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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

	:	Chapter 11
In re:	:	
	:	
	:	Case No. 25-15047 (JNP)
Flagship Resort Development	:	
Corporation, ¹	:	
	:	
	:	The Honorable Jerrold N. Poslusny
Debtor.	:	
	:	Hearing Date: September 12, 2025 at 11:00 a.m.
	:	

**UNITED STATES TRUSTEE’S OBJECTION TO THE FIRST AMENDED PLAN OF
LIQUIDATION OF FLAGSHIP RESORT DEVELOPMENT CORPORATION
PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Andrew R. Vara, the United States Trustee for Regions Three and Nine (the “U.S. Trustee”), through his undersigned counsel, hereby objects to the *First Amended Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. 273] (the “Plan”),² and respectfully states as follows:

¹ The Debtor in this chapter 11 case, along with the last four digits of each Debtor’s federal tax identification number is Flagship Resort Development Corporation (1067). The mailing address for the Debtor for purposes of this chapter 11 case is 60 North Maine Avenue, Atlantic City, NJ 08401.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan (including exhibits), as applicable.

PRELIMINARY STATEMENT

1. The U.S. Trustee incorporates his Objection as if fully set forth herein as to the conditional approval of the *Disclosure Statement for the Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code*; and 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* (the "U.S. Trustee's Disclosure Statement Objection"). See Dkt. 225. The U.S. Trustee's Disclosure Statement Objection contained objections concerning the non-debtor third party releases in the Plan, the opt-out provisions of the Plan, the overbroad exculpation provision, and the waiver of the fourteen (14) day stay in Fed. R. Bankr. P. 3020(e). See *id.*

2. The U.S. Trustee further objects to the Plan as it contains: (i) overbroad Debtor releases in Article VII.B of the Plan; (ii) language that improperly suggests that the Plan itself is a settlement agreement pursuant to Articles IV.A and Article VII.A of the Plan; (iii) language in Articles VII.D.1 and VII.D.2 that the releases, Debtor and third-party, are approved pursuant to Fed. R. Bankr. P. 9019; and (iv) overbroad and improper injunction provisions in Articles VII.E.1, VII.E.2 of the Plan.

3. The U.S. Trustee also objects to several miscellaneous sections of the Plan including Articles II.C and D; and Articles III.C.4.ii, C.6.ii, and C.7.ii, that contain the phrases "satisfaction, settlement, release and discharge" or "satisfaction, settlement and release"; Article II.E concerning Quarterly Fees; Article III.G concerning votes and deemed acceptances; Article IV.I concerning indemnification of the Plan Administrator and his representatives; Article IV.P

concerning the release and discharge of the Committee and its members; and Article VIII.C concerning Substantial Consummation of the Plan.

4. Accordingly, and for the reasons set forth in more detail herein and in the U.S. Trustee's Disclosure Statement Objection, the U.S. Trustee respectfully requests that the Court enter an order denying confirmation.

JURISDICTION AND STANDING

5. This Court has jurisdiction to hear and determine the Procedures Motion, interim approval of the Disclosure Statement, and this Objection pursuant to: **(i)** 28 U.S.C. § 1334; **(ii)** applicable orders of the United States District Court of the District of New Jersey issued pursuant to 28 U.S.C. § 157(a); and **(iii)** 28 U.S.C. § 157(b)(2).

6. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district. This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog"). Under 28 U.S.C. § 586(a)(3)(B) the U.S. Trustee has the duty to monitor and comment on plans and disclosure statements filed in chapter 11 cases.

7. The U.S. Trustee has standing to be heard on the Procedures Motion, the Disclosure Statement, and this Objection pursuant to 11 U.S.C. § 307. *See U.S. Tr. v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under section 307, which goes beyond mere pecuniary interest).

BACKGROUND

A. The Chapter 11 Case

8. On May 10, 2025, Flagship Resort Development Corporation (the “Debtor”) commenced this Chapter 11 Case by filing a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code” or “Code”). *See* Dkt. 1.

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

10. On May 30, 2025, the U.S. Trustee appointed an official committee of unsecured creditors (the “Committee”). *See* Dkt. 86.

11. As of the date hereof, no trustee or examiner has been requested or appointed.

B. The Debtor and its Business

12. The Debtor was incorporated on December 30, 1996. *See* Dkt. 174 at Article II.A, page 17 of 66. It is a privately held hospitality and resort development company headquartered in New Jersey, with a particular focus on timeshare vacation ownership opportunities in the Atlantic City region. *See id.* FantaSea Resorts Group, Inc. (“FRG”), established in 1993, is a holding company and the Debtor’s non-Debtor parent. *See id.*

13. The Debtor developed a multi-tiered ownership platform encompassing deeded timeshare interests, club memberships, and exchange-based travel benefits at three properties including the Flagship Resort, the Atlantic Palace Suites, and La Sammana Resort. *See id.* at page 18. The Debtor’s portfolio is comprised of a total of 774 living units across the three properties. *See id.* The 774 living units translate into some 37,000+ timeshare interval units either sold to deeded owners or unsold, and spread among the three properties the Debtor owned and operated

as of the Petition Date. *See id.* The Debtor describes the properties as follows: (i) The Flagship Resort, which is located at 60 North Maine Avenue in Atlantic City, and is a 32-story tower housing over 440 units, and which features amenities such as an indoor swimming pool, fitness center, arcade, and Kelsey & Kim's Oceanview restaurant, where floor-to-ceiling windows provide a direct view of the Absecon Inlet and Brigantine Beach; (ii) The Atlantic Palace, which is located at 1507 Boardwalk in Atlantic City, and is a 31-story resort with approximately 292 suites, and which offers an outdoor pool, fitness center, and game room, and is conveniently located on the Atlantic City Boardwalk, near various entertainment venues; and (iii) La Sammana Resort, which is located at 1400 West Brigantine Avenue in Brigantine, New Jersey, and is a 5-story boutique-style resort comprising 62 units, and which features a rooftop pool, fitness center, and media room. *See id.*

C. The Plan.

14. On July 1, 2025, the Debtor filed a Disclosure Statement for the Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code and a Plan Of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code. *See* Dkts. 174 and 175.

15. On the same day, the Debtor filed the 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. *See* Dkt. 176.

16. On July 28, 2025, the U.S. Trustee filed the U.S. Trustee Disclosure Statement Objection. *See* Dkt. 225.

17. On August 8, 2025, the Debtor filed a First Amended Disclosure Statement for the Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code. *See* Dkt. 261.

18. Also, on August 8, 2025, the Court entered 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. *See* Dkt. 266. The Court scheduled a confirmation hearing for September 12, 2025.

19. On August 9, 2025, the Debtor filed a Second Amended Disclosure Statement for the Plan of Liquidation of Flagship Resort Development Corporation Pursuant to Chapter 11 of the Bankruptcy Code and the Plan. *See* Dkts. 272 and 273.

20. On August 15, 2025, the Court entered 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. *See* Dkt. 266. The Court scheduled a confirmation hearing for September 12, 2025.

21. On August 29, 2025, the Debtor filed the Plan Supplement. *See* Dkt. 300.

D. Specific Provisions of the Plan

22. The Plan includes the following provisions relevant to this Objection.³

³ The U.S. Trustee only includes those provisions concerning this Objection and again incorporates the U.S. Trustee Disclosure Statement Objection and the Plan provisions included therein.

i. Debtor Release Provision

23. Article VII.D.1 of the Plan broadly provides that each of the Released Parties⁴ are “deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged, by and on behalf of the Debtor, its Estate, and, if applicable, the Post-Effective Date Debtor ... from any and all claims and Causes of Action whatsoever (including any Avoidance Actions and any derivative claims asserted or assertable on behalf of the Debtor, its Estate, or the Post-Effective Date Debtor.”⁵ See Dkt. 273 at Article VII.D.1, page 41 of 52.

⁴ The Plan defines “Released Party” as follows:

(a) the Debtor; (b) the DIP Agent; (c) BOC, in its capacity as DIP Lender; (d) Colebrook, in its capacity as DIP Lender (e) BOC, in its capacity as Receivables Lender (f) Colebrook, in its capacity as Receivables Lender, (g) the Committee and each of its members; and (h) each Related Party of each Entity in clause (a) through this clause (g), but not including any Excluded Party.

See Dkt. 273 at Article VII.D.1, page 17 of 52.

⁵ The Plan provides for a release by the Debtor as follows:

“Pursuant to section 1123(b) of the Bankruptcy Code, in exchange for good and valuable consideration, the adequacy of which is hereby confirmed, on and after the Effective Date, each of the Released Parties will be deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged, by and on behalf of the Debtor, its Estate, and, if applicable, the Post-Effective Date Debtor, in each case on behalf of itself and its respective successors, assigns, and representatives and any and all other Persons that may purport to assert any Cause of Action directly or derivatively, by, through, for, or because of the foregoing Persons, from any and all claims and Causes of Action whatsoever (including any Avoidance Actions and any derivative claims asserted or assertable on behalf of the Debtor, its Estate, or the Post-Effective Date Debtor), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise, that the Debtor, its Estate, the Post-Effective Date Debtor, if applicable, or their Affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons, including Related Parties, claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim, Interest, or other Person, based on or relating to, or in any manner arising from, in whole or in part, the Debtor or the Estate, the Chapter 11 Case, the Global Resolution, the purchase, sale, or rescission of the purchase or sale of any Security of the Debtor, the subject matter of, or the transactions or events giving rise to, any Claim, or Interest that is treated under the Plan, the business or contractual arrangements or interactions between or among the Debtor and any Released Party, the Receivables Facilities, the distribution of any Cash or other property of the Debtor to any Released Party, the assertion or enforcement of rights or remedies against the Debtor, the restructuring of any Claim or Interest before or during the Chapter 11 Case, the Debtor’s in- or out-of-court restructuring efforts, the decision to File the Chapter 11 Case, any intercompany

24. The claims being released include claims and Causes of Action “whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise.” *See id.*

transactions, the negotiation and consummation of the any sale of the Debtor’s assets, the negotiation, formulation, or preparation of the Plan, Disclosure Statement, Plan Supplement, or related agreements, instruments or other documents (including, for the avoidance of doubt, providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Released Party on the Plan or the Confirmation Order in lieu of such legal opinion), the solicitation of votes with respect to the Plan, the DIP Facility, the DIP Loan Documents, upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date; provided, however, that the foregoing releases shall have no effect on the liability of any person or Entity that results from any act or omission based on or arising out of gross negligence, fraud or willful misconduct.

Notwithstanding anything to the contrary in the foregoing, the Debtor does not, pursuant to the releases set forth above, release (i) any Retained Causes of Action, including, but not limited to, Avoidance Actions and Commercial Tort Claims; (ii) any post-Effective Date obligations of any party of Entity under the Plan, the Confirmation Order, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan; or (iii) the Excluded Parties. The foregoing does not affect the Debtor’s Stipulations and Releases contained in Paragraph 2 of the Final DIP Order, which shall remain in full force and effect.

Entry of the Confirmation Order shall constitute the Bankruptcy Court’s approval, pursuant to Bankruptcy Rule 9019, of the Debtor Release, which includes by reference each of the related provisions and definitions contained in the Plan and, further, shall constitute the Bankruptcy Court’s finding that the Debtor Release is: (i) in exchange for the good and valuable consideration provided by the Released Parties, including the Released Parties’ contributions to implementing the Plan; (ii) a good faith settlement and compromise of the Claims released by the Debtor Release; (iii) in the best interests of the Debtor and all Holders of Claims and Interests; (iv) fair, equitable, and reasonable; (v) given and made after due notice and opportunity for hearing; and (vi) a bar to any of the Debtor, the Debtor’s Estate, or, if applicable, the Post-Effective Date Debtor, asserting any claim or Cause of Action released pursuant to the Debtor Release..”

See Dkt. 273 at Article VII.D.1, pages 41 and 42 of 52.

ii. Provisions Providing that the Plan is a Settlement

25. Articles IV.A.⁶ and VIII.A.⁷ provide that the Plan is a settlement of all Claims, Interests and controversies. *See* Dkt. 273 at Article IV.A., page 28 of 52 and Article VII.A, page 40 of 52.

iii. Injunction Provisions

26. Despite the Plan being a liquidating plan, Article VII.E of the Plan broadly provides a permanent injunction against “all Entities that have held, hold or may hold any Interest in the Debtor or a Claim, Cause of Action, or other debt or liability against the Debtor” and “all Entities

⁶ Article IV.A of the Plan states as follows:

“Pursuant to Bankruptcy Rule 9019 and in consideration for the distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good faith compromise of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that a Holder of a Claim or Interest may have with respect to any Allowed Claim or Interest, or any distribution to be made on account of such Allowed Claim or Interest. The entry of the Confirmation Order shall constitute the Bankruptcy Court’s approval of the compromise or settlement of all such Claims, Interests, and controversies, as well as a finding by the Bankruptcy Court that such compromise or settlement is in the best interests of the Debtor, its Estate, and holders of Claims and Interests and is fair, equitable, and reasonable. In accordance with the provisions of the Plan, pursuant to Bankruptcy Rule 9019, without any further notice to or action, order, or approval of the Bankruptcy Court, after the Effective Date, the Plan Administrator may compromise and settle Claims against the Debtor and its Estate and Causes of Action against other Entities.”

See Dkt. 273 at Article IV.A, page 28 of 52.

⁷ Article VII.A of the Plan states as follows:

“To the greatest extent permissible under the Bankruptcy Code or applicable non-bankruptcy law, and in consideration of the classification, distributions, releases, and other benefits provided under the Plan, upon the Effective Date, the provisions of the Plan shall constitute a good faith release, compromise, and settlement of all Claims and Interests and controversies resolved pursuant to the Plan. To the greatest extent permissible under the Bankruptcy Code or applicable nonbankruptcy law, the Plan shall be deemed a motion to approve the good faith compromise and settlement of all such Claims, Interests, and controversies, and entry of the Confirmation Order shall constitute the Bankruptcy Court’s approval of such compromise and settlement, as well as a finding by the Bankruptcy Court that such settlement and compromise is fair, equitable, reasonable, and in the best interests of the Debtor, its Estate, and Holders of Claims and Interests. Subject to Article V hereof, all distributions, if any, made to Holders of Allowed Claims and Allowed Interests (as applicable) in any Class are intended to be and shall be final.”

See Dkt. 273 at Article VIII.A, page 40 of 52.

that have held, hold or may hold any Interest in the Debtor or a Claim, Cause of Action, or other debt or liability against the Debtor or against any Released Party that have been released and/or exculpated under Article VII of the Plan.”⁸ See Dkt. 273 at Article VII.E, pages 44 and 45 of 52.

iv. Other Provisions

⁸ Article VII.E of the Plan states as follows:

1. Temporary Injunction for Debtor

Except as otherwise provided in the Plan or the Confirmation Order, as of the Effective Date, all Entities that have held, hold or may hold any Interest in the Debtor or a Claim, Cause of Action, or other debt or liability against the Debtor are permanently enjoined from taking any of the following actions against the Debtor, the Estate, the Plan administrator, the Assets, or the Released Parties or their respective financial advisors, attorneys, accounts, investment bankers, consultants, representatives, and other Professionals solely in their respective capacities as such or any property of the same, on account of such Released Claims and Interests: (i) commencing or continuing, in any manner or in any place, any action or other proceeding; (ii) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order; (iii) creating, perfecting, or enforcing any lien or encumbrance; (iv) asserting any right of setoff (other than setoffs exercised prior to the Petition Date), or subrogation of any kind against any debt, liability or obligation on account of or in connection with or with respect to any released Claims or Interests; and (v) commencing or continuing in any manner or in any place, any action that does not comply with or is inconsistent with this provision through and until the date upon which all remaining property of the Debtor’s Estate has been liquidated and distributed in accordance with the Plan and the Plan has been fully administered; *provided, however*, that the foregoing injunction shall have no effect on the liability of any person or Entity that results from any act or omission based on or arising out of gross negligence, fraud or willful misconduct.

2. Injunction as to Non-Debtor Released Parties

Except as otherwise provided in the Plan or the Confirmation Order, as of the Effective Date, all Entities that have held, hold or may hold any Interest in the Debtor or a Claim, Cause of Action, or other debt or liability against the Debtor or against any Released Party that have been released and/or exculpated under Article VII of the Plan (the “Released Claims and Interests”) are permanently enjoined from taking any of the following actions against the Plan Administrator, the Assets of the Post-Effective Date Debtor, or the Released Parties (other than the Debtor), or their respective financial advisors, attorneys, accounts, investment bankers, consultants, representatives, and other Professionals solely in their respective capacities as such or any property of the same, on account of such Released Claims and Interests: (i) commencing or continuing, in any manner or in any place, any action or other proceeding; (ii) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order; (iii) creating, perfecting, or enforcing any lien or encumbrance; (iv) asserting any right of setoff (other than setoffs exercised prior to the Petition Date), or subrogation of any kind against any debt, liability or obligation on account of or in connection with or with respect to any Released Claims or Interests; and (v) commencing or continuing in any manner or in any place, any action that does not comply with or is inconsistent with this provision; *provided, however*, that the foregoing injunction shall have no effect on the liability of any person or Entity that results from any act or omission based on or arising out of gross negligence, fraud or willful misconduct.

See Dkt. 273 at Article VII.E, pages 44 and 45 of 52

27. Articles II.C⁹ and D¹⁰, and Articles III.C.4.ii¹¹, C.6.ii¹², and C.7.ii¹³ of the Plan, provide that in exchange for the treatment in the Plan, holders of claims will receive full and final

⁹ Article II.C of the Plan states as follows:

“To the extent any DIP Claims or Receivables Superpriority Claims are outstanding on the Effective Date, the DIP Claims and Receivables Superpriority Claims shall be Allowed in the full amount due and owing under the DIP Documents, the Final DIP Order, and the Final Receivables Order. Except to the extent that a holder of a DIP Claim or a Receivables Superpriority Claim agrees in writing to a different treatment, each holder of a DIP Claim and a Receivables Superpriority Claim shall receive, in full satisfaction, settlement, release and discharge of, and in exchange for such DIP Claim or Receivables Superpriority Claim, Cash in an amount equal to such DIP Claim or Receivables Superpriority Claim on the Effective Date. Upon the indefeasible payment in full in cash of all DIP Claims, all Liens and security interests granted to the DIP Agent and/or DIP Lenders, in such capacities, pursuant to the Final DIP Order and/or the DIP Loan Agreement shall be deemed cancelled and shall be of no further force and effect as against the Debtor and the Estate and each Allowed DIP Claim shall be deemed to be fully satisfied, settled, released, and compromised. Upon the indefeasible payment in full in cash of all Receivables Superpriority Claims, each Allowed Receivables Superpriority Claim shall be deemed fully satisfied, settled, released and compromised.”

See Dkt. 273 at Article II.C., page 22 of 52.

¹⁰ Article II.D of the Plan states as follows:

“Except to the extent that a holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in exchange for full and final satisfaction, settlement, and release of each allowed Priority Tax Claim, each holder of an Allowed Priority Tax Claim shall receive, at the option of the Debtor, 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 nonbankruptcy law and to the extent provided for by section 511 of the Bankruptcy Code; or (ii) such other treatment (which treatment shall be no more favorable than the treatment set forth in subsection (i) of this section) as may be agreed upon by such holder and the Debtor or otherwise determined upon an order of the Bankruptcy Court. Allowed Priority Tax Claims shall be paid on or as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Priority Tax Claim against the Debtor becomes an Allowed Priority Tax Claim, or (iii) such other date as may be ordered by the Bankruptcy Court.”

See Dkt. 273 at Article II.D., page 22 of 52.

¹¹ Article III.C.4.ii of the Plan states as follows:

“*Treatment:* Except to the extent that a Holder of an Allowed Other Secured Claim agrees to less favorable treatment, in exchange for full and final satisfaction, settlement and release of each Allowed Other Secured Claim, then (a) each holder of an Allowed Other Secured Claim will either (i) be paid in full in Cash on the Distribution Date; (ii) receive all Collateral in possession of the Debtor securing the respective holder’s Allowed Other Secured Claim plus to the extent applicable and Allowed, any post-petition interest required pursuant to section 506(b) of the Bankruptcy Code; or (iii) receive any other treatment rendering such Claim Unimpaired for purposes of the Bankruptcy Code, or (b) such Allowed Other Secured Claim will be reinstated.”

See Dkt. 273 at Article III.C.4.ii, page 25 of 52.

“satisfaction, settlement, release and discharge” or “satisfaction, settlement and release” of their claims.

28. Article II.E of the Plan contains language concerning the payment of Quarterly Fees.¹⁴

29. Article III.G of the Plan provides that a class will be deemed to accept the Plan if no votes are cast and the class contains claims or interests eligible to vote.¹⁵

¹² Article III.C.6.ii of the Plan states as follows:

“Treatment: Except to the extent that a Holder of an Allowed Continuing Trade Vendor Claim agrees to less favorable treatment, in exchange for full and final satisfaction, settlement, and release of each Allowed Continuing Trade Vendor Claim, each Holder of such Allowed Continuing Trade Vendor Claim shall receive its Pro Rata Share of: (a) the Net Distributable Proceeds remaining after the funding of the Plan Administrator Wind-Down and Expense Reserve, if any, plus (b) 50% of any available proceeds of the Palmer Litigation Bond, and any Retained Causes of Actions, including, but not limited to, Avoidance Actions and Commercial Tort Claims.”

See Dkt. 273 at Article III.C.6.ii, page 26 of 52.

¹³ Article III.C.7.ii. of the Plan states as follows:

“Treatment: Except to the extent that a holder of an Allowed Other General Unsecured Claim agrees to less favorable treatment, in exchange for full and final satisfaction, settlement, and release of each Allowed Other General Unsecured Claim, each holder of such Allowed Other General Unsecured Claim shall receive its Pro Rata Share of 50% of any available proceeds of the Palmer Litigation Bond, and any Retained Causes of Actions, including, but not limited to, Avoidance Actions and Commercial Tort Claims.”

See Dkt. 273 at Article III.C.7.ii, page 26 of 52.

¹⁴ Article II.E of the Plan states as follows:

All Quarterly Fees due prior to the Effective Date shall be paid by the Debtor on the Effective Date. On and after the Effective Date, the Post-Effective Date Debtor or Plan Administrator, as applicable, shall be responsible for filing post-Confirmation quarterly reports and any pre-Confirmation monthly reports not filed as of the Confirmation Hearing in conformity with the U.S. Trustee guidelines. Each of the Debtor, Post-Effective Date Debtor, and the Plan Administrator shall be jointly and severally liable for the payment of all applicable Quarterly Fees in the Debtor’s Chapter 11 Case until (i) the entry of a final decree in the Chapter 11 Case or (ii) the Chapter 11 Case are closed, converted, or dismissed.

See Dkt. 273 at Article II.E, pages 22 and 23 of 52.

¹⁵ Article. III.G. of the Plan states as follows:

Any Class of Claims or Interests that does not have a Holder of an Allowed Claim or Allowed Interest or a Claim or Interest temporarily Allowed by the Bankruptcy Court in an amount greater than zero as of the date of the Confirmation Hearing shall be considered vacant and deemed

30. Article IV.I of the Plan includes indemnification of the Plan Administrator and his representatives.¹⁶

31. Article IV.P(a) of the Plan provides a release and discharge to the Committee and its members.¹⁷

32. Article VIII.C of the Plan provides that Substantial Consummation will be deemed to occur on the Effective Date.¹⁸

eliminated from the Plan for purposes of voting to accept or reject the Plan and for purposes of determining acceptance or rejection of the Plan by such Class pursuant to section 1129(a)(8) of the Bankruptcy Code. If a Class contains Claims or Interests eligible to vote and no holders of Claims or Interests eligible to vote in such Class vote to accept or reject the Plan, the holders of such Claims or Interests in such Class shall be deemed to have accepted the Plan.

See Dkt. 273 at Article III.G, page 28 of 52.

¹⁶ Article IV.I of the Plan states as follows:

The Debtor and its Estate, to the extent still in existence, shall indemnify and hold harmless the Plan Administrator, and his or her employees, professionals, agents, and representatives, in each case in their capacity as such, from and against any and all liabilities, losses, damages, claims, costs, and expenses, including, but not limited to, attorneys' fees and expenses, arising out of or due to their acts or omissions related to the performance of his or her duties under this Plan; provided, however, that no such indemnification shall be made to such entities for such acts or omissions constituting actual fraud, gross negligence, or willful misconduct.

See Dkt. 273 at Article IV.I, page 32 of 52.

¹⁷ Article IV.P of the Plan states as follows:

On the Effective Date, (a) the Creditors' Committee shall dissolve automatically and its members shall be released and discharged from all rights, duties, responsibilities, obligations and liabilities arising from or related to the Chapter 11 Case or the Plan and under the Bankruptcy Code and applicable law; and (b) the retention or employment of the Creditors' Committee's respective professionals and agents shall be terminated, other than with respect to the filing and prosecution of applicable fee applications.

See Dkt. 273 at Article IV.P page 34 of 52.

¹⁸ Article VIII.C of the Plan states as follows:

"Substantial Consummation" of the Plan, as defined in 11 U.S.C. § 1101(2), shall be deemed to occur on the Effective Date.

See Dkt. 273 at Article VIII.C page 46 of 52.

OBJECTION

I. The Debtor Releases in the Plan Are Overbroad

33. The Plan provides for a release by the Debtor to the Released Parties. *See* Dkt. 273 at Article VII.D.1.

34. The Plan does not establish that each of the proposed Released Parties are providing adequate consideration in exchange for receiving such releases. In addition, certain persons included in the Released Party definition do not appear to be entitled to such releases under applicable case law. Many individuals and entities are also included in the definition of Released Parties that are unknown parties. Further, estate fiduciaries are not only receiving an exculpation under the Plan but are also receiving a release from the Debtor.

35. In *In re Zenith Elecs. Corp.*, the Court identified five factors that are relevant to determine whether a debtor's release of a non-debtor is appropriate:

- (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
- (2) a substantial contribution to the plan by the non-debtor;
- (3) the necessity of the release to the reorganization;
- (3) the overwhelming acceptance of the plan and release by creditors and interest holders; and
- (4) the payment of all or substantially all of the claims of the creditors and interest holders under the plan.

See Zenith, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (*citing Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)). These factors are neither exclusive nor conjunctive requirements but provide guidance in the court's determination of fairness. *See Master Mortgage*, 168 B.R. at 935 (finding there is no "rigid test" to be applied in every circumstance and that the five factors are neither exclusive, nor conjunctive).

36. The first *Zenith* factor requires an “identity of interest between the debtor and the third-party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate.” See *In re Spansion, Inc.*, 426 B.R. 114, n. 47 (Bankr. D. Del. 2010), citing *Zenith*, 241 B.R. at 110. An identity of interest exists when, among other things, the debtor has a duty to indemnify the non-debtor receiving the release. See *Wash. Mut.*, 442 B.R. at 347 (recognizing that indemnification may create an identity of interest thereby satisfying the first factor of *Zenith*). Here, it is unclear whether an identity of interest exists between the Debtor and each of the Released Parties.

37. The second *Zenith* factor involves whether the non-debtor party benefiting from the release made a substantial contribution of assets to the debtor’s reorganization. See *In re Congoleum Corp.*, 362 B.R. 167, 193 (Bankr. D.N.J. 2007). In considering releases, substantial contribution does not include contributions to the reorganization related to operational restructuring or negotiating for the financial restructuring. See *In re Genesis Health*, 266 B.R. at 606-7 (“the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of ‘assets’ to the reorganization.”). There is scant evidence that each of the Released Parties provided a substantial contribution of assets.

38. As to the third *Zenith* factor, no information is provided to support the contention that all of the releases are necessary to a reorganization.

39. The fourth *Zenith* factor concerning acceptance of the plan is premature and cannot be assessed at this time as the Debtor has not filed a certification of ballots.

40. The fifth *Zenith* factor is not satisfied as it does not appear that unsecured creditors will receive all or substantially all of their claims. Accordingly, these factors do not support the Debtor Releases.

41. Additionally, estate fiduciaries should be receiving an exculpation for their actions or inactions between the Petition Date and the Effective Date. *See* Dkt. 273 at Article VII.C, page 40 of 53 and Dkt. 225. The estate fiduciaries do not satisfy the *Zenith* factors and should only be granted an exculpation for their actions or inactions between the Petition Date and the Effective Date, not a release from the Debtor.

II. The Plan is Not Confirmable Because the Plan is Not a Settlement

42. The Plan cannot be confirmed because it purports to be a “settlement” with parties that have no formal agreements with the Debtor. *See* Dkt. 273 at Article IV.A and Article VII.A, pages 28, 35 and 36 of 52.

43. Under 11 U.S.C. § 1123(b)(3)(A), a plan may provide for “the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.” But section 1123(b)(3)(A) only allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims that its creditors and equity security holders may have against it, which is what Article IV.B. and Article VIII.A of the Plan seek to do. *See Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 496 (B.A.P. 9th Cir. 2003) (“The only reference in [section 1123(b)] to adjustments of claims is the authorization for a plan to provide for ‘the settlement or adjustment of any claim or interest *belonging* to the debtor or to the estate.’ . . . It is significant that there is no parallel authorization regarding claims *against* the estate.”) (emphasis in original) (quoting section 1123(b)(3)(A)) (internal citation omitted).

44. The resolution of claims against the Debtor is governed by Sections 1129 and 1141 of the Bankruptcy Code.

45. While a plan may incorporate one or more negotiated settlements, a plan is not itself a settlement. Sending a plan to impaired creditors for a vote is not equivalent to parties negotiating a settlement among themselves. A “settlement” is “an agreement ending a dispute or lawsuit.” BLACK’S LAW DICTIONARY (12th ed. 2024). An “agreement” is “a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons.” *See id.*

46. Approval of settlements is governed by Federal Rule of Bankruptcy Procedure 9019, which provides that, “[o]n motion by the trustee [or chapter 11 debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement.” But, because a “settlement” requires an agreement between the settling parties, Rule 9019 governs only parties that have entered into an express settlement agreement; it is not a blanket provision allowing general “settlements” to be unilaterally imposed upon broad swaths of claimants that have no formal agreement with any party to “settle” their claims.

47. The decision whether to approve a settlement under Rule 9019 is left to the sound discretion of the bankruptcy court, which “must determine whether ‘the compromise is fair, reasonable, and in the best interest of the estate.’” *See Washington Mut.*, 442 B.R. at 338 (quoting *In re Louise’s, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)).¹⁹ In contrast, chapter 11 plans are subject to the requirements of Bankruptcy Code sections 1123 and 1129. *See In re Armstrong World Indus., Inc.*, 432 F.3d 507, 511 (3d Cir. 2005) (“Confirmation of a proposed Chapter 11 reorganization plan is governed by 11 U.S.C. § 1129.”). What may be permissible under a

¹⁹ The standard for approval of a settlement under Rule 9019 is guided by the following criteria: “(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.” *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (citations omitted).

negotiated settlement agreement that is considered “fair, reasonable, and in the best interest of the estate” outside of the plan context is different from what may be permissible under a plan.

48. Here, Articles IV.A. and VIII.A. purport to treat the Plan itself as if it were a “settlement.” These provisions should either be removed or revised to reflect that only certain provisions in the Plan constitute settlements. The U.S. Trustee proposes the following revisions:

i. Article IV.A – “To the extent provided for by the Bankruptcy Code, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, on the Effective Date, certain of the provisions of the Plan shall constitute a good-faith compromise and settlement of certain Claims, Interests, Causes of Action, and controversies released, settled, compromised, or otherwise resolved pursuant to the Plan”; and

ii. Article VII.A – “To the extent provided for by the Bankruptcy Code, and in consideration for the distributions and other benefits provided pursuant to the Plan, and except as otherwise specifically provided in the Plan or in any contract, instrument, or other agreement or document created pursuant to the Plan, the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, effective as of the Effective Date, of Claims, Interests, and Causes of Action of any nature whatsoever, including any interest accrued on Claims or Interests from and after the Petition Date, whether known or unknown, against, liabilities of, Liens on, obligations of, rights against, and Interests in, the Debtor or any of its assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims and Interests, including demands, liabilities, and Causes of Action that arose before the Effective Date.”

49. In addition to the above, the Debtor seeks entry of the confirmation order to constitute the Court’s approval of the releases, debtor and third-party, pursuant to Bankruptcy Rule

9019. For the reasons set forth above, this language in Articles VII.D.1 and 2 of the Plan should be removed.

III. The Injunction Provisions in the Plan are Overbroad and Impermissible

50. The Plan includes overbroad and impermissible injunction language for a liquidating plan. Pursuant to Section 524(a)(3) of the Bankruptcy Code, confirmation of a plan does not operate as an injunction. Only a discharge operates as an injunction, and as this Plan is a liquidating plan, the Debtor is not entitled to a discharge. Instead, pursuant to Section 362(c) of the Bankruptcy Code, the automatic stay remains in effect until the earlier of the time the case is closed or the case is dismissed. Additionally, pursuant to Section 1141(a), the provisions of a confirmed plan bind all parties, including debtors and creditors, to the terms of a plan.

51. Because the Bankruptcy Code protects the Debtor by continuing the automatic stay until the earlier of entry of a discharge or the case is closed (11 U.S.C. § 362(c)), and by binding all parties to the terms of the Plan (11 U.S.C. § 1141(a)), the U.S. Trustee submits that Article VII.E be removed or revised.

52. The U.S. Trustee proposes the following language concerning Articles VII.E.1 and 2: “Pursuant to section 362(c)(1) of the Bankruptcy Code, the automatic stay of an act against property of the Debtor’s estates will continue until such property is no longer property of the Debtor’s estates, and pursuant to section 362(c)(2) of the Bankruptcy Code, the stay of any other act described in section 362(a) of the Bankruptcy Code continues until the earlier of the closure or dismissal of these Chapter 11 Cases. In addition, as of the Effective Date and subject to the occurrence of the Effective Date, except as otherwise specifically provided in this Plan or the Confirmation Order, all Persons and Entities who have held, hold, or may hold Claims or Interests that are fully satisfied pursuant to the Plan or any Claim or Interest that is subject to the releases

and exculpations set forth in the Plan shall be precluded and permanently enjoined on and after the Effective Date from enforcing, pursuing, or seeking any setoff or relief with respect to such Claims or Interests, except for the receipt of the payments or distributions that are contemplated by the Plan. For the avoidance of doubt, the foregoing relief may include (but is not limited to): (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such released, compromised, settled, or exculpated Claim or Interest; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such released, compromised, settled, or exculpated Claims or Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the Estates of such Entities on account of or in connection with or with respect to any such released, compromised, settled, or exculpated Claims or Interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such released, compromised, settled, or exculpated Claims or Interests; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such released, compromised, settled, or exculpated Claims or Interests. For the avoidance of doubt, this Article VII.E shall not constitute a discharge under section 1141(d) of the Bankruptcy Code.”

IV. The Overbroad Language in the Plan Concerning Compromise, Settlement, Release and Discharge Must be Removed

53. Pursuant to the Plan, holders of claims including DIP Claims and Receivables Superpriority Claims (Article II.C.), Priority Tax Claims (Article II.D.), and Other Secured Claims, Continuing Trade Vendor Claims and Other General Unsecured Claims (Article III.C.4.ii, Article

III.C.6.ii, and Article III.C.7.ii), are exchanging their claims in full and final satisfaction, compromise, settlement, release, and discharge of such claims. *See* Article II.C and D, and Article III.C.4.ii, C.6.ii and C.7.ii, pages 22, 25 and 26 of 52.

54. These provisions should be revised to remove “compromise, settlement, release and discharge.” The holders of claims have not agreed to a compromise or to settle their claims. In addition, not all creditors have agreed to release their claims. Further, the Debtors are not entitled to a discharge in this case. Instead, the language in these provisions should simply state that holders of claims are exchanging their claims in full and final satisfaction of such claims.

V. The Quarterly Fee Provision Must be Revised in the Plan

55. Article II.E of the Plan provides for the payment of Quarterly Fees. *See* Dkt. 273 at Article II.E, pages 22 and 23 of 52. The U.S. Trustee requests the language contained in Article II.E to be revised as follows: “All Quarterly Fees payable on or before the Effective Date shall be paid by the Debtor in full in cash on the Effective Date. After the Effective Date, the Debtor, Post-Effective Date Debtor and the Plan Administrator shall pay any and all Quarterly Fees in full in cash when due in this Chapter 11 Case for each quarter (including any fraction thereof) until the earliest of such Chapter 11 Case being closed, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code. The Debtor shall file all monthly operating reports due prior to the Effective Date when they become due, using UST Form 11-MOR. After the Effective Date, the Debtor, the Post-Effective Date Debtor, and the Plan Administrator shall cause to be filed with the Bankruptcy Court post-confirmation quarterly reports for this Chapter 11 Case for each quarter (including any fraction thereof) that this Chapter 11 Case is pending, using UST Form 11-PCR. The Debtor, the Post-Effective Date Debtor and the Plan Administrator shall be jointly and severally liable to pay any and all Quarterly Fees when due and payable. Notwithstanding

anything to the contrary in the Plan, (i) Quarterly Fees are Allowed; (ii) the U.S. Trustee shall not be required to file any proof of claim or any other request(s) for payment with respect to Quarterly Fees; and (iii) the U.S. Trustee shall not be treated as providing any release under the Plan. The provisions of this paragraph shall control notwithstanding any other provision(s) in the Plan to the contrary.”

VI. The Deemed Acceptance Language Must be Removed From the Plan

56. Article III.G of the Plan provides that a class will be deemed to accept the Plan if no votes are cast and the class contains claims or interests eligible to vote. *See* Dkt. 273 at Article III.G, page 28 of 52.

57. The Debtors do not provide any basis under the Bankruptcy Code, Bankruptcy Rules or case law that supports this provision. As such, the provision should be removed from the Plan.

VII. Language Concerning Indemnification of the Plan Administrator Must be Removed From the Plan

58. Article IV.I of the Plan includes indemnification of the Plan Administrator and his representatives. *See* Dkt. 273 at Article IV.I, page 32 of 52.

59. There is no reason to include indemnification in the Plan of an entity that does not exist until after the Effective Date. Instead, indemnification of such entity should be included in a Plan Administration Agreement. In fact, it appears that the Plan Supplement contains a Plan Administration Agreement, which provides exculpation and indemnification to the Plan Administrator and his representatives. *See* Dkt. 300 at page 11 of 25. As such, Article IV.I should be removed from the Plan.

VIII. The Separate Release and Discharge to the Committee and Its Members Must be Removed from the Plan

60. Article IV.P(a) of the Plan provides a separate release and discharge to the Committee and its members: “the Creditors’ Committee shall dissolve automatically and its members shall be released and discharged from all rights, duties, responsibilities, obligations and liabilities arising from or related to the Chapter 11 Case or the Plan and under the Bankruptcy Code and applicable law.” *See* Dkt. 273 at Article IV.P(a), page 34 of 52.

61. The Committee and its members act as fiduciaries for the estate. As fiduciaries, the Committee and its members are entitled to an exculpation for actions or inactions occurring from the Petition Date to the Effective Date of a plan.

62. In this Plan, the Committee and its members are receiving an exculpation and a release by third parties, which has been objected to by the U.S. Trustee in the U.S. Trustee Disclosure Statement Objection, and are receiving a release from the Debtor, which has been objected to *infra*.

63. As the Committee and its members should only be entitled to an exculpation for their actions or inactions from the Petition Date to the Effective Date of a Plan, Article IV.P(a) should be removed from the Plan.

IX. Substantial Consummation Must be Revised in the Plan

64. Article VIII.C of the Plan provides that Substantial Consummation will be deemed to occur on the Effective Date. *See* Dkt. 273 at Article VIII.C, page 46 of 52.

65. However, “Substantial Consummation” under the Bankruptcy Code “means: (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C)

commencement of distribution under the plan.” *See* 11 U.S.C. § 1101(2). Unless distributions commence on the Effective Date, the Plan cannot be deemed to be substantially consummated on the Effective Date.

66. As “Substantial Consummation” can only occur if each of the three parts of the statute have been met, the U.S. Trustee requests that the provision in the Plan concerning “Substantial Consummation” be replaced with the statutory definition.

RESERVATION OF RIGHTS

67. The U.S. Trustee reserves all of his rights and objections regarding any and all future amendments to the Plan. The U.S. Trustee reserves the right to comment on and object to the proposed form of confirmation order. The U.S. Trustee leaves the Debtor to its burden of proof and reserves any and all rights, remedies and obligations to, among other things, complement, supplement, augment, alter or modify this Objection and reservation of rights, assert any objection, file any appropriate motion, or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court sustain the objection and either deny confirmation or require revisions to be made to the Plan and grant such other relief it deems just and proper.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 & 9

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