UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
(EASTERN DIVISION)

In re:	
VANTAGE TRAVEL SERVICE, INC.	Chapter 11
Debtor.	Case No. 23-11060-JEB

DEBTOR'S MEMORANDUM OF LAW
IN SUPPORT OF CONFIRMATION OF LIQUIDATING PLAN

Vantage Travel Service, Inc. (the "Debtor") submits this memorandum of law in support of its request for confirmation of the *Debtor's Liquidating Plan Dated October 3, 2023* [Dkt. No. 434] (the "Plan"). As described in detail below, the Plan—which has been overwhelmingly accepted by the Debtor's creditors, including both trade creditors and customers—satisfies the requirements for confirmation set forth in Section 1129 of the Bankruptcy Code and accordingly should be confirmed. This Memorandum also provides support for the three legal determinations to be made by the Court through entry of an order confirming the Plan, as set forth in Sections 5.11 through 5.13 of the Plan, and serves as the response to the plan confirmation objections filed by the Attorneys General of Massachusetts, New York, and Pennsylvania, and by the United States Trustee ("UST"). The Debtor is filing a separate response to the plan confirmation objection filed by the Creditors' Committee. This Memorandum is supported by the *Plan Summary and Disclosure Statement Regarding Debtor's Liquidating Plan Dated October 3, 2023* [Dkt. No. 441] (the "Disclosure Statement"), by the *Addendum to Plan Summary and Disclosure Statement* [Dkt. No. 442] (the "Addendum"), by the *Plan Supplement to Debtor's Liquidating Plan Dated October 3, 2023* [Dkt. No. 516] (the "Plan Supplement") containing the

Creditor Trust Instrument (as defined in the Plan) and the Plan Budget (as defined in the Plan), by the updated Plan Budget attached to the *Notice of Filing of Updated Plan Budget* filed concurrently herewith, by the *Certificate of Vote on Debtor's Liquidating Plan* (the "Certificate of Vote") filed concurrently herewith, by the *Declaration of Gregory DelGreco In Support of Plan Confirmation* filed concurrently herewith (the "DelGreco Declaration"), and by the *Declaration of Lawton W. Bloom In Support of Plan Confirmation* filed concurrently herewith (the "Bloom Declaration"), each of which is incorporated herein by reference. Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

I. OVERVIEW

A. Brief Description of the Plan

The Plan is a liquidating plan, and does not contemplate the financial rehabilitation of the Debtor or the continuation of its business. Substantially all of the Debtor's assets (other than the Estate Causes of Action) have been sold since the commencement of the Debtor's Chapter 11 case, and much of the net sale proceeds have been disbursed, with the consent of the Debtor's senior secured creditor holding a security interest in such sale proceeds, Henry R. Lewis and the Henry R. Lewis Trust u/d/t dated November 24, 2004 (together, the "Prepetition Lender"). Since the closing, the Debtor has been funding its activities pursuant to a series of Court orders authorizing the Debtor's use of the Prepetition Lender's cash collateral in accordance with a Court-approved budget. The Plan provides for the completion of the Debtor's liquidation, wind-down, and case administration through the payment of administrative and priority claims pursuant to the Plan Budget to be funded by the Prepetition Lender, and for the creation of a Creditor Trust to administer the Estate Causes of Action for the potential benefit of general

unsecured creditors. The Prepetition Lender has agreed to fund the Creditor Trust with $250,000 of its collateral sale proceeds.

The Plan appoints Stephen Gray, a highly experienced and well-respected turnaround professional, as the Creditor Trustee to administer the Creditor Trust. The Plan also provides for Argus Management Corporation ("Argus"), acting though its Managing Director Lawton W. Bloom (who has served as the Debtor's financial advisor during the Chapter 11 case), to serve as the Plan Administrator. In that role, Argus's function will be to administer the payment of allowed administrative and priority claims pursuant to the Plan, address through the Plan's claims resolution procedures any such claims that are disputed, and complete the wind-down of the Debtor's business and financial affairs and the administration of its Chapter 11 case. Should Argus's Plan implementation activities not be completed by March 31, 2024 (or thereabouts), or if the Creditor Trustee otherwise desires to keep the Debtor's Chapter 11 case open for purposes of administering the Creditor Trust, then it is expected that the Creditor Trustee will then take over as Plan Administrator from Argus.

The Plan provides for the classification and treatment of claims against the Debtor's estate that are required to be classified, including: (i) the secured claim of the Prepetition Lender, classified in Class One; the secured claims of United States Surety Company ("USSC"), American Contractors Indemnity Company ("ACIC"), and their respective past, present or future parents, subsidiaries or affiliates (collectively, the "Surety"), classified in Class Two; (iii) the secured claim of Brookline Bank, classified in Class Three; (iv) the secured claim of JPMorgan Chase Bank, N.A., successor-in-interest by purchase and assumption of the deposit accounts from the Federal Deposit Insurance Corporation as Receiver for First Republic Bank, San Francisco, CA ("JPM"), classified in Class Four; (v) Priority Non-Tax Claims (if any), classified

in Class Five; (vi) allowed General Unsecured Claims (including without limitation Customer Claims), classified in Class Six; and (vii) equity interests, classified in Class Seven.

B. Voting on the Plan

Under the Plan, Class Two, Class Three, and Class Five are unimpaired and deemed to accept the Plan, while Class One, Class Four, and Class Six are impaired, and creditors holding Claims in such classes were entitled to vote on the Plan. The Plan provides that holders of Interests in Class Seven will neither receive nor retain any property on account of such Interests, and accordingly Class Seven is deemed to reject the Plan.

Of the three classes that were entitled to vote on the Plan, creditors in each such Class voted, and each such Class voted to accept the Plan, as evidenced by the Certificate of Vote.

Four objections to confirmation of the Plan have been filed, including: (i) *The Commonwealth of Massachusetts's and The State of New York's Joint Objection to the Confirmation of Debtor's Liquidating Plan of October 3, 2023* [Dkt. No. 523] (the "MA/NY Objection"); (ii) *The Commonwealth of Pennsylvania, Office of Attorney General's Objection to the Debtor's Liquidating Plan Dated October 3, 2023* [Dkt. No. 529] (the "PA Objection"); (iii) *Objection of the Official Committee of Unsecured Creditors to (A) the Plan Summary and Disclosure Statement Regarding Debtor's Liquidating Plan Dated October 3, 2023, and (B) the Debtor's Liquidating Plan Dated October 3, 2023* [Dkt No. 530] (the "Committee Objection"); and (iv) *United States Trustee's Objection to Liquidating Plan* [Dkt. No. 532] (the "UST Objection" and, collectively, the "Objections"). As noted, this Memorandum serves as the Debtor's response to the Objections other than the Committee Objection, which is the subject of the Debtor's separate response filed concurrently herewith (the "Response").

II. THE PLAN MEETS THE CRITERIA FOR CONFIRMATION

To obtain confirmation of the Plan, the Debtor must demonstrate that the Plan satisfies each of the requirements of Section 1129 of the Bankruptcy Code. As demonstrated by this Memorandum, the Plan satisfies these requirements and should be confirmed.

A. The Plan Complies With the Section 1129(a)(1) of the Bankruptcy Code

Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [title 11]." 11 U.S.C. § 1129(a)(1). The legislative history of the statute states that Section 1129(a)(1) requires that a plan comply with the applicable provisions of chapter 11, including Sections 1122 and 1123 of the Bankruptcy Code, governing the classification of claim and interests and the contents of a plan, respectively. S. REP. No. 989, 95th Cong., 2d Sess. 126 (1978); see also In re Yates Dev., Inc., 258 B.R. 38, 41 (Bankr. M.D. Fla. 2000), aff'd, 256 F.3d 1285 (11th Cir. 2001); In re Leroux., 1997 WL 375677, *9-10 (Bankr. D. Mass. 1997), aff'd Summit Inv. and Development Corp. v. Leroux, 69 F.3d 608 (1st Cir. 1995).

1. The Plan Properly Designates Classes of Claims (Sections 1122 and 1123(a)(1))

Section 1122 of the Bankruptcy Code provides that:

> (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.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122. Subject to Section 1122 of the Bankruptcy Code, Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and interests. 11 U.S.C. § 1123(a)(1).

Thus, Section 1122 sets forth the basic rule governing the classification of claims and interests: with the exception of "convenience classes" composed of small unsecured claims (not applicable here), the claims or interests within a given class must be "substantially similar" to the other claims or interests in that class. 11 U.S.C. § 1122(a); see also Granada Wines Inc. v. New England Teamsters and Trucking Indus. Pension Fund, 748 F.2d 42, 46 (1st Cir. 1984) (citing general classification rule that "all creditors of equal rank against the same property should be placed in the same class"). A plan proponent has significant flexibility in classifying claims under Section 1122 of the Bankruptcy Code, so long as there is a reasonable basis for the classification and all claims within a particular class are substantially similar. See In re Jersey City Med. Ctr., 817 F.2d 1055, 1060-61 (3d Cir. 1987) ("Congress intended to afford bankruptcy judges broad discretion [under Section 1122] to decide the propriety of plans in light of the facts of each case."); In re United States Truck Co., Inc., 800 F.2d 581, 586 (6th Cir. 1986) ("courts were given broad discretion to determine proper classification"). In turn, Section 1123(a)(1) requires a plan to designate classes of claims, subject to the Section 1122 limitation that claims in any particular class be "substantially similar."

Section 3 of the Plan designates classes of claims and interests. The claims of each of the Debtor's four secured creditors (the Prepetition Lender, the Surety, Brookline Bank, and JPM) are separately classified in Classes One through Four based on the particular creditor's lien rights. The Plan places all Priority Non-Tax Claims in Class Five. The Plan places all general unsecured claims (including any deficiency claims of the four secured creditors) together in

Class Six. All Interests are placed together in Class Seven. The Debtor respectfully submits that the classification of claims and interests under the Plan satisfies the classification requirements of Sections 1122 and 1123(a)(1) of the Bankruptcy Code.

2. The Plan Specifies Unimpaired Classes (Section 1123(a)(2))

Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. §1123(a)(2). Section 4 of the Plan contains a separate subsection for each class, and at the beginning of each such subsection clearly states whether or not the class is impaired or not impaired. As a result, any holder of a claim can readily determine whether its claim is in a class that is impaired, or left unimpaired, under the Plan. Accordingly, the Plan satisfies the requirement of Section 1123(a)(2) of the Bankruptcy Code.

3. The Plan Specifies Treatment of Impaired Classes (Section 1123(a)(3))

Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Section 4 of the Plan contains a separate subsection for each class of claims. Each subsection relating to an impaired class sets forth, with specificity, the treatment afforded to claims within the class. As a result, any holder of a claim within an impaired class can readily determine how its claim will be treated under the Plan. Accordingly, the Plan satisfies the requirement of Section 1123(a)(3) of the Bankruptcy Code.

4. The Plan Provides for Equal Treatment Within Classes (Section 1123(a)(4))

Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or

interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). With respect to the classes established under the Plan that consist of more than one claim or interest—specifically, Classes Five, Six, and Seven—the treatment of claims or interests within each such class is uniform and applies equally to every claim or interest within such class. This is particularly true with regard to Class Six, which by its terms provides that each holder of a Class Six Claim, whether a customer or a trade creditor, is to receive the same treatment. Each of those creditors is entitled to its Pro Rata beneficial interest in the Creditor Trust—the only difference in treatment being derived from the allowed amount of each such creditor's claim. With this provision, the Plan appropriately accounts for the fact that customers are receiving the Travel Credit from Pacific Travel Partners, Inc., which Travel Credit should be credited dollar-for-dollar against customers' Class Six Claims. Notably, the Plan also provides that any holder of a Customer Claim may elect to forgo utilization of its Travel Credit (or any unused portion) and have its entire resulting Class Six Claim stand on equal footing with other non-customer Class Six Claims. The Debtor submits that, contrary to the PA Objection and the UST Objection, this treatment of the Customer Claims within Class Six satisfies the requirement of Section 1123(a)(4) of the Bankruptcy Code.

5. The Plan Provides Adequate Means for Implementation (Section 1123(a)(5))

Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation. 11 U.S.C. § 1123(a)(5). Section 5 of the Plan is the main section that addresses means of implementation of the Plan. This section contains numerous provisions crafted to implement the substantive terms of the Plan, including through the appointment of a Plan Administrator, the creation of a Creditor Trust and the appointment of a Creditor Trustee to

administer the trust and related provisions for administering the Plan. Section 5 contains related provisions governing the wind down of the Debtor's business and financial affairs and the completion of administration of its Chapter 11 case. The Debtor submits that these provisions collectively provide appropriate means of implementing a plan of liquidation such as the Plan, and constitute adequate means for implementing the Plan as required by Section 1123(a)(5).

6. The Plan Complies With Section 1123(a)(6)

Section 1123(a)(6) of the Bankruptcy Code requires that a plan must include provisions in a corporate debtor's charter "prohibiting the issuance of nonvoting equity securities" and providing "appropriate distribution" of voting power among the classes of equity securities with such power. 11 U.S.C. § 1123(a)(6). The Plan involves the liquidation of the Debtor, which will not be engaged in business after the closing of the case. Thus, Section 1123(a)(6) is inapplicable to the Plan.

7. The Plan Provides for Appropriate Creditor/Estate Representatives (Section 1123(a)(7))

Section 1123(a)(7) of the Bankruptcy Code requires that the selection of any director, officer or trustee under a chapter 11 plan be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123(a)(7). The Plan provides for the appointment of Stephen Gray as the Creditor Trustee to administer the Creditor Trust, and for Argus, acting though its Managing Director Lawton W. Bloom, to serve as the Plan Administrator. The Debtor submits that each of Messrs. Gray and Bloom are experienced, capable, and well-positioned to serve in these capacities. The Debtor submits that these provisions of the Plan will promote the efficient, cost-effective implementation and administration of the Plan and are accordingly consistent with the best interests of creditors and

with public policy. Accordingly, the Plan satisfies the requirement of Section 1123(a)(7) of the Bankruptcy Code.

B. The Plan Complies With the Section 1129(a)(2) of the Bankruptcy Code

Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent "compl[y] with the applicable provisions of [title 11]." 11 U.S.C. §1129(a)(2). The legislative history of Section 1129(a)(2) explains that this provision essentially requires compliance with the disclosure requirements of the Bankruptcy Code. See H. REP. NO. 595, 96th Cong., 1st Sess. 412 (1977); S. REP. NO. 989, 85th Cong., 2d Sess. 126 (1978); In re Resorts Int'l, 145 B.R. 412, 468-69 (Bankr. D. N.J. 1990) (Section 1129(a)(2) was satisfied when proponent of plan complied with requirements of Section 1125).

In this case, the Debtor on October 4, 2023 filed the Disclosure Statement and the Addendum for the Court's consideration in connection with the *Debtor's Motion for Order Approving Disclosure Statement, Scheduling Plan Confirmation Hearing, and Establishing Related Deadlines and Plan Solicitation Procedures* that the Debtor had filed on September 21, 2023 [Dkt. No. 385] (the "Solicitation Procedures Motion"). After the conclusion of the hearing on the Solicitation Procedures Motion conducted on October 3, 2023, this Court approved the Disclosure Statement on a preliminary, conditional basis and established the procedures and scheduling for the Debtor's plan solicitation process by order entered October 5, 2023 [Dkt. 449] (the "Plan Solicitation Order").

In accordance with the Plan Solicitation Order, the Debtor on October 10, 2023 served copies of the Disclosure Statement, the related notice of the Plan confirmation hearing and related matters, the related bar date notice and proof of claim form, and (as appropriate) a ballot upon all creditors and other parties in interest, as evidenced by the *Certificate of Service of Plan*

Solicitation Documents filed on October 20, 2023 [Dkt. No. 483] (the "Certificate of Service") and the therein-referenced *Notice of Filing of Plan Solicitation Documents* filed on October 11, 2023 [Dkt. No. 469]. Accordingly, the Debtor submits that it has complied with the solicitation procedures required of it as plan proponent under Section 1125 of the Bankruptcy Code and the Plan Solicitation Order.

Three of the Objections (all but the UST Objection) contend that the Disclosure Statement is not entitled to this Court's final approval.

The MA/NY Objection contends that the Disclosure Statement is inadequate because it "misleads holders of Customer Claims about the effect of plan confirmation on their claims" and "misrepresents the [Travel Credit] as a true credit." MA/NY Objection, at pp. 8, 9. These objections are baseless. The Disclosure Statement clearly informed the Debtor's customers about the treatment of their claims, and clearly informed the Debtor's customers about the specific terms of the Travel Credit. The attorneys general may not like the Travel Credit the Debtor was able to garner for its customers, and may not like the Debtor's position concerning treatment of Customer Claims set forth in the Plan, but no reasonable person can complain about the disclosures that have been made to customers regarding these matters. Indeed, neither attorney general sought to intercede concerning appropriate disclosures *prior* to this Court's conditional approval of the Disclosure Statement, and its dissemination to customers (and other creditors) who have overwhelmingly accepted the Plan. Notably, no objection to the Plan or to final approval of the Disclosure Statement has been filed by any customer (or other creditor).

The PA Objection argues that the Disclosure Statement is inadequate because the Debtor's customers were not informed of their right to a Priority Non-Tax Claim under the Plan. That right, the PA Objection contends, derives from Section 507(a)(7) of the Bankruptcy Code,

extending a $3,350 priority to unsecured claims arising from consumer deposit claims. As a threshold matter, and as addressed below, the Debtor does not believe that its customers were entitled to a Priority Non-Tax Claim, and so the issue of disclosure is dubious, at best. The Debtor's position on this issue was fully disclosed in the Disclosure Statement, with the following language:

> The Debtor believes that Customer Claims should be treated as General Unsecured Claims in their entirety, and that no portion of Customer Claims should be granted priority under Code Section 507(a)(7), up to a maximum amount of $3,350, and thereby qualify as a Priority Non-Tax Claims that, under Section 4.5 of the Plan, would need to be paid in full in cash on the Effective Date. The Debtor believes that the language of the controlling agreements and case law interpreting Section 507(a)(7) supports the determination that the Customer Claims do not constitute consumer deposits for purposes of Section 507(a)(7) and, therefore, are simply General Unsecured Claims.

The Debtor is not required to inform creditors of legal rights that the Debtor does not believe exist. Here, the Debtor informed creditors of the possible existence of the right to priority treatment, and disclosed its reasons for not extending such treatment to its customers under the Plan. Again, no creditor has objected to the Plan, to the Plan's legal determination concerning Section 507(a)(7), or to final approval of the Disclosure Statement.

The arguments set forth in the Committee Objection as to the inadequacy of the Disclosure Statement are addressed in the Response and are without merit.

In light of the foregoing, no further disclosure to creditors concerning the Plan is required. The Disclosure Statement should be approved by the Court on a final basis. The Plan complies with Code Section 1129(a)(2).

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

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although not defined in the Bankruptcy Code, good faith "is generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objective and purposes of the Bankruptcy Code." In re Weber, 209 B.R. 793, 797 (Bankr. D. Mass. 1997) (internal citations omitted). The determination of whether a plan is proposed in good faith must be made "in light of the totality of the circumstances" surrounding formulation of the plan. In re Texas Extrusion Corp., 844 F.2d 1142, 1160 (5th Cir. 1988), cert. denied, 488 U.S. 926 (1988) (citing In re Jasik, 727 F.2d 1379, 1383 (5th Cir. 1984)); see also In re Madison Hotel Assoc., 749 F.2d 410, 425 (7th Cir. 1984) (court must determine in light of the particular facts and circumstances, whether the "plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code"). In the absence of a timely filed objection to confirmation, a court may make a finding that a plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues. Fed. R. Bankr. P. 3015(f).

The Plan has been proposed in good faith. After attending to the sale of the Debtor's assets to Pacific Travel Partners, Inc., the Debtor conferred with the Prepetition Lender and the Committee concerning the means of completing administration of the Debtor's bankruptcy estate. The Prepetition Lender promoted a liquidating plan as the preferred way forward, and agreed to provide funding for that course of action. The Committee agreed that pursuing a liquidating plan made sense. The Debtor undertook to formulate the Plan, to prepare the Disclosure Statement and related solicitation materials, and to obtain entry of the Plan

Solicitation Order. The Plan reflects the hard work and judgment of the Debtor and its professionals who managed the Plan formulation and solicitation process in a cost-effective manner. No reasonable observer would dispute that the Debtor has proposed the Plan in good faith and that the Plan is intended to achieve a result consistent with the purposes and policies underlying the Bankruptcy Code.

The Committee has apparently concluded otherwise, relating concerns over a "secret condition" to Creditor Trust funding that warrant denial of confirmation under Section 1129(a)(3). As explained in the Response, the Debtor disagrees with the Committee's characterization of the negotiations over Creditor Trust funding, and that those negotiations support denial of confirmation. The Plan was proposed in good faith, and satisfies the requirements of Section 1129(a)(3).

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

Section 1129(a)(4) of the Bankruptcy Code requires that any payment of professionals' fees from assets of a debtor's estate be approved by or subject to the approval of the Bankruptcy Court. 11 U.S.C. § 1129(a)(4). Section 2.3 of the Plan provides that all payments of professionals' fees for services through the Effective Date will be subject to prior approval of this Court; Section 6.2 of the Plan requires all professionals to file final fee applications covering such services by no later than the Administrative Claims Bar Date; and Section 8.16(b) of the Plan provides that this Court will retain jurisdiction after the Effective Date to hear and determine such fee applications. Accordingly, the Plan satisfies the requirements of Section 1129(a)(4) of the Bankruptcy Code.

E. The Plan Complies With Section 1129(a)(5)

Section 1129(a)(5) of the Bankruptcy Code establishes certain requirements concerning the post-confirmation management of a reorganized corporate debtor. The Debtor has no ongoing business to be reorganized, and the Plan provides for liquidation of the Estate. Thus, Section 1129(a)(5) is not implicated.

F. The Plan Complies With Section 1129(a)(6)

Section 1129(a)(6) of the Bankruptcy Code requires, with respect to a debtor whose rates are subject to governmental regulation following confirmation, that appropriate governmental approval be obtained for any rate change provided in the plan or that such rate change be expressly conditioned on such approval. 11 U.S.C. § 1129(a)(6). The requirement of Section 1129(a)(6) is inapplicable to the Debtor.

G. The Plan Satisfies the "Best Interests of Creditors" Test (Section 1129(a)(7))

Section 1129(a)(7) of the Bankruptcy Code provides protection to creditors and interest holders whose claims are impaired under a plan and who have not voted to accept such plan by imposing a "best interests of creditors" requirement. Under that requirement, holders of impaired claims and interests who do not vote to accept the plan must:

> receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 [of the Bankruptcy Code] on such date.

11 U.S.C. § 1129(a)(7)(A)(ii).

The best interests test focuses on individual dissenting creditors rather than classes of claims. The analysis requires that each holder of a claim or interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the

plan, not less than the amount such holder would receive or retain if the Debtor was liquidated under Chapter 7 of the Bankruptcy Code.

Under the express language of Section 1129(a)(7), the liquidation analysis applies only to non-accepting impaired claims or interests. See In re New Valley Corp., 168 B.R. 73, 79 (Bankr. D. N.J. 1994) ("a plain and sensible reading of Section 1129(a)(7)(A)(ii) yields the conclusion that an unimpaired class is not protected by the 'best interest of creditors' test"). If a class of claims or interests unanimously accepts the plan, then the best interests test is inapplicable to all members of that class. See In re Trenton Ridge Investors, Inc., 461 B.R. 440, 473-74 (Bankr. S.D. Ohio 2011); In re Merrimack Valley Oil Co., 32 B.R. 485, 487 (Bankr. D. Mass. 1983) (court must apply best interest of creditors test "[u]nless there is unanimous acceptance of the plan by each member of each class").

The best interest test is inapplicable to Class Two, Class Three, and Class Five, which are unimpaired under the Plan. Each of Class One and Class Four is impaired under the Plan; however, because each of Class One and Class Four voted unanimously to accept the Plan, the best interest test is inapplicable to the members of these two classes (the Prepetition Lender and JPM). See In re Merrimack Valley Oil Co., 32 B.R. at 487.

The best interest test does apply to the holders of Claims and Interests in the remaining two classes—Class Six Claims and Class Seven Interests. The Debtor submits that the best interest test is readily satisfied as to all members of these classes for the simple reason that the Plan effects the same result for members of such classes as would a Chapter 7 liquidation, except for one significant, advantageous difference—a Chapter 7 liquidation would involve the pursuit of the very same Estate Causes of Action to be pursued by the Creditor Trustee pursuant to the Plan, but would not involve the Prepetition Lender's funding $250,000 for a Chapter 7 trustee to

pursue such actions. The Plan's $250,000 of "seed money" for the Creditor Trust provides the means for pursuing creditor recoveries that almost certainly would not exist in a Chapter 7 liquidation. Simply put, Class Six creditors would likely receive little or nothing in a Chapter 7 liquidation, and any possible recovery in a Chapter 7 liquidation would be more attenuated than the prospects afforded by the Plan and the Prepetition Lender's funding of the Creditor Trust. Class Seven, containing all Interests, would receive nothing in a Chapter 7 liquidation, just as holders of Interests will receive nothing under the Plan. For these reasons, the Plan satisfies the requirements of Section 1129(a)(7) of the Bankruptcy Code.

H. The Plan Has Not Been Accepted by All Impaired Classes So "Cram-Down" Will Be Required (Sections 1129(a)(8) and 1129(b))

Subject to the exceptions contained in Section 1129(b), Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must have accepted the plan. 11 U.S.C. § 1129(a)(8). As to any class that does not accept the Plan, the Plan must satisfy the cramdown requirements of Section 1129(b). 11 U.S.C. § 1129(b)(1).

Class Two, Class Three, and Class Five are unimpaired under the Plan, and thus deemed to accept the Plan. 11 U.S.C. § 1126(f). The Plan satisfies the requirement of Section 1129(a)(8) with respect to these three classes.

Class One, Class Four, and Class Six are impaired under the Plan, and holders of Claims in such classes were entitled to vote to accept or reject the Plan. The Plan was accepted by each of these three Classes, as evidenced by the Certificate of Vote. Thus, the Plan satisfies the requirement of Section 1129(a)(8) with respect to each of Class One, Class Four, and Class Six.

Class Seven (Interests) is receiving nothing under the Plan and accordingly is deemed not to have accepted the Plan pursuant to Code Section 1126(g). Because there is no class junior to

Class Seven that is receiving or retaining any property pursuant to the Plan, the Plan is fair and equitable and satisfies the requirements of Code Section 1129(b)(2)(C) as to Class Seven.

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

Section 1129(a)(9) of the Bankruptcy Code contains a number of requirements concerning the payment of priority claims, chiefly that, except as may be otherwise agreed by a particular creditor, such claims must be paid in full on the effective date of the plan or, in the case of priority tax claims, in annual installments completed within five years of the petition date. 11 U.S.C. § 1129(a)(9). Section 2 of the Plan provides for full payment of allowed priority claims in a manner consistent with Section 1129(a)(9). Specifically, Section 2.1 of the Plan provides, subject to Sections 2.2 through 2.4 of the Plan, for full payment of Allowed Administrative Claims on the Effective Date. Section 2.2 provides for full payment of quarterly fees to the UST on the later of the Effective Date or when due. Section 2.3 of the Plan provides for payment of Allowed Professional Fee Claims once allowed by order of this Court. Section 2.4 of the Plan provides for full payment of Priority Tax Claims by payment in full on the Effective Date. These Plan provisions governing payment of allowed priority claims are consistent with Section 1129(a)(9).

As noted, several of the Objections contend that the Plan should not be confirmed because of its failure to provide priority treatment to claims of the Debtor's customers in accordance with Code Section 507(a)(7). For the reasons set forth in Section III.C, below, the Debtor does not agree that the Customer Claims are entitled to be treated as priority claims and, for that reason, and because the Plan provides for payment in full of all Allowed Priority Claims, it satisfies the requirements of Section 1129(a)(9).

J. The Plan Has Been Accepted by at Least One Impaired Class Entitled to Vote (Section 1129(a)(10))

Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of a plan by at least one impaired class, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). The Plan was accepted by Class Four, which Class does not include any insider, and by Class Six, excluding the vote cast by an insider, as reflected by the Certificate of Vote. Accordingly, the Plan satisfies the requirements of Section 1129(a)(10) of the Bankruptcy Code.

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

Section 1129(a)(11) of the Bankruptcy Code requires that the court find that a plan is feasible in order to confirm it. Specifically, the Bankruptcy Court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed under the plan.

11 U.S.C. § 1129(a)(11). As noted, the Plan by its terms is a liquidating plan, and thereby satisfies the requirement of Section 1129(a)(11). Plus, as of the expected Effective Date of the Plan (November 20, 2023), the Debtor's bankruptcy estate holds sufficient cash to pay all of its expected Effective Date obligations under the Plan (including those subject to Court approval prior to payment such as professional fees), as well as the projected ongoing expenses of estate administration through March 31, 2024, when the Debtor's case is expected to be closed unless the Creditor Trustee elects to keep the case open and assumes the related ongoing expenses. [DelGreco Declaration, at ¶¶ 12 – 19; Bloom Declaration, at ¶¶ 3 – 10.]

L. The Plan Satisfies the Requirements Concerning the Payment of Certain Fees (Section 1129(a)(12))

Section 1129(a)(12) of the Bankruptcy Code requires that a plan provide for payment of all fees payable under Section 1930 of Title 28. 11 U.S.C. § 1129(a)(12). As noted, Section 2.2 of the Plan provides that such fees will be paid in full in cash on the later of the Effective Date or when due. Accordingly, the Plan satisfies the requirement of Section 1129(a)(12) of the Bankruptcy Code.

M. The Plan Complies With Section 1129(a)(13)

Section 1129(a)(13) of the Bankruptcy Code requires that a plan "provides for the continuation after its effective date of payment of all retiree benefits." 11 U.S.C. § 1129(a)(13). Neither the Debtor nor the Estate provide retiree benefits; accordingly the requirement of Section 1129(a)(13) of the Bankruptcy Code is inapplicable.

N. The Plan Complies With Section 1129(a)(14)

Section 1129(a)(14) of the Bankruptcy Code requires that a plan provide for payment of any domestic support obligation that the debtor is required to pay by a judicial or administrative order or by statute. The Debtor is not an individual and has no domestic support obligations, and, accordingly, the requirement of Section 1129(a)(14) of the Bankruptcy Code is inapplicable.

O. The Plan Complies With Section 1129(a)(15)

Section 1129(a)(15) of the Bankruptcy Code requires that, in a case involving an individual debtor and in which the holder of an allowed unsecured claim objects to the confirmation of the plan, the plan must either provide for (in effect) full payment of the objecting creditor's claim or for dedication of the debtor's projected disposable income for at least 5 years

after commencement of payments under the plan. As the Debtor is not an individual, Section 1129(a)(15) is inapplicable.

P. The Plan Complies With Section 1129(a)(16)

Section 1129(a)(16) of the Bankruptcy Code requires that all transfers of property under a plan must be in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business or commercial corporation or trust. The Debtor is a corporation that was engaged in business and commercial activities, and is not subject to laws governing transfers by corporations that are not moneyed, business or commercial corporations; in any event, the only property being transferred under the Plan is delivery or retention of secured creditors' collateral, the cash distributions to creditors pursuant to the Plan, and the transfer of the Creditor Trust Assets to the Creditor Trust. Accordingly, the Plan satisfies the requirement of Section 1129(a)(16) of the Bankruptcy Code.

III. THE PLAN'S LEGAL DETERMINATIONS ARE APPROPRIATE

Confirmation of the Plan is predicated upon three legal determinations set forth at Section 5.11, Section 5.12, and Section 5.13 of the Plan: (i) the treatment of certain customer deposits received by the Debtor after May 12, 2023 and held by JPM as property of the Debtor's bankruptcy estate (Section 5.11); (ii) the right of JPM to set off the Debtor's obligations to JPM against these customer deposits pursuant to Code Section 553 (Section 5.13); and (iii) the treatment of all Customer Claims as General Unsecured Claims (and not as Priority Non-Tax Claims of up to $3,350 per customer pursuant to Code Section 507(a)(7)) (Section 5.12). Under the Plan, these issues are to be determined by the Bankruptcy Court's entry of an order confirming the Plan. This section of this Memorandum will set forth the grounds for the Court's determination of these matters.

A. Customer Deposit Funds Constitute Estate Property

The issue of the proper characterization of the Customer Deposit Funds—whether or not they constitute property of the Estate—arises out of the Debtor's prepetition intentions regarding, and the handling of, such funds, and its submission of its schedules and Statement of Financial Affairs ("SOFA") in a manner consistent with its prepetition intentions. As explained to the Court and parties in interest through the travel of this case, and as reiterated by Mr. DelGreco in the DelGreco Declaration, commencing on May 12, 2023, the Debtor made the decision to deposit, in a segregated account, all payments (net of bank and credit card processor chargebacks, fees and adjustments) received from customers making bookings and paying additional amounts toward future trips (these funds are defined in the Plan as the "Customer Deposit Funds"). [DelGreco Declaration, at ¶ 4.] This practice continued through June 23, 2023, the date on which the Debtor ceased normal course business operations, had laid off most of its workforce, and stopped accepting customer payments. [Id.] The Debtor considered the segregated Customer Deposit Funds to be held in trust for the benefit of affected customers, and not to be used to fund the Debtor's operations or otherwise. [Id.]

Consistent with the Debtor's treatment of the Customer Deposit Funds before filing for bankruptcy, and in consultation with the Debtor's bankruptcy counsel, the Debtor in its schedules and SOFA presented the Customer Deposit Trust Funds as being held in trust for the benefit of affected creditors. [Id., at ¶ 5.] That characterization was questioned by several parties in interest. In connection with the Debtor's proposed sale of assets, each of JPM and the UST objected to the Debtor's proposed inclusion of the Customer Deposit Funds in the sale on the basis that the funds were not held in trust but rather constituted property of the Estate. [Dkt. Nos. 189 and 192.] Each of these objections set forth the factual and legal reasons why the

Customer Deposit Funds constituted property of the Estate, and are incorporated herein by reference.

In the face of these sale objections, the Debtor withdrew the Customer Deposit Funds from its proposed sale of assets. And, the Debtor ultimately acquiesced to the position that the Customer Deposit Funds should properly be characterized as Estate property. The Debtor's professed intent to hold the Customer Deposit Funds in trust for affected customers was not supported by the Debtor's execution of any instrument that created a trust relationship. [DelGreco Declaration, at ¶ 4.] Nor did the Debtor notify any affected customer of the Debtor's intentions to hold such funds in trust. [Id.] Thus, as pointed out by JPM and the UST in their sale objections, the Debtor failed to meet the legal requirements to establish a trust. And, no affected customer has any reason to believe—or to have any expectation—that its payment to the Debtor was to be held in trust.

In sum, while the Debtor's submission of its schedules and SOFA presented the Customer Deposit Funds as being held in trust, that presentation was insufficient to be legally determinative of the character of such funds. It is now clear that, for purposes of the Debtor's bankruptcy case, the Customer Deposit Funds constitute property of the Estate. No creditor or other party in interest has argued otherwise, and no entity has interposed an objection to confirmation contesting the legal determination—that the Customer Deposit Funds constitute property of the Estate—to be effected by Section 5.11 of the Plan upon entry of the plan confirmation order.

B. JPM Has A Right Of Set-Off Against Customer Deposit Funds

Both in its sale objection [Dkt. No. 189] and in its proof of claim filed on October 30, 2023, a copy of which proof of claim is attached as Exhibit A, JPM provided documentation of

its right of set-off against the Customer Deposit Funds. The Debtor agrees (and has never questioned) that, to the extent that the Customer Trust Funds constitute property of the Estate, JPM has a valid right of set-off against such funds. No entity has interposed an objection to confirmation contesting the legal determination—that JPM has a right of set-off against the Customer Deposit Funds—to be effected by Section 5.13 of the Plan upon entry of the plan confirmation order. Accordingly, the record amply supports the inclusion of this finding in an order confirming the Plan.

C. Customer Claims Are General Unsecured Claims

Code Section 507(a)(7) provides that an individual's claim against the bankruptcy estate is entitled to priority, in a capped amount of $3,350, for a claim "arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided." As a general rule, the priority provisions of Code Section 507 are to be narrowly construed, and a claimant is only entitled to priority where it is clear that its claim falls within the express language of the statute. *Bos. Reg'l Med. Ctr., Inc. v. Mass. Div. of Health Care Fin. & Policy (In re Bos. Reg'l Med. Ctr., Inc.)*, 365 F.3d 51, 57 (1st Cir. 2004).

Because the term "deposit" is not defined in the Code, courts have often turned to dictionary definitions of "deposit" and the legislative history to seek guidance on the scope of Section 507(a)(7). While courts' parsing of the term "deposit" has provided little clarity (Collier on Bankruptcy notes that the case law on this topic is "in confusion", *see* 4 Collier on Bankruptcy at ¶ 507.09 (16th Ed. 2023)), the legislative history makes clear that Congress's intent in enacting Section 507(a)(7) was to protect a consumer who "assumed his deposit was

tantamount to a trust fund". H.R. Rep. No. 595, 95th Cong., 1st Sess. 188 (1977); 4 Collier on Bankruptcy at ¶ 507.09 (16th Ed. 2023).

Applying this legislative guidance—that a deposit must be "tantamount to a trust fund"—courts have held that Section 507(a)(7) does not apply to claimants who "had no expectation that [their deposit] would be placed in escrow," and who did not believe that "the monies remained their property until the services purchased were provided." *In re Palmas del Mar Country Club, Inc*., 443 B.R. 569, 574 (Bankr. D.P.R. 2010); *see also In re Castleton*, Case No. 90-00536-13, 1990 Bankr. LEXIS 1987, at *2-3 (Bankr. D. Idaho Sep. 14, 1990) ("There is no indication of any reserve, trust agreement, or other reservation of a portion of the contract price which would constitute a deposit for the rendering of future services"). Another court, although determining that the statute was clear and legislative history need not be consulted, similarly determined that the priority provision did not apply where "no trust relationship is alleged to have been created with respect to the [payments], nor have the Plaintiffs alleged that the … payments were, or should have been, segregated by the Debtor." *In re Heritage Vill. Church & Missionary Fellowship*, 137 B.R. 888, 896 (Bankr. D.S.C. 1991). Only where a clear trust or segregation obligation is evident will priority status be afforded. *See Guarracino v. Hoffman*, 246 B.R. 130, 133 (D. Mass. 2000) (Section 507(a)(7) priority applied to claim for return of tenant security deposit that Massachusetts law required be held in trust).

Here, the Debtor's T&C do not require any segregation of funds paid by customers. [DelGreco Declaration, at ¶¶ 8, 9 and Exh. A – F.] Nor did the Debtor segregate customer payments. [Id., at ¶ 10.] And, there is no applicable law or regulation that required the Debtor to segregate customer payments or to hold them in trust. Thus, neither the T&C nor applicable law or regulation provided any basis for customers to form a reasonable belief that their funds would

be segregated or held in trust. These circumstances support the determination that the Customer Claims are non-priority general unsecured claims. *See Palmas Del Mar*, 443 B.R. at 574; *Heritage Village*, 137 B.R. at 896.

The conclusion that the Customer Claims are not entitled to priority is buttressed by the fact that customer payments were non-refundable. *See In re Nittany Enters*., 502 B.R. 447, 455 (Bankr. W.D. Va. 2012) (where governing agreement provided that no refund of purported deposit would be issued, claim not entitled to priority). Here, the T&C informed customers that their payments would be non-refundable. [DelGreco Declaration, at ¶¶ 8, 9 and Exh. A – E (p. 1 of each exhibit).][1]

As to particular types of Customer Claims, there are additional grounds supporting the determination that they are not entitled to priority. Claims for agreed refunds are not claims based on a deposit that is entitled to Section 507(a)(7) priority. *See In re Util. Craft, Inc*., No. 06-10816, 2008 Bankr. LEXIS 3564, at *3 (Bankr. M.D.N.C. Dec. 29, 2008) (store credit for returned merchandise not treated as priority claim under § 507(a)(7)). Here, $23 million of the customer claims are for agreed-upon refunds. [DelGreco Declaration, at ¶ 11.] Approximately $64 million of the Customer Claims arise from customer's full payment for booked travel. [Id.] These fully-paid Customer Claims do not constitute "deposits" for purposes of Section 507(a)(7). *Heritage Vill. Church & Missionary Fellowship*, 137 B.R. at 895-896 (deposit means funds paid "as a pledge" or "partial payment"); *but see Salazar v. McDonald (In re Salazar)*, 430 F.3d 992,

[1] This language is found in the most recent version of the T&C and every prior version in effect since January 1, 2020. These versions expressly state that the "deposit is nonrefundable." The version in effect from October 2017 through 2019 did not include the express statement that the deposit is nonrefundable, but like the later versions, it contained provisions limiting any partial refund, such that a customer payment would never be refunded in full (unless the customer cancelled within 24 hours of booking for the purpose of rejecting the T&C), and the customer would not be entitled to a refund of any amounts paid once the period for cancelling the trip had passed.

996 (9th Cir. 2005); *In re WW Warehouse, Inc.*, 313 B.R. 588, 592 (Bankr. D. Del. 2004). And, about $5.4 million of the Customer Claims represent trip insurance claims. [DelGreco Declaration, at ¶ 11.] These insurance claims clearly are not "deposit" claims entitled to Section 507(a)(7) priority.

In making its Section 507(a)(7) legal determination, this Court should be guided by the overarching purpose of Section 507(a)(7)—to provide affected creditors the legal (and financial) benefit of priority status. In this case, notice of the Section 507(a)(7) legal determination necessary to Plan confirmation was transmitted to the Debtor's nearly 10,000 former customers. Not a single customer has objected to the Plan, or to the Section 507(a)(7) legal determination necessary to its confirmation, and over 80 percent of customers who voted on the Plan voted to accept it. Nor has the Committee, which directly represents customers' interests, objected to the Section 507(a)(7) legal determination. The sole objections to the Section 507(a)(7) legal determination have been interposed by three state attorneys general and the UST, none of whom have an economic interest in the Section 507(a)(7) legal determination (or in the Plan generally), each of whom must realize that the Estate, whether administered under a Chapter 11 liquidating plan or in Chapter 7, will never have sufficient funds to pay over $33 million in alleged priority claims, and each of whom seems more interested in punishing the Debtor and its principal than in promoting—or even acquiescing to—the successful outcome of this Chapter 11 case.

IV. THE PLAN'S EXCULPATION PROVISION IS APPROPRIATE

The Plan at Section 8.4 contains what the Debtor considers to be a plain-vanilla exculpation provision (the "Exculpation Provision"):[2]

> 8.4 **Exculpation of Estate Representatives.** The Debtor, the Plan Administrator and the Committee and its members, and each officer, director, attorney, accountant, agent, employee, or representative of the Debtor, the Plan Administrator and the Committee and its members, including without limitation the Professional Persons (collectively, the "Exculpated Persons"), shall be exculpated from any liability resulting from or alleged to arise out of such Exculpated Person's administration of, or involvement in matters pertaining to, the Case or the Plan, provided that the foregoing exculpation shall not apply to bar liability that results from an Exculpated Person's act or omission that is determined by Final Order to have constituted gross negligence, willful misconduct, bad faith or an ultra vires act.

All of the Objections other than the Committee Objection contend that the Exculpation Provision is impermissibly overbroad and cannot be approved. The Debtor disagrees.

The Exculpation Provision is not unlawful. No provision of the Bankruptcy Code or other applicable law prohibits the exculpation provided by the Exculpation Provision. Thus, the Modified Exculpation Provision is authorized by Section 1123(b)(6) of the Bankruptcy Code, which permits a plan to include "any other appropriate provision not inconsistent with this title." Many courts have recognized that an exculpation provision like the Exculpation Provision is permitted—and common—in Chapter 11 plans. *See, e.g., Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) (noting that exculpation provisions are common in Chapter 11 plans); *In re Health Diagnostic Laboratory, Inc.*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016)

[2] Bankruptcy Court decisions in this district have found no issue with such an exculpation provision. See In re GKS Corporation, Chapter 11 Case No. 19-30998-EDK, at Dkt. Nos. 239 (plan) and 287 (confirmation order); In re Community Intervention Services, Inc., Chapter 11 Case No. 21-40002-EDK, at Dkt. Nos. 220 (plan) and 294 (confirmation order); In re Tri-Wire Engineering Services, Inc., Chapter 11 Case No. 21-11322-CJP, at Dkt. Nos. 359 (plan) and 367 (confirmation order). In each of these cases, the Plan as confirmed contained an exculpation provision identical or nearly identical to the Exculpation Provision.

(exculpation provisions are common and permissible so long as properly limited in scope). The Exculpation Provision is appropriately limited in scope. It covers the Debtor and the Plan Administrator—the fiduciaries who have been and will be responsible for administration of the Chapter 11 case and implementation of the Plan—and their respective representatives through whom these fiduciaries must act, and only as to matters pertaining to the Chapter 11 case and the Plan. The Committee and its members and representatives are covered as well.

Even the cases cited in the Objections, viewed collectively, evince the appropriateness of the Exculpation Provision—the cases almost all support the proposition that estate fiduciaries are entitled to exculpation for conduct related to administration of a chapter 11 case, a chapter 11 estate, or a chapter 11 plan, except for conduct constituting gross negligence or willful misconduct—the very parameters set forth by the Exculpation Provision. *See, e.g., In re Mallinckrodt PLC,* 639 B.R. 837, 883 (Bank. D. Del. 2022) (court approved modified exculpation clause limited to estate fiduciaries); *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 504 (Bankr. S.D. Ohio 2021) (approving properly limited exculpation clause covering estate fiduciaries); *In re Aegean Marine Petroleum Network, Inc.* 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019) (same). Only where the proposed exculpation exceeds these bounds will it be found objectionable. *See In re Tribune Co.,* 464 B.R. 126, 189 (Bankr. D. Del. 2011) (exculpation that covered non-fiduciaries was too broad); *In re Washington Mutual, Inc.* 442 B.R. 314 (Bankr. D. Del. 2011) (exculpation that covered non-fiduciaries was too broad); *In re Exide Technologies*, 303 B.R. 48, 71-75 (Bankr. D. Del. 2003) (exculpation that covered debtor's lenders was too broad).

Regarding the UST's desired exclusion of prepetition and post-effective date matters from exculpation, there is no principled argument for so delimiting exculpation. Under the Plan,

a Plan Administrator will be appointed on the Plan's effective date to take over responsibility for winding up the Debtor's business and financial affairs, and completing the administration of the Debtor's bankruptcy estate and this Chapter 11 case. The Plan Administrator will thus be continuing in the very same role that the Debtor, acting through its officers and employees, has performed to date and will perform through the effective date of the Plan.[3] Indeed, the Plan Administrator will pursuant to Section 5.5 of the Plan be "the sole authorized officer of the Debtor". Inarguably, the Plan Administrator will be an estate fiduciary from the inception of, and for the duration of, the Plan Administrator's appointment. Inarguably, the estate and creditors will benefit from having the Plan Administrator appointed to implement the Plan. There is no reason why the Plan Administrator should not be exculpated to the same degree as the Debtor itself.

Relevant case law does not support the UST's position that exculpation should be limited to matters occurring between the petition date and the effective date of a plan. In *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), the court, in evaluating an exculpation provision that covered acts "during the bankruptcy case", noted that the "fiduciary standard … applies only to estate fiduciaries" and that "the exculpation clause must be limited to the fiduciaries who have served ***during the chapter 11 proceeding*** … ." 442 at 350-51 (emphasis added). Here, once the Plan is confirmed and becomes effective, the Chapter 11 case will remain open for administration by the Plan Administrator, an estate fiduciary, and so it is appropriate that the Plan's exculpation provision encompass the Plan Administrator, and extend for the duration of the Chapter 11 case. *Id.*; s*ee also In re Murray Metallurgical Coal Holdings,*

[3] Notably, the proposed Plan Administrator has been assisting the Debtor in performing these services through these Chapter 11 cases, in its capacity as the Debtor's Court-approved financial advisor; for its work in that role, the Plan Administrator will be entitled to the protection of the Exculpation Provision.

LLC, 623 B.R. 444, 504 (Bankr. S.D. Ohio 2021) (overruling UST objection to exculpation clause that covered prepetition matters).

In sum, the Exculpation Provision is not unlawful. Rather, it is: (i) an appropriate exculpation provision for a liquidating plan such as the Plan; (ii) consistent with exculpation provisions approved in virtually every Chapter 11 case where a plan is confirmed; (iii) functionally identical to exculpation provisions approved by other Courts in this district; and (iv) one that would almost certainly be approved by every court whose decision was cited in the Objections. The Debtor respectfully submits that the Exculpation Provision is appropriate, and that its inclusion in the Plan is not an impediment to confirmation.

V. CONCLUSION

For the foregoing reasons, the Debtor respectfully requests that this Court enter an Order confirming the Plan, and granting such other and further relief as is just and proper.

Dated: November 8, 2023

VANTAGE TRAVEL SERVICE, INC.

By its attorneys,

/s/ A. Davis Whitesell

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CERTIFICATE OF SERVICE

I, A. Davis Whitesell, hereby certify that, to the best of my knowledge, the foregoing ***Debtor's Memorandum of Law In Support of Confirmation of Liquidating Plan*** will, contemporaneously with its entry on the Court's docket through the Court's CM/ECF system, be transmitted by email through such system to all registered users of such system in this Chapter 11 case, including the individuals whose names, party affiliations, and email addresses are set forth on the attached CM/ECF Service List.

Dated: November 8, 2023

/s/ A. Davis Whitesell

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