IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
CREATIVEMASS HOLDINGS, INC. *et. al.*,	Case No. 25-10695 (MFW)
Debtors.[1]	Jointly Administered
	(Subchapter V)

BRIEF IN SUPPORT OF CONFIRMATION OF DEBTORS' FIRST AMENDED JOINT PREPACKAGED SUBCHAPTER V PLAN OF LIQUIDATION

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number are as follows: Creativemass Holdings, Inc. (2172) and Creativemass Enterprises US LLC (9046). The Debtors' mailing address is 1209 N Orange Street, Wilmington, DE 19801.

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The above-captioned debtors and debtors in possession, Creativemass Holdings, Inc. ("Creativemass") and Creativemass Enterprises US LLC ("Creativemass US," together with Creativemass, the "Debtors"), hereby submit this brief (the "Confirmation Brief") in support of confirmation of the *Debtors' First Amended Joint Prepackaged Subchapter V Plan of Liquidation* [D.I. 72] (as may be further modified, amended, or supplemented from time to time, the "Plan"),[1] filed on May 22, 2025, pursuant to section 1129 of title 11 of the United States Code ("Bankruptcy Code") and respectfully states as follows:

PRELIMINARY STATEMENT

1. The proposed Plan, which has obtained the **unanimous** support of all members of the Voting Class that submitted ballots, represents the vehicle by which the Debtors' Creditors and Holders of Equity Interests will finally see recovery on account of their claims and interests after years of waiting. Those parties did business with, worked for, or invested in what has long since become a crumbled, non-operating business gutted by its founder, Michael Rouse. After Ms. Springer was appointed as the independent CRO of the Debtors, she was left with the shell of an enterprise and a singular focus: analyze the Debtors' books and records to the extent that they were available to her, determine what assets and liabilities existed, and formulate a plan to pay the Debtors' stakeholders as much as possible.

2. In doing so, the CRO has faced a Herculean task, in that there was no business to operate, no employees (save for one remaining director and one remaining officer) to consult, and little by way of books and records. Nonetheless, the CRO and her Professionals undertook the process of evaluating all available information, consulting with all persons with knowledge they

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan and/or Solicitation Motion, as applicable.

could find, and expending great time and effort attempting to locate and/or communicate with every Holder of Equity Interests they could locate.

3. After doing so, the CRO, on behalf of the Debtors, formulated the Plan, which proposes to pay Creditors in full, with interest, and after payment of Administrative Expenses and Priority Tax Claims (if any), to distribute every last remaining dollar to Holders of Equity Interests. And although these Chapter 11 Cases are proceeding under subchapter V, and therefore the Plan can be confirmed without an impaired accepting class, the Debtors went to great lengths to give Holders of Equity Interests the opportunity to participate and exercise their voice in the Plan process, both by voting on it and by having the opportunity to object to its confirmation.

4. Having undertaken that process, the Debtors now come to the Court requesting confirmation with **not one member** of the Voting Class rejecting the Plan, and not one economic stakeholder objecting to its confirmation. As discussed below, the CRO's good faith efforts and determination have been rewarded. The Debtors propose a Plan that not only satisfies all of the Bankruptcy Code's requirements but has won the support of those who matter most: the Debtors' Creditors and Holders of Equity Interests.

5. And yet, notwithstanding the unanimous support of all stakeholders, the only party that objects to the Plan's confirmation is the Office of the Unites States Trustee. The Debtors submit that those objections are misguided, legally incorrect, or insufficient and should not give this Court pause in confirming the Plan. The Debtors address and dispense with each of those objections below.

6. In bankruptcy parlance, the Plan should be confirmed because it meets the requirements under the Bankruptcy Code and applicable law. In real-world terms, the Plan should be confirmed because the Debtors' Creditors and Holders of Equity Interests have waited long

enough to see any recovery with respect to their Claims and Equity Interests, having watched the Debtors' enterprise fail, Michael Rouse disappear without a trace, and Australian Administration and U.S. bankruptcy proceedings commenced. The Plan represents the final chapter for these stakeholders in their tortured history with the Debtors, and it should be confirmed to allow them to recover as much as possible, close the book on their relationship with the Debtors, and move on. The Debtors therefore respectfully request the Court overrule the U.S. Trustee's objections in full and confirm the Plan.[2]

RELEVANT BACKGROUND

I. Procedural History Related to Solicitation and the Plan

7. Prior to filing these Chapter 11 Cases, on April 8, 2025, the Debtors, through their Claims, Noticing and Solicitation Agent, Stretto, Inc. ("Stretto"), initiated a solicitation process for the Impaired Class to vote on the *Debtors' Joint Prepackaged Subchapter V Plan of Liquidation* [D.I. 9] (the "Solicited Plan") pursuant to section 1125(g) of the Bankruptcy Code (the "Solicitation").

8. Through the Soliciation, Members of Class 2 under the Plan, who are Impaired, received Solicitation Packages, including notice of the Third-Party Release provisions in the Plan as well as the treatment of each Class under the Plan. Members of Class 2 were also given the opportunity to opt *into* those Third-Party Releases using the form accompanying their ballots (the "Opt-In Form"). *See Affidavit of Service* [D.I. 14] (the "Solicitation Affidavit of Service").

[2] Contemporaneous with the filing of this Confirmation Brief, the Debtors are filing the *Declaration of Claudia Z. Springer in Support of Confirmation of Debtors' First Amended Joint Prepackaged Subchapter V Plan of Liquidation* (the "Confirmation Declaration") and will submit the proposed Order confirming the Plan as an exhibit to the *Notice of Proposed Findings of Fact, Conclusions of Law, and Order Confirming Debtors' First Amended Joint Prepackaged Subchapter V Plan of Liquidation* (the "Proposed Confirmation Order").

9. On April 14, 2025 (the "Petition Date"), the Debtors commenced the above-captioned cases (these "Chapter 11 Cases") by filing (i) voluntary petitions for relief under Subchapter V of Chapter 11 of the Bankruptcy Code, pursuant to the Small Business Debtor Reorganization Act, as amended, (ii) the Plan, and (iii) the Solicitation Motion.[3]

10. By the Solicitation Motion, among other things, the Debtors sought approval of their prior Solicitation of the votes of Holders of Equity Interests in Class 2 (including the Converted Noteholders).[4]

11. On April 15, 2025, the Office of the United States Trustee (the "U.S. Trustee") appointed William A. Homony of Miller Coffey Tate LLP, to serve as the Subchapter V trustee (the "Subchapter V Trustee") in these cases pursuant to Bankruptcy Code section 1183(a).

12. On April 16, 2025, the Bankruptcy Court entered an order (the "Solicitation Order") [D.I. 31] granting the relief sought by the Solicitation Motion, with certain modifications requested by the U.S. Trustee and Subchapter V Trustee. In so doing, the Bankruptcy Court, among other things, approved the Solicitation Procedures, conditionally waived certain requirements under the Bankruptcy Code and Bankruptcy Rules, required a meeting of creditors be convened pursuant to

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[3] *See Motion for Entry of an Order (I) Scheduling a Confirmation Hearing; (II) Establishing Plan Objection Deadlines; and Related Procedures; (III) Approving Solicitation Procedures; (IV) Directing that a Meeting of the Creditors Be Convened; (V) Waiving the Requirement of Filing Rule 2015.3 Reports; (VI) Waiving the Requirements of Filing Schedules of Assts and Liabilities and Statement of Financial Affairs; (VIII) Waiving the Requirement of Filing Status Report and Directing a Status Conference Not Be Held; (VIII) Setting the Bar Date; and (IX) Granting Related Relief* [D.I. 7].

[4] As more fully discussed in the Solicitation Motion, because the Debtors limited books and records contained limited contact information for the Holders of Equity Interests, the Debtors' CRO embarked on an effort to reach each member of the Voting Class with the information available to her and her professionals. This led to the First Request for Information and Second Request for Information. The First and Second Requests for Information were largely successful in obtaining physical mailing addresses for the majority of Voting Class members whose information was missing, which then permitted the Debtors to serve the Solicitation Package on them. As of the Solicitation Date, the Debtors were unable to obtain the mailing addresses for approximately fifty-five (55) Holders of Equity Interest. As of the date of this Confirmation Brief, through the Debtors' efforts, that number decreased to approximately forty (40) Holders of Equity Interest.

section 341 of the Bankruptcy Code,[5] and set the Confirmation Date as the general Bar Date for filing Proofs of Claims and/or Proofs of Equity Interest against the Debtors and one-hundred eighty (180) days from the Petition Date as the Government Bar Date. It also set the following dates with respect to confirmation of the Plan:

EVENT	PROPOSED DATE/DEADLINE
Relevant Dates for Voting Purposes	
Record Date	April 8, 2025
Commencement of Solicitation	April 8, 2025
Voting Deadline[6]	May 15, 2025 at 11:59 p.m. (ET)
Other Relevant Dates	
Petition Date	April 14, 2025
Plan Supplement Date	May 8, 2025
Voting Report Date	May 22, 2025
Confirmation Objection Deadline	May 22, 2025 at 4:00 p.m. (ET)
Deadline to file Proposed Confirmation Order	May 22, 2025
Deadline to file (i) brief in support of Confirmation of the Plan (including any replies to confirmation objections) (the "Confirmation Brief"), (ii) declarations in support of confirmation of the Plan and (iii) voting certification	May 22, 2025 at 4:00 p.m. (ET)
Confirmation Hearing	May 29, 2025 at 9:00 a.m. (ET)

13. To assist with, among other things, the administration of the Chapter 11 Cases and the Plan process, the Debtors sought and received Court approval for their retention of Pashman

[5] The U.S. Trustee subsequently scheduled and held the 341 meeting on May 7, 2025.

[6] This date is the same date by which the Non-Voting Parties (as defined herein) must return their Opt-In Forms.

Stein Walder Hayden P.C. ("Pashman"), Novo and Stretto pursuant to the following retention applications and motions:

i. *Debtors' Application for Entry of an Order Under Section 327(a), 328(a), and 1184 of the Bankruptcy Code, Bankruptcy Rules 2014 and 2016 and Local Rules 2014-1 and 2016 Authorizing Retention and Employment of Pashman Stein Walder Hayden, P.C. as Counsel for the Debtors Nunc Pro Tunc to the Petition Date* (the "Pashman Retention Application") [D.I. 37], which the Bankruptcy Court granted on May 6, 2025, *see* D.I. 59;

ii. *Motion of Debtors for Entry of an Order (I) Authorizing the Debtors to (A) Employ and Retain Novo Advisors, LLC and (B) Designate Claudia Z. Springer as Chief Restructuring Officer for the Debtors Effective as of the Petition Date; and (II) Granting Related Relief* (the "Novo Retention Motion") [D.I. 38], which the Bankruptcy Court granted on May 6, 2025, *see* D.I. 60;[7] and

iii. *Debtors' Application for Appointment of Stretto, Inc. as Administrative Advisor Effective as of the Petition Date* (the "Stretto Application") [D.I. 39], which the Bankruptcy Court granted on May 6, 2025, *see* D.I. 61.

14. Given their desire to provide notice of the Chapter 11 Cases, the Plan, the Voting Deadline and the Plan Objection Deadline to as many stakeholders as possible and because contact information for certain stakeholders was unavailable even after a reasonable search by the CRO the Debtors published the form of notice approved by the Court (the "Publication Notice") in the *Wall Street Journal* on April 21, 2025, and in *The Australian* on April 23, 2025. *See* D.I. 47, 48.

15. On May 8, 2025, the Debtors filed the Plan Supplement [D.I. 67] (the "Plan Supplement"), which contained, among other things, a list of the Holders of Equity Interests and their corresponding share amounts, which was served on the Holders of Equity Interests on May 8, 2025. *See Affidavit of Service re: Notice of Filing of Plan Supplement* [D.I. 68].

[7] The order the Bankruptcy Court entered with respect to the Novo Retention Motion incorporates certain revisions the U.S. Trustee requested be made to the proposed forms of order filed with the motion to which the Debtors agreed.

16. On May 15, 2025, the Confirmation Objection Deadline passed with only the U.S. Trustee objecting to confirmation of the Plan.[8]

17. On May 22, 2025, Stretto filed the *Declaration of Clarissa D. Cu Regarding the Solicitation and Tabulation of Votes on Creativemass Holdings, Inc. and Its Affiliated Debtors' Joint Subchapter V Plan of Liquidation* [D.I. 74] (the "Voting and Tabulation Declaration") to certify the tabulation of votes and opt-ins in connection with the Plan.

18. Also, on May 22, 2025, the Debtors filed the Plan to revise certain discrete provisions of the Solicited Plan (the "Plan Amendments").

II. The Plan Voting Results

19. As discussed above, and pursuant to section 1125(g) of the Bankruptcy Code, the Debtors solicited votes pre-petition from members of Class 2 under the Plan. As the only Impaired class, pursuant to section 1126 of the Bankruptcy Code Class 2 was the only class entitled to vote on the Plan. 11 U.S.C. § 1126.

20. The following table summarizes the Classes of Claims and Equity Interests under the Plan and whether such Classes were entitled to vote to accept or reject the Plan:

Class	Claim/Equity Interest	Status	Entitled to Vote
1.A	Unsecured Noteholder Claims	Unimpaired	No
1.B	General Unsecured Claims	Unimpaired	No
2	Equity Interests	Impaired	Yes

21. The voting results, as reflected in the Voting and Tabulation Declaration, are summarized as follows:

[8] Discussion of the UST Objection (defined herein) is set forth in Section IV, *infra*.

Total Ballots Counted					
Voting Class	Accepting		Rejecting		Class Voting Results
	Number	Share Amount	Number	Share Amount	
Class 2 (Equity Interests)	256 (100%)	4,389,066 (100%)	0 (0%)	0 (0%)	Accepting

22. As reflected above, the Plan was accepted by one hundred percent (100%) of the Holders of Equity Interests in Class 2 that voted on the Plan, both in number of Holders and in number of shares voted. Notably, sixty-two (62) of the two hundred fifty-six (256) accepting votes were cast by Converted Noteholders, representing 1,961,813 shares held and forty-five (45%) of shares that voted. *See* Voting and Tabulation Declaration, Ex. B. The sixty-two (62) Converted Noteholders account for sixty-five percent (65%) of the total amount of all Converted Noteholders, which equal ninety-five (95).

ARGUMENT

I. The Plan Satisfies the Disclosure Requirements of 11 U.S.C. § 1190.

23. Pursuant to section 1190 of the Bankruptcy Code, a plan filed under subchapter V:

> 1) shall include –
>
> A. a brief history of the business operations of the debtor;
>
> B. a liquidation analysis; and
>
> C. projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;
>
> 2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.

11 U.S.C. §§ 1190(1)–(2).

24. Article 1 of the Plan provides a detailed "History of the Business Operations of the Debtor," including subsections entitled "Nature and History of the Debtors' business," "Filing of the Debtors' Chapter 11 Cases," "Legal Structure and Ownership," "Debtors' Assets," "Debtors' Liabilities," "Current and Historical Financial Conditions," "Events Leading to Filing these Chapter 11 Cases," "Significant Events To-Date During These Chapter 11 Cases and Anticipated Future Significant Events," and "Projected Recovery of Avoidable Transfers." The foregoing sections describe key events in the Debtors' prepetition history that were imparted to the CRO and those that have transpired prior and during these Chapter 11 Cases. The Plan therefore satisfies Section 1190(1)(A) of the Bankruptcy Code.

25. A Liquidation Analysis was not annexed to the Plan because it (i) contemplates a process that will distribute the Australian Distribution Proceeds, which is the Debtors' sole remaining asset, to Creditors and Holders of Equity Interests, and (ii) provides that the Creditors will be paid in full.

26. Moreover, because the Plan is a liquidating plan, no financial projections were attached thereto. The Debtors did, however, include in the Plan Supplement a bank statement evidencing sufficient funds necessary to make payments under the Plan with respect to the Creditors. Upon receipt of the Material Australian Dividend, the Debtors will file an amended Plan Supplement annexing a bank statement reflecting such receipt, which will be used for purposes of distributions to Holders of Equity Interests.

27. Accordingly, the Plan satisfies all requirements of section 1190 of the Bankruptcy Code.

II. The Plan Satisfies the Confirmation Requirements of a Consensual Plan Under 11 U.S.C. § 1191(a).

28. A Subchapter V plan can be confirmed under section 1191(a) of the Bankruptcy Code if all requirements of section 1129(a) are met other than subsection 1129(a)(15). 11 U.S.C. § 1191(a). If a consensual plan is confirmed under section 1191(a), the Subchapter V Trustee's service is terminated upon "substantial consummation." 11 U.S.C. § 1183(c).

29. One of the requirements of section 1129(a) is that "[w]ith respect to each class of claims or interests – (A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. §1129(a)(8). Here, the Plan meets this requirement. First, Creditors are Unimpaired under the Plan, as they are receiving payment in full on account of their Allowed Claims. Second, with respect to Holders of Equity Interests, the Plan is fully consensual. As more particularly described in the Voting and Tabulation Declaration, the Holders of Equity Interests (Class 2) *unanimously* voted to accept the Plan.

30. The requirements of section 1129(a)(8) of the Bankruptcy Code are therefore satisfied and the Plan can be confirmed so long as the other applicable requirements of section 1129(a) are met. As outlined below, the Debtors submit that such requirements are met, and therefore the Plan can be confirmed as a consensual plan under Subchapter V of the Bankruptcy Code.

III. The Plan Satisfies the Applicable Provisions of 11 U.S.C. § 1129(a).

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

31. Section 1129(a)(1) of the Bankruptcy Code requires that a plan "complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of 11 U.S.C. § 1129(a)(1) explains that this provision encompasses the requirements of 11 U.S.C.

§§ 1122 and 1123 governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re Johns-Manville Corp*., 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986); *In re Johns-Manville Corp*., 843 F.2d 636 (2d Cir. 1988); *In re Toy & Sports Warehouse, Inc*., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

32. As discussed herein, the Plan fully complies with all of the applicable provisions of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code.

a. The Plan Complies with the Requirements of Section 1122.

33. Section 1122 provides that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to other claims or interests of such class." 11 U.S.C. § 1122(a). Courts have recognized that plan proponents have significant flexibility under section 1122 in classifying claims. *See Frito-Lays Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (affirming separate classification where rational basis existed for classification scheme); *see also In re Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 633 (Bankr. D. Del. 2022) (citing *John Hancock Mut. Life Ins. Co. v. Route 37Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) ("The Third Circuit recognizes that plan proponents have significant flexibility in placing similar claims in multiple classes if there is a rational basis to do so.").

34. Indeed, as one court noted, "even in the context of reorganization, a majority of both cases and commentators have rejected the concept that all creditors of equal rank must receive equal treatment." *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989). Courts will generally approve placement of similar claims in different classes, provided there is a rational or reasonable basis to do so. *See also In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R.

723, 757 (Bankr. S.D.N.Y. 1992) ("A plan proponent is afforded significant flexibility in classifying claims under § 1122(a) if there is a reasonable basis for the classification scheme and if all claims within a particular class are substantially similar.") (citation omitted); *see also In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060 (3d Cir. 1987) ("The express language of this statute explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes.").

35. Here, the Plan contains two (2) separate Classes of Claims and Equity Interests, with each class containing substantially similar claims or interests as required by section 1122 of the Bankruptcy Code: Allowed Claims are placed in Class 1,[9] and Equity Interests are placed in Class 2. The two (2) Classes are dissimilar with respect to the nature of the claims therein, and therefore are properly classified separately under the Plan.

36. Based on the foregoing, the Debtors submit that the Plan complies with the provisions of section 1122.

b. The Plan Satisfies the Mandatory Requirements of Section 1123(a).

37. As set forth in greater detail below, the Plan complies with the applicable provisions of section 1123(a).

i. Section 1123(a)(1)

38. Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes for all claims and interests, other than the types of claims specified in Bankruptcy Code sections

[9] Classes 1.A (Unsecured Noteholder Claims) and 1.B (General Unsecured Claims) are only referred to as such in the Plan for purposes of showing the two distinct types of unsecured debt (Convertible Note debt and other debt, both of which are unsecured). Allowed Claims in Classes 1.A and 1.B are treated identically and together make up Class 1.

507(a)(2) (administrative expense claims), 507(a)(3) (claims arising during the "gap" period in an involuntary bankruptcy case), and 507(a)(8) (priority tax claims)). 11 U.S.C. § 1123(a)(1).

39. The Plan expressly classifies all claims and interests against the Debtors, other than Administrative Expense Claims and Priority Tax Claims, which are not classified under the Plan, but identified the foregoing as being paid in full, in Cash, upon Allowance or within such other time as permitted under the Bankruptcy Code. Therefore, the Plan satisfies section 1123(a)(1) of the Bankruptcy Code.

ii. Section 1123(a)(2)

40. Section 1123(a)(2) 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). Article 2 of the Plan identifies Class 1, consisting of Unsecured Noteholder Claims (Class 1.A) and General Unsecured Claims (Class 1.B), as Unimpaired. Therefore, the Plan satisfies section 1123(a)(2) of the Bankruptcy Code.

iii. Section 1123(a)(3)

41. Section 1123(a)(3) 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). Article 2 of the Plan details the treatment of Class 2, consisting of Equity Interests, which is the only Impaired class under the Plan. Therefore, the Plan satisfies section 1123(a)(3) of the Bankruptcy Code.

iv. Section 1123(a)(4)

42. Section 1123(a)(4) requires that a plan provide that each claim or interest in a particular class receive the same treatment as other members of the same class, unless a holder agrees otherwise. 11 U.S.C. § 1123(a)(4). Article 2 of the Plan satisfies this requirement by providing that each Allowed Claim in Class 1 and Equity Interest in Class 2 will receive the same

treatment as the other Claims and Equity Interests included in such respective Classes. Therefore, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

v. Section 1123(a)(5)

43. Section 1123(a)(5) of the Bankruptcy Code requires that a plan "provide adequate means for the plan's implementation," and sets forth examples of typical means for implementing a plan. 11 U.S.C. § 1123(a)(5).

44. Here, the means for implementation of the Plan does not fall under any of section 1123(a)(5)'s examples but is nonetheless adequate under this subsection of the Bankruptcy Code. The Debtors are no longer operational, and the Plan is a liquidating plan. As such, the Plan provides that it will be funded by the Cash Funds currently in possession of the Debtors, *see* Plan Supplement, and the Material Australian Dividend to be provided by the Australian Administration, to be distributed by the Debtors pursuant to the Plan's terms. Based on the foregoing, the Debtors submit that the Plan complies with the requirements of section 1123(a)(5) of the Bankruptcy Code.

vi. Section 1123(a)(6)

45. Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of non-voting equity securities and requires that the reorganized debtor's charters so provide. The Plan does not provide for the issuance of non-voting equity securities, so this section of the Bankruptcy Code is inapplicable.

vii. Section 1123(a)(7)

46. Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the

plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Here, (i) Equity Interests will be cancelled and extinguished, and (ii) the Plan does not address the selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee because the Debtors are not operational and have ceased operations. Therefore, this section of the Bankruptcy Code is inapplicable.

viii. Section 1123(a)(8)

47. Section 1123(a)(8) of the Bankruptcy Code requires that, in a case in which the debtor is an individual, the plan provides for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan. 11 U.S.C. § 1123(a)(8). This section of the Bankruptcy Code is inapplicable because the Debtors are corporate entities.

c. The Consensual Release Provisions and the Exculpation Provision Under the Plan Are Consistent with Section 1123(b).

48. The Plan provides for the releases of certain claims by the Debtors (the "Debtor Releases"), as well as consensual third-party releases (the "Third-Party Releases," and together with the Debtor Releases, the "Release Provisions"). Furthermore, the Plan exculpates estate fiduciaries that are critical to these Chapter 11 Cases (the "Exculpation Provision"). The Release Provisions and Exculpation Provision are integral components of the Plan, are consistent with the Bankruptcy Code, and comply with applicable case law, including the *Harrington v. Purdue Pharm L.P.* ("*Purdue*")[10] decision. Moreover, the Third-Party Releases are granted by the Releasing Parties (as defined by the Plan) only on an "opt-in" basis and are supported by the

[10] 144 S. Ct. 2071 (2024).

Debtors' Voting Class. Therefore, the Release Provisions and Exculpation Provision should be approved.

i. The Debtor Releases Are Appropriate and Should Be Approved.

49. Article 11 of the Plan, specifically Article 11.9, provides for Debtor Releases, which are customary releases supported by the Bankruptcy Code. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *In re Spansion, Inc*., 426 B.R. 114, 143 (Bankr. D. Del. 2010) (citing section 1123(b)(3)(A) of the Bankruptcy Code) (internal quotation marks omitted). In determining whether a debtor release is proper, courts in Delaware and elsewhere generally consider the following five factors (although all five need not be satisfied to approve releases by the debtors):

1. whether the non-debtor has made a substantial contribution to the debtor's reorganization;
2. whether the release is essential to the debtor's reorganization;
3. whether there is an agreement by a substantial majority of creditors to support the release;
4. whether there is an identity of interest between the debtor and the third party; and
5. whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release.

See, *e.g.*, *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)); *In re Spansion, Inc.*, 426 B.R. at 143 n.47 (citing the *Zenith* factors).

50. Consideration of these factors supports the Debtor Releases. The Debtor Releases are a valid exercise of the Debtors' business judgment, and are fair, reasonable, and in the best

interests of the Debtors' Estates because the Released Parties[11] made valuable contributions to the liquidation process, both pre- and post-petition, and meaningfully participated in formulating and will meaningfully participate in implementing the Plan.

51. First, the Released Parties participated heavily in connection with the requisite fact gathering needed to formulate a comprehensive Plan, without those efforts it would have been very difficult, if not impossible, to develop the Plan. For instance, prior to Ms. Springer's appointment, Mr. Ulrich and Mr. Gonzalez were the only two persons left standing as representatives of the Debtors. Each assisted the CRO and her Professionals by (i) identifying Creditors, (ii) obtaining and providing the CRO with access to the Debtors' books and records, and institutional knowledge with respect to the Debtors and their previous operations; and (iii) connecting the CRO and her Professionals with others who could assist in providing information necessary for the CRO and her counsel to formulate the Plan, etc. The information Mr. Ulrich and Mr. Gonzalez provided to the CRO and her Professionals has been invaluable to the Debtors' ability to conceptualize, formulate, and to ultimately implement the Plan pursuant to the terms therein. Each of the Released Parties are critical participants in the Plan process who share a common goal with the Debtors in seeing the Debtors finally wind down and distribute the Plan Administrator Assets to the Creditors and Holders of Equity Interests.

52. Again, each Released Party has made a substantial contribution to the Debtors' Estates, playing an integral role in the formulation of the Plan and expending significant time and resources in so doing. Therefore, the Release Parties' contributions and continued efforts are integral for the implementation of the Plan.

[11] Pursuant to Section 14.1 of the Plan, "Released Party" means each of the following: (a) the Debtors; and (b) the Debtors' current officers and directors, which include Alex Ulrich, Rodrigo Gonzalez and Claudia Springer. For the avoidance of doubt, Michael Rouse is not included in the definition of Released Party.

53. Second, as evidenced by the Voting and Tabulation Declaration and noted herein, the Debtors' Holders of Equity Interests support the Plan, and no Holders of Equity Interest (or Creditor) objected to the Debtor Releases contained in the Plan. Those members of the Voting Class that submitted Ballots voted *unanimously* to accept the Plan. This degree of consensus evidences the Debtors' Holders of Equity Interests support for the Debtor Releases and Plan.

54. Third, an identity of interest exists between the Debtors and the Released Parties. Whether there is an identity of interest depends on whether the debtor and non-debtor are sufficiently interlinked such that a lawsuit against the non-debtor would effectively be a lawsuit against the debtor or would deplete the assets of the Estate(s). *In re Master Mortgage Inv. Fund*, Inc., 158 B.R. 930 (Bankr. W.D. Mo. 1994). Lawsuits against the Released Parties may implicate the Debtors, as a result of any indemnification or similar obligations the Debtors may have or that may be asserted against them. Moreover, for that reason, each Released Party shares a common goal in attaining a confirmed Plan that results in distribution of the Plan Administrator Assets as contemplated thereunder.

55. For these reasons, the Debtor Releases are justified, in the best interests of the Debtors' estates and all stakeholders, are an integral part of the Plan, and satisfy nearly all the factors considered by courts in determining whether a debtor release is proper. Based on the foregoing, the Debtor Releases constitute a sound exercise of the Debtors' business judgment that is both fair and equitable and in the best interests of the Debtors' Estates. Accordingly, the Debtor Releases set forth in the Plan should be approved.

ii. The Consensual Third-Party Releases Are Appropriate and Should be Approved

56. In addition to the Debtor Releases, Article 11 of the Plan, specifically Article 11.10, provides for the Third-Party Releases and is only applicable to the Releasing Parties.[12] The Third-Party Releases are (i) consistent with Third Circuit precedent and the United States Supreme Court's decision in *Purdue*, and (ii) integral to the Plan, and should be approved.

57. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a Chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a party may "include any other appropriate provision not inconsistent with the applicable provisions of" the Bankruptcy Code. 11 U.S.C. §§ 1123(b)(1)–(4), (6).

58. Consensual third-party release provisions included in bankruptcy plans are not inconsistent with the Bankruptcy Code and courts in the Third Circuit and other sister Circuits routinely approve third-party releases if they are consensual, as they are here. *See In re BlockFi, Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023) (confirming a chapter 11 plan with third party and debtor releases); *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019); *In re Wash. Mut. Inc.*, 442 B.R. 314, 352–55 (Bankr. D. Del. 2011); *In re Indianapolis Downs, LLC.*, 486 B.R. 286, 305 (Bankr. D. Del. 2013); *U.S. Bank Nat'l Assoc. v. Wilmington Tr. Co. (In re Spansion, Inc.*), 426 B.R. 114, 144 (Bankr. D. Del. 2010); *In re Motors Liquidation Co.*, 447 B.R. 198, 220 (Bankr. S.D.N.Y. 2011) ("[A] plan may 'include any other appropriate provision not inconsistent with applicable provisions of this title' [and] third-party releases aren't 'inconsistent with the applicable provisions of this title. . . .'").

[12] Pursuant to Section 14.101 of the Plan, "Releasing Party" means each Person who affirmatively marked the box on the Opt-In Form electing to opt into granting the releases provided under this Plan.

59. The law is clear that a release is consensual where parties have received sufficient notice and have had an opportunity to object to and/or opt in to the releases. In *Emerge*,[13] this Court recognized that a release by a non-debtor third party is consensual where the releasing party indicates its consent by an affirmative act. Since *Emerge*, this Court and others have approved numerous third-party releases as consensual where the releasing third parties were required to indicate their consent by returning a form indicating the party's desire to participate in the third-party release, *i.e.*, opting into the third-party release.

60. Moreover, opt-in procedures are routinely approved in this Court. *See*, *e.g.*, *Oldco Tire Distributors, Inc., et al.*, Case No. 24-12391 (CTG) (Bankr. D. Del. March 28, 2025) [D.I. 968] (confirming a Plan that provided parties to opt into the third-party releases); *In re Accuride Corp. et al.*, Case No. 24-12289 (JKS) (Bank. D. Del. Feb. 12, 2025) [D.I. 704] (same); *In re Exp OldCo Winddown, Inc.*, Case No. 24- 10831 (KBO) (Bankr. D. Del. Dec. 17, 2024) [D.I. 1150] (approving third-party releases that required the releasing parties to affirmatively opt-in via a ballot or opt-in form); *In re SunPower Corp.*, et al., Case No. 24-11649 (CTG) (Bankr. D. Del. Oct. 18, 2024) [D.I. 872] (approving third-party releases that required the releasing parties to affirmatively opt-in by voting to accept the plan or by completing and returning the applicable opt-in form); *In re Casa Systems, Inc*., Case No. 24-10695 (KBO) (Bankr. D. Del. June 5, 2024) [D.I. 421] (same).

61. Furthermore, it is critical to note that nothing in the *Harrington v. Purdue Pharm L.P.*[14] decision disturbs the forgoing approach and interpretation employed by this Court, as the *Purdue* case did not involve consensual releases granted by opt-in procedures; rather, it only addressed the permissibility of non-consensual releases. The Supreme Court expressly provided:

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[13] No. 19-11563 (KBO), 2019 WL 7634308, at *1 (Bankr. D. Del. Dec. 5, 2019).

[14] 144 S. Ct. 2071 (2024).

> **Nothing in what we have said should be construed to call into question consensual third-party releases** offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. *See*, *e.g.*, *In re Specialty Equipment Cos.*, 3 F. 3d 1043, 1047 (CA7 1993). Nor do we have occasion today **to express a view on what qualifies as a consensual** release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.

Purdue, 144 S. Ct. at 2087–88 (emphasis added).

62. The Supreme Court's decision in *Purdue* is not at odds with the release provisions commonly approved by this Court, and its holding is generally inapplicable to the release provisions contemplated by the Debtors. In *Purdue*, the Supreme Court made clear the narrow scope of the decision; thus *Purdue's* applicability is therefore limited to cases where a debtor (or debtors) seeks approval of non-consensual third-party releases.

63. Here, all parties in interest were provided notice of these Chapter 11 Cases, the Plan, and the deadline to object to confirmation of the Plan. Moreover, the Commencement Notice, the Ballots, the Notices of Non-Voting Status and the Opt-In Forms provided recipients with timely, clear, unambiguous notice of the Third-Party Releases. The Debtors required all Holders of Claims or Equity Interests to then affirmatively opt-in to the Third-Party Releases in order to grant and be bound by them, either by checking a box on the Ballot and returning the Ballot, or by completing and returning the Opt-In Form. In each case the Debtors provided Holders of a Claim or Equity Interest with instructions on how to do so. As of the time of filing, one hundred seventy-nine (179) Ballots from Holders of Equity Interests were returned with the opt-in box checked. Likewise, two (2) Creditors returned their respective Opt-In Form. *See* Voting and Tabulation Declaration, ¶ 15. The parties that returned the aforementioned Ballots and Opt-In Forms therefore affirmatively and consensually opted into the Third-Party Releases.

64. Approval of the Third-Party Releases under the circumstances of these Chapter 11

Cases is appropriate because they are not binding on any non-consenting parties. The Third-Party Releases are effective and binding upon only those parties that affirmatively opted into the Third-Party Releases. Thus, the only parties providing the Third-Party Release are Creditors or Holders of Equity Interests that have affirmatively acted, or otherwise agreed, to such Third-Party Releases. All parties had ample opportunity to evaluate and opt into, or alternatively opt out of or abstain from opting into, the Third-Party Releases.

65. Here, again, there is no questioning the consensual nature of the Third-Party Releases. The Creditors and Holders of Equity Interests had sufficient notice that the Plan contains Third-Party Releases (and the other Release Provisions) as such provisions were printed, in bold type face, on the Commencement Notice, the Ballots and the Opt-In Form. Additionally, the Ballot and the Opt-In Form provide an uncomplicated mechanism, *i.e.* checking a box, to opt into the Third-Party Releases.

66. Finally, the Third-Party Releases are integral and essential provisions of the Plan and help provide finality for the Released Parties and are in exchange for good and valuable consideration provided by the Released Parties. Additionally, the Third-Party Releases are in the best interests of the Debtors, the Estates, and all Holders of Claims and Equity Interests (that opted into the Third-Party Releases) and are fair, equitable, and reasonable. Further, each Creditor and Holder of Equity Interests were given due notice and an opportunity to be heard as it relates to the Third-Party Releases as evidenced by the *Solicitation Affidavit of Service*.

67. For all of these reasons, the Third-Party Releases are appropriate and should be approved. Importantly, the Commencement Notice, the Ballots, and the Non-Voting Status and Opt-In Form sent to Creditors and Holders of Equity Interests, as applicable, quoted the entirety of the Third-Party Releases in bold, conspicuous font, and clearly provided such Creditors and

Holders with detailed instructions on how to opt in to the Third-Party Releases. Thus, affected parties were on notice of the Third-Party Releases, including how to grant them or refrain from doing so. The Third-Party Releases are therefore consensual as to all Creditors and Holders of Equity Interests who affirmatively opted in to the Third-Party Releases.

iii. The Exculpation Provision Should Be Approved

68. In addition to the Debtor Releases and Third-Party Releases, Article 11 of the Plan, specifically Article 11.11, sets forth the Exculpation Provision. The Exculpation Provision is intended to prevent collateral attacks against estate fiduciaries that have acted in good faith to help facilitate the Chapter 11 Cases and the Debtors' Plan. Moreover, the Exculpation Provision is an integral part of the Plan and otherwise satisfies the governing standards in the Third Circuit as it provides necessary and customary protections to estate fiduciaries whose efforts were and continue to be vital to implementing the Plan. Accordingly, the Exculpation Provision should be approved.

69. An exculpation provision is not a mandatory release of all liability, instead, it establishes the appropriate standard of liability with respect to the parties exculpated. *See In re PWS Holding Corp*., 228 F.3d 224, 246 (3d Cir. 2000) (reasoning that the exculpation provision "does not affect the liability of third parties, but rather sets forth the appropriate standard of liability"); *see also In re Enron Corp*., 326 B.R. 497, 501 (S.D.N.Y. 2005) (in finding creditors' appeal of confirmation based on the plan's exculpation provision moot, the court specifically noted that the bankruptcy court addressed the exculpation provision and found it appropriate because it excluded gross negligence and willful misconduct).

70. In the Third Circuit, exculpation provisions like the one set forth in the Plan are regularly approved. *See In re Laboratory Partners, Inc.*, No. 13-12769 (PJW) (Bankr. D. Del. July 10, 2014) (finding that exculpation was appropriately extended to secured lender who funded

the chapter 11 case); *In re FAH Liquidating Corp.*, No. 13-13087 (KG) (Bankr. D. Del. July 28, 2014) (finding that exculpation as applied to a non-debtor Plan Sponsor was appropriate under section 1123(b)). Exculpation provisions that are limited to claims not involving actual fraud, willful misconduct, or gross negligence, are customary and generally approved in this district under appropriate circumstances. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 350–51 (Bankr. D. Del. 2011) (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate).

71. Unlike third-party releases, exculpation provisions do not affect the liability of third parties *per se* but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtors' restructuring. *See PWS Holding Corp.*, 228 F.3d at 245 (finding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code."); *see also In re Premier Int'l Holdings, Inc.*, No. 09–12019 (CSS), 2010 WL 2745964, at *10 (Bankr. D. Del. Apr. 29, 2010) (approving a similar exculpation provision as that provided for under the Plan); *In re Spansion*, No. 09–10690 (KJC), 2010 WL 2905001, at *16 (Bankr. D. Del. April 16, 2010) (same).

72. Moreover, exculpation for parties participating in the Plan process is appropriate where Plan negotiations and formulation processes could not have occurred without protection from liability. *See In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019) ("I believe that an appropriate exculpation provision should say that it bars claims against the exculpated parties based on the negotiation, execution, and implementation of agreements and transactions that were approved by the Court."); *In re Drexel Burnham Lambert*

Grp., Inc., 960 F.2d 285, 293 (2d Cir. 1992); *Enron Corp*., 326 B.R. at 503 (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

73. Further, as noted *supra,* in order to confirm a bankruptcy plan, this Court must find, under sections 1129(a)(2) and (a)(3), that the Debtor has complied with the applicable provisions of the Bankruptcy Code and that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors and, by extension, to the Debtors' current officers, current directors and professionals who are the beneficiaries of the Exculpation Provision, and evidence that the Plan was negotiated at arm's length and in good faith. Therefore, the Court's good faith findings with respect to the Debtors' Chapter 11 Cases and the Plan should extend to the Exculpated Parties.

74. Article 11.11 of the Plan exculpates parties with respect to any Exculpated Claim, including, without limitation, any act or omission in connection with, related to, or arising out of, in whole or in part, the Debtors' Chapter 11 Cases. The Exculpated Parties were critical to the Debtors' Chapter 11 Cases, and specifically, the formulation of the Plan. The Debtors and their remaining officers and directors, as well as the CRO and retained Professionals, actively formulated, negotiated, and/or interfaced with the Debtors' Creditors, Holders of Equity Interests, the U.S. Trustee and the Subchapter V Trustee regarding the terms of the Plan. The Debtors ask that the Court find that the Exculpated Parties participated in good faith with respect to the Debtors' Chapter 11 Cases for the reasons discussed in Section II.c.(ii), *infra*.

75. Further, the Exculpation Provision is limited to estate fiduciaries and includes the carve out for gross negligence and willful misconduct, which is consistent with established practice in this jurisdiction and others. *See, e.g.*, *PWS Holding Corp.*, 228 F.3d at 235, 245 (approving plan

provision that released claims except as to willful misconduct or gross negligence, and characterizing such a provision as "commonplace . . . in Chapter 11 plans"); *In re Wash. Mut. Inc*., 442 B.R. at 350 (noting that the "Third Circuit has held that a creditors' committee, its members, and estate professionals may be exculpated under a plan for their actions in the bankruptcy case except for willful misconduct or gross negligence").

76. Accordingly, the Exculpation Provision is standard in other chapter 11 plans confirmed in this district. *See, e.g.*, *In re VER Techs. HoldCo, LLC*, No. 18-10834 (KG) (Bankr. D. Del. July 26, 2018); *In re Sea Containers Ltd.*, No. 06-11156 (KJC) (Bankr. D. Del. Nov. 24, 2008); *In re ACG Holdings*, No. 08-11467 (CSS) (Bankr. D. Del. Aug. 6, 2008).

77. The Court should approve the Exculpation Provision and adopt the appropriate standard of liability for the Exculpated Parties with respect to Exculpated Claims.

B. The Plan Complies with Section 1129(a)(2).

78. Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of the plan "compl[y] with the applicable provisions" of the Bankruptcy Code, which generally is intended to ensure that a plan proponent has complied with the requirements of the Bankruptcy Code governing the solicitation of acceptances of a plan. *See In re Texaco Inc*., 84 B.R. 893, 906–07 (Bankr. S.D.N.Y. 1988).

79. On the Solicitation Date, the Claims, Noticing, and Solicitation Agent, at the direction of the CRO (which was approved by the Court in the Solicitation Order), sent Solicitation Packages to the Reachable Class 2 Members via first class mail, and email where a physical mailing address was not provided as a result of the First and Second Requests for Information.

80. On a rolling basis, the Claims, Noticing, and Solicitation Agent then tabulated the Ballots submitted by Holders of Equity Interests prior to the Voting Deadline and in accordance

with the Solicitation Order, the Claims, Noticing, and Solicitation Agent finally tabulated the Ballots submitted by Holders of Equity Interests and timely filed the Voting and Tabulation Declaration.

81. The Debtors submit that, as the proponent of the Plan, they have complied with all applicable provisions of the Bankruptcy Code, and therefore section 1129(a)(2) of the Bankruptcy Code is satisfied.

C. The Plan Complies with Section 1129(a)(3).

82. Section 1129(a)(3) requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). "[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code" in light of the particular facts and circumstances of the case. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004); *see also PWS Holding Corp.*, 228 F.3d at 242 (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 424–25 (7th Cir. 1984)); *In re Burns & Roe Enters.*, No. 08-4191 (GEB), 2009 WL 438694, at *5 (D.N.J. Feb. 23, 2009). Moreover, the burden of proof is on the debtor to show by a preponderance of the evidence that a plan of reorganization was proposed in good faith. *See In re Dernick*, 624 B.R. 799, 811 (Bankr. S.D. Tex. 2020).

83. The Debtors have proposed the Plan in good faith to achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Although not defined by the Bankruptcy Code, "good faith" has been described to include (i) a showing that the plan was proposed with honesty and good intentions, and (ii) the existence of a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988); *see also Traders State Bank v. Mann*

Farms, Inc. (In re Mann Farms, Inc.), 917 F.2d 1210, 1214 (9th Cir. 1989) (interpreting analogous provision under chapter 12); *In re Nite Lite Inns*, 17 B.R. 367, 370 (Bankr. S.D. Cal. 1982).

84. The objectives and purposes of the Bankruptcy Code include "preserving going concerns and maximizing property available to satisfy creditors, giving debtors a fresh start in life, discouraging debtor misconduct, the expeditious liquidation and distribution of the bankruptcy estate to its creditors, and achieving fundamental fairness and justice." *In re WR Grace & Co.*, 729 F.3d 332, 346 (3d Cir. 2013) (citations omitted).

85. Here, the Plan has been proposed in good faith. Ms. Springer, the Plan proponent, is an independent fiduciary who was retained by the Debtors more than two (2) years after the Note to Equity Conversion[15] occurred. She has been tasked with picking up the pieces of a broken enterprise and distributing the funds remaining with the information available to her and her Professionals. Any issue regarding the fairness of the Note to Equity Conversion and the circumstances surrounding the same should not, and cannot, equate to Ms. Springer proposing the Plan in bad faith. Quite the opposite, she is proposing this Plan based on her reasonable business judgment given the facts and circumstances of these Chapter 11 Cases.

86. A finding of good faith is found when the Plan is in furtherance of maximizing recoveries. *See WR Grace*, 729 F.3d at 346. Here, that is what Ms. Springer has done. In her reasonable business judgment, the CRO determined that, rather than materially diminish the finite pool of Assets available for distribution by challenging an allowable the Note to Equity Conversion by the former CEO and investigating the facts and circumstances surrounding the same, particularly where the Note to Equity Conversion was allowed under the terms of the Convertible

[15] A more detailed recitation of facts concerning the Note to Equity Conversion can be found in Section 1.7 of the Plan.

Notes and all readily available documents, she would instead distribute the Assets in accordance with the Debtors' books and records as they currently stand.

87. Creditors and Holders of Equity Interests have been waiting for repayment (as it relates to Creditors) and any fractional distribution (as it relates to the Holders of Equity Interests). Additionally, out of an abundance of caution, the CRO caused an entire pre-petition Solicitation to be done in order to give those that are Impaired – Holders of Equity Interests – a voice with respect to the Plan and the treatment contemplated therein. Those Impaired under the Plan have screamed their support of the Plan as evidenced by the unanimous votes to accept the Plan.

88. Accordingly, section 1129(a)(3) of the Bankruptcy Code is satisfied.

D. The Plan Complies with Section 1129(a)(4).

89. Section 1129(a)(4) requires that payments to be made under the Plan "for services or for costs and expenses in connection with the case, or in connection with the plan and incident to the case," be approved by the Court as reasonable. 11 U.S.C. § 1129(a)(4). As such, section 1129(a)(4) requires that the Court review and approve any payments on account of non-ordinary course administrative expenses. *See, e.g.*, *In re Resort Int'l, Inc.*, 145 B.R. 412, 475–76 (Bankr. D.N.J. 1990); *In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (finding that Bankruptcy Code section 1129(a)(4) was satisfied where plan provides for payment of "allowed" administrative expenses); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988).

90. Under the Plan, each Professional seeking payment of fees and expenses incurred in connection with the Chapter 11 Cases must file and serve a properly noticed fee application, which will be subject to the Court's final approval, and only the amount of fees allowed by the Court will be paid.

91. Accordingly, section 1129(a)(4) of the Bankruptcy Code is satisfied.

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

92. Section 1129(a)(5) requires that (i) the plan proponent disclose the identity of any individual that will serve after confirmation of the plan as a director, officer, or voting trustee of the debtor or that will be a successor to the debtor under the plan and that the appointment of any such individual be consistent with the interests of creditors and shareholders and public policy and (ii) the plan proponent disclose the identity of any insider that will be employed by the reorganized debtor and the nature of the compensation that they will receive. 11 U.S.C. §§ 1129(a)(5)(A), (B).

93. This section is satisfied inasmuch as Article 2.7 of the Plan provides that because the Debtors are liquidating and have ceased operations, accordingly, there will be no post-confirmation management. Therefore, section 1129(a)(5) of the Bankruptcy Code is satisfied.

F. Section 1129(a)(6) Is Inapplicable.

94. Section 1129(a)(6) requires that any regulatory commission with jurisdiction over the rates of a debtor approve any changes in rate regulations provided in a plan. 11 U.S.C. § 1129(a)(6). The Debtors are not subject to any such regulation and consequently the Plan does not propose any such rate changes; thus, this section of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

G. The Plan Complies with Section 1129(a)(7).

95. The "best interests test" of section 1129(a)(7) requires that, with respect to each class of impaired claims or interests under a plan, every holder of a claim or interest in such impaired class either (i) accept the plan, or (ii) receive or retain property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7). Under the best interests test, the court "must find that each [non-accepting] creditor will receive or

retain value that is not less than the amount he would receive if the debtor were liquidated [under chapter 7 of the Bankruptcy Code]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 440 (1999); *U.S. v. Reorganized CF&I Fabricators, Inc*., 518 U.S. 213, 228 (1996).

96. Here, because the Plan (i) contemplates a liquidation process, and (ii) provides that the Creditors will be paid in full, a liquidation analysis is unnecessary as the interests would be similar (as a result of the added costs to pay the appointed Chapter 7 Trustee).

97. Accordingly, the Plan satisfies the best interest test and section 1129(a)(7) of the Bankruptcy Code.

H. The Plan Complies with Section 1129(a)(8).

98. Section 1129(a)(8) requires that each class of claims and interests established under a plan either accept the plan or not be impaired under the plan. 11 U.S.C. § 1129(a)(8). A class of claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of claims in that class vote to accept the plan, counting only those claims whose holders actually vote. *See* 11 U.S.C. §§ 1126(c)–(d). As set forth above, the Plan does satisfy this requirement as the only Impaired class – Equity Interests (Class 2) – voted to accept the Plan, one hundred percent (100%). *See* Voting and Tabulation Declaration.

99. Based on the foregoing, section 1129(a)(8) of the Bankruptcy Code is satisfied.

I. The Plan Complies with Section 1129(a)(9).

100. Bankruptcy Code section 1129(a)(9) provides that, except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that:

> a. with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the

> holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
>
> b. with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive-- (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and
>
> c. with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash-- (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)).

11 U.S.C. § 1129(a)(9).

101. However, in a subchapter V bankruptcy, like this one, notwithstanding section 1129(a)(9)(A), a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under 11 U.S.C. § 1191(b). 11 U.S.C. § 1191(e). In other words, the foregoing types of administrative expense claims may be paid through the life of the plan of reorganization.

102. Here the Plan satisfies these requirements. With respect to the Allowed Professional Fee Claims, the Plan provides the same shall be paid in full, in Cash, from the Professional Fee Escrow Account. With respect to Priority Tax Claims, while the Debtors do not believe there will be any, such Claims will be paid in accordance with, that being paid in full, in Cash, upon Allowance or within such other time as permitted under the section 1129(a)(9)(C).

103. Accordingly, the Plan satisfies the best interest test and section 1129(a)(9) of the

Bankruptcy Code.

J. The Plan Complies with Section 1129(a)(10).

104. Section 1129(a)(10) requires that at least one class of claims that is impaired under the plan has voted to accept the plan, determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10). As set forth in the Voting and Tabulation Declaration, Class 2 was the only Impaired class entitled to vote and Class 2 voted to accept the Plan.

105. Accordingly, section 1129(a)(10) of the Bankruptcy Code is satisfied.

K. Section 1129(a)(11) is Inapplicable.

106. Section 1129(a)(11) requires a court to find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). A plan proponent must prove a chapter 11 plan's feasibility by the preponderance of evidence. *See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) (rejecting "clear and convincing" as the applicable standard). The burden of proof necessary to satisfy the requirement is a relatively ***low threshold***. *See In re Sea Garden Motel and Apartments*, 195 B.R. 294, 304 (Bankr. D. N.J. 1996). Moreover, to demonstrate a plan's feasibility, it is not necessary that success of the plan be guaranteed. *See In re Landing Assoc., Ltd*., 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993) (noting that no plan can offer absolute certainty and that section 1129(a)(9) requires only that the plan offer a reasonable probability of success). Rather, a bankruptcy court must determine whether a plan is workable and has a reasonable likelihood of success. *See U.S. v. Energy Res. Co*., 495 U.S. 545, 549 (1990); *IRS v. Kaplan (In re Kaplan)*, 104 F.3d 589, 597 (3d Cir. 1997). Here, however, because the Plan is a liquidation plan, section 1129(a)(11) of the

Bankruptcy Code is inapplicable.

L. Section 1129(a)(12) is Inapplicable.

107. Section 1129(a)(12) of the Bankruptcy Code requires that a plan provide that all fees payable under 28 U.S.C. § 1930 be paid on or before the effective date of the plan. Here, the Debtors have elected to proceed under Subchapter V of chapter 11 of the Bankruptcy Code where such fees are not due by the Debtors. Accordingly, this section of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

M. Section 1129(a)(13) is Inapplicable.

108. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. The Debtors do not have any present obligations to pay retiree benefits within the meaning of section 1129(a)(13). Accordingly, this section of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

N. Section 1129(a)(14) is Inapplicable.

109. Section 1129(a)(14) requires that, if applicable, the debtor pay all domestic support obligations. Here, the Debtors are corporate entities and are not required by any judicial or administrative order to pay domestic support obligations. As such, this section of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

O. Section 1129(a)(15) is Inapplicable.

110. Pursuant to section 1181(a), section 1129(a)(15) of the Bankruptcy Code is inapplicable in this subchapter V case. Section 1191(a) also expressly provides that a consensual plan confirmed under section 1191(a), as is the situation here, need not comply with section 1129(a)(15). In either case, section 1129(a)(15) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

P. Section 1129(a)(16) is Inapplicable.

111. Section 1129(a)(16) requires that transfers of property under the plan shall be made 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. This section of the Bankruptcy Code is inapplicable as the Plan calls for no such transfers.

III. The Sole Plan Objection from the U.S. Trustee

112. Despite the Plan being fully consensual and accepted by all members of the Voting Class that submitted Ballots, the U.S. Trustee filed the lone objection to confirmation of the Plan. *See* D.I. 69 (the "UST Objection").

113. The U.S. Trustee objects to the Plan on the following grounds (collectively, the "UST Objection Grounds"): (i) the Plan was not proposed in good faith, *see* UST Objection at ¶¶ 25-32, (ii) the Plan violates sections 501 and 502 of the Bankruptcy Code, *see* UST Objection at ¶¶ 33-45, (iii) the Debtors should not distribute unclaimed property to the other Holders of Equity Interests, *see* UST Objection at ¶¶ 46-50, and (iv) the Professional Fees should run through Effective Date, not Confirmation, *see* UST Objection at ¶¶ 51-53.

114. The Plan Amendments modify certain provisions of the Plan which the Debtors believe address and resolve certain of the UST Objection Grounds. With respect to the others, the Debtors address and refute each of these in turn.

a. *The Plan Has Been Proposed in Good Faith Pursuant to §1129(a)(3)*

115. As discussed above and in greater detail below, the Debtors have proposed the Plan in good faith and not by any means forbidden by law, *see* Section III.C, *supra*, and the actions of pre-bankruptcy management cannot be used as a basis to preclude a finding of good faith. *See In re Cellular Information Systems, Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); *see also In re*

Machne Menachem, Inc., 371 B.R. 63, 69 (Bankr. M.D. Pa. 2006).

116. The UST Objection, however, challenges that good faith on the basis that the Plan treats current Unsecured Noteholders differently than *former* noteholders whose Convertible Notes were converted to Equity: "[h]ere, the Court should require the Debtors to demonstrate that giving a handful of noteholders – including, indirectly, the Debtors' sole director – 100% on their notes, while giving all other former noteholders 45% on their claims, upholds the principle of equality of distribution." UST Objection, at ⁋ 30. The U.S. Trustee further asserts that "[t]he record should be clear whether Mr. Ulrich protested the note and thereby had his indirectly-held notes retained. There should be no appearance that the Debtors' sole director is seeking to cement full payment on (or foreclose any dilution of) his indirect note claim while preventing other noteholders from protesting the conversion of their own notes into equity." *Id*. at ⁋ 32.[16]

117. The U.S. Trustee's argument is fatally flawed for a number of reasons. Perhaps most critically, among the UST Objection Grounds is the inappropriate conflation of what may have been the actions or motives of Mr. Rouse with respect to the Note to Equity Conversion, and the actions and motives of the Debtors, through Ms. Springer as the Debtors' independent CRO, in proposing the Plan. Ms. Springer, acting as an independent fiduciary, has reviewed the books and records of the Debtors that are available, including the capital structure, the Convertible Notes, and the share certificates in and equity ledger of Creativemass, and has proposed a Plan that accords with what those books and records reflect.

118. She has done so without pressure, orchestration, or even substantive input from Mr. Ulrich regarding the treatment of his Unsecured Noteholder Claim and other Creditors. Whatever

[16] Undermining the U.S. Trustee's argument that Mr. Ulrich exerted influence on the Note to Equity Conversion process, Mr. Ulrich's parents, Thomas & Rebecca Ulrich, are among the Converted Noteholders (holding 52,326 shares on account of their Convertible Note).

bad faith may, or may not, have existed with respect to Mr. Rouse's actions or motives in converting some but not all Convertible Notes to Equity, it cannot be impugned to Ms. Springer as the proponent of the Plan to argue that the Plan has not been proposed in good faith. Moreover, while Ms. Springer clearly had no role in the Note to Equity Conversion, whether a plan proponent has acted in good faith looks only to the circumstances surrounding the proposal of the plan itself, not acts and conduct that pre-date the bankruptcy filing. *See*, *e.g.*, *Cellular Info.Sys., Inc.*, 171 B.R. at 945 (citing *In re General Homes Corp.*, 134 B.R. 853, 862 (Bankr. S.D. Tex. 1991) (holding that "[t]he evaluation of good faith is not based on the plan proponents' behavior prior to the filing of the bankruptcy petition ... but instead, in light of the totality of the circumstances surrounding confirmation." (internal quotation marks omitted); *see also In re Jandous Elec. Constr. Corp.,* 115 B.R. 46, 52 (Bankr. S.D.N.Y. 1990). *See also, In re Machne Menachem, Inc.*, 371 B.R. at 69 ("Although this Court is well aware of the scathing opinion by Judge Glasser concerning Spritzer's pre-petition corporate law violations, that conduct may not be a factor in determining whether this plan is proposed in good faith. Again, the good faith requirement of a § 1129(a)(3) inquiry pivots on the plan itself. *In re Combustion Engineering, Inc.,* 391 F.3d 190 at 247 [citing *In re PWS Holding Corp.,* 228 F.3d 224 at 242 (citing *In re Abbotts Dairies of Pa., Inc.,* 788 F.2d 143 n. 5)]).

119. Moreover, while Mr. Ulrich's Unsecured Noteholder Claim is being paid in full, that treatment is no different or more favorable than the Plan's treatment of the other Unsecured Noteholder Claims and General Unsecured Creditor Claims. There is nothing in the Plan that purports to favor Mr. Ulrich or grant him enhanced treatment because he is an insider.[17] To wit, he is receiving the same treatment as all other *Creditors*.

[17] It is critical to note that Mr. Ulrich became an insider for purposes of section 101(31) four months after the Note-to-Equity Conversion, which only affected Series C Convertible Notes, and requested repayment of his Series A Convertible Note (which was effectively a loan to Creativemass) in late November of 2022.

120. The U.S. Trustee complains that Mr. Ulrich is getting more than "*former* noteholders," *see* UST Objection ¶ 30 (emphasis added), but that acknowledgement unwittingly undermines the U.S. Trustee's own argument that the Plan fails the good faith test. The U.S. Trustee misidentifying former noteholders is an apparent effort to confuse the Court as the Converted Noteholders are not Holders of Convertible Notes, they are, and long have been, Holders of Equity Interests.

121. According to the Debtors' books and records, and pursuant to the terms of their Convertible Notes, the Converted Noteholders became *former* noteholders upon the Note to Equity Conversion. They now own common stock in Creativemass, and they therefore are not Creditors because they no longer hold a Convertible Note. The terms of the Convertible Notes made clear that a conversion to Equity was at the Debtors' option should a Qualified Financing not occur and this risk was thus known to the Converted Noteholders. The Plan proposed by the Debtors is reflective of that fact and nothing else.

122. If the U.S. Trustee is implicitly challenging the Note to Equity Conversion, it stands alone and has no economic stake in doing so. Moreover, under the terms of the Convertible Note Agreements and in the absence of ***facts*** that would call into question its legality, the CRO has no basis to do so.

123. Based on the four corners of the Convertible Note Agreements, the CRO, as an independent fiduciary, has concluded that the Note to Equity Conversion was proper. *See also* Confirmation Decl., ¶¶ 48-51.

124. Paragraph 4(d) of the Convertible Note Agreements[18] provides:

> If this Note has not been converted pursuant to Section 4(a)

[18] A true and correct copy of a Series C Convertible Note Agreement is attached to the Confirmation Declaration as **Exhibit A**.

> [Conversion of Note Upon Closing of a Qualified Financing] prior to the Maturity Date, then, at any time after the Maturity Date until repayment of this Note, this Note may be converted into Class A Common Stock of the Borrower upon the approval of the holders of a majority of the shares of Class A Common Stock held by the stockholders of the Borrower and on such terms and at such price as determined by the Borrower's Board of Directors at the time of conversion.

125. The "Qualified Financing" as contemplated in Paragraph 4(a) of the Convertible Note Agreements did not occur prior to the Maturity Date [December 24, 2022]. Confirmation Decl., ¶ 50, *see also* Ex. B to the Confirmation Decl. Based on that failure, the Creativemass board exercised the conversion right set forth therein and after being purportedly approved by the holders of majority of the Class A shares – namely Mr. Rouse[19] – converted nearly all Series C Convertible Notes to common stock in Creativemass on December 25, 2022. *Id*.

126. The Convertible Note Agreements are governed by Delaware law. "Delaware … is contractarian. That is because enforcing contracts as written – holding counterparties to the benefit of their bargain – is of substantial benefit to society in general." *Valhalla Partners II, L.P. v. Vistar Media, Inc.,* 2024 WL 5039563, at *3 (Del. Ch. Dec. 9, 2024).[20] These principles apply to interpretation and enforcement of the terms of convertible notes just as they do with respect to other types of contracts, and their application is not avoided simply because the result seems

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[19] Who has since forfeited all his Class A shares. *See* Exit Deed referenced in Section 1.7 of the Plan.

[20] *See also Prime Victor Int'l Ltd. v. Simulacra Corp.*, 682 F. Supp. 3d. 428, 437-38 (D. Del. 2023) (citing *Daniel v. Hawkins*, 289 A.3d 631, 645 (Del. 2023) ("The interpretation of the language of a contract or any financial instrument is a question of law."). Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party. *Prime Victor*, 682 F. Supp. 3d. at 438 (citing *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014)). The goal of contract interpretation is to "effectuate the parties' intent," which normally begins with the text of the instrument, whether it be a contract or a note agreement. *Prime Victor*, 682 F. Supp. 3d. at 438 (finding that the express language of the note agreement and the rights thereunder governed). If the language of the agreement is clear and unambiguous, courts in Delaware give plain meaning to the instrument's terms and provisions. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021).

inequitable. *See id.* at *2 ("[The court] therefore gives the language its most obvious meaning. Plaintiffs had conversion rights before the maturity date, if certain occurrences in fact happened. Those occurrences did not happen before maturity, and the Second Round Notes became payable. Plaintiffs are entitled to payment of the face amount together with interest, which is the result they bargained for. That a different result comports better with Plaintiffs' business model, or that Valhalla wishes it had provided different contractual language, is not controlling here.").

127. Furthermore, enforcing contracts as written and consistent with the parties' benefit of the bargain does not give way to an implied covenant of good faith and fair dealing. *Id.* at *20 ("The implied covenant is not a vehicle for imposing equity on a contract: 'it is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract.' Here, [the parties] expressly discussed and negotiated what rights would inure to each at maturity of the [notes], and there is no gap in the [notes]. The [notes] in fact contain a provision on the very subject, that [the court] has construed as providing for a right to repayment at maturity.") (quoting *Nemec v. Shrader,* 991 A.2d 1120, 1128 (Del. 2010)).[21]

128. Consistent with these bedrock principles of contract enforcement, the CRO has proposed a Plan that is based on the result of the Note to Equity Conversion, which Creativemass was entitled to do absent a Qualified Financing, pursuant to the terms of the Convertible Note

[21] Also, it is "well-settled principle that where a dispute arises from the obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim," and in that context, "any fiduciary [duty] claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous." *Nemec v. Shrader*, 991 A.2d 1120, 1123 (Del. 2010). *See also New Enterprises Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 562-64 (Del. Ch. 2023); *In re WeWork Litig.*, 2020 WL 6375438 at *11-12 (Del. Ch. 2020); and *Ogus v. SportTechie, Inc.*, 2020 WL 502993 at *11 (Del. Ch. 2020).

Agreements. The U.S. Trustee is trying to substitute its own business judgment for that of Converted Noteholders themselves who, by voting in favor of the Plan, have spoken in a clear, unanimous voice, that they are in support of their treatment under the Plan. The U.S. Trustee appears to argue that this result was not fair, and therefore the Plan's classification and treatment is not proposed in good faith. That position is contrary to Delaware law.

129. The fact that an insider is to receive payment under a plan that comports with the Debtors' books and records of what is owed does not equate to a finding that the plan is not proposed in good faith. Certainly that cannot be the case where there is no evidence of misconduct by or on behalf of the insider, nor unfair treatment to the creditors on account of the insider's status, and the U.S. Trustee has pointed to none here other than that Mr. Ulrich's Series A Convertible Note was not converted when others' Series C Convertible Notes were. *Compare In re EBP, Inc.*, 172 B.R. 241, 244-245 (Bankr. N.D. Ohio 1994) (finding that a plan was not proposed in good faith when the Plan favored paying off an insider's unsecured claim in full while proposing to pay other unsecured creditors a fraction of their claim).

130. Also, it is important to note that Mr. Ulrich's Convertible Note Agreement is a Series A[22] Convertible Note, which was not intended to be included in the Note to Equity Conversion. His Convertible Note was issued a year prior to the Series C Convertible Notes and has a different maturity date entirely.[23] Confirmation Decl., ¶ 52. Moreover, even before the Note to Equity Conversion with respect to Series C Convertible Notes,[24] Mr. Ulrich elected to not extend

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[22] In Carta, Mr. Ulrich's Convertible Note is reflected as being a Series A Convertible Note, whereas every other Convertible Note is being reflected as a Series C Convertible Note.

[23] A true and correct copy of Mr. Ulrich's Series A Convertible Note is attached to the Confirmation Declaration as **Exhibit B**.

[24] A true and correct copy of an email sent by Mr. Rouse to all Series C Convertible Noteholders is attached to the Confirmation Declaration as **Exhibit C**.

his Convertible Note and requested, in November of 2022, that Creativemass pay for what it owed him on the maturity date (which was December 16, 2022).[25] *Id*.

131. As the U.S. Trustee notes, a finding of good faith is supported when the Plan is proposed in furtherance of maximizing recoveries. Here, the CRO, in her reasonable business judgment, determined that rather than materially diminish the finite pool of Assets of non-operational Debtors by conducting a full scale investigating of the circumstances surrounding the motives behind the Note to Equity Conversion, she would instead distribute the Assets in accordance with the Debtors' books and records as they stand because the Note to Equity Conversion appeared proper on its face according the terms of the Convertible Note Agreements. Moreover, given the amount of Cash Funds and the soon to be received Material Australian Dividend, the Plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Further, a full-scale investigation would be expensive and likely rendered be meaningless given that the whereabouts of the chief proponent of the Note to Equity Conversion, Mr. Rouse, are unknown and others, including the Australian Liquidators, have attempted to locate him without success. The Plan's main objective is maximizing value and facilitate an expeditious liquidation and distribution scheme, both of which are consistent with the objectives of the Bankruptcy Code. *See WR Grace*, 729 F.3d at 346.

132. Finally, the Holders of Equity Interests (made up of both the Converted Noteholders and those that invested in Creativemass by purchasing equity shares) have spoken: of those who returned Ballots, **100%** voted to accept the Plan. The formulation of this Plan is therefore in the best interests of the Debtor's estates, their Creditors, and the Holders of Equity Interests.

[25] A true and correct copy of an email sent by Mr. Ulrich requesting payment of his Convertible Note in November 2022 is attached to the Confirmation Declaration as **Exhibit D**.

133. Thus, the Plan has been proposed in good faith and not by any means forbidden by law, and the Court should reject the U.S. Trustee's argument otherwise.

b. *The Classifications of Classes in the Plan are Proper*

134. Relatedly, the Plan's classification of claims and interests are proper, despite the U.S. Trustee's assertion that the Plan's classification promotes inequality. The Plan classifies Claims and Equity Interests as they are reflected in the Debtors' books and records. What the U.S. Trustee would have the Debtors do instead is classify Claims and Equity Interests according to a factual scenario that simply does not exist. The U.S. Trustee's argument fails to acknowledge the Note to Equity Conversion in an ill-conceived attempt to obtain an outcome which it would prefer, ignoring not only the Debtors' books and records but also the unanimous voice of the Holders of Equity that voted to accept the Plan.

135. As the U.S. Trustee correctly points out, the central idea of a finding of good faith is when the plan provides for equality amongst the distributions as it relates to creditors and that all similarly situated creditors are to be treated similarly. *See* UST Objection ¶ 28 (citing *Begier v. IRS*, 496 U.S. 53, 58 (1990) and *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 239 (3d Cir. 2004) to support that proposition). That is exactly what the Debtors propose to do through the Plan. There are only five (5) entities and persons with Unsecured Noteholder Claims, and those five (5) entities and persons are being treated the exact same way. Moreover, every entity or person in Class 2, including Converted Noteholders, is being treated the same – receiving their *pro rata* share of the remaining Plan Administrator Assets. Thus, the Debtors did not summarily put similarly situated entities or persons in different Classes with different treatment. Rather, the Debtors placed similarly situated entities or persons in the same Classes with the same treatment, as required pursuant to section 1122(a) of the Bankruptcy Code.

136. Section 1.5 of the Plan and Exhibit C to the Plan Supplement reflects the outstanding liabilities and Equity Interests according to the Debtors' book and records. As described more fully in the Plan, certain Holders of Convertible Notes protested the Note to Equity Conversion, and were thereby not included in the same. The classification set forth in Section 1.5 and 2 of the Plan, however, reflect the Debtors' books and records.

137. The U.S. Trustee's position would require departure from the Debtors' books and records. In effect, the U.S. Trustee appears to be asking for the Debtors to unconvert notes that were properly converted according to their terms, without a basis for doing so. That is, the U.S. Trustee is seeking that the Debtors propose a Plan that classifies claims and interests and distributes the Assets in a manner inconsistent with the Debtors' books and records. The Debtors cannot now unilaterally unconvert all of the Convertible Notes, a result that is made even more improper where not a single one of the converted Holders of Equity Interests ("Converted Noteholders") (i) formally objected to the Plan, (ii) initiated an adversary proceeding to contest the Note to Equity Conversion, or, (iii) at the very least, voted to reject the Plan. As seen in the Voting and Tabulation Declaration, sixty-two (62) of the ninety-five (95) Converted Noteholders voted on the Plan, and sixty-two (62) voted to accept the Plan, *i.e.*, sixty-five percent (65%) of Converted Noteholders support the treatment that they are receiving under the Plan. Now that the Plan Objection Deadline and the Voting Deadline have passed, Class 2 has spoken, and Class 2 would like to proceed in the manner contemplated in the Plan.

138. The U.S. Trustee certainly cannot stand in the shoes of a Converted Noteholder to challenge a transaction where the parties with an economic stake, *i.e.*, the Converted Noteholders have spoken for themselves through the Plan process that afforded them the voice that the U.S. Trustee is attempting to silence.

c. *The Right to Protest the Note to Equity Conversion Was Not Foreclosed Prematurely*.

139. The Plan does not represent the Debtors' attempt to improperly extinguish challenges to the Note to Equity Conversion. *See* UST Objection ¶ 32. To the contrary, the Debtors proposed the Plan to provide finality so that Creditors and Holders of Equity Interests can receive a long-awaited distribution, yet still have the opportunity to object to their treatment under the Plan, the basis for their conversion to equity, or anything else properly related to the Plan's confirmation. This Court approved that contemplated procedure when it set a Voting Deadline and a Confirmation Objection Deadline for, among others, Converted Noteholders to exercise their rights.

140. The Note to Equity Conversion occurred over two-and-a-half years ago. The Converted Noteholders' right to challenge that conversion has been available to them since that time in whatever manner and forum they chose. Additionally, these Chapter 11 Cases gave them Plan voting and objection processes that represented a final opportunity and uniform forum in which to do so. None have.

141. Rather, in the nearly two months since the Solicitation Date, the Debtors received overwhelming support for confirmation of the Plan, including from almost two-thirds of Converted Noteholders. The Plan was not proposed to extinguish Converted Noteholders' right to challenge the conversion; it was an opportunity to do so, and when given the opportunity, the Converted Noteholders instead voted to accept the Plan and their treatment under it.

142. It is therefore unreasonable for the U.S. Trustee to require what would effectively amount to a Plan objection *beyond* the Confirmation Objection Deadline (rendering the Confirmation Objection Deadline useless) especially in light of the overwhelming evidence that

the Holders of Equity Interests, including sixty-two (62) of the ninety-five (95) Converted Noteholders who voted to support the Plan.

d. *The Distribution Process Set Forth in Section 8.6 of the Plan is Proper*

143. Section 8.6 of the Plan details the procedures that will apply in the event Distributions under the Plan are undeliverable. Among other things, it provides that within ninety (90) days after the mailing or other delivery of any such Distribution checks, notwithstanding applicable escheatment Laws, all such Distributions shall revert to the Plan Administrator to be maintained for redistribution to other parties on a *pro rata* basis entitled to Distributions under the Plan. Plan at § 8.6.

144. The U.S. Trustee objects, but the Plan's proposed procedures for undeliverable Distributions is proper and need not be removed for the Plan to be confirmed. Section 347(b) of the Bankruptcy Code allows for this type of provision, including in subchapter V cases.

145. Section 347(b) provides, in relevant part, as follows:

> Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under chapter … 11 … of this title for … the performance of any other act as a condition to participation in the distribution under any plan confirmed under section …1129 … becomes the property of the debtor or of the entity acquiring the assets of the debtor under the plan, as the case may be.

11 U.S.C. § 347(b).

146. The U.S. Trustee suggests that Section 8.6 of the Plan operates as in a typical chapter 11 case, whereas subchapter V cases are to be treated differently. But section 347(b) is applicable here by its own terms, because this is a case where the Plan will be confirmed under section 1191 and the Debtors require that parties entitled to receive a distribution submit the appropriate tax documentation as a condition doing so. Therefore, to the extent they fail to do so in the period required by the Plan, the property to which they are entitled can revert to the Debtors.

See, *e.g.*, *In re In re IBIS Corp.*, 272 B.R. 883, 888 (Bankr. E.D. Va. 2001) ("The terms of the confirmed plan determine whether a creditor is required to take any action in order to participate in the distribution under the confirmed plan [for purposes of section 347]"). After it reverts to the Debtors, the Debtors will then disburse the pool of undeliverable property to the Equity Holders on a *pro rata* basis.

147. The Debtors do not believe it is appropriate or reasonable to divert any unclaimed funds to any entity or individual other than the participating Holders of Equity Interests. Though such an outcome may be appropriate in other situations, here the circumstances of these Chapter 11 Cases quite frankly demand it given the fact that the Holders of Equity Interests are receiving a fraction of the value of their shares.

148. However, to address the U.S. Trustee's concerns that the Plan leaves insufficient time for Class 2 members to come forward to receive their distribution, the Debtors have modified the Plan to provide that any funds earmarked for Distribution to Holders of Equity Interests who the Debtors have been unable to reach or who have not come forward shall be held in trust until the Government Bar Date. After the Government Bar Date passes and the Debtors calculate the Distribution to which Class 2 members are entitled, any undeliverable Distributions would then be made available and included in such calculations, to be redistributed to known and reachable Holders of Equity Interests in order to maximize their recoveries.

e. *Professional Fees Through the Confirmation Date is Appropriate*

149. Because of the nature of these Chapter 11 Cases, it is important to cut the professional fees off at Confirmation, rather than the Effective Date, to stop the accrual of administrative claims.

150. Moreover, this cut off of professional fees has been approved by this Court in

numerous cases, some of which were prepackaged cases. *See In re Project Sage M. Holdings Oldco, Inc. et al.*, Case No. 24-10245 (JTD) (Bankr. D. Del. June 18, 2024) (confirming second amended plan where professional fee claim was defined as "any Claim by a Professional for the compensation for services rendered and the reimbursement of expenses incurred by such Professionals through and including the Confirmation Date."); *see also In re Appgate, Inc., et al*., Case No. 24-10956 (CTG) (Bankr. D. Del. June 18, 2024) (confirming a prepackaged plan where professional fee claim was defined as "Claim by a Professional seeking an award by the Bankruptcy Court of compensation for services rendered or reimbursement of expenses incurred by such Professionals through and including the Confirmation Date."); *In re Wheel Pros, LLC et al*., Case No. 24-11939 (JTD) (Bankr. D. Del. Oct. 15, 2024) (confirming joint prepackaged plan where professional fee claim was defined as "a Claim by a Professional seeking an award by the Bankruptcy Court of compensation for services rendered or reimbursement of expenses incurred by such Professionals through and including the Confirmation Date."); *In re Southcross Energy Partners, L.P. et al.*, Case No. 19-10702 (MFW) (Bankr. D. Del. Jan. 27, 2020) (confirming first amended plan where professional fee claim was defined as "administrative expense claim of a Professional Person against any Debtor for compensation for services rendered or reimbursement of costs, expenses or other charges and disbursements incurred during the period from the Petition Date up to, and including, the Confirmation Date."). Therefore, the Debtors believe that the provision as written, is confirmable.

CONCLUSION

151. For the foregoing reasons, the Debtors respectfully request the Court (a) enter the proposed Confirmation Order, confirming the Plan, (b) overrule any remaining and outstanding objections, and (c) grant such other and further relief as is just and proper.

Dated: May 22, 2025
Wilmington, Delaware

PASHMAN STEIN WALDER HAYDEN, P.C.

/s/ Alexis R. Gambale

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