotiated the Plan with the Committee and its other stakeholders. Such negotiations were extensive, resulted in a Plan that maximizes value for all stakeholders, and enables the Debtor to conclude its case swiftly while giving finality to all stakeholders. Furthermore, the Exculpation Provision is limited to acts during this Chapter 11 Case and does not extend beyond such time

⁷¹ Parks Decl., ¶ 44.

⁷² *Id.*

period. Accordingly, under the circumstances it is appropriate for the Bankruptcy Court to approve the Exculpation Provision and to find that the Exculpated Parties have acted in good faith and in compliance with the law. *See In re PWS Holding Corp.*, 228 F.3d at 246–47 (approving plan exculpation provision exception for willful misconduct and gross negligence); *In re Indianapolis Downs*, 486 B.R. at 306 (same).

D. The Injunction Provision

144. The Injunction Provision is necessary to effectuate the Releases and Exculpation Provision contained in the Plan and to protect the Released Parties and Exculpated Parties from any potential litigation from prepetition creditors after the Effective Date.⁷³ Any such litigation would hinder the efforts of the Plan Administrator to fulfill its responsibilities effectively as contemplated under the Plan and, thereby, undermine the Debtor’s efforts to maximize value for all holders of Claims and Interests.⁷⁴ Thus, the Injunction Provision is a necessary part of the Plan precisely because it enforces the discharge, release, and exculpation provisions that are centrally important to the Plan. *See SEC v. Drexel Burnham Lambert Grp. (In re Drexel Burnham Lambert Grp.)*, 960 F.2d 285, 293 (2d Cir. 1992) (holding that a court may approve an injunction provision where such provision “plays an important part in the debtor’s reorganization plan”).

145. As such, to the extent the Court finds that the Releases and Exculpation Provisions are appropriate, the Debtor respectfully requests that the Injunction Provision be approved in conjunction therewith.⁷⁵

146. The Debtor submits that the discretionary provisions of the Plan are consistent with and permissible under section 1123(b) of the Bankruptcy Code.⁷⁶ In light of the foregoing, because

⁷³ Parks Decl., ¶ 45.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Parks Decl., ¶ 8.

the Plan fully complies with sections 1122 and 1123 of the Bankruptcy Code, the Debtor submits that the Plan fully complies with and satisfies the requirements of section 1129(a)(1) of the Bankruptcy Code.⁷⁷

III. THE U.S. TRUSTEE'S REMAINING OBJECTIONS

147. The U.S. Trustee Objection raises certain other objections to the Plan that the Debtor expects to resolve consensually through an amended Plan filed in advance of the Confirmation Hearing. To the extent these objections remain unresolved, the Debtor reserves its rights to supplement this briefing as necessary.

WAIVER OF STAY

148. The Debtor respectfully requests that the Court cause the Confirmation Order to become effective immediately upon its entry notwithstanding the 14-day stay imposed by operation of Bankruptcy Rule 3020(e), which states that “[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 3020(e); *see also* Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend. (stating that a “court may, *in its discretion*, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately”) (emphasis added). According to the Advisory Committee notes to the 1999 amendments to the Bankruptcy Rules, the purpose of Bankruptcy Rule 3020(e) is to permit a party in interest to request a stay of the confirmation order pending appeal before the plan is implemented and an appeal becomes moot. Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend.

149. The Debtor may take certain steps to effectuate the Plan in anticipation of and to facilitate the occurrence of the Effective Date so that the Effective Date can occur promptly.

⁷⁷ Parks Decl., ¶ 5.

Therefore, good cause exists to waive any stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry. To the extent a party wishes to seek an appeal, it may seek to stay the effectiveness of the Confirmation Order in connection with the appeal.⁷⁸

⁷⁸ If for some reason a party in interest appeals the Confirmation Order, such party is on notice that the Debtor is asking the Court for a waiver of the stay imposed by Bankruptcy Rule 3020(e). Therefore, such party is on notice that it must request a stay pending appeal immediately after the entry of the Confirmation Order. *See, e.g., Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 187 (3d Cir. 2001) (noting that all parties were on notice that plan called for “Immediate Effectiveness,” allowing appellants the opportunity to seek stay immediately upon confirmation of plan).

CONCLUSION

138. For the reasons set forth in this Memorandum of Law, the Debtor respectfully submits that: (a) the Disclosure Statement and the Plan fully satisfy all applicable requirements of the Bankruptcy Code; (b) the Disclosure Statement should be approved on a final basis and the Plan should be confirmed by the Court; (c) all objections and joinders be overruled, and (d) the 14-day stay of the Confirmation Order should be waived.

Dated: September 8, 2025

Respectfully submitted,

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