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**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| **In re** | : | **Chapter 11** |
| | : | |
| **CHINA FISHERY GROUP LIMITED (CAYMAN), *et al*.,** | : | **Case No. 16-11895 (JLG)** |
| | : | |
| | : | **(Jointly Administered)** |
| **Debtors.**[1] | : | |

**MEMORANDUM OF LAW IN SUPPORT OF ENTRY OF AN ORDER CONFIRMING FIFTH AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION PACIFIC ANDES INTERNATIONAL HOLDINGS LIMITED (BERMUDA) AND CERTAIN OF ITS AFFILIATED DEBTORS**

[1] The Debtors in these chapter 11 cases are as follows: China Fishery Group Limited (Cayman), Pacific Andes International Holdings Limited (Bermuda), N.S. Hong Investment (BVI) Limited, South Pacific Shipping Agency Limited (BVI), China Fisheries International Limited (Samoa), CFGL (Singapore) Private Limited, Chanery Investment Inc. (BVI), Champion Maritime Limited (BVI), Growing Management Limited (BVI), Target Shipping Limited (HK), Fortress Agents Limited (BVI), Ocean Expert International Limited (BVI), Protein Trading Limited (Samoa), CFG Peru Investments Pte. Limited (Singapore), Smart Group Limited (Cayman), Super Investment Limited (Cayman), Pacific Andes Resources Development Limited (Bermuda), Nouvelle Foods International Ltd. (BVI), Golden Target Pacific Limited (BVI), Pacific Andes International Holdings (BVI) Limited, Zhonggang Fisheries Limited (BVI), Admired Agents Limited (BVI), Chiksano Management Limited (BVI), Clamford Holding Limited (BVI), Excel Concept Limited (BVI), Gain Star Management Limited (BVI), Grand Success Investment (Singapore) Private Limited, Hill Cosmos International Limited (BVI), Loyal Mark Holdings Limited (BVI), Metro Island International Limited (BVI), Mission Excel International Limited (BVI), Natprop Investments Limited, Pioneer Logistics Limited (BVI), Sea Capital International Limited (BVI), Shine Bright Management Limited (BVI), Superb Choice International Limited (BVI), and Toyama Holdings Limited (BVI).

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Pacific Andes International Holdings Limited (Bermuda), Pacific Andes International Holdings (BVI) Limited, Nouvelle Foods International Ltd. (BVI), N.S. Hong Investment (BVI) Limited, Clamford Holding Limited (BVI) and Pacific Andes Enterprises (Hong Kong) Limited (each a "**Plan Debtor**" and collectively, the "**Plan Debtors**") hereby submit this *Memorandum of Law in Support of Entry of an Order Confirming the Debtors' Fifth Amended Chapter 11 Plan of Reorganization Pacific Andes International Holdings Limited (Bermuda) and Certain of its Affiliated Debtors* (the "**Memorandum of Law**") and respectfully state as follows:

## I. PRELIMINARY STATEMENT

1. On December 23, 2021, the Plan Debtors filed the *Revised Fourth Amended Chapter 11 Plan of Reorganization Pacific Andes International Holdings Limited (Bermuda) and Certain of its Affiliated Debtors* (as amended, the "**Plan**") [Docket No. 2871-1] and the *Disclosure Statement for Revised Fourth Amended Joint Chapter 11 Plan of Reorganization of Andes International Holdings Limited (Bermuda) and Certain of its Affiliated Debtors* (the "**Disclosure Statement**") [Docket No. 2871].

2. The Plan and Disclosure Statement represent the culmination of substantial efforts by the Plan Debtors to propose a fair and equitable resolution of the business and legal issues presented in these Chapter 11 Cases[2].

3. As discussed more fully below, the Plan Debtors submit that the Plan satisfies all applicable requirements of title 11 of the United States Code (the "**Bankruptcy Code**"), the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and the Local Bankruptcy Rules for the Southern District of New York (the "**Local Rules**").

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Plan.

4. In further support of confirmation of the Plan, on January 13, 2022, the Plan Debtors filed the *Declaration of Ng Puay Yee (Jessie) in Support of Entry of an Order Confirming Fifth Amended Chapter 11 Plan of Reorganization Pacific Andes International Holdings Limited (Bermuda) and Certain of its Affiliated Debtors* (the "**Ng Declaration**") [Docket No. 2906].

## II. BACKGROUND AND OVERVIEW OF THE PLAN

### A. Background

5. The facts relevant to confirmation of the Plan are set forth in the Plan, Disclosure Statement, the Ng Declaration, and any additional evidence presented or testimony that may be adduced at the Confirmation Hearing, all of which are incorporated herein by reference.

### B. The Plan

6. The Plan classifies the holders of Claims and Equity Interests into twenty-four (24) classes and provides for a distribution of the Plan Debtors' assets in accordance with the Bankruptcy Code and applicable non-bankruptcy law. The classification scheme is set forth in the table below.

| Class | Designation | Treatment | Entitled to Vote |
|---|---|---|---|
| 1 | Qingdao Plant-Related Facility Claims | Unimpaired | No (deemed to accept) |
| 2 | Maybank Secured Facility Claims | Unimpaired | No (deemed to accept) |
| 3 | Other Secured Claims | Unimpaired | No (deemed to accept) |
| 4 | Other Priority Claims | Unimpaired | No (deemed to accept) |
| 5 | Maybank PATM Term Loan Claims | Impaired | Yes |
| 6 | Maybank Banking Facility Claims | Impaired | Yes |
| 7 | Rabobank Europaco Trade Facility Claims | Impaired | Yes |
| 8 | Rabobank NFS Facility Claims | Impaired | Yes |
| 9 | Standard Chartered Banking Trade Facility Claims | Impaired | Yes |
| 10 | CITIC Banking Facility PAIH Claims | Impaired | Yes |

| | | | |
|---|---|---|---|
| 11 | Pickenpack Letters of Comfort Claims | Impaired | Yes |
| 12 | KBC Facility Claims | Impaired | Yes |
| 13 | UOB Banking Facility (Europaco) Claims | Impaired | Yes |
| 14 | Fubon Factoring Facility Claims | Impaired | Yes |
| 15 | Richtown Intercompany Claims | Impaired | Yes |
| 16 | Pacos Trading Intercompany Claims | Impaired | Yes |
| 17 | PAE (BVI) Intercompany Claims | Impaired | Yes |
| 18 | PAIH General Unsecured Claims | Impaired | Yes |
| 19 | PAE HK Loan Claims | Impaired | Yes |
| 20 | Teh Hong Eng Loan Claims | Impaired | Yes |
| 21 | N.S. Hong Club Facility Guaranty Claim | Unimpaired | No (deemed to accept) |
| 22 | Intercompany Claims | Unimpaired | No (deemed to accept) |
| 23 | Intercompany Interests | Unimpaired | No (deemed to accept) |
| 24 | Existing PAIH Interests | Impaired | No (deemed to reject) |

7. Thus, other than claims that are not required to be classified under the Bankruptcy Code, the Plan provides for twenty-two (22) different classes of Claims and two (2) classes of Interests.

C. The Solicitation of Votes and Noticing of Non-Voting Classes Relating to Plan.

8. On September 27, 2021, the Plan Debtors filed their *Motion for Entry of an Order Approving (I) Disclosure Statement, (II) Form and Manner of Notices, (III) Form of Ballots and (IV) Solicitation Materials and Solicitation Procedures* (the "**Solicitation Procedures Motion**") [Docket No. 2686].

9. On December 22, 2021, the Bankruptcy Court entered its *Order Approving (I) Disclosure Statement, (II) Form and Manner of Notices, (III) Form of Ballots and (IV) Solicitation Materials and Solicitation Procedures* (the "**Solicitation Procedures Order**") [Docket No. 2870]. By the Solicitation Procedures Order, the Bankruptcy Court, *inter alia*, approved the PAIH

Disclosure Statement as containing adequate information sufficient for a reasonable hypothetical investor to make an informed judgment about the Plan.

10. On December 30, 2021[3], the Plan Debtors commenced their solicitation (the "**Solicitation**") of votes on the Plan by mailing to the members of Class 5, Class 6, Class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class, 13, Class 14, Class 15, Class 16, Class 17, Class 18, Class 19, and Class 20 through (together, the "**Voting Classes**"), a package containing (a) the Confirmation Hearing Notice (as defined in the Solicitation Procedures Motion); (b) the Solicitation Procedures Order; (c) the Plan; (d) the PAIH Disclosure Statement (e) an appropriate Ballot; and (f) self-addressed return envelope (collectively, the "**Solicitation Package**"). See *Affidavit of Service of of PAIH Solicitation Documents of Stephenie Kjontvedt* sworn to on January 11, 2022 (the "**Solicitation CoS**") [Docket No. 2889], ¶ 4.

11. In addition, as permitted by the Solicitation Procedures Order, on December 30, 2021, members of Class 1, Class 2, Class 3, Class 4, Class 21, Class 22, and Class 23 were mailed a package containing the Notification of Non-Voting Status And Notice of Opt-Out of Third-Party Release for Class 1, Class 2, Class 3, Class 4, Class 21, Class 22, and Class 23, substantially in the form annexed to the *Declaration in Support of PAIH Plan and Disclosure Statement, And the Plan Debtors' Motion for Entry of an Order Approving (I) Disclosure Statement, (II) Form of and Manner of Notices, (III) Form of Ballots, and (IV) Solicitation Material and Solicitation Procedures* ("**Supplemental Declaration**") [Docket No. 2850] as Exhibit G. See Solicitation CoS, ¶ 4. Further, holders of Class 23 claims were mailed a package containing the Notification of Non-Voting Status And Notice of Opt-Out of Third-Party Release - Class 24, substantially in the form annexed to the Supplemental Declaration as Exhibit G. See Solicitation CoS, ¶ 4.

[3] Notice of Confirmation Hearing was mailed to members of all Classes on December 27, 2021. *See Solicitation CoS,* ¶ 3.

12. As provided in the Solicitation Procedures Order, the Voting Deadline was set for January 10, 2022. The voting results are reflected in the Voting Certification. See *Declaration of Stephenie Kjontvedt of Epiq Corporate Restructuring, LLC Regarding Voting and Tabulation of Ballots Cast on the Revised Fourth Amended Plan of Reorganization of Pacific Andes International Holdings Limited (Bermuda) and Certain of Its Affiliated Debtors* ("Voting Certification") [Docket No. 2895].

13. The Bankruptcy Court scheduled the Confirmation Hearing for 11:00 a.m. on January 19, 2022, and set an objection deadline of January 10, 2022. Notice of the dates and times for the Confirmation Hearing and objection deadline was included in the Confirmation Hearing Notice (as defined in the Solicitation Procedures Motion).

## III. THE PLAN SHOULD BE CONFIRMED

14. When considering confirmation of a chapter 11 plan, creditors should be permitted to decide whether the proposed plan treatment is in their best interests. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207, 108 S. Ct. 963, 969 (1988); see also Coltex Loop Central Three Partners, L.P. v. BT/SAP Pool C Assocs, L.P. (In re Coltex Loop Central Three Partners, L.P.), 138 F.3d 39, 44 (2d Cir. 1998) ("The Code thus strikes a considered balance between creditor and debtor interests, which . . . courts must scrupulously respect.").

15. However, the Bankruptcy Court has an independent duty to ensure that the Plan satisfy each of the requirements of section 1129 of the Bankruptcy Code.

16. The Plan Debtors, as proponents of the Plan, bear the burden of proof on all elements necessary for confirmation. See, e.g., In re Adelphia Commc'ns Corp., 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007) (plan proponent possesses burden to establish the satisfaction of the best interests test); In re WorldCom Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *46 (Bankr. S.D.N.Y. Oct. 31, 2003) ("A debtor, as the proponent of the Plan, bears the burden of proof under

section 1129 of the Bankruptcy Code"). To meet this burden, the Plan Debtors must demonstrate that the Plan complies with the provisions of the Bankruptcy Code by a preponderance of the evidence. See, e.g., Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.), 994 F.2d 1160, 1165 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown."); see also In re Adelphia Commc'ns Corp., 368 B.R. at 252 (under best interests test, plan proponent possesses burden to establish its satisfaction by preponderance of the evidence); In re Bally Total Fitness of Greater New York, Inc., No. 07-12395 (BRL), 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) ("The Debtors, as proponents of the Plan, have the burden of proving the satisfaction of the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence."); In re WorldCom Inc., 2003 WL 23861928 at *46 (debtor must meet the burden by a preponderance of the evidence under section 1129 of the Bankruptcy Code).

17. To confirm the Plan, the Bankruptcy Court must find that both the Plan and the plan proponents comply with each of the requirements of section 1129(a) of the Bankruptcy Code. See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 648 (2d Cir. 1988) (plan must comply with section 1129(a) requirements).

18. As further described herein, and as established by the Ng Declaration and as established by the Voting Certification, at the Confirmation Hearing, the Plan Debtors will have satisfied their burden, by at least a preponderance of the evidence, that all of the requirements of the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules have been satisfied. Accordingly, the Plan Debtors respectfully submit that the Plan should be confirmed.

A. The Plan Complies With the Applicable Provisions of Title 11 (Section 1129(a)(l))

19. Section 1129(a)(1) of the Bankruptcy Code provides that a plan may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1).

20. The legislative history of section 1129(a)(1) explains that this provision embodies the requirements of, among others, sections 1122 and 1123 of the Bankruptcy Code governing, respectively, the classification of claims and the contents of the plan. H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 648 – 49 (2d Cir. 1988) ("the legislative history of subsection 1129(a)(1) suggests that Congress intended the phrase 'applicable provisions' in this subsection to mean provisions of Chapter 11 that concern the form and content of reorganization plans"); In re WorldCom Inc., 2003 WL 23861928 at *46 ("the legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123 governing classification of claims and contents of a plan, respectively"); In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) (same); In re Texaco Inc., 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988) ("In determining whether a plan complies with section 1129(a)(1), reference must be made to Code §§ 1122 and 1123 with respect to the classification of claims and the contents of a plan of reorganization").

21. Section 1122 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

22. The relevant inquiry under section 1122(a) is whether all claims in a class have substantially similar rights to the Debtors' assets. Thus, a plan proponent has significant flexibility in classifying claims under section 1122, as long as a reasonable legal and/or factual basis exists for the proposed classifications, and all claims within a particular class are substantially similar. See, e.g., In re Jersey City Med. Center, 817 F.2d 1055, 1060 – 61 (3d Cir. 1987) ("Congress intended to afford bankruptcy judges broad discretion [pursuant to section 1122] to decide the propriety of plans in light of the facts of each case."); In re Holywell Corp., 913 F.2d 873, 880 (11th Cir. 1990) (proponent of plan has considerable discretion in classifying claims and interests according to relevant facts and circumstance of case); Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd. Ltd. P'ship), 21 F.3d 477, 483 (2d Cir. 1994) (holding that similar claims may be separately classified unless sole purpose is to engineer an assenting impaired class); Windels Marx Lane & Mittendorf, LLP v. Source Enters., Inc. (In re Source Enters., Inc.), 392 B.R. 541, 556 (S.D.N.Y. 2008) ("[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.") (internal quotation marks omitted).

23. In addition to Administrative Expense Claims, Priority Tax Claims, Professional Fees, which need not be designated pursuant to section 1123(a)(1) of the Bankruptcy Code, the Plan designates twenty-two (22) classes of Claims and two (2) classes of Equity Interests. The Claims and Interests placed in each Class are substantially similar to other Claims and Equity Interests, as the case may be, in each such Class. Class 1 includes only the Qinqdao Plant-Related Facility Claims. Class 2 includes only Maybank Secured Facility Claims. Class 3 includes only Other Secured Claims. Class 4 includes only Other Priority Claims. Class 5 includes only Maybank PATM Term Loan Claims. Class 6 includes only Maybank Banking Facility Claims. Class 7

includes only Rabobank Europaco Trade Facility Claims. Class 8 includes only Rabobank NFS Facility Claims. Class 9 includes only Standard Chartered Banking Trade Facility Claims. Class 10 includes only CITI Banking Facility PAIH Claims. Class 11 includes only Pickenpack Letters of Comfort Claims. Class 12 includes only KBC Facility Claims. Class 13 includes only UOB Banking Facility (Europaco) Claims. Class 14 includes only Fubon Factoring Facility Claims. Class 15 includes only Richtown Intercompany Claims. Class 16 includes only Pacos Trading Intercompany Claims. Class 17 includes only PAE (BVI) Intercompany Claims. Class 18 includes only PAIH General Unsecured Claims. Class 19 includes only the PAE HK Loan Claims. Class 20 includes only Teh Hong Eng Loan Claims. Class 21 includes only the N.S. Hong Club Facility Guaranty Claim. Class 22 includes only Intercompany Claims. Class 23 includes only Intercompany Interests. Class 24 includes only Existing Interests. See Ng Declaration, ¶ 46.

24. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between holders of Claims and Equity Interests in any particular class. The Plan Debtors respectfully submit that classification scheme in the Plan satisfies section 1122 of the Bankruptcy Code. The Plan Debtors have not invoked section 1122(b) of the Bankruptcy Code and therefore, it is not applicable. See Ng Declaration, ¶ 47.

25. Section 1123(a) of the Bankruptcy Code identifies seven (7) required contents of a plan that are applicable in these Chapter 11 Cases.[4] The Plan fully complies with section 1123(a).

i. The Plan Designates Classes of Claims and Interests

26. Section 1123(a)(1) of the Bankruptcy Code requires that a chapter 11 plan designate classes of claims and interests other than claims of a kind specified in section 507(a)(2) of the

[4] An eighth requirement, set forth in 11 U.S.C. § 1123(a)(8), only applies in a case in which the debtor is an individual.

Bankruptcy Code (administrative expense claims), section 507(a)(3) of the Bankruptcy Code (claims arising during the "gap" period in an involuntary bankruptcy case), and section 507(a)(8) of the Bankruptcy Code (priority tax claims). 11 U.S.C. § 1123(a)(1). Section 4 of the Plan satisfies this requirement by expressly classifying all Claims and Equity Interests, other than Administrative Expenses Claims, Priority Tax Claims, Professional Fees, as follows: Class 1 - Qinqdao Plant-Related Facility Claims; Class 2 - Maybank Secured Facility Claim; Class 3 - Other Secured Claims; Class 4 - Other Priority Claims; Class 5 - Maybank PATM Term Loan Claims; Class 6 - Maybank Banking Facility Claims; Class 7 - Rabobank Europaco Trade Facility Claims; Class 8 - Rabobank NFS Facility Claims; Class 9 - Standard Chartered Banking Trade Facility Claims; Class 10 - CITI Banking Facility PAIH Claims; Class - Pickenpack Letters of Comfort Claims; Class 12 - KBC Facility Claims; Class 13 - UOB Banking Facility (Europaco) Claims; Class 14 - Fubon Factoring Facility Claims; Class 15 - Richtown Intercompany Claims; Class 16 - Pacos Trading Intercompany Claims; Class 17 - PAE (BVI) Intercompany Claim; Class 18 - PAIH General Unsecured Claims; Class 19 – PAE HK Loan Claims. Class 20 - Teh Hong Eng Loan Claims; Class 21 - N.S. Hong Club Facility Guaranty Claim; Class 22 - Intercompany Claims; Class 23 - Intercompany Interests; and Class 24 - Existing PAIH Interests. Therefore, the Plan Debtors respectfully submit that section 1123(a)(1) of the Bankruptcy Code is satisfied.

ii. The Plan Identify Unimpaired Classes of Claims and Interests

27. Section 1123(a)(2) of Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Section 4 of the Plan satisfies this requirement by specifying that Class 1, Class 2, Class 3, Class 4, Class 20, Class 21, and Class 22 are Unimpaired under the Plan. See Ng Declaration, ¶ 49.

iii. The Plan Specify the Treatment of Impaired Classes

28. Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Section 4 of the Plan specifies that Class 5, Class 6, Class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class, 13, Class 14, Class 15, Class 16, Class 17, Class 18, Class 19, Class 20, and Class 24 are impaired under the Plan and Section 5 of the Plan specifies the treatment of the Claims in Class 5, Class 6, Class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class, 13, Class 14, Class 15, Class 16, Class 17, Class 18, Class 19, Class 20, and Class 24. See Ng Declaration, ¶ 50.

29. Accordingly, section 1123(a)(3) of the Bankruptcy Code is satisfied.

iv. The Plan Provide the Same Treatment Within Each Class

30. Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Section 5 of the Plan satisfies this requirement by providing the same treatment to each Claim or Equity Interest in each respective Class. See Ng Declaration, ¶51. There is no provision in either of the Plan to the contrary. Accordingly, section 1123(a)(4) of the Bankruptcy Code is satisfied.

v. The Plan Provide Adequate Means for Implementation

31. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation. See 11 U.S.C. § 1123(a)(5). Adequate means for implementation of a plan may include, *inter alia*, retention by the debtor of all or part of its property and the transfer of property of the estate to one or more entities. See generally, In re Spiegel, Inc., No. 03-11540 (BRL), 2005 WL 1278094, at *5 (Bankr. S.D.N.Y. May 25, 2005).

32. Sections 6, 7, 8, and 9 of the Plan provide adequate and proper means for the implementation of the Plan. In particular, Section 6.1 of the Plan provides for Sale Transaction for the sale of certain Interests and Real Property. Further, Section 6.4 of the Plan provides for the appointment of a Plan Administrator to carry out the Plan and specifies the Plan Administrator's powers and duties. Sections 6, 7, 8, and 9 of the Plan also provides for various other procedural and administrative mechanisms that will govern the implementation of the Plan. Sections 7 and 8 of the Plan provide procedures related to, *inter alia*, distributions, resolution of disputed claims, the means by which distributions will be transmitted, and the respective responsibilities of the Plan Administrator and recipients of distributions with respect to tax reporting and withholding. See Ng Declaration, ¶ 52. The Plan Debtors submit that the foregoing constitutes more than adequate means for implementation of the Plan, and therefore section 1123(a)(5) of the Bankruptcy Code is satisfied.

vi. Prohibition on the Issuance of Non-Voting Securities

33. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate documents prohibit the issuance of non-voting equity securities and related corporate governance matters. See 11 U.S.C. §1123(a)(6). The Plan do not contemplate the issuance of new stock in the Plan Debtors. See Ng Declaration, ¶ 54. Accordingly, the Plan Debtors believe section 1123(a)(6) of the Bankruptcy Code does not apply herein.

vii. Selection of Trustees, Member and Manager

34. 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." 11 U.S.C. § 1123(a)(7). This provision is supplemented by section 1129(a)(5) of the

Bankruptcy Code, which directs the bankruptcy court to scrutinize the methods by which the management of a reorganized corporation is to be chosen to provide adequate representation of those whose investments are involved in the bankruptcy – i.e., creditors and equity holders. See In re Mesa Air Group, Inc., No. 10-10018 (MG), 2011 WL 320466, at *9 (Bankr. S.D.N.Y. Jan. 20, 2011). The Plan Debtors do not currently, and will have no continued operations following confirmation of the Plan. No new officers or directors are appointed under the Plan, nor is it expected that any new officers or directors will be appointed following confirmation of the Plan. The Plan Debtors will continue in existence in their current form to implement the Plan. Accordingly, section 1123(a)(7) of the Bankruptcy Code is not applicable. To the extent that the appointment of the Plan Administrator implicates section 1123(a)(7) of the Bankruptcy Code, the Plan Debtors submit that the appointment of the Plan Administrator is consistent with the interests of the Debtors' stakeholders. Due to the non-U.S. nature of the responsibilities, the Debtors are conferring with potential candidates in Hong Kong and BVI. It is expected that the identity and qualifications of the proposed Plan Administrator will be identified at or before Confirmation Hearing. See Ng Declaration, ¶ 55.

viii. Impairment and Non-Impairment of Claims and Interests

35. Section 1123(b) identifies six (6) discretionary provisions that may be included in a plan. The Plan contains certain of these discretionary provisions, all of which are consistent with the Bankruptcy Code.

36. Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). The Plan provides that Class 1, Class 2, Class 3, Class 4, Class 21, Class 22, and Class 23 are unimpaired, and Class 5, Class 6, class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class 13, Class 14, Class 15, Class

16, Class 17, Class 18, Class 19, Class 20, and Class 24 are impaired. See Plan, § 4.5; Ng Declaration, ¶ 46.

37. The Plan Debtors respectfully submit that such treatment is permissible under section 1123(b)(1) of the Bankruptcy Code.

ix. Executory Contracts and Unexpired Leases

38. Section 1123(b)(2) of the Bankruptcy Code also provides that a plan may, subject to section 365 of the Bankruptcy Code, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section. See 11 U.S.C. § 1123(b)(2).

39. The Plan constitutes a motion under section 365(a) of the Bankruptcy Code for the authorization to reject executory contracts and unexpired leases not previously assumed. Section 365(a) of the Bankruptcy Code states that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor" if such action represents a reasonable exercise of its business judgment. 11 U.S.C. § 365(a). If the court finds a debtor's business judgment has been reasonably exercised, it approves the proposed rejection. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523, 104 S. Ct. 1188, 1194–95 (1984); In re RLR Celestial Homes, Inc., 108 B.R. 36, 46 (Bankr. S.D.N.Y. 1989). Under the business judgment standard, courts will approve a debtor's business decision unless that judgment is the product of bad faith, whim, or caprice. See Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1047 (4th Cir. 1985).

40. The Plan provide that all executory contracts and unexpired leases that exist between any of the Plan Debtors and any party that have not been previously rejected, assumed, or assumed and assigned pursuant to any other order of the Bankruptcy Court shall be deemed

rejected on the Effective Date. See Plan, § 9.1. Claims created by the rejection of executory contracts and unexpired leases pursuant to the Plan must be filed no later than thirty (30) days after mailing of notice of the Effective Date. See Plan, § 9.3. The Plan Debtors respectfully submit that the provisions of the Plan regarding the treatment of executory contracts and unexpired leases are fair and reasonable under the circumstances, and comply with sections 365(a) and 1123(b)(2) of the Bankruptcy Code.

x. Settlements and Retention of Claims

41. Section 1123(b) of the Bankruptcy Code provides that a plan may provide for "(a) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or (b) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest." 11 U.S.C. § 1123(b)(3).

42. The Plan embody the settlement of certain claims by and between the Plan Debtors and their respective creditors. See Plan, §§ 4.1, 6.6 and 7.9. In addition, subject to the release, exculpation and injunction provisions of Section 11 of the Plan, the Plan provides that Retained Causes of Action shall vest in the Plan Administrator, who shall have the exclusive right to institute, prosecute, abandon, settle or compromise all Retained Causes of Action. See Plan, §§ 11.1 and 11.6. Accordingly, section 1123(b)(3) of the Bankruptcy Code is satisfied.

xi. Sale of Property and Distribution of Proceeds

43. Section 1123(b)(4) of the Bankruptcy Code provides that a plan may provide "for the sale of substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4).

44. The Plan provides for the sale of Plan Debtors' equity interest in the Real Property Owners pursuant to the terms of the Asset Purchase Agreement annexed to the Plan as Exhibits C

through I, and further provides for the distribution of the Sale Transaction Proceeds in accordance with the terms of the Bankruptcy Code. See Plan, § 6.1.

xii. Modification of Rights of Holders of Secured Claims and Unsecured Claims

45. Section 1123(b)(5) of the Bankruptcy Code provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1123(b)(5).

46. The Plan does not modify the rights of holders of secured claims. See Plan, §§ 5.1 through 5.3. The Plan does modify the rights of certain holders of unsecured Claims and Equity Interests (Class 5, Class 6, Class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class, 13, Class 14, Class 15, Class 16, Class 17, Class 18, Class 19, Class 20, and Class 24), and does not modify the rights of holders of other types of unsecured Claims (Class 4, Class, Class 21, Class 22, and Class 23), see Plan, §§ 5.4 through 5.24. The Debtors submit that the modification of such rights is consistent with section 1123(b)(5) of the Bankruptcy Code.

xiii. The Plan Includes Other Provisions That Are Not Inconsistent With Applicable Sections of the Bankruptcy Code

47. Section 1123(b)(6) of the Bankruptcy Code provides that a Plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). The Plan does provide additional appropriate provisions that are not inconsistent with applicable sections of the Bankruptcy Code, including, but not limited to: (i) Plan § 11.7 (Releases by Plan Debtor), (ii) Plan § 11.8 (Releases by Holders of Claims and Interests,) (iii) Plan § 11.9 (Exculpation), and (iv) Plan § 11.10 (Injunction). As discussed in Section IV, *infra*, these

provisions are consistent with the Bankruptcy Code, and thus, the Plan complies with section 1123(b) of the Bankruptcy Code.

48. Section 1123(c) of the Bankruptcy Code requires in a case involving an individual, that "a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale or lease." 11 U.S.C. § 1123(c). The Plan Debtors are not individuals, and accordingly, section 1123(c) does not apply to these Chapter 11 Cases.

49. Section 1123(d) of the Bankruptcy Code provides that "[n]otwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). The Plan does not contemplate the curing of any default. Accordingly, section 1123(d) of the Bankruptcy Code does not apply to the Plan.

50. Based upon the foregoing, the Plan Debtors respectfully submit that the Plan complies with the applicable provisions of sections 1122 and 1123 of the Bankruptcy Code and, therefore, meets the requirements of section 1129(a)(1) of the Bankruptcy Code.

B. The Plan Debtors Have Complied With the Applicable Provisions Of Title 11 (Section 1129(a)(2))

51. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [title 11 of the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The principal purpose of section 1129(a)(2) is to ensure that a plan proponent has complied with the requirements of sections 1125 and 1126 of the Bankruptcy Code. See In re WorldCom, Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) ("The legislative history to section 1129(a)(2) reflects that this provision is intended to

encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code.").

52. As noted above, the Bankruptcy Court has approved the Disclosure Statement, pursuant to section 1125 of the Bankruptcy Code as containing "adequate information" of a kind and in sufficient detail to enable hypothetical reasonable investors typical of the Debtors' creditors to make an informed judgment whether to accept or reject the Plan. In addition, the Bankruptcy Court approved the Plan Debtors proposed form and manner of notice of the Confirmation Hearing in the Solicitation Procedures Order. As set forth in the Solicitation CoS, the Plan Debtors fully complied with the requirements of the Solicitation Procedures Order. See Solicitation CoS.

53. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Under section 1126 of the Bankruptcy Code, only holders of allowed claims and allowed equity interests in impaired classes of claims or equity interests that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. See 11 U.S.C. § 1126.

54. As set forth in the Solicitation CoS, in accordance with section 1126 of the Bankruptcy Code, the Debtors solicited votes from holders of Claims in Class 5, Class 6, Class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class 13, Class 14, Class 15, Class 16, Class 17, Class 18, Class 19, Class 20 and Class 24 only. See Solicitation CoS, ¶ 4. Class 5, Class 6, Class 7, Class 8, Class 9, Class 10, Class 11, Class 12, Class 13, Class 14, Class 15, Class 16, Class 17, Class 18, Class 19, and Class 20 are impaired under the Plan and will receive distributions under the Plan. See Plan, §§ 4.5, 5.5 through 5.20. Accordingly, pursuant to section 1126(a) of the Bankruptcy Code, holders of Claims in such Classes were entitled to vote to accept or reject the Plan.

55. Class 1, Class 2, Class 3, Class 4, Class 21, Class 22, and Class 23 are unimpaired under the Plan. See Plan, §§ 4.5, 5.1, 5.2, 5.3, 5.4, 5.21, 5.22 and 5.23. As a result, pursuant to section 1126(f) of the Bankruptcy Code, holders of Claims in such Classes are conclusively presumed to have accepted the Plan. As such, the votes of holders of Class 1, Class 2, Class 3, Class 4, Class 21, Class 22, and Class 23 claims were not solicited. Such Classes were served with a *Notification of Non-Voting Status and Notice of Opt-Out of Third-Party Releases.*

56. Holders of Class 24 Existing PAIH Interests will not receive any distributions or retain any property interests under the Plan. See Plan, §§ 4.5 and 5.24. As a result, pursuant to Bankruptcy Code section 1126(g), holders of Class 23 Existing PAIH Interests are deemed to have rejected the Plan. Votes were thus not solicited from the holders of Class 24 Existing Interests.

57. Based upon the foregoing, the Debtors respectfully submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

C. The Plan Was Proposed In Good Faith (Section 1129(a)(3))

58. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts within the Second Circuit have defined the good faith standard to require "a showing 'that the plan [was] proposed with honesty, good intentions and with a basis for expecting that a reorganization can be effected."' In re Granite Broad. Corp., 369 B.R. 120, 128 (Bankr. S.D.N.Y. 2007); The Argo Fund Ltd. v. Bd. of Dirs. Of Telecom Argentina, S.A. (In re Bd. of Dirs. Of Telecom Argentina, S.A.), 528 F.3d 162, 174 (2d Cir. 2008) (citing In re Koelbl, 751 F.2d 137, 139 (2d Cir. 1984)); see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 649 (2d Cir. 1988). In the context of a chapter 11 plan, courts have held that "a plan is proposed in good faith 'if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the

[Bankruptcy] Code.'" In re Leslie Fay Cos., Inc., 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (quoting In re Texaco Inc., 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988)).

59. Good faith is to be determined "in light of the totality of the circumstances surrounding" formulation of the plan. Public Finance Corp. v. Freeman (In re Public Finance Corp), 712 F.2d 219, 221 (5th Cir. 1983); see also In re Oneida Ltd., 351 B.R. 79, 85 (Bankr. S.D.N.Y. 2006) ("Good faith should be evaluated in light of the totality of the circumstances surrounding confirmation.") (internal citations omitted); In re Lionel L.L.C., No. 04-17324 (BRL), 2008 WL 905928, at *6 (Bankr. S.D.N.Y. Mar. 31, 2008) (looking to totality of the circumstances in order to determine a plan proposed in good faith under section 1129(a)(3)). In determining whether the good faith requirement has been satisfied, the court will focus on "the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." In re Granite Broad. Corp., 369 B.R. at 128 (quoting In re PWS Holding Corp., 228 F.3d 224, 242 (3d Cir. 2000)).

60. Accordingly, bankruptcy courts have held that the good faith requirement is satisfied if the plan has been proposed for the purpose of preserving the value of the bankruptcy estate and distributing that value to creditors. See In re Source Enters, Inc., No. 06-11707 (AJG), 2007 WL 2903954, at *6 (Bankr. S.D.N.Y. Oct. 1, 2007) (the good faith requirement was satisfied in plan filed with the legitimate and honest purposes of maximizing value of estate and effectuating equitable distribution), aff'd, 392 B.R. 541 (S.D.N.Y. 2008).

61. Liquidation is specifically allowed in a chapter 11 plan pursuant to section 1129(a)(11) of the Bankruptcy Code. See, e.g., Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 37 n. 2, 128 S. Ct. 2326 (2008) ("Although the central purpose of Chapter 11 is to facilitate reorganizations rather than liquidations (covered generally by Chapter 7), Chapter 11

expressly contemplates liquidations."); In re BGI, Inc., 772 F.3d 102, 107 n. 8 (2d Cir. 2014) (same); In re Deer Park, Inc., 136 B.R. 815, 818 (9th Cir. B.A.P. 1992) ("Had Congress not intended to include liquidation as an acceptable type of reorganization plan, then presumably all provisions dealing with liquidation would fall within Chapter 7, which is specifically titled 'Liquidation'").

62. The Plan has been proposed by the Plan Debtors in good faith, with the legitimate and honest purpose of maximizing the value of the Plan Debtors' Estates. The Plan Debtors submit that the Plan maximizes value and that there is no alternative to the Plan that would return greater value to creditors. See Ng Declaration, ¶¶ 56 - 60.

63. Accordingly, the Debtors respectfully submit that section 1129(a)(3) of the Bankruptcy Code is satisfied.

D. All Payments To Be Made By the Plan Debtors' Estates In Connection With These Chapter 11 Cases Are Subject to the Approval of the Bankruptcy Court (Section 1129(a)(4))

64. Section 1129(a)(4) of the Bankruptcy Code requires that: "[a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). In essence, this subsection requires that any and all fees promised or received from the estate in connection with or in contemplation of a chapter 11 case must be disclosed and made subject to the court's approval. See In re Johns-Manville Corp., 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986) (implying that court must be permitted to review and approve reasonableness of professional fees made from estate assets); see also In re Elsinore Shore Assocs., 91 B.R. 238, 268 (Bankr. D. N.J. 1988) (the requirements of section

1129(a)(4) were satisfied where the plan provided for payment of only "allowed" administrative expenses).

65. In these Chapter 11 Cases, the only such payments are to the Plan Debtors retained professionals. The Plan requires such persons to file final applications for allowance of professional fees and reimbursement of expenses within 45 days of the Effective Date of the Plan. See Plan, § 3.2. Only allowed claims of such persons and professionals will be paid. Furthermore, section 12 of the Plan provides that the Bankruptcy Court will retain jurisdiction after the Effective Date to hear and determine all applications for professional fees.

66. Accordingly, the Plan Debtors respectfully submit that the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. Disclosure of All Required Information Regarding Post-Confirmation Directors, Management And Insiders (Section 1129(a)(5))

67. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of any individual proposed to serve, after confirmation of a plan, as director, officer or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the Plan. See 11 U.S.C. § 1129(a)(5)(A)(i). The Plan does not provide for the appointment of any new director, officer or voting trustee after confirmation of the Plan. The Plan contemplates that a Plan Administrator will be appointed on the Effective Date. See Plan, § 6.4 The identity of the Plan Administrator was disclosed in the Ng Declaration. See Ng Declaration, ¶ 55. The Plan contemplates that the Plan Debtors will continue in existence until they are dissolved in accordance with applicable international law, and as such, there are no successors to any of the Plan Debtors. See Plan, §§ 6.5 and 6.8. The Plan relates solely to the Plan Debtors and not to any other person or entity. Thus,

the Plan Debtors respectfully submit that the Plan satisfies the requirements of section 1129(a)(5)(A)(i) of the Bankruptcy Code.

68. Section 1129(a)(5)(A)(ii) of the Bankruptcy Code requires that the appointment of the person identified in accordance with section 1129(a)(5)(A)(i) "is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(ii). Thus, section 1129(a)(5)(A)(ii) asks the bankruptcy court to ensure that post-confirmation governance is in "good hands," which has been interpreted by courts to mean that, without limitation, control of the reorganized entity by the proposed individuals will be beneficial. See, e.g., In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992) (citations omitted); In re Bashas' Inc., 437 B.R. 874, 912 (Bankr D. Ariz. 2010) (the appointment of post-confirmation officers and directors should not "perpetuate[] incompetence, lack of discretion, inexperience or affiliations with groups inimical to the best interests of the debtor.") (citations omitted).

69. The Plan Debtors believe that the appointment of the Plan Administrator is consistent with the interests of creditors and equity security holders and with public policy. As set forth in the Ng Declaration, due to the non-U.S. nature of the responsibilities, the Debtors are conferring with potential candidates in Hong Kong and BVI. It is expected that the identity and qualifications of the proposed Plan Administrator will be identified at or before Confirmation Hearing. See Ng Declaration, ¶ 55. Therefore, the Plan Debtors believe that the Plan Administrator's appointment will satisfy the requirements of section 1129(a)(5)(A)(ii) of the Bankruptcy Code.

70. Section 1129(a)(5)(B) of the Bankruptcy Code provides that a plan may be confirmed if the proponent discloses the identity of any insider that will be employed or retained

by the reorganized debtor, and the nature of any compensation for such insider. See 11 U.S.C. § 1129(a)(5)(B). No insider is to be employed or retained under the Plan. Accordingly, section 1129(a)(5)(B) of the Bankruptcy Code is not applicable.[5]

F. The Plan Does Not Provide For Any Rate Change Subject To Regulatory Approval (Section 1129(a)(6))

71. Section 1129(a)(6) of the Bankruptcy Code requires, with respect to a debtor the rates of which are subject to governmental regulation following confirmation, that appropriate governmental approval has been obtained for any rate change provided for in the plan, or that such rate change be expressly conditioned on such approval. See 11 U.S.C. §1129(a)(6). Section 1129(a)(6) of the Bankruptcy Code does not apply to the Plan as there is no governmental regulatory commission that has jurisdiction over any rates of the Plan Debtors.

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

72. The "best interests of creditors" test as set forth in section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest has accepted the plan or will receive property of a value not less than what such holder would receive if the debtor were liquidated under chapter 7. See In re Leslie Fay Cos., 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997).

73. The best interests test focuses on individual dissenting creditors rather than classes of claims. See, e.g., In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992); see also ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 361 B.R. 337, 364 (S.D.N.Y. 1997) ("The best interest of creditors test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the

[5] The Plan Administrator will have the discretion to hire the Debtors' personnel on such terms as those personnel and the Plan Administrator agree.

plan. If even one dissenting member of an impaired class would get less under the Plan than in a hypothetical liquidation, the fact that the class as a whole approved the Plan is immaterial") (citations omitted). The analysis requires that each holder of a claim or interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. See In re Adelphia Commc'ns Corp., 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007) ("In determining whether the best interests standard is met, the court must measure what is to be received by rejecting creditors in the impaired classes under the plan against what would be received by them in the event of liquidation under chapter 7."); see also In re Leslie Fay Cos., Inc., 207 B.R. at 787 (best interests test requires court to "find that each [dissenting] creditor will receive or retain value that is not less than the amount he [or she] would receive if the debtor were liquidated.") (citations omitted); In re Best Prods. Co., 168 B.R. 35, 72 (Bankr. S.D.N.Y. 1994) (best interests test met when classes voting against plan would receive either the same or larger distribution than under chapter 7 liquidation). Accordingly, if the Bankruptcy Court finds that each nonconsenting member of an impaired class will receive at least as much under the Plan as it would receive in a chapter 7 liquidation, the Plan satisfies the best interests of creditors test.

74. The Plan Debtors prepared a liquidation analysis (the "Liquidation Analysis") [Docket No. 2871-2], and attached to the Declaration of David W. Prager ("Prager Declaration"), as Exhibit B. [Docket No. 2907]. The purpose of the Liquidation Analysis is to compare the value of projected Distributions to holders of Claims under the Plan against estimated Distributions if the Plan Debtors were to be liquidated under chapter 7 of the Bankruptcy Code, to demonstrate that the Plan satisfies the "best interests" test.

75. The Liquidation Analysis in fact demonstrates that a liquidation of the Plan Debtors under chapter 7 of the Bankruptcy Code would result in reduced recoveries for impaired classes of Claims. See Prager Declaration, ¶ 14.

76. As shown by the Liquidation Analysis, the holders of Claims in the impaired classes are not receiving or retaining any less value under the Plan than they would in chapter 7. Accordingly, the Plan Debtors believe that the "best interests of creditors" test is satisfied as to each impaired class of claims and interests. In addition, the docket of the Chapter 11 Cases does not reflect an election by any class pursuant to § 1111(b)(2) of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

H. It is Anticipated that Each Impaired Class, Will Vote to Accept the Plan (Section 1129(a)(8))

77. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests under a plan has either accepted the plan or is not impaired under the plan. See 11 U.S.C. § 1129(a)(8). With respect to an unimpaired class of claims, under section 1126 of the Bankruptcy Code, such unimpaired class of claims is "conclusively presumed" to have accepted the plan and need not be further examined under section 1129(a)(8). See 11 U.S.C. § 1126(f). Thus, pursuant to the Plan, Classes 1, 2, 3, 4, 20, 21, 22 and 23 are unimpaired and therefore conclusively presumed to have accepted the Plan.

78. With respect to an impaired class of claims, acceptance of a plan is determined by reference to section 1126(c) of the Bankruptcy Code, which identifies the members of a class who may vote and the number and amount of votes necessary for the acceptance of a plan by a class of claims or interests. In particular, section 1126(c) of the Bankruptcy Code provides that a plan is accepted by an impaired class of claims if the class members accepting hold at least two-thirds in

amount and more than one-half in number of the claims held by the class members that have cast votes on the plan. See 11 U.S.C. § 1126(c).

79. All Classes of Impaired Claims have voted to accept the Plan. See Voting Certification.

80. Section 1126(g) of the Bankruptcy Code provides: "[n]otwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests." 11 U.S.C. 1126(g).

81. Pursuant to the Plan, Class 24 (Existing Interests) will not receive or retain any property under the Plan. See Plan, § 4.24. As a result, pursuant to section 1126(g) of the Bankruptcy Code, Class 24 is deemed to reject the Plan.

82. Because of the deemed rejection of Class 24, the Plan fails to satisfy section 1129(a)(8) of the Bankruptcy Code. However, the Plan may still be confirmed over the deemed rejection of Class 24, pursuant to section 1129(b) of the Bankruptcy Code (as described in more detail below) because the Plan does not discriminate unfairly and is fair and equitable with respect to Class 24.

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

83. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan. The Plan satisfies each of the requirements of section 1129(a)(9). First, consistent with section 1129(a)(9)(A), the Plan provides for all Allowed Administrative Expense Claims (i.e., section 507(a)(2) and section 507(a)(3) claims) to be paid in full in Cash as soon as practicable on the Effective Date or as soon thereafter as is reasonably practicable, unless the holder of such Allowed Administrative Expense Claim has agreed to less favorable treatment or has already received payment on account of such Claim. See Plan, § 3.1.

84. Second, with respect to priority claims under sections 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of the Bankruptcy Code, the Plan provides for payment in full of such Priority Non-Tax Claims as soon as practicable after the later of (i) the Effective Date, and (ii) the date on which such Claim becomes Allowed, unless such holder of an Allowed Priority Non-Tax Claim has agreed to a different treatment for such Claim. See Plan, § 5.4.

85. Third, the Plan provides that Priority Tax Claims will be treated consistently with section 1129(a)(9)(C) of the Bankruptcy Code, in that each holder of an Allowed Priority Tax Claim shall be paid in full in Cash on or as soon as reasonably practicable after the later of (i) the Effective Date, and (ii) the date such Claim becomes Allowed, except to the extent that a holder of an Allowed Priority Tax Claim has agreed to a different treatment. See Plan, § 3.3.

86. Thus, the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Has Been Accepted By At Least One Impaired, Non-Insider Class (Section 1129(a)(10))

87. Section 1129(a)(10) of the Bankruptcy Code provides that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

88. The Plan satisfies this requirement. As described above, the Plan was accepted by all Classes of Impaired Claims. As a result, at least one Class of Claims that is Impaired under the Plan has accepted the Plan, determined without including any acceptance of the Plan by any insider, as required by section 1129(a)(10) of the Bankruptcy Code.

K. The Plan Is Feasible or Feasibility Analysis Not Applicable (Section 1129(a)(11))

89. Pursuant to section 1129(a)(11) of the Bankruptcy Code, a plan may be confirmed only if "[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).

90. Substantially all of the Debtors' remaining assets are being sold pursuant to the Plan. To the extent Bankruptcy Code section 1129(a)(11) applies to implementation of the Plan, the Plan Debtors submit that the feasibility requirement of section 1129(a)(11) is satisfied because the Plan Debtors' Estates have sufficient assets on hand to implement the Plan as proposed. See Liquidation Analysis.

L. The Plan Provides for the Payment of Certain Fees (Section 1129(a)(12))

91. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930 be paid or that provision be made for their payment. See 11 U.S.C. § 1129(a)(12). The Plan provides that all fees payable pursuant to section 1930 of Title 28 of the United States Code shall be paid on the Effective Date by the Debtors. All fees payable pursuant to Section 1930 of Title 28 of the United States Code after the Effective Date shall be paid by the Plan Administrator on a quarterly basis until the Chapter 11 Cases are closed, converted, or dismissed. See Plan, §§ 13.1.

M. The Plan Debtors Have No Ongoing Retiree Benefit Obligations (Section 1129(a)(13))

92. Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation, after the plan's effective date, of all retiree benefits at the level established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code at any time prior to

confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits.

93. The Plan Debtors have no obligation to provide any retiree benefits, and accordingly, section 1129(a)(13) of the Bankruptcy Code does not apply.

N. The Plan Debtors Have No Domestic Support Obligations (Section 1129(a)(14))

94. Section 1129(a)(14) of the Bankruptcy Code requires a debtor to pay all domestic support obligations that first become payable after the date of the filing of the petition.

95. The Plan Debtors do not have any domestic support obligations, and accordingly, section 1129(a)(14) of the Bankruptcy Code does not apply.

O. Requirements for Individual Chapter 11 Cases Not Applicable (Section 1129(a)(15))

96. Section 1129(a)(15) of the Bankruptcy Code provides that in a case where the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan, either (a) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim, or (b) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor as defined by section 1325(b)(2) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer. See 11 U.S.C. § 1129(a)(15).

97. The Plan Debtors are not individuals, and accordingly, section 1129(a)(15) of the Bankruptcy Code does not apply.

P. The Plan Debtors Are Not Nonprofit Entities (Section 1129(a)(16))

98. Section 1129(a)(16) of the Bankruptcy Code requires that "all transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law

that govern the transfer of property by a corporation or trust that is not a moneyed, business or commercial corporation or trust." 11 U.S.C. § 1129(a)(16).

99. The Plan Debtors are not corporations or trusts that are not a moneyed, business, or commercial corporation or trust. Accordingly, section 1129(a)(16) of the Bankruptcy Code does not apply.

Q. Fair and Equitable; No Unfair Discrimination (Section 1129(b))

100. Section 1129(b)(1) of the Bankruptcy Code provides that, "if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent under the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1).

101. Thus, the Plan may be confirmed if, in addition to satisfying the other requirements for confirmation, the Plan is determined to be "fair and equitable" and "does not discriminate unfairly" with respect to each class of Claims or Equity Interests that has not accepted the Plan. Under the Plan, the holders of Claims in Class 24 Existing Interests are deemed to reject the Plan, and accordingly the Bankruptcy Court may only confirm the Plan if the Plan "does not discriminate unfairly" and is "fair and equitable" with respect to Class 23. See 11 U.S.C. § 1129(b).

i. The Plan Does Not Discriminate Unfairly With Respect to Rejecting Class

102. The Plan does not discriminate unfairly with respect to any Class. Although Congress did not define "discriminate unfairly" in the Bankruptcy Code, courts have interpreted this standard to mean that creditors or interest holders with similar legal rights should not receive materially different treatment under a proposed plan. See, e.g., In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986). Courts in the Second Circuit have ruled that "[u]nder

section 1129(b) of the Bankruptcy Code, a plan unfairly discriminates where similarly situated classes are treated differently without a reasonable basis for the disparate treatment." In re WorldCom, Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *59 (Bankr. S.D.N.Y. Oct. 31, 2003); see also In re Buttonwood Partners, Ltd., 111 B.R. 57, 63 (Bankr S.D.N.Y. 1990) (courts assess whether "(i) there is a reasonable basis for discriminating, (ii) the debtor cannot consummate the plan without discrimination, (iii) the discrimination is proposed in good faith, and (iv) the degree of discrimination is in direct proportion to its rationale," but also noting that second prong assessing whether the debtor cannot consummate plan without discrimination is not dispositive of question of unfair discrimination).

103. In accordance with the foregoing standards, the Plan does not "discriminate unfairly" with respect to Class 24. This result is solely a function of the Debtors' capital structure and the absolute priority rule. Therefore, there is no unfair discrimination with respect to Class 24.

ii. The Plan is Fair and Equitable With Respect to Rejecting Classes

104. In addition to not discriminating unfairly, the Plan must be fair and equitable with respect to classes that reject the Plan. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202, 108 S. Ct. 963, 966 (1988) ("fair and equitable" means that a plan must "comply with the absolute priority rule"); JP Morgan Chase Bank, N.A. v. Charter Commc'ns (In re Charter Commc'ns, Inc.), 419 B.R. 221, 268–69 (Bankr. S.D.N.Y. 2009) (confirming plan as "fair and equitable" where no holder of a junior claim or interest to the objecting noteholders received any recovery under the plan); In re Montgomery Court Apartments of Ingham County, Ltd., 141 B.R. 324, 343 (Bankr. S.D. Ohio 1992) (fair and equitable standard means that "[holders] of junior claims or interests cannot receive distributions under a proposed plan unless senior creditors have

been fully paid"). Section 1129(b) of the Bankruptcy Code provides explicit guidance as to the meaning of "fair and equitable."

105. With respect to claims, "fair and equitable" means that each holder of a claim of such class (a) will receive or retain property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (b) the holder of any claim or interest that is junior to the claims, or such class will not receive or retain any property under the plan on account of such junior claim or interest. See 11 U.S.C. § 1129(b)(2)(B).

106. With respect to equity interests, "fair and equitable" means that each equity interest holder (a) will receive or retain property of a value, as of the effective date of the plan, equal to the greatest of (i) the allowed amount of any fixed liquidation preference to which such holder is entitled, (ii) any fixed redemption price to which such holder is entitled, or (iii) the value of such interest; or (b) the holder of any interest that is junior to the interests of such class will not receive or retain any property under the plan on account of such junior interest. See 11 U.S.C. § 1129(b)(2)(C).

107. Under the Plan, Class 24 is deemed to reject the Plan. However, the Plan can be confirmed over the deemed rejection of Class 24 because (i) no class junior to Class 24 is receiving or retaining any property under the Plan, and (ii) no class of equal rank to Class 24 is being afforded better treatment than Class 24. Accordingly, the Plan does not discriminate unfairly as to any impaired Class of Claims or Interests and is fair and equitable with respect to each such Class.

R. Confirmation of One Plan (Section 1129(c))

108. The Plan is the only plan that has been filed in these Chapter 11 Cases. Accordingly, section 1129(c) of the Bankruptcy Code is satisfied.

S. The Principal Purpose of the Plan is Not Avoidance of Taxes or Section 5 of the Securities Act (Section 1129(d))

109. Section 1129(d) of the Bankruptcy Code states that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. § 1129(d). The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no party that is a governmental unit, or any other entity, has requested that the Bankruptcy Court decline to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

T. Compliance with Bankruptcy Rule 3016

110. Bankruptcy Rule 3016(a) requires that "[e]very proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entity submitting or filing it." FED. R. BANKR. P. 3016(a). This requirement is satisfied because the Plan is dated, as of December 22, 2021, and the Plan identifies the Plan Debtors as the parties filing it.

111. Bankruptcy Rule 3016(b) requires that a disclosure statement be filed with the plan or within a time fixed by the bankruptcy court. The Plan Debtors satisfied this requirement by filing the Disclosure Statement contemporaneously with the Plan.

112. Bankruptcy Rule 3016(c) requires that "[i]f a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction." FED. R. BANKR. P. 3016(c). Sections 11.7, 11.8, 11.9 and 11.10 of the Plan provides for certain injunctions and exculpations, which are

specifically and conspicuously identified by the use of bold typeface or italics typeface. Accordingly, the Plan complies with Bankruptcy Rule 3016(c).

## IV. THE RELEASE, EXCULPATION AND INJUNCTION PROVISIONS OF THE PLAN ARE JUSTIFIED AND SHOULD BE APPROVED[6]

### A. The Releases, the Exculpation, and the Injunction

113. Pursuant to section 11.7 of the Plan, the Plan Debtors shall release the Released Parties from all Causes of Action and any other debts, obligations, rights, suits, damages, actions, remedies, and liabilities from the beginning of time through the Effective Date, other than for fraud, gross negligence, or willful misconduct. The release set forth in section 11.7 of the Plan is referred to herein as the "Debtor Releases".

114. Section 11.8 of the Plan provides that holders of Claims and Interests who did not elect to opt out of the releases in section 11.8 of the Plan are deemed to have conclusively, absolutely, unconditionally, irrevocably and forever released and discharged the Released Parties from any and all direct claims and causes of action held by such holders whatsoever, including pre-Petition Date Claims and causes of action, based in whole or in part upon any act or omission, transaction or other occurrence or circumstance existing or taking place after the Petition Date in any way related to the Debtors, the Chapter 11 Cases or the Plan. Holders of Claims and Interests who returned a ballot or a Notice of Non-Voting Status with the "Opt-Out" box checked are deemed to have opted out of the foregoing release. Further, holders of Claims and Interests who did not return a ballot or Notice of Non-Voting Status are deemed to not have opted out of the releases in section 11.8 of the Plan. The release set forth in section 11.8 of the Plan are referred to herein as the "Third-Party Releases".

[6] This section is a summary of these provisions and is qualified in its entirety by the language in the Plan.

115. Section 11.9 of the Plan (the "Exculpation"), exculpates the collectively the Exculpated Parties from liability to any Person for any prepetition or postpetition act taken or omitted to be taken in connection with the Chapter 11 Cases, or related to formulating, negotiating, soliciting, preparing, disseminating, confirming, or implementing this PAIH Plan or consummating this PAIH Plan, the Disclosure Statement, or any contract, instrument, release, or other agreement or document created or entered into in connection with this PAIH Plan or any other prepetition or postpetition act taken or omitted to be taken in connection with or in contemplation of the restructuring of the Plan Debtors.

116. Section 11.10 of the Plan (the "Injunction") permanently enjoins all Parties and Entities, on and after the Effective Date, on account of any Claim or Interests satisfied and released in the Plan, from commencing or continuing in any manner any action or other proceeding against any of the Plan Debtors. In addition, the Injunction enforces the Debtor Releases, Creditor Releases and Exculpation provided for under the Plan and is narrowly tailored to achieve that purpose.

B. The Releases, Exculpation and Injunction Provisions are Appropriate

i. Plan Releases

117. In reviewing settlements under Chapter 11 plans, bankruptcy courts are guided by the standards applicable to Bankruptcy Rule 9019. See In re WorldCom Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *48 (Bankr. S.D.N.Y. Oct. 31, 2003); see also In re Best Prods. Co., 168 B.R. 35, 50 (Bankr. S.D.N.Y. 1994) ("[W]hether the claim is compromised as part of the plan or pursuant to a separate motion, the standards for approval of the compromise are the same. The settlement must be 'fair and equitable,' . . . and be in the best interest of the estate.") (internal citations omitted).

118. Bankruptcy Rule 9019(a) provides, in relevant part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." FED. R. BANKR. P. 9019(a). This standard applies when the settlement is incorporated into the Chapter 11 plan. See In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 758 (Bankr. S.D.N.Y. 1992) (noting that 11 U.S.C. § 1123 provides that a plan may include settlement provisions and Bankruptcy Rule 9019 grants the court broad authority to approve comprises and settlements). The benchmark is whether or not the terms of the proposed compromise "fall[] below the lowest point in the range of reasonableness." Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983); see also Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–25, 88 S. Ct. 1157, 1163 (1968).

119. Courts have set forth the following list of factors to consider in evaluating whether a settlement satisfies such standards:

> (1) the balance between the litigation's possibility of success and the settlement's future benefits;
>
> (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment;
>
> (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement;
>
> (4) whether other parties in interest support the settlement;
>
> (5) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement;
>
> (6) the nature and breadth of releases to be obtained by officers and directors; and
>
> (7) the extent to which the settlement is the product of arm's length bargaining.

Motorola, Inc. v. Official Comm. Of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007).

120. Application of these factors confirms that the Plan Releases are fair and equitable, and in the best interests of the Plan Debtors' Estates and should be approved. The Plan Releases were essential to the formulation of the Plan and were supported by substantial contribution.

ii. The Debtor Releases

121. It is well-established that debtors are authorized to settle or release their claims in a chapter 11 plan. See In re Adelphia Commc'ns Corp., 368 B.R. 140, 263 n. 289 (Bankr. S.D.N.Y. 2007) (holding that a debtor may release its own claims); In re Oneida, Ltd., 351 B.R. 79, 94 n.21 (Bankr. S.D.N.Y. 2006) (noting that a debtor's release of its own claims is permissible). Moreover, section 1123(b)(3)(A) of the Bankruptcy Code specifically provides that a chapter 11 plan may provide for the "settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). A plan that proposes to release a debtor's claim is considered a "settlement" for purposes of satisfying section 1123(b)(3)(A) of the Bankruptcy Code. See, e.g., Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.), 68 F.3d 26, 33 (2d Cir. 1995).

122. In reviewing a plan settlement and release of the Plan Debtors' claims pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, the court should be guided by the "reasonable business judgment" standard of Rule 9019 of the Federal Rules of Bankruptcy Procedure. See In re WorldCom, Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *43–46 (Bankr. S.D.N.Y. Oct. 31, 2003); see also In re DBSD N. Am., Inc., 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (finding debtor releases appropriate where they represented a valid exercise of the debtors' business judgment and were in the best interests of the estate); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 758–759 (Bankr. S.D.N.Y. 1992).

123. Application of the Iridium factors confirms that the Debtor Releases are fair and equitable, represent a valid exercise of the Debtors' business judgment, are in the best interests of the Plan Debtors' Estates and should be approved. The Debtor Releases were negotiated at arm's-length and in good faith. Pursing any such claims against the Releasees is not in the best interests of the Plan Debtors' Estates as the costs involved would likely outweigh any potential benefits, and the Plan Debtors believe that no such claims exist.

124. In addition, each of the Releasees afforded significant value to the Plan Debtors, played an integral role in the formulation of the Plan and/or waived certain claims and other settlements in the Plan.

125. Moreover, the Debtor Releases are similar in scope to those approved by this Bankruptcy Court and other courts in this district. See, e.g., In re Almatis B.V. , et al., *Findings of Fact, Conclusions of Law, and Order Confirming the First Amended Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code*, Case No. 10-12308 (MG) (Bankr. S.D.N.Y. Sept. 20, 2010) [Docket No. 444], (confirming chapter 11 plan that contained estate releases for directors, officers and employees as well as prepetition and postpetition lenders, committee members, and noteholders); In re Uno Rest. Holdings Corp. et al., *Order Confirming Second Amended Joint Consolidated Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Uno Restaurant Holdings Corporation and its Affiliated Debtors and Debtors in Possession,* Case No. 10-10209 (MG) (Bankr. S.D.N.Y. July 6, 2010) (the "Uno Rest. Confirmation Order") [Docket No. 559] (same); In re DJK Residential LLC, et al., *Findings of Fact, Conclusions of Law, and Order (I) Approving the Debtors' Disclosure Statement and (II) Confirming the Debtors' First Amended Prepackaged Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code*, Case No. 08-10375 (JMP) (Bankr. S.D.N.Y. May 7, 2008) at

¶ 26 [Docket No. 497] (finding that releases and discharges of claims and causes of action by the debtors were a valid exercise of the debtors' business judgment).

126. Accordingly, the Debtor Releases are consistent with applicable law, represent a valid exercise of the Plan Debtors' business judgment, and should be approved.

iii. Third-Party Releases and Response to UST Objection

127. The sole objection (the "UST Objection") to the PAIH Plan was filed by the Office of the United States Trustee ("UST"). The UST Objection objects to confirmation, arguing that the PAIH Plan "impermissibly imposes third party releases on parties who have not affirmatively or unambiguously demonstrated their consent to grant such releases." See UST Objection [Docket No. 2879]. However, it is submitted that the Third-Party Releases are entirely consensual and therefore are consistent with and appropriate under the case law in this District.

128. The vast majority of cases in this District (and elsewhere) have accepted the opt-out structure as being fair to creditors and consistent with due process. See e.g. In re Avianca Holdings S.A., 632 B.R. 124 (Bankr. S.D.N.Y. Sept. 15, 2021); (confirming plan with opt-out third-party releases over objection of U.S. Trustee); In re Stearns Holdings, *LLC*, 607 B.R. 781 (S.D.N.Y. Nov. 13, 2019) (confirming third-party release over objection of U.S. Trustee); In re Ditech Holding Corporation, 606 B.R. 544 (S.D.N.Y. Aug. 28, 2019)(confirming third-party release over objection of U.S. Trustee); In re Calpine Corp., 2007 WL 4565223 at *10 (approving creditor releases where plan provided that only those creditors entitled to vote on the plan who either (i) voted to accept the plan or (ii) abstained from voting and elected not to opt out of the release provision would be subject to the creditor releases); In re Fairway Group Holdings Corp., et al., *Findings of Fact, Conclusions of Law, and Order (I) Approving Debtors' (A) Disclosure Statement, (B) Solicitation of Votes and Voting Procedures and (C) Form of Ballots, and (II)*

*Confirming Second Amended Joint Prepackaged Chapter 11 Plan of Reorganization of Fairway Group Holdings Corp. and Its Affiliated Debtors*, Case No. 16-11241 (MEW) (Bankr. S.D.N.Y. June 8, 2016) [Docket No. 156] (confirming plan that allowed creditors entitled to vote on the plan to opt out of certain creditor releases in the plan); In re Mesa Air Group, Inc. et al., *Order Confirming Third Amended Joint Plan of Reorganization of Mesa Air Group, Inc. and Affiliated Debtors Under Chapter 11 of the Bankruptcy Code*, Case No. 10-10018 (MG) (Bankr. S.D.N.Y. Jan. 20, 2011) (the "Mesa Confirmation Order") [Docket No. 1448] at ¶ 27 (approving creditor releases where creditors entitled to vote on the plan were permitted to opt out of such releases regardless of whether they voted to accept or reject the plan); In re Uno Rest. Holdings Corp., et al., Uno Rest. Confirmation Order at ¶ 38 (approving creditor releases for creditors that voted to accept the plan and agreed to provide such releases).

129. The Second Circuit has routinely held that releases of non-debtor parties are permissible where the affected creditors consent to the releases. See Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005) (stating that "[n]ondebtor releases also may be tolerated if the affected creditors consent"); In re Adelphia Commc'ns Corp., 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007) (noting that "[t]he Seventh Circuit held in *Specialty Equipment* that consensual releases are permissible, and the Metromedia court did not quarrel with that view.").

130. Consent is present when a party votes in favor of the plan. Id. (upholding releases with respect to those who voted in favor of plan); see also In re Chassix Holdings, Inc., 533 B.R. 64, 80 (Bankr. S.D.N.Y. 2015) ("[C]ase law in this District and elsewhere supports the conclusion that the creditors' vote for the Plan constitutes a consent to the releases"). Consent also exists when a party has the opportunity to affirmatively (a) "opt out" of a release and chooses not to do

so or (b) "opt into" a release and chooses to do so. See, e.g., Chassix, 533 B.R. at 80 (holding that "creditors who rejected the Plan, but who nevertheless 'opted in' to the releases, have consented to those releases"); In re Calpine, Corp., No. 05-60200 (BRL), 2007 WL 4565223 at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) (finding release provision to be consensual by those that "vote in favor of the Plan, who abstain from voting and choose not to opt out of the releases, or who have otherwise consented to give a release"); In re Conseco, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) (holding that release provision that bound those who "agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release" to be "purely consensual").

131. Similarly, consent does not exist if a party is deemed to reject or accept a plan and is given no opportunity to vote or to "opt in" or "opt out" of the releases. See, e.g., Chassix, 533 B.R. at 81–82 ("Since no 'opt in' mechanism was provided for creditors and interest holders who were deemed to have rejected the Plan, those parties have not 'consented' to the proposed creditor releases."); In re Chemtura Corp., 439 B.R. 561, 609–612 (Bankr. S.D.N.Y. 2010) (refusing to enforce creditor releases against creditors who were provided with no mechanism by which they could express their desire to grant or to withhold such releases).

132. Judge Glenn held that Judge Chapman's analysis in In re Cumulus Media Inc., No. 17, 13381 (Bankr. S.D.N.Y. Feb. 2018) was correct – the opt-out structure is permissible provided that a clear and prominent explanation of the procedure is given. In upholding the opt-out structure in his recent September 15, 2021 decision in In re Avianca Holdings S.A., Judge Glenn repeated Judge Chapman's words, stating "*Inaction is action under appropriate circumstances. When someone is clearly and squarely told if you fail to act your rights will be affected, that person is then given the information that puts them on notice that they need to do something or else."* This

Court upheld the same analysis in In re Ditech Holding Corporation. It is submitted that the same approach is appropriate in the Debtors' Bankruptcy Cases.

133. The proposed Solicitation Package meets the requirements set forth by both Judge Glenn and Judge Chapman. The Solicitation Packages, which were mailed to more than 15,000 creditors and parties in interest, discloses the full text of the Third-Party Releases, provides clear instruction of how to opt-out of the Third-Party Release, and warns of the consequences of not opting out of the Third-Party Releases. See *Declaration in Support of PAIH Plan and Disclosure Statement, And the Plan Debtors' Motion for Entry of an Order Approving (I) Disclosure Statement, (II) Form of and Manner of Notices, (III) Form of Ballots, and (IV) Solicitation Material and Solicitation Procedures* ("Supplemental Declaration") [Docket No. 2850] as Exhibits F and G.

134. In addition, each unimpaired Class received a *Notice of Non-Voting Status and Notice of Opt-Out of Third-Party Release*, which contained similar instructions and warning of the consequences of not Opting Out.

135. The opt-out structure is also consistent with the Supreme Court's views on consent in the context of class action releases. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985), the Court upheld the "opt-out" class action structure, noting that due process requires nothing more than "notice reasonably calculated … to apprise [a person] of the pendency of the action and afford them an opportunity to present their objections."

136. Here, the Third-Party Releases are completely consensual in that each holder of a Claim or Interest has the ability to opt-out of the Third-Party Releases with no consequences if they elect to do so. The Third-Party Releases were conspicuously noted in the Plan, Disclosure

Statement, the Ballots, and the Notices of Non-Voting Status And Notice of Opt-Out of Third-Party Releases.

137. The cases relied upon by the UST Objection are distinguishable and have been distinguished by Court in this District in recent cases under similar circumstances. See e.g. In re Avianca Holdings S.A., 632 B.R. at 134; In re Ditech Holding Corporation, 606 B.R. at 629. Unlike Chassix, every person who the Plan Debtors propose to bind to the Third-Party Releases has received an opportunity to opt out. The recent decision in Purdue Pharma, No. 21 cv 7532 (CM), 2021 WL 5979108, at *4 (S.D.N.Y. Dec. 16, 2021), relates solely to nonconsensual releases, and does not address the Opt-Out provisions. In re SunEdison Inc., 576 B.R. 453 (Bankr. S.D.N.Y. 2017) does not discuss the question of opt-out versus opt in. The Court held only that the concept of "consent" required non-voting creditors to be able to elect whether to be bound by third-party releases. Nothing suggested that the opt-in mechanism was required as opposed to an opt-out. In the instant Bankruptcy Cases, all parties had the opportunity to opt out.

138. Further, it is submitted that the consensual Third-Party Release and the Opt Out mechanism is already *law of the case.* The CFG Peru Plan, which was confirmed by Order dated June 10, 2021, provided for similar releases in these Bankruptcy Cases using the same opt-out procedures. See In re HS 45 John LLC, 585 B.R. 64, 79 (Bankr. S.D.N.Y. 2018) (the doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); New York City Dept. of Finance v. Twin Rivers, Inc., 1997 WL 299423, *1 (S.D.N.Y. June 5, 1997). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." In re HS 45 John LLC, 585 B.R. at 80.

139. Under the CFG Peru Plan, the term "Releasing Parties" was defined, *in pertinent part*, as "*collectively, and in each case in its capacity as such: (a) the Creditor Plan Proponents; (b) the Senior Notes Trustee; (c) the Club Facility Agent; (d) all Holders of Claims and Interests, solely in their capacities as such, that are presumed to accept the Plan* ***and*** *who do not opt out of the releases in the Plan; (e) all Holders of Claims or Interests, solely in their capacity as such, who vote to accept the Plan; (f) all Holders of Claims and Interests, solely in their capacity as such, that (x) abstain from voting on the Plan* ***and*** *who do not opt out of the releases in the Plan; (y) vote to reject the Plan* ***and*** *who do not opt out of the releases in the Plan; or (z) are deemed to reject the Plan* ***and*** *who do not opt out of the releases in the Plan; (g) with respect to each Entity in clauses (a) through (f), each such Entity's respective current and former Affiliates; (h) with respect to each Entity in clauses (a) through (g), each such Entity's respective Related Parties …"* See CFG Peru Plan, Definition No. 127 ("Releasing Parties") [Docket No. 2569-1] (emphasis added).

140. The Debtors' Plans provide similar relief as set forth in the CFG Peru Plan using the same opt-out procedures, and the approval of same will provide consistency in these Bankruptcy Cases.

141. Lastly, to the extent necessary, the Third-Party Release was given for consideration. The Ng Family and Ng Entities (as defined in the Disclosure Statement) have taken actions, to their personal detriment, in the best interest of Plan Debtors' estates and made a substantial contribution, including, without limitation,

i. under the Global Settlement Agreement, as modified, approved by the Bankruptcy Court by Order dated June 10, 2021, releasing claims and interests, including without limitation, indemnification claims against the Plan Debtors and all rights to receive any distribution under the CFG Peru Plan on behalf of viable pre-petition claims, and

providing material assistance to the Creditor Plan Proponents under the CFG Peru Plan including in Singapore, Hong Kong and United Kingdom, which resulted in not less than $20 million in proceeds and $6 million in proceeds for payment of Administrative Expense Claims to being paid to the CFGL-PARD Group Debtors' estates, but for which the CFGL Group Debtors and PARD Group Debtors would have no material assets and no ability to propose a feasible plan of reorganization;

ii. once effectuated and approved, entering into the Liquidator-Controlled Companies Settlement Agreement pursuant to the terms and conditions thereof;

iii. releasing claims and interests so as to provide that the Debtors under the PAIH Plan are able to sell non-debtor assets, the proceeds of which shall provide for a material distribution to creditors of the Debtors' estates, but for which the PAIH Group Debtors would have no material assets and no ability to propose a feasible plan of reorganization;

iv. agreeing pursuant to the HSBC-HK Settlement Deed to release all direct and derivative claims and causes of action against HSBC arising from HSBC's pre-petition efforts to obtain the appointment of the JPLs and otherwise interfere with the operation of the Debtors' businesses;

v. providing for the termination of long-term leases of residential properties as part of the sale of assets under the proposed PAIH Plan;

vi. the provision of significant post-petition funding which permitted the Debtors to propose their plans of reorganization and achieve a material recovery for creditors of the Debtors' estates;

vii. providing essential and necessary post-petition services to the Debtors' estates without receipt of salary, material benefits or compensation, nor any certainty that such compensation could be reinstated or recovered in the future; and

viii. releasing or subordinating valid claims against the Debtors' estates to those claims of third-party creditors and claimants.

142. The Non-Debtor Affiliates have taken actions, adverse to their respective interests, in the best interest of Debtors' estates including, without limitation:

i. entering into the Intercompany Settlement Agreement, which, according to the Trustee, was a necessary and essential step in his efforts to sell the Peruvian OpCos, and releasing any objection to the CFG Peru Plan with respect to any termination of the Intercompany Settlement Agreement resulting under the CFG Peru Plan and any claims thereunder;

ii. under the Global Settlement Agreement, releasing claims and interests, including all rights to receive any distribution under the Joint Debtor Plan on behalf of viable pre-petition claims, which resulted in not less than $20 million in proceeds and $6 million in proceeds for payment of Administrative Expense Claims to being paid to the CFGL-PARD Group Debtors' estates, but for which the CFGL Group Debtors and PARD Group Debtors would have no material assets and no ability to propose a feasible plan of reorganization;

ix. releasing claims and interests so as to provide that the Plan Debtors are able to sell non-debtor assets, the proceeds of which shall provide for a material distribution to creditors of the Debtors' estates, but for which the PAIH Group Debtors would have no material assets and no ability to propose a feasible plan of reorganization;

x. once effectuated and approved, entering into the Liquidator-Controlled Companies Settlement pursuant to the terms and conditions thereof;

xi. agreeing pursuant to the HSBC-HK Settlement Deed to release all direct and derivative claims and causes of action against HSBC arising from HSBC's pre-petition efforts to obtain the appointment of the HK PL and Cayman JPLs and otherwise interfere with the operation of the Debtor's businesses, which negatively impacted the non-Debtor Affiliates businesses;

xii. providing for the termination of long-term leases of residential properties as part of the sale of assets under the proposed PAIH Plan;

xiii. the provision of significant post-petition funding which permitted the Debtors to propose their plans of reorganization and achieve a material recovery for creditors of the Debtors' estates;

xiv. releasing or subordinating valid claims against the Debtors' estates to those claims of third-party creditors and claimants.

143. The Joint Debtor Plan would not be possible without the contributions and significant concessions of these third parties. Full notice of these contributions and concessions were outlined in detail in the Disclosure Statement. See PAIH Disclosure Statement, V(N)(9).

144. Although the UST Objection seemingly argues against the scope of the parties released, the releases are both typical and the same as provided for in the CFG Peru Plan. Further, for avoidance of doubt, any Released Parties will only be released to the extent of and in their capacities as it relates to the Debtors.

145. Similarly, the UST Objection argues against the scope of the Exculpate Parties" is overbroad; however, the definition of "Exculpated Parties" correlates with the definition in the CFG Peru Plan and as already confirmed by the Court. For avoidance of doubt, the Exculpation clause will only apply to the extent of and in their capacities as it relates to the Debtors.

146. The Plan Debtors respectfully submit that the consensual nature of the Third-Party Releases satisfies the requirements in Metromedia and are consistent with provisions approved in other cases in this District and before this Bankruptcy Court as set forth above and should be approved.

iv. Exculpation

147. Courts have recognized that a plan provision exculpating parties from *all* claims arising out of a chapter 11 case is permissible, so long as claims based upon willful misconduct and other *ultra vires* acts are preserved. See In re PWS Holding Corp., 228 F.3d 224, 246–47 (3d Cir. 2000) (provision exculpating parties from any act or omission related to the chapter 11 cases approved); see also In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 722 (Bankr. S.D.N.Y. 1992) (plan provision exculpating equity committee was "consistent with the role that

committees play in the bankruptcy system, because it preserve[d] liability . . . for 'willful misconduct'").

148. Moreover, plan exculpations may properly be extended to *all* entities that participated in plan negotiations. See, e.g., PWS Holding, 228 F.3d at 246 (approving plan exculpation for the "Creditor Representative"); In re Enron Corp., 326 B.R. 497, 500–01 (S.D.N.Y. 2005) (approving plan exculpation for "Indenture Trustees"); In re Genesis Health Ventures, Inc., 266 B.R. 591, 606 (Bankr. D. Del. 2001) (holding that the applicable standard for exculpation was the same for all "persons associated with and providing services toward the reorganization of the debtors", including commercial lenders and their professionals).

149. Courts in the Second Circuit evaluate the appropriateness of exculpation provisions based upon a number of factors, including whether the plan was proposed in good faith, whether the provision is integral to the plan, and whether the exculpation provision was necessary for plan negotiations. See, e.g., In re Enron Corp., 326 B.R. at 503 (finding exculpation provision necessary to effectuate the plan); In re Source Enters., Inc., No. 06-11707 (AJG), 2007 WL 2903954, at *13 (Bankr. S.D.N.Y. Oct. 1, 2007) (approving exculpation, release, and injunction provisions because they were fair and equitable and in the best interests of the debtors' estates and its creditors) aff'd 392 B.R. 541 (S.D.N.Y. 2008); In re Bally Total Fitness of Greater New York, Inc., No. 0712395 (BRL), 2007 WL 2779438, at *8 (Bankr. S.D.N.Y. Sept. 17, 2007) (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to a successful reorganization, and integral to the plan).

150. Throughout these Chapter 11 Cases, the Exculpated Parties have contributed substantial value to the Debtors and the formulation of the Plan. The Exculpated Parties' efforts in negotiating and ultimately formulating the Plan enabled the Plan Debtors to file the Plan, which

results in a resolution of the business and legal issues presented in these Chapter 11 cases. Inasmuch as the Exculpation is limited to acts relating to the Chapter 11 Cases, the provision complies with applicable law.

v. Injunction

151. The Injunction complies with section 524(e) of the Bankruptcy Code and is important to the overall objections to the Plan to finally resolve all claims against the Debtors in these Chapter 11 Cases. Further, the Injunction is a key component of the Plan. See, e.g., In re Drexel Burnham Lambert Group., 960 F.2d 285, 293 (2d Cir. 1992) (finding that bankruptcy court has jurisdiction and power to approve release and injunction in a plan, where such releases and injunction play an important part in plan of reorganization); Abel v. Shugrue (In re Ionosphere Clubs, Inc.), 184 B.R. 648, 655 (S.D.N.Y. 1995) ("[B]ankruptcy courts may issue injunctions enjoining creditors from suing third parties . . . in order to resolve finally all claims in connection with the estate and to give finality to a reorganization plan."); In re Bally Total Fitness, 2007 WL 2779438 at *8 (finding that exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan).

152. Further, the Injunction is similar to those previously approved by this Bankruptcy Court. See, e.g., Mesa Confirmation Order at ¶ 23; Oldco M Corp. Confirmation Order at ¶ 9. Accordingly, the Injunction should be approved.

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## CONCLUSION

Based upon the foregoing, the Plan Debtors respectfully submit that (i) the Plan satisfies all of the applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules; and (ii) the Plan Debtors, as plan proponents, have satisfied the applicable requirements of the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules. According, for all of these reasons the Debtors respectfully request that the Court enter an order confirming the Plan.

Dated: New York, New York
January 13, 2022

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