IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re **THE NORDAM GROUP, INC., *et al.*,** Debtors.	Chapter 11 Case No. 18–11699 (MFW) Hearing Date: March 7, 2019, at 10:30 a.m. Objections Due: February 28, 2019, at 4 p.m., extended for U.S. Trustee to March 4, 2019 **Re: Dkt. Nos. 848 and 849**

U.S. TRUSTEE'S OBJECTION TO FIRST AMENDED JOINT POSTPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF THE NORDAM GROUP, INC. AND ITS DEBTOR AFFILIATES AND FINAL APPROVAL OF DISCLOSURE STATEMENT

Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned attorneys, hereby submits this Objection to the Confirmation of the First Amended Joint Postpackaged Chapter 11 Plan of Reorganization of the Nordam Group, Inc. and its Debtor Affiliates and to final approval of the Disclosure Statement[1] relating to the same (Docket Nos. 848 and 849, respectively), and respectfully states as follows:

I. PRELIMINARY STATEMENT

1. The Debtors' Plan is at war with itself regarding the treatment of unimpaired claims, which encompasses all claims against the Debtors. On the one hand, the Plan provides that, "holders of Claims need not file proofs of Claim with the Bankruptcy Court . . . . [and] shall not be subject to any claims resolution process in the Bankruptcy Court . . . and shall retain all

[1] Unless otherwise defined herein, capitalized terms shall have the same meaning and context as those capitalized terms included in the Plan.

their rights under applicable nonbankruptcy law to pursue their Claims against the Debtors or Reorganized Debtors *in any forum with jurisdiction over the parties*." Plan, § VII.A (emphasis added). The Plan further provides that, with minor exceptions, all proofs of claim that have been filed in the cases will be deemed withdrawn on the Effective Date. *See id.*

2. In contrast, the discharge provision of the Plan provides that, on the Effective Date, (a) the Debtors will be discharged from all unimpaired Claims, even those that the Debtors dispute or otherwise refuse to pay, and (b) all prepetition defaults by the Debtors "shall be deemed cured (and no longer continuing) as of the Effective Date with respect to any Claim that is unimpaired by the Plan." Plan, § VIII.B.

3. It is unclear how, after the Effective Date, a holder of a supposedly unimpaired claim may "pursue their Claims against the Debtors or Reorganized Debtors in any forum with jurisdiction over the parties" when, on the Effective Date, such claim will be discharged, and all pre-petition defaults of the Debtors deemed cured. There should be no ambiguity under a Plan as to whether a particular claim has been discharged, or when such discharge is effective. This is especially true here, because the issue may well be decided by non-bankruptcy courts presiding over suits brought by creditors against the Reorganized Debtors for payment on purportedly unimpaired claims.

4. Because the Plan discharges all unimpaired claims on the Effective Date, regardless of whether such claims are paid, the supposed unimpaired claimholders are actually impaired and therefore entitled to vote on the Plan. Such claimholders are further impaired by another Plan provision, which provides that, on the Effective Date, all assets of the Debtors shall vest in the Reorganized Debtors "free and clear of all . . . . Claims," including unimpaired

claims. *See* Plan § IV.I. Pursuant to such provision, any judgement a creditor obtains against the Reorganized Debtors on their supposed unimpaired claim would be unenforceable against any assets of the Reorganized Debtors that were transferred from the Debtors by way of the Plan. As such, section IV.I of the Plan impairs the rights of the holders of purportedly unimpaired claims.

5. The rights of the purported unimpaired claimholders also are impaired by the third party release provision, through which unimpaired claimants will be deemed to release numerous non-debtor parties from all claims that have *any* connection whatsoever to the Debtors. Such release will occur on the Effective Date, regardless of when, if ever, the claimant receives payment from the Debtors on their supposedly unimpaired claim. *See* Plan § VIII.D.

6. The above conflicts and deficiencies of the Plan can be corrected by the inclusion of a special provision addressing the treatment of unimpaired claims, which has been included in many pass-through pre-packaged cases. That provision is set forth in paragraph 46 below. Such provision would delay the date by which an unimpaired claim is discharged, enjoined or released until such claim is either paid in full, or ruled Disallowed by a final order of a court of competent jurisdiction. It also would prevent the assets of the Debtors from passing to the Reorganized Debtors free and clear of the unimpaired claims until such claims are paid in full, or Disallowed.

7. In addition to the above issues, which relate primarily to the timing of certain provisions of the Plan that affect unimpaired claimants, the U.S. Trustee further objects to confirmation of the Plan due to the following aspects of the release and exculpation provisions of the Plan:

(a) the overbreath of who is deemed to *give* third party releases, which includes (i) all "Related Parties" of all unimpaired claimholders, even though such Related Parties include many who will not receive any distribution in these cases, have no right to vote on the Plan or to opt-out of the releases, and likely did not even receive notice that they would be giving broad releases to a large number of parties; and (ii) all of the Debtors' employees, even though such employees did not receive adequate notice that they would be treated as releasing parties;

(b) the overbreath of (i) the *scope* of the kind claims that will be released by way of the Debtor Releases and Third Party Releases, which include known and unknown claims for fraud, willful misconduct and gross negligence held by the Debtors, as well as by those parties deemed to give Third Party Releases, and (ii) *who will benefit* from such releases, which includes all of the Debtors' non-debtor affiliates, current and former directors, officers, employees, shareholders and professionals, and the Committee, its members and professionals, even though the release of those parties who are estate fiduciaries is broader than what they are entitled to under *PWS Holding Corporation*, 228 F.3d 224 (3d Cir. 2000); and

(c) the overbreath of the scope of the Exculpation provision, which extends beyond what is permitted under *PWS* and other applicable law because it is not limited to post-petition actions, and benefits numerous parties who are not estate fiduciaries.

8. For these reasons, set forth in greater detail below, the Plan should not be confirmed, and the Disclosure Statement should not receive final approval.[2]

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[2] The U.S. Trustee's counsel believes she has reached an agreement with the Debtors' counsel as to modifications to be made to the Plan relating to issues other than those addressed in this Objection. The U.S. Trustee reserves the right to supplement this Objection, or to assert additional objections at the hearing on confirmation, if such modifications are not made.

II. JURISDICTION

9. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this objection.

10. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc.* (*In re Columbia Gas Systems, Inc.*), 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc.* (*In re Revco D.S., Inc.*), 898 F.2d 498, 500 (6th Cir. 1990) (describing the "U.S. Trustee as a "watchdog").

11. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment such plans and disclosure statements.

12. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on this objection.

III. FACTS

13. On July 22, 2018 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

14. The U.S. Trustee appointed an official committee of unsecured creditors in these cases on August 1, 2018.

15. On November 12, 2018, the Debtors filed their Joint Postpackaged Chapter 11 Plan of Reorganization of The NORDAM Group, Inc. and its Debtor Affiliates, and a Disclosure Statement relating to the same. *See* Dkt. Nos. 657 and 658. On December 17, 2018, the Debtors filed amended versions of the Plan and Disclosure Statement. *See* Dkt. Nos. 780 and 781. Those documents were further amended on January 3, 2019. *See* Dkt. Nos. 848 and 849. Upon information and belief, the Plan and Disclosure Statement filed on January 3, 2019 are the versions that the Debtors sent out for plan solicitation.

16. On January 3, 2019, this Court entered an order conditionally approving the Disclosure Statement, approving certain solicitation and notice procedures, and setting January 30, 2019 as the date for the hearing on confirmation of the Plan and final approval of the Disclosure Statement. *See* Dkt. No. 838. The Debtors have continued the hearing date a number of times, and it is currently set for March 7, 2019.

17. On January 4, 2019 the Debtors filed the notice of the combined hearing for final approval of the Disclosure Statement and confirmation of the Plan (the "Combined Hearing Notice"). *See* Dkt. No. 850.

18. The Plan provides for only one voting class, which is a class of shareholders (Class 7). All classes of secured and unsecured claims are stated to be unimpaired, and therefore the holders of claims in those classes are not entitled to vote. *See* Plan, III.A & B.

19. No bar date has been set in these cases, nor have the Debtors filed a motion seeking the same.

Plan Provisions Relevant to the U.S. Trustee Objection

20. The Plan provides the following with respect to the claims allowance process:

> **Claim Allowance Process**
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> Notwithstanding section 502(a) of the Bankruptcy Code and the Schedules, and except as otherwise set forth in the Plan, **holders of Claims need not file proofs of Claim with the Bankruptcy Court** and the Reorganized Debtors and holders of Claims shall determine, adjudicate, and resolve any disputes over the validity and amounts of such Claims in the ordinary course of business as if these chapter 11 cases had not been commenced. **The holders of Claims shall not be subject to any claims resolution process in the Bankruptcy Court in connection with their Claims and shall retain all their rights under applicable nonbankruptcy law to pursue their Claims against the Debtors or Reorganized Debtors in any forum with jurisdiction over the parties.** From and after the Effective Date, the Reorganized Debtors may satisfy, dispute, settle, or otherwise compromise any Claim without approval of the Bankruptcy Court.
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> Except for (1) proofs of Claim asserting damages arising out of the rejection by the Debtors of an executory contract or unexpired lease pursuant to Article V and (2) proofs of Claim that have been objected to by the Debtors before the Effective Date, **upon the Effective Date, any filed Claim, regardless of the time of filing, and including Claims filed after the Effective Date, shall be deemed withdrawn**.

Plan, § VII.A (emphasis added).

21. The Discharge provision of the Plan is as follows:

> **Discharge of Claims**
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> Pursuant to section 1141(d) of the Bankruptcy Code, and except as otherwise specifically provided in the Plan or in a contract, instrument, or other agreement or document executed pursuant to the Plan, the distributions, rights, and treatment that are provided in the Plan **shall be in complete satisfaction, discharge, and release, effective as of the Effective Date, of Claims** (including any Intercompany Claims resolved or compromised after the Effective Date by the Reorganized Debtors), Interests, and Causes of Action **of any nature whatsoever**, **regardless of whether any property is distributed or retained pursuant to the Plan on account of such Claims** and Interests, and regardless of whether the holder of such a Claim or Interest has voted to accept the Plan. **Any default or "event of default" by the Debtors or affiliates with respect to any Claim or Interest that existed**

> **immediately before or on account of the filing of these chapter 11 cases shall be deemed cured (and no longer continuing) as of the Effective Date with respect to a Claim that is unimpaired by the Plan. The Confirmation Order shall be a judicial determination of the discharge of all Claims and Interests subject to the occurrence of the Effective Date.** Nothing in this Article VIII.B shall affect the rights of holders of Claims or Interests to seek to enforce the Plan, including the distributions to which holders of Allowed Claims or Interests are entitled to receive under the Plan.[3]

Plan, § VIII.B (emphasis added).

22. The following provision of the Plan addresses the vesting of the Debtors' Property in the Reorganized Debtors:

> ***Vesting of Assets in Reorganized Debtors***
>
> Except as otherwise provided in the Plan or any agreement, instrument, or other document incorporated in the Plan or the Plan Supplement, **on the Effective Date, all property in each estate**, all Causes of Action, all executory contracts and unexpired leases assumed or assigned by any of the Debtors, and any property acquired by any of the Debtors, including Interests held by the Debtors in non-Debtor subsidiaries, pursuant to the Plan **shall vest in each respective Reorganized Debtor, free and clear of all Liens, Claims,** charges, or other encumbrances unless expressly provided otherwise by the Plan or Confirmation Order. . . .

Plan, § IV.I (emphasis added).

23. Section VIII.D of the Plan sets forth the following releases to be given by numerous non-debtor parties in favor of other non-debtor parties, and also in favor of the Debtors for all categories of releasing parties other than "2" below (collectively, the "Third Party Releases"):

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[3] Please see the discussion in Point IV.B (i) below addressing the clause "except as otherwise specifically provided in the Plan," as well as the last sentence of the discharge provision.

Releases by Holders of Claims and Interests

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, the Released Parties shall be and are deemed conclusively, absolutely, unconditionally, irrevocably, and **forever released, waived and discharged by**:

1. holders of Interests who vote to accept the Plan;

2. **holders of Claims or Interests who are unimpaired under the Plan and who do not timely object to the third party releases provided pursuant to this Article VIII.D;** *provided that* holders of unimpaired Claims shall not release or be deemed to have released the Debtors or Reorganized Debtors with respect to such unimpaired Claims pursuant to this Article VIII.D.2;

3. holders of Interests whose vote to accept or reject the Plan was solicited but who did not vote either to accept or to reject the Plan and did not opt out of granting the releases set forth in the Plan;

4. the Committee and its members;

5. the Prepetition Secured Parties;

6. the DIP Agent and DIP Lenders;

7. the Exit Facility Agents and Exit Facility Lenders;

8. the New Investor; and

9. **with respect to each of the foregoing Entities in clauses (1) through (8), all Related Parties to the maximum extent**;

in each case in their capacity as such from any and all Claims, Interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever (including any derivative Claims asserted or that may be asserted on behalf of the Debtors or their estates), that such Entity would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim or Interest, **whether known or unknown**, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, **whether for tort, fraud, contract,** violations of federal or state laws or otherwise, including avoidance actions, Causes of Action based on veil piercing or alter-ego theories of liability, contribution, indemnification, joint liability, or otherwise that the Debtors or their estates would have been legally entitled to assert (whether individually or collectively), **based on or relating to, or in any manner arising from, in whole or in part, the Debtors,** the Prepetition Credit Documents, the DIP Documents, the formulation, preparation, dissemination, negotiation of the Plan, the Disclosure

> Statement, the Exit Facility Documents, the Investment Agreement, the NewCo Organizational Documents, the New LLC Agreement, or any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Plan, the Disclosure Statement, or these chapter 11 cases, the pursuit of confirmation and consummation of the Plan, the administration and implementation of the Plan, including the issuance or distribution of securities or property pursuant to the Plan, or any other related agreement, or upon any other act or omission, transaction, agreement, event, or other occurrence **taking place on or before the Effective Date** related or relating to the foregoing. Notwithstanding anything to the contrary in the foregoing, the releases set forth in this Article VIII.D do not (1) release any Entity's Effective Date or post-Effective Date obligations, rights, or defenses arising under the Plan or any document, instrument, or agreement assumed or executed in connection with the Plan (including documents, instruments, or agreements included in the Plan Supplement) or (2) affect the rights of holders of Allowed Claims and Interests to receive distributions under the Plan.

Plan, §VII.D (emphasis added).

24. The Plan also includes broad releases given by the Debtors (the "Debtor Releases") to numerous non-debtor parties. The Debtor Release provides as follows:

> **Releases by Debtors**
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> As of the Effective Date, pursuant to section 1123(b) of the Bankruptcy Code, for good and valuable consideration, the adequacy of which is hereby confirmed, **the Debtors, the Reorganized Debtors**, and each of their respective current and former affiliates (with respect to non-Debtors, to the extent permitted by applicable law), on behalf of themselves and their respective estates, including any successor to the Debtors or any estate representative appointed or selected pursuant to section 1123(b)(3) of the Bankruptcy Code, **shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released, waived, and discharged the Released Parties from any and all Claims, Interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever** (including any derivative Claims asserted or that may be asserted on behalf of the Debtors or their estates), **whether known or unknown,** foreseen or unforeseen, **existing or hereinafter arising,** in law, equity, or otherwise, **whether for tort, fraud, contract,** violations of federal or state laws or otherwise, including avoidance actions, Causes of Action based on veil piercing or alter-ego theories of liability, contribution, indemnification, joint liability, or otherwise that the Debtors or their estates would have been legally entitled to assert (whether individually or collectively), **based on or relating to, or in any manner arising from, in whole**

> **or in part, the Debtors,** the Prepetition Credit Documents, the DIP Documents, the formulation, preparation, dissemination, negotiation of the Plan, the Disclosure Statement, the Exit Facility Documents, the Investment Agreement, the NewCo Organizational Documents, the New LLC Agreement, or any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Plan, the Disclosure Statement, or these chapter 11 cases, the pursuit of confirmation and consummation of the Plan, the administration and implementation of the Plan, including the issuance or distribution of securities or property pursuant to the Plan, or any other related agreement, or upon any other act or omission, transaction, agreement, event, or other occurrence **taking place on or before the Effective Date** related or relating to the foregoing. Notwithstanding anything to the contrary in the foregoing, the releases set forth in this Article VIII.C do not (1) release any Entity's Effective Date or post-Effective Date obligations, rights, or defenses arising under the Plan or any document, instrument, or agreement assumed or executed in connection with the Plan (including documents, instruments, or agreements included in the Plan Supplement) or (2) affect the rights of holders of Allowed Claims and Interests to receive distributions under the Plan.

Plan § VIII.C (emphasis added).

25. The beneficiaries of the Debtor Releases and the Third Party Releases are the Released Parties, who are defined in the Plan as follows:

> **"*Released Party*"** means each of the following in their capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) the Prepetition Secured Parties; (d) the DIP Agent; (e) the DIP Lenders; (f) the Exit Facility Agents; (g) the Exit Facility Lenders; (h) the Committee and each of its members; (i) the New Investor; and (j) with respect to each of the foregoing entities in clauses (a) through (i), **all Related Parties**; *provided that* a holder of a Claim or Interest that objects to or opts-out of the releases set forth in Article VIII.D shall not be a "Released Party."

Plan, § I.A.75 (emphasis added).

26. The term "*Related* Parties," which appears in the definitions of "*Released* Parties" and "Exculpated Parties," and is also included in the Third Party Release provision as a category of parties giving Third Party Releases, is defined in the Plan as follows:

> "***Related Parties***" means with respect to any Released Party or any Exculpated Party, an Entity's predecessors, successors and assigns, parents, subsidiaries, **affiliates,** managed accounts or funds, and all of their respective **current and former officers, directors, principals, shareholders** (and any fund managers, fiduciaries or other agents of shareholders with any involvement related to the Debtors), members, partners, **employees**, **agents**, trustees, advisory board members, financial advisors, **attorneys, accountants**, actuaries, investment bankers, consultants, **representatives**, management companies, fund advisors and other professionals, and such persons' respective heirs, executors, estates, servants and nominees, each in their capacities as such.

Plan, § I.A.74 (emphasis added).

27. The following is the Plan's Exculpation Provision.

> **Exculpation**
>
> Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur liability for, and each Exculpated Party **is hereby released and exculpated from, any Cause of Action for any Claim related to any act or omission in connection with, relating to, or arising out of,** these chapter 11 cases, in whole or in part, **the Debtors,** the formulation, preparation, dissemination, negotiation, of the Plan, the Disclosure Statement, the New Investment Agreement, the NewCo Organizational Documents, the New LLC Agreement, or any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Plan, the Disclosure Statement, the filing of these chapter 11 cases, the pursuit of confirmation or consummation of the Plan, the administration and implementation of the Plan, including the issuance or distribution of securities or property pursuant to the Plan, or any other related agreement, except for Claims or Causes of Action arising from an act or omission that is judicially determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Exculpated Parties shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities. The Exculpated Parties have, and upon completion of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of, and distribution of, consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

Plan, § VIII.E (emphasis added).

28. The following is the definition of Exculpated Parties:

> "***Exculpated Parties***" means each of the following in their capacity as such: (a) the Debtors and Reorganized Debtors, (b) the Committee and each of its members, and (c) with respect to each of the foregoing entities in clauses (a) and (b), **all Related Parties**.

Plan, § I.A.28 (emphasis added).

IV. LAW AND ANALYSIS

A. The Disclosure Statement Fails to Provide Adequate Disclosure

29. Section 1125 of the Bankruptcy Code prohibits solicitation of votes on a reorganization plan prior to court approval of a written disclosure statement, which contains "adequate information." *See* 11 U.S.C. § 1125(b).

30. "Adequate information" is defined in section 1125 as being:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of debtor's books and records, that would enable a reasonable hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan.

11 U.S.C. § 1125(a)(1).

31. The disclosure statement requirement of section 1125 is "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (*citing Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

32. "Adequate information" under section 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with Debtors over the plan. *See Century Glove, Inc. v. First American Bank*, 860 F.2d 94 (3d Cir. 1988).

33. The Disclosure Statement is defective because it inaccurately describes the purportedly unimpaired classes as "unimpaired," when in fact they are impaired in a number of ways, as set forth in Point B (i) below. The Disclosure Statement further fails to disclose why the votes of members of the purportedly unimpaired classes were not solicited, even though such classes are actually impaired.

34. The inadequacies of the Disclosure Statement are amplified by the fact that the purportedly unimpaired classes were not even served with the Plan or Disclosure Statement. Rather, they were served with only the Combined Hearing Notice, which indicated that their claims were unimpaired.

35. Notice must be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action. *Folger Adam Security v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000). The Disclosure Statement fails to meet that standard with respect to the purportedly unimpaired classes.

B. The Plan Is Not Confirmable

36. In *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001), the court held that the plan proponent bears the burden of proof with respect to confirmability of a

Plan: "The Code imposes an independent duty upon the court to determine whether a plan satisfies each element of § 1129, regardless of the absence of valid objections to confirmation." 266 B.R. at 599. The court further stated: "A nonconsensual plan requires the proponent to prove all but one of the thirteen elements [of 11 U.S.C. § 1129(a)], that all classes consent or are unimpaired, 11 U.S.C. § 1129(a)(8), plus the additional requirements of section 1129(b), that the plan does not unfairly discriminate against dissenting classes and that treatment of such dissenting classes is fair and equitable." 266 B.R. at 599. *See also, In re Armstrong World Industries, Inc.*, 432 F.3d 507, 511 (3d Cir. 2005). The Debtors fail to meet these standards, as detailed below.

i. All Purportedly Unimpaired Classes are Impaired <u>and Therefore Entitled to Be Solicited to Vote on the Plan</u>

37. A class of claims is impaired pursuant to 11 U.S.C. §1124(1) unless the plan: "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." A class of impaired claims is entitled to vote on a plan pursuant to 11 U.S.C. §1126(a).

38. Classes of claims may be unimpaired by either reinstating them unaffected by the Plan or by providing for unequivocal full payment of claims in affected classes. The Plan provides for payment in full of unimpaired claims, but only if they are "Allowed," as that term is defined in section I.A.2 of the Plan. "Allowed" claims are defined not to include any claim that is disputed by the Debtors, which dispute can be raised by the Debtors at any time. Any such dispute most likely will be asserted outside of the objection procedures of the Bankruptcy Code

and Bankruptcy Rules, because the Plan provides that, with minor exceptions,[4] all proofs of claim filed in the cases will be deemed withdrawn on the Effective Date of the Plan, and that holders of unimpaired claims "shall not be subject to any claims resolution process in the Bankruptcy Court." *See* Plan, § VII.A.

39. The Plan in these cases calls itself a "postpackaged" plan with purportedly unimpaired claims passing through the bankruptcy so as to allow holders of such claims to sue the Debtors outside of Bankruptcy Court if the Debtors dispute such claims, or otherwise fail to pay them in full. *See* Plan, § VII.A. However, the discharge provision of the Plan would appear to prevent a holder of an unimpaired claim from suing the Debtors outside of Bankruptcy Court to obtain payment on such claims, because that provision discharges all unimpaired claims on the Effective Date, and further provides that all prepetition defaults of the Debtors with respect to all unimpaired claims will be deemed cured as of the Effective Date. *See* Plan, § VIII.B. This is true even as to unimpaired claims that remain unpaid as of the Effective Date and beyond. Therefore, the discharge provision of the Plan impairs the holders of purportedly unimpaired claims.

40. The Debtors may argue that the discharge provision does not actually discharge the unimpaired claims on the Effective Date, because the provision includes the language, "except as otherwise specifically provided in the Plan." Plan, § VIII.B. However, there is nothing in the Plan that *specifically* provides that the discharge does not apply to unimpaired

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[4] The exceptions are claims for rejection damages, and claims as to which the Debtors have filed claims objections prior to the Effective Date. Plan, § VII.A. To date, the Debtors have not filed any claims objections.

claims, or that it applies only once such claims are paid in full or Disallowed. While there are certain provisions of the Plan that are not consistent with the idea that unimpaired claims will be discharged on the Effective Date, that is not the same as *specifically providing* that such claims will not be discharged.

41. Whether, and when, a claim is discharged under a bankruptcy plan should not be the subject of ambiguity or conflicting provisions. This is especially true where, as here, such ambiguity may well be decided by non-bankruptcy courts presiding over actions brought by creditors to enforce their purportedly unimpaired claims against the Reorganized Debtors, as is permitted under § VII.A. of the Plan.

42. Nor does the last sentence of the discharge provision negate the discharge of unimpaired claims that is to take place on the Effective Date. That sentence provides, "[n]othing in this Article VIII.B shall affect the rights of holders of Claims or Interests to seek to enforce the Plan, including the distributions to which holders of Allowed Claims or Interests are entitled to receive under the Plan." Such a provision would be useful to unimpaired claimholders if this were a pay in full plan, rather than a pass-through plan. In a pay in full plan, the unimpaired claimants would be required to file proofs of claim in this Court, and any objections the Debtors had to such claims would have to be filed in, and resolved by, this Court. If the Debtors fail to pay a claim that held to be Allowed by this Court, the claimholder could seek to enforce its right in this Court to have that claim paid under the Plan. However, the Debtors' Plan is not a pay in full plan with respect to those unimpaired claims that the Debtors dispute, or which are otherwise not yet Allowed on the Effective Date. Rather, those claims are supposed to pass through the bankruptcy unimpaired, and the holders of such claims are supposed to be able to sue the

Debtors on those claims in non-bankruptcy courts. Yet those rights would appear foreclosed by the discharge provision, even with the language preserving the right of claimholders to "enforce the Plan."

43. The purportedly unimpaired claimholders are also impaired by section VII.I of the Plan, which provides that, on the Effective Date, all assets of the Debtors vest in the Reorganized Debtors "free and clear of all . . . Claims," including all unimpaired claims. This provision could be used to prevent the holder of an unimpaired claim to enforce any judgment it might obtain against assets of the Reorganized Debtors that were transferred to them by the Debtors under the Plan.

44. Finally, the third party release provision of § VIII.D of the Plan impairs the purportedly unimpaired claimants because that release takes place on the Effective Date, even if the Debtors dispute the purportedly unimpaired claim at that time, and even if the Debtors ultimately never pay such claim. Thus, the claimant is forced to give up what might be, for example, a viable claim against a non-debtor guarantor at a time when it is not known whether the Debtors will pay the purportedly unimpaired claim. This is contrary to the Third Circuit's interpretation of § 524(e) of the Bankruptcy Code set forth in *PWS*: "Thus, for example, § 524(e) makes clear that a discharge in bankruptcy does not extinguish claims by third parties against guarantors or directors and officers of the debtor for the debt discharged in bankruptcy." *PWS*, 228 F.3d at 246-47. Moreover, the Third Party Release acts to release not just the purported unimpaired claims themselves, or claims against non-debtor parties connected to such unimpaired claims. Rather, the Third Party Release acts as a release of *all* claims that have *any* connection with the Debtors whatsoever, including unknown claims against the non-debtor

Released Parties for fraud and willful misconduct. This is true despite that most of the non-debtors Released Parties have contributed nothing to the Plan or to the unimpaired claimholders who will be deemed to release them.

45. In light of the above, the purportedly unimpaired classes are in fact impaired under the Plan, and therefore entitled to vote pursuant to 11 U.S.C. §1126(a). Because the purportedly unimpaired classes were not solicited to vote on the Plan, the Plan cannot be confirmed.

46. To ameliorate this situation without having to solicit the votes of the purportedly unimpaired classes, the Debtors could add a provision to the Plan similar to what has been included in a number of pre-pack plans, or orders confirming the same.[5] That provision is as follows:

> **Unimpaired Claims**. Notwithstanding anything to the contrary in the Plan, the Plan Supplement, or the Confirmation Order, until an Unimpaired Claim, as that term is defined below, has either been (x) paid in full in accordance with applicable law, or on terms agreed to between the holder of such Unimpaired Claim and the Debtors or Reorganized Debtors, or in accordance with the terms and conditions of the particular transaction giving rise to such Unimpaired Claim, or (y) otherwise satisfied, disposed of or Disallowed by a Final Order of a court of competent jurisdiction: (a) the provisions of sections VIII.B, VIII.D and VIII.F of the Plan[6] shall not apply or take effect with respect to such Unimpaired Claim, (b) such Unimpaired Claim shall not be deemed settled, satisfied, resolved, released, discharged, barred or enjoined, (c) the

[5] *See, e.g.,* confirmation order in *Arsenal Energy Holdings LLC*, 19-10226 (BLS), Dkt. No. 61, ¶ 30; confirmation order and attached plan in *Checkout Holding Corp.*, 18-12794 (KG), Dkt. No. 266, ¶ 43 (order), and Dkt. No. 266-1, § 1.1 (definition of "Unimpaired" in plan); confirmed plan in *Remington Outdoor Company, Inc.*, 18-10684 (BLS), Dkt. No. 248-1, § IX.B (last sentence), page 63 of 81; confirmed plan in *Allen Systems* (Case 15-10332, Dkt. No. 183-1, §3.3)(KJC).

[6] Section VIII.B of the Plan is the discharge provision, VIII.D is the Third Party Release, and VIII.F is the injunction provision.

property of each of the Debtors' Estates that vests in the applicable Reorganized Debtor under the Plan shall not be free and clear of such Unimpaired Claim, and (d) no Liens securing such Unimpaired Claim shall be released or discharged.

The term "Unimpaired Claim" means (i) an Administrative Claim under the Plan (other than Professional Fee Claims), (ii) a Priority Tax Claims under the Plan, and (iii) a Claims arising under Class 1, 2, 3, 4 (*excluding* Cure Claims and rejection damage claims), 5 or 6 of the Plan.

ii. The Plan's Releases and Exculpation Provisions are Overbroad

a. The Third-Party Releases Are Non-Consensual As to Certain Releasing Parties

47. The Third Party Releases set forth in section VIII.D of the Plan are stated to be provided by nine enumerated categories of non-debtor parties. The second category of non-debtor parties to provide releases is all "holders of Claims or Interests who are unimpaired under the Plan," except those who file an objection. Because all Claims are unimpaired under the Plan, all holders of Claims in these cases are deemed to provide Third Party Releases unless they file an objection.

48. Under the facts and circumstances of the present cases, the U.S. Trustee is not objecting to all holders of unimpaired Claims and Interests being deemed to give Third Party Releases. What the U.S. Trustee does object to is category 9 of the Third Party Release provision, which makes releasing parties out of all "Related Parties" to the parties listed in categories 1 through 8 of the Third Party Release. Category 9 is broad enough to include all the employees, directors and officers, shareholders, affiliates, and professionals of all holders of unimpaired Claims, except those who file objections.

49. All Related Parties to the holders of unimpaired claims will be deemed to provide

releases in favor of all Released Parties, which consist of the Debtors, numerous non-debtor parties, and all of their respective "Related Parties." The scope of the claims that are released is very broad, covering both direct and derivative claims that are related in any way to the Debtors, arising at any time prior to the Effective Date, including both pre-petition and post-petition time period. The release makes no exception for claims arising out of fraud, intentional misconduct or gross negligence, whether known or unknown.

50. There is no evidence that the employees of unimpaired claimants, or the other "Related Parties" of unimpaired claimants, have given consent to provide these broad Third Party Releases. It is unlikely that such Related Parties even received notice of the Debtors' bankruptcy filing, let alone notice that they would be deemed to give broad releases in a bankruptcy case in which they have no direct involvement. The Related Parties do not have the right to vote on the plan or to opt out of the releases. Nor do they have a meaningful ability to object to the Plan if they did not receive notice of the same.[7] In addition, the Related Parties are

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[7] The Debtors may argue that the Court should not rule at this time as to whether the Related Parties can be deemed to give Third Party Releases, because category 9 of the Third Party Release, which turns Related Parties into releasing parties, is limited by the words "to the maximum extent," which presumably means to the maximum extent allowed by applicable law. *See* Plan, § VIII.D (9). Yet, not ruling on this issue now would leave a gap of uncertainty with respect to how the Third Party Release might later be interpreted, potentially by non-bankruptcy courts, with respect to the Related Parties, which is unfair to those parties. *See In re Spansion, Inc.*, 426 B.R. 114, 143-44 (Bankr. D. Del. 2010)(Court rejected debtors' argument that the third party releases did not make the plan unconfirmable because they only released claims "to the fullest extent permissible under applicable law." The Court indicated that, because objections had been asserted to the releases, it would not leave the issue for some future date).

not receiving any distribution under the Plan, or other consideration for giving the Third Party Releases.

51. In sum, as to the releases to be provided by the Related Parties, there has been no consent, no notice and no consideration. Such releases therefore are not permissible under applicable law, and the Plan should not be confirmed unless the Related Parties are no longer treated as releasing parties.

52. Another category of Third Party Releases that is not consensual, and is excessively broad, is the releases to be provided by all of the Debtors' employees, in favor of all "Released Parties," which include all of the Debtors' "Related Parties." The Debtors' Related Parties include all of the Debtors' current and former directors, shareholders, affiliates, employees and professionals. These releases do not just release claims that arise out of, or are otherwise related to, the unimpaired claims that such employees holds against the Debtors, which are likely limited to small amounts of post-petition wages in most cases.[8] Rather, the Third Party Releases the Debtors' employees will be deemed to provide are very broad, covering all claims, including direct claims that are not derivative of the Debtors, as long as such claims have *any* connection to the Debtors and arose prior to the Effective Date. The claims to be released include known and unknown claims arising from fraud, willful misconduct and gross negligence. Given their scope, these Third Party Releases potentially could be asserted as a defense by, for

[8] Some of the Debtors' employees may also hold claims for pre-petition wages, but most if not all such claims likely were paid by the Debtors pursuant to the authority they received under the interim and final orders authorizing the Debtors to pay pre-petition wages, salaries and other obligations. *See* Dkt. Nos. 80 and 181.

example, one of the Debtors' employees against a direct claim brought against them by another of the Debtors' employees, alleging assault, harassment or other intentional misconduct while on the job. Any such release would be grossly unfair, excessively broad, and completely unnecessary for the Debtors' reorganization.

53. The Third Party Release the Plan is non-consensual as to the Debtors employees because such employees did not affirmatively consent to provide such releases, had no right to vote on the Plan, and no ability to opt-out of such releases. The employees most likely were not served with a copy of the Plan, as they were not in a voting class. While the employees may have been served with the Combined Hearing Notice, such notice did not inform the Debtors' employees that if they held any claim against the Debtors, even for a small amount of salary, they will be deemed to give expansive Third Party Releases to numerous non-debtor parties, including all other employees of the Debtors.

54. Section 546 (e) of the Bankruptcy Code provides that, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 546(e). Nevertheless, some Courts, including this Court, have allowed releases by creditors and interest holders of a debtor in favor of non-debtor parties, although, except in "extraordinary circumstances," such approval is to be based on the consent of the releasing party. *See In re Tribune Company,* 464 B.R. 126, 204 (Bankr. D. Del. 2011), *quoting Gillman v. Continental Airlines (In re Continental Airlines),* 203 F.3d 203, 212 (3d Cir. 2000).

55. *In In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), this Court held that third-party releases of non-debtors should be allowed only to the extent the releasing parties have given affirmative consent, explaining that "any third party release is effective only

with respect to those who *affirmatively consent* to it by voting in favor of the Plan and not opting out of the third party releases." *Id.* at 355 (emphasis added). Moreover, the Court clarified that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot (*or are not entitled to vote in the first place*)." *Id.* (emphasis added), *citing In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999); *see also See In re Coram Healthcare Corp*., 315 B.R. 321, 335 (Bankr. D. Del. 2004)(holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide Technologies*, 303 B.R. 48, 74 (Bankr. D. Del. 2003)(approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan); *Zenith*, 241 B.R. at 111 (release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan).

56. Here, it does not appear that any affirmative consent has been obtained from the "Related Parties," or from the Debtors' employees, none of whom had the right to vote on the Plan or opt-out of giving Third Party Releases. Moreover, as noted above, the Related Parties likely received no notice at all of the Debtors' bankruptcy cases, let alone that they would be deemed to give broad releases to numerous parties under the Debtors' Plan, and the Debtors' employees did not receive effective notice that they would be treated as releasing parties.

57. In *Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), the Third Circuit surveyed cases from various circuits as to when, if ever, a non-consensual third party release is permissible. The Court acknowledged that a number of Circuits do not allow such non-consensual releases under any circumstances. *See id*. at 212. Other Circuits, the Court found,

"have adopted a more flexible approach, albeit in the context of extraordinary cases," such as mass tort cases. *See id.* at 212, *citing Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640, 649 (2d Cir. 1988).

58. The Third Circuit in *Continental Airlines* ultimately determined that the proposed releases in that case, which enjoined shareholder lawsuits against debtors' directors and officers, did "not pass muster under even the most flexible test for the validity of non-debtor releases." *Continental*, 203 F.3d at 214. Therefore, the Court determined that it "need not speculate on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration." *Id.* at 214, n. 11 (emphasis added). However, the Court did describe the "hallmarks of permissible non-consensual releases" to be "fairness, necessity to the reorganization, and special factual findings to support these conclusions." *Id.* at 214.

59. In *In re Genesis Health Ventures*, Inc., 266 B.R. 591 (Bankr. D. Del. 2001), the Court held that the exculpation clause, which released claims of any creditors or equity holders against the debtors' lender, had to be analyzed as a non-consensual third party release that required factual showings under *Continental* – that the releases were necessary for the reorganization and were given in exchange for fair consideration. *Id.* at 607. The Court elaborated that "necessity" under *Continental* requires a showing: (a) that the success of the debtors' reorganization bears a relationship to the release of the non-debtor parties and (b) that the non-debtor parties being released from liability have provided "a critical financial

contribution to the debtors' plan" in exchange for the receipt of the release. *Id.* at 607. Whether a release is "fair" is determined by examining whether non-consenting non-debtors are receiving reasonable consideration in exchange for the release. *Id.* at 608;[9] *see also In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del 2010).

60. In the present cases, there is nothing in the record to indicate the presence of "extraordinary circumstances," or that that the high threshold necessary for approval of non-consensual third party releases has been met with respect to each of the Related Parties of the releasing parties, or each of the Debtors' employees. Nor is there any evidence that the Third Party Releases to be given by the Related Parties and the Debtors' employees are necessary to the Debtors' reorganization, that each of the non-debtor parties who will benefit from the releases have provided a "critical financial contribution" to the Debtors' Plan, or that the Related Parties and the Debtors' employees are receiving "fair consideration" in exchange for the releases they are being forced to give without their consent, and most likely without their knowledge. *See Continental*, 203 F.3d at 214, n. 11; *Genesis*, 266 B.R. at 607.

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[9] In *Genesis*, this Court found that the senior lenders had made a financial contribution to the plan, which allowed the debtors to make the 7.34% distribution to the unsecured creditors, who otherwise would be "out of the money." 266 B.R. at 608. Ultimately, though, the Court found that such contribution was not enough, because "even if the threshold *Continental* criteria of fairness and necessity for approval of non-consensual third-party releases were marginally satisfied by these facts . . . . [the] financial restructuring plan under consideration here would not present the *extraordinary circumstances* required to meet even the most flexible test for third party releases." *Id.* (emphasis added).

b. The Third Party Releases Are Also
<u>Overbroad as to the Parties Being Released.</u>

61. Included among those parties who will be receiving broad releases under the Third Party Release provision are the following categories as to which the U.S. Trustee objects:

(a) The Debtors' non-debtor affiliates;

(b) All of the Debtors' directors, officers, employees, shareholders, professionals and other Related Parties; and

(c) The Committee, its members and their Related Parties, including but not limited to the Committee' professionals.

See Plan, § I.A. 74 and 75 (definitions of "Released Party" and "Related Parties").

62. In *Washington Mutual,* this Court disallowed third party releases of the Debtors' affiliates, stating that there was no evidence of who the affiliates are or why they should get a discharge without filing their own bankruptcy cases. 442 B.R. at 354. The same is true here.

63. Also in In *Washington Mutual,* this Court held that there was no basis for allowing third party releases of the debtors' directors and officers, when "[t]he only 'contribution' made by them was in the negotiation of the Global Settlement and the Plan, [which] activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and *will be exculpated*) . . . ." 442 B.R. at 354 (emphasis added), *citing Spansion*, 426 B.R. at 145.

64. The Third Circuit Court of Appeals came to the same conclusion in *Continental,* in examining third party releases of the debtors' directors and officers, stating, "we have found no evidence that the non-debtor D & Os provided a critical financial contribution to the

Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability." *Continental*, 203 F.3d at 215.

65. It is especially problematic in the current cases that the Third Party Release covers the Debtors' directors, officers and professionals, as well as the Committee, its members and professionals, because such releases do not exclude claims for willful misconduct and gross negligence. *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000), the Third Circuit set forth the limits of releases and exculpations for official committees in bankruptcy, and all other estate fiduciaries. The Court held that a plan provision, which the Court described as a "release," did not render the Plan non-confirmable, because, by that provision, "the Committee and professionals who provided services to the Debtors remain liable for willful misconduct [and] gross negligence," which is the "standard of liability . . . that already applies." *Id*. at 246; *see also Washington Mutual*, 442 B.R. at 350, *citing PWS*.

66. The Debtors have the burden of justifying the validity of all third party releases, whether consensual or non-consensual, for each and every party to be released and each and every party deemed to give a release. Because an evidentiary predicate is necessary to approve the Third Party Releases, the U.S. Trustee reserves argument on this issue until the record at the confirmation hearing is closed.

c. **The Releases Provided by the Debtors Are Impermissibly Broad Under Applicable Law**

67. The Plan is also not confirmable due to its inclusion of excessively broad releases to be given by the Debtors in favor of a large number of Released Parties, many of which are not specifically identified. The releases cover claims arising both pre-petition and post-petition, and

are not limited to claims and causes of action connected to the bankruptcy cases or the restructuring. Rather, they release any claim or causes of action "based on or relating to, or in any manner arising from, in whole or in part, the Debtors." The Debtor Releases also release claims for fraud and other willful misconduct and gross negligence, whether known or unknown by the Debtors.

68. The Debtor Releases benefit numerous parties who do not appear to have made a substantive contribution to the Debtors' plan, and who fail to meet other of the factors set forth in *In* re *Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del 1999) and *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994), discussed below. These Released Parties include the Pre-Petition Secured Lenders and the DIP Agent and DIP Lenders, all of whom will paid in full on the Effective Date, and whom have not compromised their claims or provided any financing for the Plan. The Debtor releases also benefit the Exit Facilities Lenders. While the Exit Facilities Lenders are providing funds to be used by the Debtors to assist in their reorganization (for which they will be compensated), it is concerning that the Debtors are agreeing to release as of yet unknown claims attributable to fraud and willful misconduct by such lenders.

69. The Debtor Releases also benefit all of the Debtors' employees and shareholders, and are so broad that they would even release claims arising out of theft of the Debtors' assets, even if such theft is as of yet unknown to the Debtors.

70. The Debtor Releases also benefit parties who are entitled to exculpation under the Plan, such as the Debtors' professionals, directors and officers, and the Committee, its members and professionals. Because the Debtor Release is broader than the exculpation, it allows these

estate fiduciaries to obtain through the release what they cannot through the exculpation clause, namely immunity from willful misconduct and gross negligence.

71. Pursuant to this Court's decision in *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), and *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011), and among others, the five factors set forth in *In* re *Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del 1999) and *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994) should be considered to determine whether, notwithstanding § 524(e) of the Code, a plan may provide for releases by debtors of non-debtor entities. Those factors are as follows:

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

Washington Mutual, 442 B.R. at 346 (citing *Zenith*, 241 B.R. at 110)); *Tribune*, 464 B.R. at 186 (citing *Washington Mutual); accord In re Spansion, Inc.*, 426 B.R. 114, 142-43, n. 47 (Bankr. D. Del. 2010); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004). "The factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness." *Washington Mutual*, 442 B.R. at 346; *Tribune*, 464 B.R. at 186.

72. An example of a substantial contribution would be if a released party made a lump sum payment to the Plan, thereby allowing the Debtors to make a distribution to unsecured creditors. *See, e.g., Coram*, 315 B.R. at 335 (after examination of the *Zenith* factors, the Court approved the debtors' release of noteholders who had contributed $56 million in funding to the plan).

73. It is unclear how the *Zenith/Master Mortgage* factors of "necessity of release to the reorganization" and "substantial contribution to the plan" would be met as to every current and former employee, director, officer and shareholder of the Debtors and all current and former professionals, including those who were not retained in these cases. Nor is it clear whether all such parties have even *requested* releases from the Debtors.

74. In *Washington Mutual*, in addition to rejecting the third party releases in favor of the Debtors' directors and officers, this Court also determined there was insufficient basis for the *debtors'* release of their, and the committee's, directors, officers and professionals, even though one of the *Zenith* factors, identity of interest, was present as to at least the debtors' directors and officers. 442 B.R. at 349-350 (citing *Continental Airlines*, 203 F.3d at 216). The Court held:

> With respect to the directors, officers or professionals of the Debtors and the Committee who served in the chapter 11 cases, they are *receiving exculpations* . . . . Consequently, the releases as to them are unnecessary, duplicative or *exceed the limits of what they are entitled to receive*."

Id. at 350 (emphasis added).

75. Similarly, in *Tribune*, this Court rejected the release by the debtors of their Related Persons, which, as here, included all the debtors' "current and former officers, directors,

employees, attorneys, advisors and professionals." 464 B.R. at 187. Applying the *Zenith/Master Mortgage* factors, the Court held:

> There is no basis in the record to support any finding that any "substantial contribution" has been made by the Debtors' Related Persons or that a release is necessary to the reorganization. Despite acceptance by a majority of creditors, I cannot conclude that the Plan's release of the Debtors' Related Persons, based on this record, would be fair.

Id. at 188.

76. Likewise, this Court in *In re Genesis Health Ventures, Inc.*, 266 B.R. at 606–07, rejected the debtors' release of their officers, directors, employees and professionals based on the Third Circuit's ruling in *PWS*, 228 F.3d 224 (3d Cir. 2000), holding that:

> [T]he release of the debtors' pre-petition claims against the officers, directors, employees and professionals of the debtors is beyond the post-petition focus of the *PWS Holding Corporation* release clause. . . . As in *Zenith*, the officers and directors of the debtors no doubt made meaningful contribution to the reorganization by designing and implementing the operational restructuring of the companies, and negotiating the financial restructuring with parties in interest. However, the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of "assets" to the reorganization.

Id.

77. Here, by way of the Debtor Releases (as well as the Third Party Releases), the Debtors' officers, directors and professionals, and the Committee, its members and professionals, all of whom are estate fiduciaries, would obtain immunity from claims for willful misconduct and gross negligence, even though such a release is not permitted under the holding of the Third Circuit in *PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000). For this reason, and because the Debtors' officers, directors and professionals have not made a substantial contribution to the

Plan, the Debtors should not be permitted to release them. Nor should the Debtors be permitted to release all of their employees and shareholders, because they too do not meet the *Zenith/Master Mortgage* requirements.

78. In addition, the Debtors should not be permitted to release the large number of their own Related Parties who are not adequately identified, such as the Debtors' "representatives" and "agents," as well as the representatives and agents of the other Released Parties.

79. Finally, included as the beneficiaries of the Debtor Releases are the *Reorganized* Debtors' officers, directors, employees, shareholders, professionals, and other agents, representative and affiliates. To the extent such provision is intended to act as a release of future actions, or to release persons or entities employed in the future, it should be rejected. *See Washington Mutual*, 442 B.R. at 348 (rejecting the release of the liquidating trustee, because, *inter alia*, the trustee has not yet taken any action for which he needed a release).

80. The Debtors have the burden to establish whether the *Zenith/Master Mortgage* factors have been met as to each of the non-debtors who are the beneficiaries of the Debtor Releases. Because an evidentiary predicate is necessary to approve the Debtor Releases, the U.S. Trustee reserves argument on this issue until the record at the confirmation hearing is closed.

d. **The Exculpation Provision is Excessively Broad**

81. Section VIII.E of the Plan sets forth a provision that both releases and exculpates certain parties identified as "Exculpated Parties" from any cause of action arising out of the Debtors, or out of the chapter 11 cases, except for fraud, willful misconduct and gross

negligence, without any time restriction. The U.S. Trustee objects to three aspects of that provision:

(a) The provision extends protection to certain non-fiduciaries;

(b) The provision is not limited to post-petition actions, but rather is broad enough to include pre-petition actions as well;

(c) The provision seeks to cover post-effective date actions as well, by including the Reorganized Debtors, and their directors, officers, employees, shareholders, professionals and other Related Parties in the definition of "Exculpated Parties.'

82. With respect to the first point, the definition of "Exculpated Parties" covers the Debtors, the Reorganized Debtors, the Committee and each of its members, and "all Related Parties" of the foregoing. It is the "Related Parties" portion of this definition that is excessively broad, because it is not limited to just the Debtors' directors and officers who served during the course of the cases, and the professionals of the Debtors and the Committee that were retained in these cases. Rather, it is broad enough to cover all current and former directors and officers of the Debtors, including those who did not serve during the course of these bankruptcy cases, as well as all current and former employees and shareholders of the Debtors and of the members of the Committee, most of whom are not estate fiduciaries, and all of the Debtors' professionals, regardless of whether they were retained in these cases. The definition of "Related Parties" also includes all affiliates of the Debtors and all affiliates of the members of the Committee, none of whom are estate fiduciaries.

83. As stated by this Court in *Washington Mutual*, an "exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals,

the Committees and their members, and the Debtors' directors and officers." 442 B.R. at 350-51 (emphasis added); *accord*, *In re Tribune Company*, 464 B.R. 126, 189 (Bankr. D. Del. 2011)(holding that the exculpation clause "must exclude non-fiduciaries"); *Indianapolis Downs*, 486 B.R. 286 (Bankr. D. Del. 2013); *In re PTC Holdings LLC*, 55 Bankr. Ct. Dec 206, 2011 Bankr. LEXIS 4436, *37-38 (Bankr. D. Del. Nov. 10, 2011)(Shannon, J.).

84. In addition, this Court has ruled that a plan exculpation clause must be limited to actions taking place during the bankruptcy case, and should not cover pre-petition activity, as the exculpation clause does here. *See Washington Mutual*, 442 B.R. at 350 (exculpations cover "actions in the bankruptcy case"), *citing PWS*, 228 F.3d at 246. Nor should the exculpation act as a future release for post-effective date actions, by including the Reorganized Debtors and their Related Parties.

85. The Plan should not be confirmed unless the Exculpation provision is (a) limited to acts and omissions during the course of the bankruptcy cases up through the Effective Date, and (b) benefits only estate fiduciaries, meaning the Debtors, their directors and officers who served during the bankruptcy cases, the Committee and its members, in their capacity as such, the individuals who served on the Committee, in their capacity as such, and the professionals of the Debtors and the Committee who were retained in these cases.

V. RESERVATION OF RIGHTS

86. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate Motion and/or conduct any and all discovery as may be

deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying confirmation of the Plan unless the changes addressed in this Objection are made, and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: March 3, 2019
Wilmington, Delaware

Respectfully submitted,

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