UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
www.flsb.uscourts.gov

In re:	Chapter 11 Cases
DELPHI BEHAVIORAL HEALTH GROUP, LLC, *et al.*,[1]	Case No. 23-10945-PDR
	(Jointly Administered)
Debtors.	
_____/	

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTORS' AMENDED JOINT PLAN OF LIQUIDATION

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Dated: May 9, 2023

[1] The address of the Debtors is 1901 West Cypress Creek Road, Suite 500, Fort Lauderdale, FL 33309. The last four digits of the Debtors' federal tax identification numbers are: (i) Delphi Behavioral Health Group, LLC (2076), (ii) 61 Brown Street Holdings, LLC (0007), (iii) Aloft Recovery, LLC (6674), (iv) Banyan Recovery Institute, LLC (6998), (v) Breakthrough Living Recovery Community, LLC (5966), (vi) California Addiction Treatment Center, LLC (7655), (vii) California Vistas Addiction Treatment, LLC (8272), (viii) DBHG Holding Company, LLC (6574), (ix) Defining Moment Recovery Community, LLC (3532), (x) Delphi Health BuyerCo, LLC (2325), (xi) Delphi Health Group, LLC (0570), (xii) Delphi Intermediate HealthCo, LLC (6378), (xiii) Delphi Management LLC (6474), (xiv) Desert View Recovery Community, LLC (7437), (xv) DR Parent, LLC (2700), (xvi) DR Sub, LLC (8183), (xvii) Las Olas Recovery, LLC (9082), (xviii) Maryland House Detox, LLC (1626), (xix) New Perspectives, LLC (0508), (xx) Next Step Housing, LLC (6975), (xxi) Ocean Breeze Detox, LLC (7019), (xxii) Ocean Breeze Recovery, LLC (9621), (xxiii) Onward Living Recovery Community, LLC (4735), (xxiv) Palm Beach Recovery, LLC (4459), (xxv) Peak Health NJ, LLC (7286), (xxvi) QBR Diagnostics, LLC (7835), (xxvii) Rogers Learning, LLC (1699), (xxviii) SBH Haverhill, LLC (0971), (xxix) SBH Union IOP, LLC (4139), (xxx) Summit at Florham Park, LLC (8226), (xxxi) Summit Behavioral Health, LLC (3337), (xxxii) Summit Health BuyerCo, LLC (2762), (xxxiii) Summit IOP Limited (4567), and (xxxiv) Union Fresh Start, LLC (6841).

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The above-referenced, affiliated, debtors and debtors-in-possession (collectively, the "**Debtors**" or "**Debtors-in-Possession**"), by and through their undersigned counsel, hereby submit this memorandum of law (the "**Memorandum**") in support of confirmation, pursuant to section 1129 of title 11 of the United States Code (the "**Bankruptcy Code**"), of the *Debtors' Amended Joint Plan of Liquidation*, dated March 29, 2023 [ECF No. 313] (as may be amended or modified, including, but not limited to all exhibits thereto, collectively, the "**Plan**").[2] No written objections have been filed in opposition to confirmation of the Plan and the Debtors are unaware of any potential objections to confirmation of the Plan. In support of this Memorandum, the Debtors respectfully represent as follows:

PROCEDURAL BACKGROUND

1. On February 6, 2023 (the "**Petition Date**"), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code commencing the above-captioned cases (the "**Chapter 11 Cases**"). The Debtors' Chapter 11 Cases are being jointly administered under the caption *In re Delphi Behavioral Health Group, LLC,* Case No. 23-10945-PDR. The Debtors continue to manage their affairs as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On February 27, 2023, the Office of the United States Trustee (the "**U.S. Trustee**") entered on the docket of the Chapter 11 Cases a notice that, until further notice, the U.S. Trustee would not appoint an official committee of unsecured creditors [ECF No. 164]. No official committee of unsecured creditors has been appointed.

3. For a detailed description of the Debtors, the circumstances leading to the

[2] Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in, as applicable, the Plan or the Disclosure Statement (defined herein).

commencement of these bankruptcy cases and information regarding the Debtors' businesses and capital structure, the Debtors respectfully refer the Court and parties-in-interest to the *Declaration of Edward A. Phillips in Support of Chapter 11 Petitions and First Day Filings* [ECF No. 9] (the "**First Day Declaration**")[3] which is incorporated herein by reference.

DISCLOSURE STATEMENT AND SOLICITATION PROCESS

4. On February 16, 2023, the Debtors filed (i) the original *Disclosure Statement for Debtors' Joint Plan of Liquidation* [ECF No. 102] (the "**Original Disclosure Statement**") and (ii) the original *Debtors' Joint Plan of Liquidation* [ECF No. 103] (the "**Original Plan**").[4]

5. On February 17, 2023, the Court entered its *Order (I) Setting Hearing to Consider Approval of Disclosure Statement; (II) Directing Plan Proponent to Serve Notice; and (III) Setting Deadline for Filing Objections to Disclosure Statement* [ECF No. 106] (the "**Disclosure Statement Hearing Order**").

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[3] The First Day Declaration was admitted into evidence at the first-day hearing in these Chapter 11 Cases held by the Court on February 9, 2023. *See* ECF No. 101 (Exhibit Register reflecting that the First Day Declaration was admitted into evidence).

[4] The Debtors filed the Original Disclosure Statement and the Original Plan on February 16, 2023, in order to comply with certain "bankruptcy milestone" deadlines set forth in: (A) the *Interim Order (I) Authorizing Debtors to (A) Obtain Postpetition Senior Secured Financing and (B) Use Cash Collateral, (II) Granting Adequate Protection to Senior Secured Lenders, (III) Granting Liens and Superpriority Claims, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [ECF No. 82] (the "**Interim DIP Financing Order**"), at §9.b (the "Milestones"), which approved, on an interim basis, the debtor-in possession lending facility evidenced by the *Superpriority Secured Debtor-in-Possession Credit Agreement*, dated February 6, 2023, attached as Exhibit "B" (the "**DIP Loan Agreement**") to the Debtors' *Emergency Motion (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use the Cash Collateral, (III) Granting Adequate Protection to Senior Secured Lenders, (IV) Granting Liens and Superpriority Claims, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing* [ECF No. 24] (the "**DIP Financing Motion**") and the relief requested in the DIP Financing Motion was approved by the Court on a final basis per order entered on March 7, 2023 [ECF No. 189] (the "**Final DIP Financing Order**") and on a supplemental final basis per order entered on April 27, 2023 [ECF No. 507] (the "**Supplemental Final DIP Financing Order**"); and (B) the *Asset Purchase Agreement*, dated February 19, 2023, filed as Exhibit "A" (the "**Original Asset Purchase Agreement**"), at §7.3(d) ("Bankruptcy Milestones"), to the *Debtors' Motion for Entry of an Order (A) Approving Stalking Horse Bid Agreement and Authorizing the Sale of Certain Assets of the Debtors Outside the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Claims and Liens Except for Permitted Liens, Encumbrances and Assumed Liabilities, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* [ECF No. 23] (the "**Sale Motion**"). The Original Asset Purchase Agreement was updated by the *Asset Purchase Agreement* and related documents [ECF Nos. 111, 182, 234 and 267] (collectively, the "**Asset Purchase Agreement**") which also includes the Bankruptcy Milestones.

6. On March 27, 2023, the Debtors filed the *Debtors' (I) Memorandum of Law in Support of Approval of the Debtors' Proposed Disclosure Statement for Debtors' Joint Plan of Liquidation; (II) Expedited Agreed Motion Approving (A) Reduction of the Solicitation Period of the Plan from 45 Days to 39 Days (or Such Shorter Period as the Court Determines in Its Discretion), (B) Bi-Furcated Deadlines for the Debtors to Object to Proofs of Claim, (C) a Voting Record Date, (D) the Form of the Ballots, and (E) the Form of the Debtors' Recommendation Letter to Be Included in the Solicitation Packages to be Sent to Creditors Entitled to Vote For or Against Confirmation of the Plan of Liquidation; and (III) Granting Related Relief* [ECF No. 272] (the "**Expedited Motion**").

7. In the Expedited Motion, the Debtors requested certain relief related to the Disclosure Statement (defined herein) and solicitation of the Plan, including but not limited to approval of the form of the Ballots (defined herein) to be sent to each of the four Impaired voting Classes of Claims. *See* Expedited Motion, Exhibit "B".

8. On March 29, 2023, the Debtors filed (i) the *Disclosure Statement for Debtors' Amended Joint Plan of Liquidation* [ECF No. 314] (as may be amended or modified, including, but not limited to all exhibits thereto, collectively, the "**Disclosure Statement**") and (ii) the Plan.

9. Attached as Exhibit "2" to the Disclosure Statement is the *Liquidation Analysis* (the "**Liquidation Analysis**").

10. On March 30, 2023, the Court conducted a hearing (the "**Disclosure Statement Hearing**") and, among other things, approved the adequacy of the Disclosure Statement and granted the relief requested in the Expedited Motion.

11. On April 3, 2023, the Court entered the *Order (I) Approving Disclosure Statement; (II) Setting Hearing on Confirmation of Plan; (III) Setting Hearing on Fee Applications; (IV)*

Setting Various Deadlines; (V) Describing Plan Proponent's Obligations; (VI) Reducing the Solicitation Period of the Plan from 45 Days to 39 Days; (VII) Approving Bi-Furcated Deadlines for the Debtors to Object to Proofs of Claim; (VIII) Setting a Voting Record Date; (IX) Approving the Forms of Ballots; (X) Approving the Form of the Debtors' Recommendation Letter to be Included in Solicitation Packages to be Sent to Creditors Entitled to Vote for or Against Confirmation of the Plan of Liquidation; and (XI) Granting Related Relief [ECF No. 326] (the "**Disclosure Statement Order**").

12. The Disclosure Statement Order, among other things: (i) approved the Disclosure Statement as containing "adequate information" regarding the Plan in accordance with section 1125(a) of the Bankruptcy Code (*see* Disclosure Statement Order at p. 2); (ii) authorized the Debtors to serve the solicitation packages on creditors entitled to vote for or against confirmation of the Plan (as defined therein, the "**Solicitation Packages**") (*see* Disclosure Statement Order at pp. 4, 7-8); (iii) authorized the Debtors to include the Debtors' recommendation letter in support of confirmation of the Plan in the Solicitation Packages (*see id.* at p. 7, as defined therein, the "**Recommendation Letter**"); (iv) approved the form of the ballots to be included in the Solicitation Packages (*see id.* at p. 7, as defined therein, the "**Ballots**"), including the Ballots for the following four voting Classes—Class 3 ("Protective Advance Secured Claims"; the "**Class 3 Ballot**"), Class 4 ("Senior Credit Agreement Term Loan Secured Claims"; the "**Class 4 Ballot**"), Class 5 ("HoldCo Credit Agreement Term Loan Unsecured Claims"; the "**Class 5 Ballot**"), and Class 6 ("General Unsecured Claims"; the "**Class 6 Ballot**"); (v) preserved and reserved certain preserved claims (*see id.* at pp. 6-7, the "**Preserved Claims**") for later prosecution and adjudication in accordance with the Plan; (vi) set forth solicitation procedures and deadlines; and

(vii) scheduled a hearing to consider confirmation of the Plan on May 15, 2023 at 10:00 a.m. (the "**Confirmation Hearing**").

13. On April 18, 2023, the Debtors filed the *Certificate of Service* [ECF No. 395] (the "**Original Certificate of Service**") reflecting service of the Disclosure Statement Order and Solicitation Packages in compliance with the Disclosure Statement Order.

14. On May 3, 2023, the Debtors filed the *Certificate of Service of Supplemental Service of Solicitation Materials* [ECF No. 521] (the "**Supplemental Certificate of Service**" and together with the Original Certificate of Service, collectively, the "**Certificates of Service**") reflecting service of, among other things, the Disclosure Statement Order and/or Solicitation Packages by overnight mail on April 20, 2023 on 52 new general unsecured creditors listed on the Debtors amended schedules filed by the Debtors during April and additional interested parties.

PLAN SUPPLEMENT

15. On April 28, 2023, the Debtors filed the initial plan supplement [ECF No. 512] (the "**Initial Plan Supplement**"). In the Initial Plan Supplement, the Debtors (i) attached a copy of the proposed Liquidating Trust Agreement (as defined in the Plan, the "**Liquidating Trust Agreement**"), and (ii) provided the amounts, per Articles IV.C.(b), D.(b) and E.(b) of the Plan, expected to be paid or assumed prior to the Effective Date with respect to, respectively, Protective Advance Secured Claims (Class 3), Senior Credit Agreement Term Loan Secured Claims (Class 4), and HoldCo Credit Agreement Term Loan Unsecured Claims (Class 5).

16. On May 9, 2023, the Debtors filed a second plan supplement [ECF No. 549] (the "**Second Plan Supplement**", and together with the Initial Plan Supplement, collectively, the "**Plan Supplement**"). In the Second Plan Supplement, the Debtors (i) set forth the name of the proposed Liquidating Trustee (as defined in the Plan, the "**Liquidating Trustee**") as Joseph J. Luzinski of Development Specialists, Inc., (ii) provided certain information with respect to the Assumption

Notices (which incorporate by reference the Available Contracts) related to Part IV of this Memorandum,[5] (iii) attached a revised Exhibit "B" to the Plan ("Non-Exclusive List of Insider Avoidance Actions Targets and Insider Avoidance Actions"), and (iv) provided a list of an additional prepetition executory contract related to the Debtors' 401(k) plan that the Debtors may seek to assume, or to assume and assign, or reject, on the Effective Date of the Plan, or alternatively, will reject upon the Effective Date of the Plan in accordance with the terms of the Plan.

VOTING RESULTS

17. In accordance with the Disclosure Statement Order, the Debtors solicited the holders of Claims in Class 3 (Protective Advance Secured Claims), Class 4 (Senior Credit Agreement Term Loan Secured Claims), Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims), and Class 6 (General Unsecured Claims). The voting results, as reflected in the Epiq Declaration (defined herein) by Epiq Corporate Restructuring, LLC ("**Epiq**"), the Debtors' solicitation agent, are summarized as follows:

Class	Number Voted to Accept	Number Voted to Reject	Amount Voted to Accept	Amount Voted to Reject
Class 3: Protective Advance Secured Claims	**8 (100%)**	0 (0%)	**$25.86 million (100%)**	$0 (0%)
Class 4: Senior Credit Agreement Term Loan Secured Claims	**19 (100%)**	0 (0%)	**$16.39 million (100%)**	$0 (0%)
Class 5: HoldCo Credit Agreement Term Loan Unsecured Claims	**19 (100%)**	0 (0%)	**$16.11 million (100%)**	$0 (0%)

[5] This issue is discussed in depth in Part IV of this Memorandum.

Class	Number Voted to Accept	Number Voted to Reject	Amount Voted to Accept	Amount Voted to Reject
Class 6: General Unsecured Claims	**31 (94%)**	2 (6%)	**$6.11 million (99.94%)**	$3,942 (.06%)

18. In sum, (i) Classes 3, 4, and 5 voted *universally* to accept the Plan, and (ii) Class 6 voted overwhelmingly to accept the Plan, with 94% in number representing 99.94% of the Allowed Claims in Class 6 casting Ballots voting to confirm the Plan.[6]

NO OBJECTIONS HAVE BEEN FILED TO CONFIRMATION OF THE PLAN

19. The U.S. Trustee has not objected to confirmation of the Plan. Prior to the Disclosure Statement Hearing, the U.S. Trustee contacted the undersigned counsel and provided comments with respect to the Original Plan. In response, the Debtors made revisions to the Original Plan which resolved the U.S. Trustee's comments. *See* Plan (ECF No. 313, redline version) at ECF pp. 91 ("Administrative Expense Claims"), 99 ("Withholding and Reporting Requirements"), 104 ("Time Bar to Cash Payments"), 105 ("Satisfaction of Claims"), 109 ("Claims Based Upon Rejection of Executory Contracts"), and 121-122 ("Temporary Injunction").

20. No creditor or other party-in-interest has filed an objection to confirmation of the Plan.

SOURCES OF FACTS IN SUPPORT OF CONFIRMATION OF THE PLAN

21. The pertinent facts regarding the Chapter 11 Cases and the Plan, as well as in

[6] In addition, all of the remaining Class 6 Ballots which were received by Epiq and reflect a vote on the Plan, but which are not reflected in these totals because such Ballots are defective (*e.g.,* sent by email or received by Epiq after the April 28th voting deadline), voted *to confirm* the Plan. *See* Epiq Declaration. Four of these Class 6 Ballots which voted for confirmation of the Plan, representing combined Allowed Class 6 Claims totaling in excess of $763,000, were submitted by creditors holding valid Class 6 Claim and voting to confirm the Plan, and such Class 6 Ballots would otherwise have been counted but for being sent by email or having been received by Epiq after the voting deadline. If the Class 6 Ballots of these additional creditors are counted, the total amount of Allowed General Unsecured Claims in Class 6 voting to confirm the Plan totals close to $6.9 million.

support of confirmation of the Plan, are set forth in the: (i) First Day Declaration; (ii) Disclosure Statement; (iii) Plan; (iv) *Declaration of Emily Young of Epiq Corporate Restructuring, LLC Regarding the Solicitation and Tabulation of Ballots Cast on Debtors' Amended Joint Plan of Liquidation* [ECF No. 550] (the "**Epiq Declaration**"); (v) *Debtors' Certificate of Proponents of Plan on Acceptance of Plan, Report on Amount to Be Deposited, Certificate of Amount Deposited and Payment of Fees* [ECF No. 51] (the "**Plan Proponents' Report**"); (vi) *Declaration of Edward A. Phillips in Support of Confirmation of the Debtors' Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code*, filed concurrently herewith (the "**Phillips Declaration**"); (vii) the record in the Chapter 11 Cases; and (viii) testimony that may be proffered and/or otherwise adduced at the Confirmation Hearing.

ARGUMENT

22. This Memorandum is divided into four parts. *Part I* addresses satisfaction of the applicable requirements for horizontal "gifting" contained in a chapter 11 plan under the Bankruptcy Code and relevant case law. *Part II* principally addresses applicable case law governing releases and demonstrates that the Debtors' release provisions – including the Third-Party Releases (defined herein) – are appropriate and consistent with relevant law and precedent. *Part III* addresses the applicable requirements for confirmation of the Plan under section 1129 of the Bankruptcy Code and demonstrates the satisfaction of each requirement. Finally, *Part IV* addresses satisfaction of the applicable requirements for the Debtors, through the Effective Date of the Plan, to decide which of the Available Contracts (defined herein) will be the Assumed Contracts (defined herein) to be assumed by the Debtors, and assigned by the Debtors, to the Buyer (defined herein) on the closing date of the sale as authorized under the Court's prior Sale Order.

I. THE PLAN'S GUC DISTRIBUTION FRAMEWORK IS AN INTEGRAL COMPONENT OF THE PLAN AND SHOULD BE APPROVED

A. Overview of the Plan's GUC Distribution Framework.

23. The Plan is premised upon, and incorporates, a negotiated distribution framework in favor of the holders of Allowed General Unsecured Claims in Class 6 of the Plan and the funding of a Liquidating Trust comprised principally of the following three components (collectively, the "**GUC Distribution Framework**"): (i) the General Unsecured Claims Cash Recovery (*i.e.,* the initial distribution in the amount of $250,000 to be made by the Liquidating Trust for the benefit of the holders of Allowed General Unsecured Claims in Class 6;[7] (ii) the Winddown Funding Amount (*i.e.,* the $250,000 in initial funding for the cost of administering the Liquidating Trust)[8], and (iii) the Recovery Waterfall which provides for the priority of distributions to be made to creditors from proceeds realized from Liquidating Trust Assets (*e.g.*, the proceeds generated from Causes of Action pursued by the Liquidating Trust).[9] *See* Plan, Art. IV.F (describing the treatment of Allowed General Unsecured Claims in Class 6 of the Plan); Exhibit A (Recovery Waterfall); Disclosure Statement, pp. 26-27 (describing three Causes of Action to be transferred to the Liquidating Trust).

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[7] As defined in the Plan, "*General Unsecured Claims Cash Recovery*" means "*a Cash distribution in the amount of $250,000.00, funded by the Prepetition Lenders Unsecured Claims Pool to be shared on a pari passu basis by holders of Allowed General Unsecured Claims (Class 6)*"). *See* Plan, Art. I.56. In turn, "*Prepetition Lenders Unsecured Claims Pool*" means *"$500,000.00 in Cash contributed by or on behalf of the Prepetition Lenders, including, to the extent applicable, a carve-out from the DIP Collateral and/or the Prepetition Collateral, to fund (i) the General Unsecured Claim Cash Recovery and (ii) the Winddown Funding Amount"*). *See* Plan, Art. I.A.90.

[8] As defined in the Plan, "*Winddown Funding Amount*" means "*Cash in the amount of $250,000.00, funded by the Prepetition Lenders Unsecured Claims Pool to be used exclusively to fund the Liquidating Trust Budget and distributions pursuant to the Recovery Waterfall*". *See* Plan, Art. I.A.121.

[9] As defined in the Plan, "*Recovery Waterfall*" means "*the provisions set forth in Exhibit "A" of the Plan setting forth the priority for distributions of the proceeds realized from the Liquidating Trust Assets*." *See* Plan, Art. I.A.102.

24. The GUC Distribution Framework was negotiated over several months at arms-length and in good faith between and among the Debtors, the DIP Agent, the Senior Credit Agreement Agent, and the HoldCo Credit Agreement Agent. *See* Disclosure Statement, Art. IV.L; Phillips Declaration, ¶ 15. The principal terms of the GUC Distribution Framework were originally read into the record at the Disclosure Statement Hearing on March 30, 2023, and are detailed in the Disclosure Statement and the Plan. *See* Disclosure Statement at ECF pp. 40-43 out of 230 pages; Plan at ECF pp. 20-21 out of 137 pages.

25. As detailed in the Disclosure Statement, the GUC Distribution Framework incorporated into the Plan provides the following distributions and benefits:

- **Prepetition Lenders Unsecured Claims Pool in the amount of $500,000**[10]: This amount will be used for –
    - ***A Funding of the General Unsecured Claim Cash Recovery***[11] ***in the Amount of $250,000***: The $250,000 comprises the guaranteed Cash distribution to the holders of Allowed General Unsecured Claims (Class 6); and
    - **The *Winddown Funding Amount totaling $250,000 Which Will Comprise a Part of the Winddown Assets***[12]: These funds will comprise part of the Winddown Assets to be used by the Liquidating Trustee to fund the post-Effective Date winddown of the Chapter 11 Cases, to pursue Causes of Action and to make distributions to creditors pursuant to the Recovery Waterfall.
- **The Recovery Waterfall**: The GUC Distribution Framework incorporates a unique distribution waterfall with respect the priority for distributions of the proceeds realized from the Liquidating Trust Assets[13], if any, from the Winddown Assets. Importantly,

[10] As defined in the Plan, "*Prepetition Lenders Unsecured Claims Pool* " means "$500,000.00 in Cash contributed by or on behalf of the Prepetition Lenders, including, to the extent applicable, a carve-out from the DIP Collateral and/or the Prepetition Collateral, to fund (i) the General Unsecured Claim Cash Recovery and (ii) the Winddown Funding Amount". *See* Plan, Art I.A.90.

[11] As defined in the Plan, "*General Unsecured Claim Cash Recovery*" means "*means a Cash distribution, in the amount of $250,000.00, funded by the Prepetition Lenders Unsecured Claims Pool, to be shared on a pari passu basis by holders of Allowed General Unsecured Claims (Class 6)*". *See* Plan, Art I.A.56.

[12] As defined in the Plan, "*Winddown Assets*" means "*the (i) Winddown Funding Amount, (ii) Insider Avoidance Actions, and (iii) remaining assets of the Debtors' Estates*." *See* Plan, Art I.A.120.

[13] As defined in the Plan, "*Liquidating Trust Assets*" means "*from and after the Effective Date all assets of the Debtors that are not sold or distributed on or prior to the Effective Date (including, for the avoidance of doubt, the*

the Recovery Waterfall provides for a gifting mechanism between, on the one hand and as applicable, the DIP Lender (from the DIP Collateral) or the Senior Credit Agreement Lenders (from the Prepetition Collateral), and on the other, the holders of Allowed General Unsecured Claims (Class 6), prior to the DIP Claims (as applicable) and the Protective Advance Secured Claims (Class 3) and the Senior Credit Agreement Term Loan Secured Claims (Class 4) being satisfied in full (*see fourth*- and *sixth*-level priority of distributions immediately below). The Recovery Waterfall is summarized by the following distribution priority framework:

- *First*, to the Liquidating Trustee for the fees and reasonable, documented, and out of pocket, costs and expenses incurred in connection with the administration of the Liquidating Trust, subject to, and in accordance with, the Liquidating Trust Budget (subject to the funds available from the Winddown Funding Amount and any Cash proceeds from Liquidating Trust Assets received by the Liquidating Trust on and after the Effective Date);

- *Second*, $500,000.00 to the:

  - holders of Allowed Protective Advance Secured Claims (Class 3) solely to the extent such claims have not been credit bid for the Purchased Assets;[14] *and*

  - holders of Allowed General Unsecured Claims (Class 6), solely to the extent such claims have not been paid in full from the General Unsecured Claim Cash Recovery,

  to be shared (a) 50% (to the holders of the Allowed Protective Advance Secured Claims (Class 3), and to be distributed pursuant to the order of priority of repayment under the terms of the Senior Credit Agreement Loan Documents) and (b) 50% (to the holders of Allowed General Unsecured Claims (Class 6));

- *Third*, to the:

  - holders of Allowed Protective Advance Secured Claims (Class 3), solely to the extent such claims have not been credit bid for the Purchased Assets or paid in full from the *Second* priority of distributions in this Recovery Waterfall, *and*

  - holders of Allowed Senior Credit Agreement Term Loan Secured Claims (Class 4), solely to the extent such claims have not been credit

Winddown Assets), or otherwise dealt with pursuant to the terms of the Plan including, but not limited to, with respect to any Debtor's Power of Attorney, to be transferred to a Liquidating Trust, after consultation with the DIP Agent, and the Senior Credit Agreement Agent." *See* Plan, Art I.A.76.

[14] Per the Asset Purchase Agreement, and as reflected in the Liquidation Analysis, $5 million of Allowed Protective Advance Secured Claims (Class 3) have been credit bid. *See* Asset Purchase Agreement, ¶ 3.2 (definition of "Credit Bid"); Liquidation Analysis ("Specific Notes to the Liquidation Analysis"), ¶ L.

bid for the Purchased Assets, *and*

- holders of Allowed General Unsecured Claims (Class 6), solely to the extent such claims have not been paid in full from the General Unsecured Claim Cash Recovery and/or the *Second* priority of distributions in this Recovery Waterfall,

to be shared (a) 50% (to the holders of the Allowed Protective Advance Secured Claims (Class 3) and Allowed Senior Credit Agreement Term Loan Secured Claims (Class 4), and to be distributed pursuant to the order of priority of repayment under the terms of the Senior Credit Agreement Loan Documents) and (b) 50% (to the holders of Allowed General Unsecured Claims (Class 6)), until the holders of (i) Allowed General Unsecured Claims (Class 6) have received a total distribution of 20% in Cash of the amount of their Allowed General Unsecured Claims and (ii) Allowed Protective Advance Secured Claims (Class 3) and Allowed Senior Credit Agreement Term Loan Secured Claims (Class 4) are each paid in full in Cash;

- *Fourth*, to holders of Allowed HoldCo Credit Agreement Term Loan Unsecured Claims (Class 5), until paid in full in Cash; and

- *Fifth*, to, holders of Existing Equity Interests (Class 9), consistent with such holder's rights of payment existing immediately prior to the Petition Date.

26. The GUC Distribution Framework is made possible through both (a) a "gifting" carve-out by, as applicable, the DIP Lenders from the DIP Collateral and the Senior Credit Agreement Lenders from the Prepetition Collateral to fund the General Unsecured Claims Cash Recovery in the amount of $250,000 and Winddown Funding Amount in the amount of $250,000, as well as the agreement by these parties to the distribution framework embedded in the Recovery Waterfall that favors distributions to the General Unsecured Creditors (Class 6), and (b) acceptance of the Plan by Class 5 (HoldCo Creditor Agreement Term Loan Unsecured Claims) which effectively subordinates, through the Recovery Waterfall, distributions to the holders of Allowed Claims in that class to distributions to the General Unsecured Creditors (Class 6).[15]

[15] Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims) is the other class containing unsecured claims in the Plan. Creditors in Class 5 are collectively owed over $16 million. *See* Liquidation Analysis. Under the Plan, the holders of Allowed Claims in Class 5 will receive distributions from the Liquidating Trust in accordance

27. Importantly, in the absence of the GUC Distribution Framework reflected in the Plan, it would be impossible for the holders of Allowed General Unsecured Claims (Class 6) to receive any distributions whatsoever in the Debtors' bankruptcy cases because the DIP Lenders (which will be owed over $13 million by the Debtors by the time the Effective Date of the Plan occurs) and the Senior Credit Agreement Lenders (which are collectively owed over $42 million from the prepetition secured lending arrangements) would justifiably assert that their liens encumber all of the Debtors' assets. *See, e.g.*, Final DIP Financing Order [ECF No. 189], ¶ 4, 5, 7 (granting liens and claims in favor of the DIP Lenders and the Senior Credit Agreement Lenders on all of the Debtors' assets, including but not limited to, avoidance actions under the Bankruptcy Code and their proceeds). Given the fact that the Debtors' assets being transferred to the Liquidating Trust are expected to generate a mere fraction of the $55 million collectively owed to the DIP Lenders and the Senior Credit Agreement Lenders, the General Unsecured Creditors (Class 6) are not legally entitled to any distributions in the Debtors' bankruptcy cases in the absence of the General Unsecured Claims Cash Recovery and the Recovery Waterfall. *See* Disclosure Statement, pp. 26-27; Liquidation Analysis. Accordingly, the Debtors respectfully submit that the GUC Distribution Framework provides a meaningful recovery to the holders of Allowed General Unsecured Claims (Class 6), and the Plan should be confirmed by the Court.

with the Recovery Waterfall. *See* Plan, Art. IV.E, Exh. A. As reflected in the Recovery Waterfall, the holders of Allowed Claims in Class 5 are placed in the fourth level of priority of distribution and will not receive any distributions from the Liquidating Trust until (i) the holders of Allowed General Unsecured Claims in Class 6 have received a total distribution of 20% in Cash of the amount of such claims, and (ii) Allowed Senior Credit Agreement Term Loan Secured Claims (Class 3) and Allowed Senior Credit Agreement Term Loan Secured Claims (Class 4) are paid in full. *See* Plan, Exh. A.

B. All Voting Classes of Impaired Claims Have Either Universally Accepted (Classes 3, 4 and 5), or Overwhelming Accepted (Class 6), the Plan, and Relevant Case Law Affirms the "Horizontal Gifting" Proposed in the Plan.

28. As an initial comment, the Court should approve the GUC Distribution Framework for the simple reason that it has been consensually and universally approved by all three Classes of Impaired Claims (*i.e.*, Classes 3, 4 and 5) that will be "negatively" impacted by the distributions it proposes in favor of General Unsecured Claims (Class 6), and it has also been overwhelmingly approved by Class 6. As reflected in the Epiq Declaration and the Proponents' Report, each of the (i) eight ballots representing approximately $25.86 million of Allowed Protective Advance Secured Claims (Class 3), (ii) 19 ballots representing over $16.39 million of Allowed Senior Credit Agreement Term Loan Secured Claims (Class 4), and (iii) 19 ballots representing over $16.11 million of Allowed HoldCo Credit Agreement Term Loan Unsecured Claims (Class 5), voted for confirmation of the Plan. *See* Epiq Declaration and the Plan Proponents' Report. Also, as mentioned previously, Class 6 has overwhelmingly voted to confirm the Plan with 94% in number, representing 99.94% of the Allowed Claims in Class 6, casting votes to confirm the Plan. *See id.* In brief, the Court should approve the GUC Distribution Framework for the simple reason that it has been strongly endorsed by all of the Impaired Classes of Claims entitled to vote on the Plan.

29. Moreover, it is entirely reasonable for a plan to provide for different treatment across classes of equal priority through a voluntary carve-out from a lender's collateral (*i.e.*, horizontal gifting) which the GUC Distribution Framework does here as between the following two classes of unsecured Claims: Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims) and Class 6 (General Unsecured Claims).[16] As mentioned above, the holders of Allowed

[16] The Debtors' records reflect that the third Class of unsecured claims, Class 8 (Subordinated Claims), has no creditors. Pursuant to Article III.E of the Plan ("Elimination of Vacant Classes"), Class 8 is vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class.

Claims in Class 5 will not receive any distributions under the Plan until the holders of Allowed Claims in Class 6 receive a distribution totaling twenty (20%) percent of their Allowed Claims. *See In re Nuverra Environmental Solutions, Inc*, 590 B.R. 75, 82, 92-94 (D. Del. 2018) (affirming bankruptcy court's confirmation of plan that contained horizontal gifting); *see also In re World Health Alternatives, Inc.*, 344 B.R. 291, 297 (Bankr. D. Del. 2006) (approving disparate treatment between unsecured creditor classes "because the money does not belong to the estate-it belongs to the secured creditor . . . [i]n other words, the payout to the general unsecured creditors is a carve out of the secured creditor's lien and not estate property"); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Del. 2001) (noting that the disparate treatment between two classes of unsecured claims represented a permissible allocation by the secured creditors of a portion of the distribution to which they would otherwise be entitled, rather than unfair discrimination against such classes by the proponents of the plan). Due to the universal acceptance of the Plan, combined with case law affirming the practice of horizontal gifting and the lack of any objections to confirmation of the Plan, the Debtors respectfully submit that the Plan should be confirmed by the Court.

C. <u>The GUC Distribution Framework Is Materially Better for General Unsecured Creditors (Class 6) Compared to Other Recent Chapter 11 Plans Involving Debtors Providing Substance Abuse Treatment Services</u>.

30. A brief comparison between the GUC Distribution Framework and distributions (or lack thereof) provided to general unsecured creditors in plans confirmed in other recent chapter 11 cases involving debtors, similar to the Debtors, that operate in the inpatient and/or outpatient substance abuse treatment service sector of the economy demonstrates that the GUC Distribution Framework will provide a distribution to holders of Allowed General Unsecured Claims (Class 6) which is far better than what occurred in these other cases. *See, e.g., In re AAC Holdings, Inc.*, Case No. 20-11648 (Bankr. D. Del. Oct. 20, 2020; ECF Nos. 3, 695 and 582) (the debtor operated

26 facilities in eight states providing inpatient and outpatient substance abuse treatment services; court confirms chapter 11 plan projecting zero (0%) percent recovery for class holding approximately $35.8 million in general unsecured claims; class of general unsecured creditors were granted interests in a litigation trust providing a lower priority of distribution than all allowed secured claims); *In re EBH Topco, LLC*, Case No. 18-11212-BLS (Bankr. D. Del. Feb. 13, 2019; ECF Nos. 16, 589, 765, 1019) (the debtor described itself as a provider of behavioral health services and the largest independent provider of residential drug and alcohol addiction treatment in the United states operating 13 treatment centers across 8 states and 22 outpatient locations; court confirms chapter 11 plan projecting zero (0%) percent recovery for class holding over $195 million in general unsecured claims; general unsecured creditors received beneficial interests in a creditor trust with lowest priority of creditor distribution); *In re Solid Landings Behavioral Health, Inc.*, Case No. 8:17-bk-12213-CB (Bankr. C.D. Cal. Mar. 22, 2018; ECF Nos. 14, 399, 401, 468) (the debtors were providers of individualized 12-step and alternative treatment programs for people suffering from substance abuse and mental health disorders operating 11 facilities in three states; court confirms plan providing for liquidating trust interests to class of general unsecured creditors; class of general unsecured creditors would receive distributions from liquidating trust only after, among other requirements, substantial secured claims were paid in full).

31. In sharp contrast to these three other chapter 11 cases where general unsecured creditors received no guaranteed payment and would receive distributions, if at all, from a post-confirmation trust, but only after creditors holding substantial secured claims with higher statutory priority under the Bankruptcy Code were paid in full, the GUC Distribution Framework in the Plan provides the holders of Allowed General Unsecured Claims (Class 6) (i) a *pro rata* share of an initial $250,000 payment (*i.e.,* the General Unsecured Claims Cash Recovery), representing an

estimated percentage recovery totaling two (2%) percent of the projected $12 million of Allowed General Unsecured Claims, and (ii) the right to share *equally* with the two classes of secured claims (*i.e.,* Class 3 – Protective Advance Secured Claims; Class 4 – Senior Credit Agreement Term Loan Secured Claims) with respect to *every dollar* of distributions made from the Liquidating Trust to creditors until the holders of Allowed General Unsecured Claims (Class 6) have received a total distribution of twenty (20%) percent of such claims. *See* Plan, Art. IV.C-F; Exh. A; Liquidation Analysis. Accordingly, the Debtors respectfully submit that the treatment of general unsecured creditors through the GUC Distribution Framework is materially better than distribution frameworks for such creditors in other recent cases involving similar debtors, and the Court should confirm the Plan.

II. THE RELEASE PROVISIONS CONTAINED IN THE PLAN ARE APPROPRIATE AND SHOULD BE APPROVED.

32. The Plan: (i) releases certain Claims and Causes of Actions of the Debtors, their Estates, and the Liquidating Trustee (as defined in the Plan, the "**Debtor Release**"), *see* Plan, Art. XII.H, and (ii) consensually releases certain Claims and Causes of Action of participating non-Debtors (as defined in the Plan, the "**Third-Party Releases**" and, together with the Debtor Release, the "**Plan Releases**"), *see* Plan, Art. XII.I; and (iii) exculpates Claims and Causes of Action for certain parties in connection with the Chapter 11 Cases (as defined in the Plan, the "**Exculpation**"), *see* Plan, Art. XII.J. These provisions result from arms-length negotiations, have been granted in exchange for substantial consideration, were essential to obtaining stakeholder support for the Plan, are appropriate under the circumstances, are consistent with the Bankruptcy Code, and comply with applicable law. Accordingly, the Plan Releases and Exculpation should be approved.

A. The Debtor Release is Appropriate and Should Be Approved by the Court.

33. No objections have been filed to the Debtor Release. As a general rule, debtors possess considerable leeway in liquidating plans in granting releases of their own claims as a valid exercise of their business judgment and are noncontroversial. 11 U.S.C. § 1123(b)(3)(A); *see, e.g., In re Advance Watch Company Ltd.*, Case No. 15-12690, 2016 WL 323367, at *6 (Bankr. S.D.N.Y. Jan. 25, 2016) (stating rule); *see also In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 263, n.289 (Bankr. S.D.N.Y. 2007), *appeal dismissed*, 371 B.R. 660 (S.D.N.Y. 2007), *aff'd*, 544 F.3d 420 (2d Cir. 2008) (noting that debtor releases are uncontroversial). In evaluating the debtor's business judgment in the liquidating context, courts also assess whether the debtor release is in the best interests of the debtor's estate. *See In re Universal Rehearsal Partners, Ltd.*, Case No. 22-31966, 2023 WL 2816684, at *4 (Bankr. N.D. Tex. Apr. 6, 2023); *In re Midway Gold US, Inc.*, 575 B.R. 475, 510 (Bankr. D. Colo. 2017); *In re Residential Capital, LLC*, Case No. 12-12020 (MG), 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013).

34. Here, the Debtor Release is unopposed and was negotiated in connection with the GUC Distribution Framework, is an essential component of the Plan, and constitutes a sound exercise of the Debtors' business judgment. Critically, without the Debtor Release, the Debtors would not have been able to secure support for the Plan, including but not limited to, the meaningful General Unsecured Claim Cash Recovery in the amount of $250,000 to be distributed *pro rata* to the holders of Allowed General Unsecured Claims in Class 6 of the Plan through the GUC Distribution Framework, the very favorable sharing mechanism for those creditors under the Recovery Waterfall, and the additional $250,000 for the initial funding for the cost of administering the Liquidating Trust. *See* Phillips Declaration, ¶ 26. During the Debtors' bankruptcy cases, Mr. Phillips (the Interim Chief Executive Officer) in collaboration with of Mr. Tepner (an independent manager) and the Debtors' professionals, undertook an independent

factual investigation and review and analysis to determine the propriety of the Debtor Release, including a review of the Debtors' internal documents and records, including both pre- and post-petition transactions. *See* Phillips Declaration, ¶ 27. As a result of such work, Mr. Phillips has found no basis for a claim on behalf of the Debtors against any party benefitting from the Debtor Release. *See* Phillips Declaration, ¶ 27.

35. In addition, the Debtor Release is subject to significant carve-outs. The Debtor Release does not apply, to any Insider Avoidance Action Targets and Insider Avoidance Actions, or to any claims against any Debtor Released Party resulting from acts described in Articles XII.H and M of the Plan, including: (i) acts or omissions determined by a final order of a court to have constituted fraud, willful misconduct or gross negligence (Art. XII.H); (ii) fraud, malpractice, criminal conduct, intentional unauthorized use of confidential information that causes damages, or *ultra vires* acts of such Person (Art. XII.M); and (iii) acts subject to Rule 4-1.8(h) of the Florida Rules of Professional Conduct ("Limiting Liability for Malpractice") (Art. XII.M).

36. Courts in this District and elsewhere have approved similar debtor release provisions in other liquidating chapter 11 plans. *See, e.g., In re TAM Winddown LLC and UP Winddown LLC,* Case No. 20-23346-PDR (Bankr. S.D. Fla. Mar. 19, 2021); *In re Adinath Corp*., Case No. 15-16885-LMI (Bankr. S.D. Fla. June 28, 2016; ECF No. 967; order confirming liquidating plan); *In re Daffy's, Inc.*, Case No. 12-13312 (MG) (Bankr. S.D.N.Y. April 2, 2013; ECF No. 949; order confirming liquidating plan); *In re Finlay Enterprises, Inc.*, Case No. 09-14873 (JMP) (Bankr. S.D.N.Y. June 29, 2010; ECF No. 715; order confirming liquidating plan).

37. Therefore, the Debtor Release is limited in scope, and granting the Debtor Release represents a valid exercise of the Debtors' business judgment and is in the best interest of the Estates and should be approved.

B. The Third-Party Releases Should Be Approved

1. The Third-Party Releases are Consensual.

38. No objections have been filed to the Third-Party Releases. The Plan provides that the Releasing Parties[17] will grant limited and fully consensual Third-Party Releases. The Third-Party Releases are fully consensual because each Releasing Party can choose whether to grant them. It is generally settled that creditors and interest holders may consent to third-party releases. *See, e.g., In re A&B Associates, L.P.*, 2019 WL 1470892, at *49 (Bankr. S.D. Ga. Mar. 29, 2019) ("[c]ircuit courts in the Second, Fourth, Sixth, Seventh and Eleventh Circuits have held that third-party releases may be given consensually and, in limited circumstances, may be approved without consent"); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 239, 260 (Bankr. M.D. Fla. 2006) ("[c]onsensual releases have been routinely upheld by courts") (citing cases).

39. In determining what constitutes consent, cases have approved the use of an opt-out procedure when the releasing party has had adequate notice of the release because "[i]naction is action under appropriate circumstances." *In re Avianca Holdings S.A.*, 632 B.R. 124, 136-137 (Bankr. S.D.N.Y. 2021) (citing cases); *In re LATAM Airlines Grp., S.A.*, Case No. 20-11254 (JLG), 2022 WL 2206829, at *46 (Bankr. S.D.N.Y. June 18, 2022). Courts have found notice to be "adequate" when, for example, the third-party release appears in bold text in the plan and disclosure statement, or if language on the ballot clearly explains that the failure to "opt out" of the release constitutes consent to the release. *See, e.g., In re Mallinckrodt PLC*, 639 B.R. 837, 878-879 (Bankr. D. Del. 2022) (finding opt out mechanism in plan appropriate, in part, where

[17] As defined in the Plan, "*Releasing Parties*" means "*collectively, and in each case solely in their capacity as such: (i) the holders of all Claims that vote to accept the Plan; (ii) the holders of Claims who are entitled to vote on the Plan and abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan on the applicable Ballot indicating that they opt not to grant the releases provided in the Plan; and (iii) the Released Parties*." *See* Plan, Art. I.A.104.

third-party, opt-out provision was capitalized, bolded, and/or underlined); *In re DBSD North America, Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009) ("[s]imilarly, adequate notice is provided in this case, as both the [p]lan and [d]isclosure [s]tatement have the third party release provision set off in bold font, and the ballots set forth in both capitalized and bold text the effect of consenting to the Plan or abstaining without opting out of the release"); *see also In re CiCi's Holdings, Inc*., Case No. 21-30146, 2021 WL 819330, at *10 (Bankr. N.D. Tex. Mar. 3, 2021) (approving third-party releases, in part, where notice to impacted parties provided unambiguous information describing the third-party releases in bold and conspicuous typeface and referenced the third-party releases in the Plan).

40. Consistent with the notice framework approved by bankruptcy courts, the Third-Party Releases in the Plan were unambiguously disclosed to each Releasing Party that is a creditor in each of the four voting Classes in the Plan. Specifically, each of the Ballots sent to creditors in Classes 3, 4, 5, and 6 included, in bolded and capitalized text, exact copies of the Third-Party Releases provision (pp. 9-10) and relevant definitions, as well as identical bolded and capitalized specialized text for the Ballots (*see* the Ballots attached to the Initial Certificate of Service [ECF No. 395] at ECF pp. 129-183 out of 657 ECF pages; p. 4 of each Ballot at ¶¶ "c" and "d"), as well as a special shaded box on the very page of the Ballot that creditors had to fill out (*id;* see p. 12 of each Ballot) titled "*Important Information Regarding Certain Releases by Holders of Claims*", informing each voting creditor, among other things, that (i) submitting a Ballot voting to accept the Plan is deemed a grant of the Third-Party Releases, (ii) submitting a Ballot voting to reject the Plan is deemed an opt out of the Third-Party Releases, (iii) abstaining from voting for or against confirming the Plan, but submitting a Ballot without checking the appropriate opt out box in item 3 of the Ballot is deemed a grant of the Third-Party Releases, and (iv) failing to submit a Ballot is

a deemed a consent of the Third-Party Releases. *Id*. In addition, both the Plan and the Disclosure Statement state the Third-Party Release in bolded and capitalized Text. *See* Plan, XII.I; Disclosure Statement. pp. 55-56.

41. As such, the Debtors submit that each Releasing Party that is a creditor in each of the four voting Classes in the Plan was provided with a robustly and prominently disclosed opt-out mechanism and the decisions such creditors made not to return Ballots, and not to file an objection to the Third-Party Releases, represents their affirmative, deemed consent for approval of the Third-Party Releases. *See, e.g., Mallinckrodt*, 639 B.R. at 880 "those who did not opt of [of the third-party releases] intended for their silence to indicate their consent"); *Avianca Holdings*, 632 B.R. at 137 ("[w]hen someone is clearly and squarely told if you fail to act your rights will be affected, that person is then given information that puts them on notice that they need to do something else or else. That's not a trap.") (quoting Hr'g Tr. at 27:8-11, *In re Cumulus Media Inc*., No. 17-13381 (SCC) (Bankr. S.D.N.Y. Feb. 5, 2018) [Docket No. 434]).

42. In addition, for many years, courts in this district and elsewhere have approved third-party releases that include a similar list of related parties that are included in the scope of the Third-Party Releases. *See, e.g., In re TAM Winddown LLC and UP Winddown LLC,* Case No. 20-23346-PDR (Bankr. S.D. Fla. Mar. 19, 2021 [ECF No. 496]; order confirming liquidating plan); *In re Adinath Corp*., Case No. 15-16885-LMI (Bankr. S.D. Fla. June 28, 2016 [ECF Nos. 967 (order confirming liquidating plan) and 836 (liquidating plan)]; order confirming liquidating plan); *In re Maguire Group Holdings, Inc.*, Case No. 11-39347-BKC-RAM (Bankr. S.D. Fla. July 25, 2012; ECF No. 701; order confirming reorganization plan); *see also In re Avianca Holdings S.A*., Case No. 20-11133 (MG) (Bankr. S.D.N.Y. Nov. 20, 2021 [ECF No. 2300]; order confirming reorganization plan). Accordingly, the Debtors submit that the Third-Party Releases are

consensual and should be approved by the Court.

2. The Released Parties are Entitled to the Third-Party Releases Under the Standard for Non-Consensual Releases.

43. As explained above, the Third-Party Releases are consensual, with each Releasing Party that is a creditor in each of the four voting Impaired Classes in the Plan having had a full opportunity to decide whether to opt out of the Third-Party Releases. As such, the Debtors believe that the Court does not need to engage in an analysis of whether the Third-Party Releases may be approved under the analysis for granting non-consensual releases set forth in the Eleventh Circuit's decision in *SE Property Holdings, LLC* v. *Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1076-79 (11th Cir. 2015). The *Seaside Engineering* court described a non-exclusive list of seven considerations set forth in the Sixth Circuit's decision in *In re Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002)[18] to guide bankruptcy courts in considering whether to approve third-party releases. *Seaside Engineering*, 780 F.3rd at 1079. In its decision, the Eleventh Circuit indicated that such *Dow Corning* factors should be applied flexibly, and bankruptcy courts possess the discretion to determine which of those factors would be relevant in each chapter 11 case. *Seaside Engineering*, 780 F.3rd at 1079; *see also In re Mercedes Homes, Inc.*, 431 B.R. 869, 878 (Bankr. S.D. Fla. 2009) (confirming plan and approving non-debtor releases under the *Dow Corning* factors); *In re Friedman's, Inc*., 356 B.R. 758, 761-762 (Bankr. S.D. Ga. 2005) (same); *In re TAM Winddown LLC and UP Winddown LLC,* Case No.

[18] The non-exclusive *Dow Corning* considerations include: (1) there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the debtor; (2) the non-debtor has contributed substantial assets to the reorganization; (3) the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) the impacted class, or classes have overwhelmingly voted to accept the plan; (5) the plan provides a mechanism to pay for all, or substantially all, of the class, or classes, affected by the injunction; (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and (7) the bankruptcy court made a record of specific factual findings that support its conclusions. 280 F.3d at 658.

20-23346-PDR (Bankr. S.D. Fla. Mar. 19, 2021 [ECF No. 496, ¶ 29]; order approving third-party releases under *Seaside Engineering*). Similarly, the Debtors believe that the Court does not need to engage in an analysis of whether "unusual circumstances" are present in these Chapter 11 Cases supporting the grant of third-party releases as was done by the U.S. Bankruptcy Court for the Middle District of Florida. *In re Celebrity Resorts, LLC*, No. 6:10-bk-03550-ABB, 2010 WL 5392657, at *7 (Bankr. M.D. Fla. Dec. 28, 2010).

44. However, if consent alone is insufficient to warrant approval of the Third-Party Releases, the Debtors believe that applicable *Dow Corning* considerations from *Seaside Engineering*, and/or the unusual circumstances in these Chapter 11 Cases, amply support approval of the Third-Party Releases. All of the Released Parties[19] have provided significant contributions in these Chapter 11 Cases which have been critical to the success of the Debtors' liquidation process, including but not limited to a complicated sale of the assets related to the Debtors' three remaining inpatient or outpatient, substance use disorder treatment facilities located in Massachusetts and New Jersey, as well as for the Plan itself. *See* Phillips Declaration, ¶ 31. Among other things, the Released Parties agreed to provide substantial assets to the Debtors' estates and contributions to the liquidation, including (as applicable):

- funding the Chapter 11 Cases by providing $13 million in debtor-in-possession financing and the consensual use of cash collateral, which provided the Debtors with critical liquidity that facilitated

[19] As defined Art. I.A.103 in the Plan, "*Released Parties*" means, collectively, and in each case solely in their capacities as such: (i) the Debtors; (ii) the Estates; (iii) the Prepetition Lenders; (iv) the Prepetition Agent; (v) the DIP Lenders; (vi) the DIP Agent; (vii) the Buyer; (viii) with respect to each of the foregoing Persons in clauses "(i)" through "(vii)", each of their respective affiliates, predecessors, successors, assigns, direct and indirect subsidiaries, affiliated investment funds or investment vehicles, managed accounts, funds and other entities, investment advisors, subadvisors and managers with discretionary authority; and (ix) with respect to each of the foregoing Persons in clauses "(i)" through "(viii)", each of their respective current and former officers and directors, principals, equity holders, members, partners, managers, employees, subcontractors, agents, financial advisors, attorneys, Interim Chief Executive Officer, accountants, investment bankers, consultants, representatives, and other professionals, and such Person's respective heirs, executors, estates, servants, and nominees, in each case in their capacity as such; provided however that notwithstanding anything in this Plan to the contrary, each of the Insider Avoidance Actions Targets, in any capacity, shall not be a Released Party." (the underlined language is also bolded in the original).

the administration of the Chapter 11 Cases and have allowed the Debtors to continue their operations throughout the pendency of the cases;

- agreeing to support, as well as to fund, the Plan; and

- allowing meaningful value to be distributed to holders of Allowed General Unsecured Claims (Class 6) by means of the GUC Distribution Framework, notwithstanding that the DIP Lenders, which will be collectively owed $13 million by the Debtors as of the Effective Date of the Plan, and the Senior Credit Agreement Lenders, which are collectively owed over $42 million by the Debtors, will, at best, recover a mere fraction of this amount under the Plan.

45. Another *Dow Corning* consideration is whether the impacted Classes have overwhelmingly voted to accept the Plan. *Seaside Engineering*, 780 F.3d at 1079. Here, the Class of General Unsecured Creditors (Class 6) is the primary impacted class because the Prepetition Lenders which exist in Classes 3, 4 and 5 will benefit from the Third-Party Releases. As shown by the Epiq Declaration and the Plan Proponents' Report, Class 6 has overwhelmingly voted to confirm the Plan with 94% in number, representing 99.94% of the Allowed Claims in Class 6 casting Ballots, voting to confirm the Plan. *See* Epiq Declaration; Plan Proponents' Report. This is a significant endorsement of the Third-Party Releases, as well as the Debtor Release, that the Court should not overlook.

46. Additionally, not one single creditor has objected to any of the Plan Releases (*i.e.*, the Third-Party Releases and the Debtor Release). In particular, this fact alone reinforces and affirms the Debtors' determination that the Plan Releases, including the Debtor Release and the Third-Party Releases, are in the best interests of the Estates. Indeed, there could be no better evidence as to the reasonableness and fairness of the Plan Releases than the support of those creditors who would be most affected by a release of estate claims or Causes of Action. *See In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 938 (Bankr. W.D. Mo. 1994) (stating that creditor

approval of a release is "the single most important factor" to determine whether a release is appropriate). Also, the U.S. Trustee has not objected to the Third-Party Releases (or the Debtor Release). And, of course, the Ballots provided creditors in the voting Classes the option to opt-out of the Third-Party Releases on the Ballots.[20] Accordingly, for these reasons and for the other reasons set forth herein, the Third-Party Releases (and the Debtor Release) should be approved.

47. Moreover, many of the Released Parties, including the Debtors' officers and managers, have indemnification rights against the Debtors arising from the Debtors' formation documents which also provide an additional *Dow Corning* factor in favor of approving the Third-Party Releases. *Seaside Engineering*, 780 F.3d at 1079; *see* Phillips Declaration, ¶ 32. Absent the Third-Party Releases, any legitimate indemnification claims by these individuals would result in indemnification Claims against the Debtors' Estates and/or the Liquidating Trust Assets. Accordingly, and viewed through the lens of the *Dow Corning* factors, three of six such factors directly support this Court approving the Third-Party Releases.[21]

48. From the standpoint of the Released Parties, these parties fall into three categories based on their respective roles with respect to the GUC Distributions Framework and the liquidation of the Debtors, and the circumstances supporting their release under Article XII.I of the Plan vary slightly from one another. The first category is comprised of the Debtors and their Estates, the Debtors' professionals, and the parties related to this set of Released Parties (*e.g.*,

[20] Out of the seven requests received by Epiq by parties seeking to opt-out of the Third-Party Releases, four were submitted by two former chief executive officers of the Debtors on behalf of entities and include (i) a defendant in prepetition litigation commenced by the Debtors (Harmony Hills Behavioral Health, LLC) that filed a proof of claim which is the subject of a pending objection (*see* ECF No. 469), (ii) duplicate ballots for an entity which could be the target of a Cause of Action to be initiated by the Liquidating Trustee (3030 Harbor LLC) and that filed a proof of claim which is the subject of a pending objection (*see* ECF No. 455), and (iii) a current, general unsecured creditor of the Debtors (Banning Real Estate LLC).

[21] The seventh *Dow Corning* consideration is whether the bankruptcy court made a record of specific factual findings that supports its conclusions. *Seaside Engineering*, 780 F.3d at 1079.

affiliates, predecessors, certain current and former managers and officers). Each of these persons and entities confronted novel challenges and faced unique risks, as they worked to negotiate the GUC Distribution Framework, the sale process and the beginning of the Debtors' liquidation on an expedited basis. *See* Phillips Declaration, ¶ 33. To take one example, this category of Released Parties devoted substantial amounts of time working on marketing and preparing the Debtors for a sale within a few weeks of the Petition Date as well as engaging in and facilitating negotiations and decisions on behalf of the Debtors which resulted in the GUC Distribution Framework. *See* Phillips Declaration, ¶ 33. Such services were necessary for the Debtors to conduct their Chapter 11 Cases and be in the position to propose the Plan for creditor approval and confirmation within approximately three months of the Petition Date. *See* Phillips Declaration, ¶ 33. In addition, this set of Released Parties worked under truly extraordinarily tight timeframes to fulfill all of the other obligations of the Debtors under the Bankruptcy Code, Bankruptcy Rules, Local Rules of this Court and various orders entered by the Court. *See* Phillips Declaration, ¶ 33.

49. The second category of Released Parties is comprised of the Prepetition Lenders (*i.e.,* the Senior Credit Agreement Lenders and the HoldCo Credit Agreement Lenders), the Prepetition Agent (*i.e.*, the agent for the Prepetition Lenders), the DIP Lenders, the DIP Agent, and the parties related to this set of Released Parties. The DIP Lenders will have provided $13 million of funding during the Chapter 11 Cases that has been critical in permitting the Debtors to undertake their bankruptcy cases and have sufficient liquidity to operate their business between the Petition Date and the expected sale closing in late May, and ultimately confirm the Plan. *See* Phillips Declaration, ¶ 34. Significantly, the Senior Credit Agreement Lenders (the lenders under the prepetition secured lending arrangement) and the DIP Lenders are providing carve-outs from, as applicable, the Prepetition Collateral and DIP Collateral under the terms of the GUC

Distribution Framework which will provide an initial distribution totaling $250,000 to the holders of General Unsecured Claims (Class 6), an initial funding of the Liquidating Trust in the amount of $250,000, as well as through the Recovery Waterfall which will provide potential distributions, subject to a cap of twenty (20%) percent, to the holders of Allowed General Unsecured Claims (Class 6) prior to the claims of the Prepetition Lenders and the DIP Lenders having an opportunity to be satisfied in full. *See* Phillips Declaration, ¶ 34. In addition, the HoldCo Credit Agreement Lenders (Class 5), which are collectively owed in excess of $16.11 million, have consensually agreed to the GUC Distribution Framework, through both negotiations over the Plan and the universal acceptance of the Plan by that Class, which includes the subordination of any right to any distribution under the Recovery Waterfall to creditors in Class 5 in favor of creditors in Class 6, and will likely result in effectively no distribution at all to Class 5.

50. The third category of Released Parties is comprised of the Buyer, and parties related to the Buyer. The Buyer has been instrumental with respect to the expected preservation of the remaining business owned by the Debtors which is expected to be sold to the Buyer in the sale which the Debtors anticipate will close in late May. *See* Phillips Declaration, ¶ 35. Through the actions of the Buyer and after the sale closing, the Debtors' former businesses in New Jersey and Massachusetts will continue to operate, to employ over 100 of the Debtors' former employees, to buy products and services from the vendors that did business with the Debtors, and to provide important substance use disorder and mental health services to the community. *See* Phillips Declaration, ¶ 35. Through the sale approved by the Court, the Buyer will assume meaningful amounts of the financial obligations of the Debtors (*e.g.*, the assumption and assignment of Assumed Contracts from the Debtors to the Buyer), thereby reducing the potential universe of Claims in these Chapter 11 Cases which has afforded a material distribution to the holders of

Allowed General Unsecured Claims in Class 6. *See* Phillips Declaration, ¶ 35.

51. In light of the substantial contributions made by the Released Parties to the achievement of selling the Debtors' business, negotiating a GUC Distribution Framework and the terms of the Plan which has been supported by virtually all of the creditors through their Ballots—***all done within a 98-day period from the Petition Date to the Confirmation Date***—and the limited nature of the Third-Party Releases, the Debtors submit that approving such releases provided in Article XII.I is both appropriate and warranted.

52. Significantly, the Third-Party Releases are, just like the Debtor Release, subject to significant carve-outs. The Third-Party Releases do not apply to any claims against any Released Party resulting from acts described in Articles XII.I and M of the Plan, including: (i) acts or omissions determined by a final order of a court to have constituted fraud, willful misconduct or gross negligence (Art. XII.I); (ii) fraud, malpractice, criminal conduct, intentional unauthorized use of confidential information that causes damages, or *ultra vires* acts (Art. XII.M); and (iii) acts subject to Rule 4-1.8(h) of the Florida Rules of Professional Conduct ("Limiting Liability for Malpractice") (Art. XII.M). Accordingly, the Debtors submit that the Third-Party Releases should be approved.

53. Moreover, courts located in this District and elsewhere in the Eleventh Circuit have approved releases of non-debtors in certain factual situations, such as where the releases are necessary or fair or when unusual circumstances exist. *See, e.g., Celebrity Resorts*, 2010 WL 5392657, at *7 (granting non-debtor, third-party due to unusual circumstances); *Mercedes Homes*, 431 B.R. at 878 (granting third-party, non-debtor releases as necessary and fair); *Friedman's*, 356 B.R. at 761-762 (approving non-debtor, third-party releases under the necessary and fair criteria); *In re Adinath Corp*., Case No. 15-16885-LMI (Bankr. S.D. Fla. June 28, 2016; ECF No. 967; order

confirming liquidating plan); *In re Maguire Group Holdings, Inc.*, Case No. 11-39347-BKC-RAM (Bankr. S.D. Fla. July 25, 2012; ECF No. 701; order confirming plan); *In re Finlay Enterprises, Inc.*, Case No. 09-14873 (JMP) (Bankr. S.D.N.Y. June 29, 2010) (ECF No. 715 (order confirming liquidating plan grants third-party releases same)). For the reasons set forth herein, the Debtors submit that these Chapter 11 Cases reflect unusual circumstances and the Third-Party Releases are entirely fair.

54. In sum, the Third-Party Releases are integral and essential to the Plan and were an express requirement of the restructuring consideration which the Released Parties would not have otherwise provided but for the releases. Without the compromises that have been made possible by the Plan and the Released Parties' contributions in connection therewith, the Debtors would not be in a position to effectuate a chapter 11 liquidation that maximizes value for all stakeholders. Accordingly, the Debtors submit that the Third-Party Releases are unquestionably in the best interests of the Debtors' Estates and should be approved by the Court.

3. The Exculpation Provision Should be Approved.

55. As is common in chapter 11 plans, the Plan includes an exculpation provision (the "**Exculpation Provision**"), which is limited to claims against the Exculpated Parties[22], each of which played a critical role in these Chapter 11 Cases, including the negotiation and formulation

[22] As defined Art. I.A.48 in the Plan, "Exculpated Party" means "*collectively, each in their capacities as such: (i) the Debtors; (ii) the Estates; (iii) the Prepetition Lenders; (iv) the Prepetition Agent; (v) the DIP Lenders; (vi) the DIP Agent; (vii) the Buyer; (viii) the Liquidating Trustee (solely with respect to the period prior to the Effective Date); (ix) with respect to each of the foregoing Persons in clauses "(i)" through "(viii)", such Persons' respective predecessors, successors, assigns, direct and indirect subsidiaries, and affiliates; (x) with respect to each of the foregoing Persons in clauses "(i)" through "(ix)", such Persons' current and former officers, directors, principals, shareholders, members, partners, managers, employees, agents, financial advisors, attorneys, Interim Chief Executive Officer, interim officers, accountants, investment bankers, investment managers, investment advisors, consultants, representatives, and other professionals, and such Person's respective heirs, executors, estates, and nominees, in each case in their capacity as such and whether currently serving or having previously served postpetition; and (xi) any other Person entitled to the protections of section 1125(e) of the Bankruptcy Code; provided however that notwithstanding anything in this Plan to the contrary, each of the Insider Avoidance Actions Targets, in any capacity, shall not be an Exculpated Party."* (the underlined language is also bolded in the original).

of the Plan and the GUC Distribution Framework, including, among other things, preparing and filing the Chapter 11 Cases, and leading and administering the Chapter 11 Cases themselves, the DIP lending arrangement, the sale of the Debtors' remaining operating facilities in Massachusetts and New Jersey, the Disclosure Statement, and the Plan, including the solicitation, confirmation, consummation, and administration thereof. The limited Exculpation Provision is supported by the facts and applicable law and should be approved by the Court. No objections have been filed to the Exculpation Provision.

56. Exculpation provisions similar to the Exculpation Provision in the Plan are appropriate where the exculpated parties have acted in good faith in the case to obtain resolution of the issues and to propose a plan that provides the most value to a debtor's creditors. *See*, *e.g., In re Worldcom, Inc.*, Case No. 02-13533(AJG), 2003 WL 23861928, at *28 (Bankr. S.D.N.Y. Oct. 31, 2003); *see also Nilhan Developers, LLC* v. *Ronald Glass as Trustee (In re Nilhan Developers, LLC)*, 631 B.R. 507, 532-534 (Bankr. N.D. Ga 2021) (approving the inclusion of exculpation provisions in plans). In *Winn-Dixie*, the bankruptcy court approved an exculpation clause in a plan similar to the Exculpation Clause in the Plan where (i) the exculpated parties made significant contributions to the bankruptcy cases and expected the exculpation clause to be included in the plan, (ii) the exculpation resulted from good faith plan negotiations, (iii) the plan was overwhelming accepted by creditors, and (iv) the exculpation carved-out fraud. *Winn-Dixie Stores*, 356 B.R. at 261.[23]

57. Here, the Debtors propose to exculpate only the Exculpated Parties, all of whom have played a critical role in achieving a consensual plan of liquidation, as set forth above. The

[23] The exculpation provision approved by the court in *Winn-Dixie* is found in the *Joint Plan of Reorganization of Winn-Dixie Stores, Inc. and Affiliated Debtors*, Case No. 05-03817-3F1, ECF No. 10058, § 12.15 ("Exculpation and Limitation of Liability").

Exculpation Provision is an integral piece of the Plan and is the product of good-faith, arms-length negotiations, which were made possible only through significant contributions by the Exculpated Parties prior to and during the Chapter 11 Cases. *See* Phillips Declaration, ¶ 40. The Exculpated Parties have participated in these Chapter 11 Cases in good faith and with the expectation that the Plan would include the Exculpation Provision to protect those parties who have contributed to the Debtors' liquidation from collateral attacks related to any good faith acts or omissions related to the Debtors' liquidation. *See* Phillips Declaration, ¶ 40.

58. Similar to the Plan Releases, the Exculpation Provision is narrow in scope and subject to significant carve-outs. The Exculpation Provision does not apply to any claims against any Exculpated Parties resulting from acts described in Articles XII.J and M of the Plan, including: (i) acts or omissions determined by a final order of a court to have constituted fraud, willful misconduct or gross negligence (Art. XII.I); (ii) fraud, malpractice, criminal conduct, intentional unauthorized use of confidential information that causes damages, or *ultra vires* acts (Art. XII.M); and (iii) acts subject to Rule 4-1.8(h) of the Florida Rules of Professional Conduct ("Limiting Liability for Malpractice") (Art. XII.M). Accordingly, the Debtors submit that the Exculpation Provision should be approved.

59. The Exculpation Provision also should be approved under the standard established by several courts located in the Eleventh Circuit. Courts in this District have approved exculpation provisions where they did not exclude liability for fraud, gross negligence or willful misconduct. *See, e.g., In re Adinath Corp*., Case No. 15-16885-LMI (Bankr. S.D. Fla. June 28, 2016; ECF No. 967; order confirming liquidating plan); *In re Maguire Group Holdings, Inc.*, Case No. 11-39347-BKC-RAM (Bankr. S.D. Fla. July 25, 2012; ECF No. 701; order confirming plan). Due to the fact that the Exculpation Provision in the Plan is limited to acts arising out of the Chapter 11 Cases and

includes a carve-out for claims arising from, among other things, gross negligence or willful misconduct, the provision complies with applicable law.

60. In sum, the Exculpation Provision is consistent with the Bankruptcy Code and complies with applicable case law. As such, the Exculpation Provision should be approved by the Court.

III. THE PLAN SATISFIES EACH REQUIREMENT FOR CONFIRMATION

61. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See, e.g., Liberty Nat'l Enterprises* v. *Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. Partnership)*, 115 F.3d 650, 653 (9th Cir. 1997); *Heartland Federal Savings & Loan Ass'n* v. *Briscoe Enter., Ltd. II (In re Briscoe Enter., Ltd., II)*, 994 F.2d 1160, 1165 (5th Cir. 1993); *In re Paige*, 439 B.R. 786, 792 (D. Utah), *aff'd*, 685 F.3d 1160 (10th Cir. 2012); *In re DiMaria*, 202 B.R. 634, 638 (Bankr. S.D. Fla. 1996) (Ray, J.) (to confirm a plan under section 1129 of the Bankruptcy Code "[i]n order for a [p]lan to be confirmed in a Chapter 11 case…it now appears fairly well established that the burden of proof is by a preponderance of the evidence"); *In re SM 104 Ltd*., 160 B.R. 202, 214 (Bankr. S.D. Fla. 1993) (*citing Grogan* v. *Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)) ("It is the Debtor's burden to prove each of the requirements of confirmation by a preponderance of the evidence");[24] *but see In re New Midland Plaza Associates*, 247 B.R. 877, 883 (Bankr. S.D. Fla. 2000) (confirming amended plan of reorganizing

[24] Courts throughout the Eleventh Circuit apply the preponderance of the evidence standard to plan confirmation. *See e.g., In re Walden Palms Condominium Assoc, Inc.*, 625 B.R. 543, 548 (Bankr. M.D. Fla. 2020); *In re Aspen Village at Lost Mountain Assisted Living, LLC*, 609 B.R. 555, 563 (Bankr. N.D. Ga. 2019); *In re Monticello Realty Investments, LLC*, 526 B.R. 902, 912 (Bankr. M.D. Fla. 2015); *In re Rosewood at Providence, LLC*, 470 B.R. 619, 627-628 (Bankr. M.D. Ga. 2011); *In re BBL Group, Inc*., 205 B.R. 625, 633 (Bankr. N.D. Ala. 1996); *Fleet Finance, Inc.* v. *Bostic and Baxter (In re Bostic)*, Case No. 95-10205, 1995 WL 17005376, at *3 (Bankr. S.D. Ga. Aug. 31, 1995); *In re Investors Florida Aggressive Growth Fund, Ltd*., 168 B.R. 760, 765 (Bankr. N.D. Fla. 1994).

under the clear and convincing evidence standard); *In re Miami Center Associates, Ltd.*, 144 B.R. 937, 940 (Bankr. S.D. Fla. 1992) (requiring debtor to show by clear and convincing evidence that a plan is fair and equitable). Preponderance of the evidence "means that is more likely than not". *Briscoe Enter.*, 994 F.2d at 1164. Through filings with the Court and any evidence that may be proffered or adduced at the Confirmation Hearing to be held before the Court on May 15, 2023, or at such later date as the Court may determine, the Debtors will demonstrate, by a preponderance of the evidence, that the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code. Each such requirement is addressed individually herein. As a result, the Plan should be confirmed.

A. The Plan Complies with the Applicable Provisions of the Bankruptcy Code as Required by Section 1129(a)(1) of the Bankruptcy Code.

62. Section 1129 of the Bankruptcy Code sets forth a number of requirements that must be satisfied for a plan to be confirmed. Under section 1129(a)(1) of the Bankruptcy Code, a plan must comply with all applicable provisions of Bankruptcy Code. 11 U.S.C. § 1129(a)(1). "The phrase 'applicable provisions' has been interpreted to include sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and interests and the contents of a chapter 11 plan." *See In re Aegerion Pharmaceuticals*, 605 B.R. 22, 30 (Bankr. S.D.N.Y. 2019) (citing H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978)); *see also In re Falcon Air Express, Inc.*, No. 06-11877-BKC-AJC, 2007 WL 1376286, at *3 (Bankr. S.D. Fla. Mar. 8, 2007) (confirming plan, in part, because it "complies with each of the applicable provisions of the Bankruptcy Code, including without limitation the provisions of 11 U.S.C. §§ 1122 and 1123"). As demonstrated below, the Plan fully complies with all requirements of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code.

1. The Plan Satisfies the Classification Requirements of Section 1122(a) of the Bankruptcy Code.

63. Section 1122(a) of the Bankruptcy Code provides as follows:

> 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 in such class.

11 U.S.C. § 1122(a). Substantial similarity does not require that claims or interests in a particular class be identical, or that all similarly situated claims must receive the same plan treatment. Rather, section 1122(a) provides plan proponents with considerable discretion in classifying claims and interests according to the facts and circumstances of each case. *See, e.g., Olympia & York Florida Equity Corp*. v. *Bank of New York (In re Holywell Corp.)*, 913 F.2d 873, 880 (11th Cir. 1990) (plan proponents have considerable, but not unlimited, discretion when classifying claims and interests); *see also In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305, 1321 (7th Cir. 1995) ("[a] debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan"); *In re W.R. Grace & Co.*, 475 B.R. 34, 110 (D. Del. 2012) (citing *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) ("[p]lan proponents and bankruptcy courts have considerably broad discretion in deciding how to classify claims.")).

64. Classification must satisfy "two straight-forward rules: Dissimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason." *In re Quigley Co., Inc*., 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) (quoting *Aetna Cas. & Sur. Co.* v. *Clerk, U.S. Bankr. Court (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996)). Courts have interpreted the "legitimate reason" basis for separately classifying similar claims as a requirement that there exists a valid business reason or rational basis for doing so. *See, e.g., In re Coastal Broadcasting Sys., Inc.*, 570 Fed. Appx. 188, 193 (3d Cir. 2014) (citing *Jersey City Med. Ctr.*, 817 F.2d at 1061) ("'grouping of similar claims in different classes' is permitted so long as

the classification is 'reasonable'"); *In re Sabine Oil & Gas Corp*., 555 B.R. 180, 310-311 (Bankr. S.D.N.Y. 2016) ("[c]ourts generally will approve placement of similar claims in different classes provided there is a "rational" or "reasonable" basis for doing so" and approving classification framework because "a valid business, factual, and/or legal reason exists for separately classifying the various classes of claims and interests created under the [p]lan"); *In re Idearc Inc*., 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009) ("[d]ecisions interpreting section 1122(a) generally uphold separate classification of different groups of unsecured claims when a reasonable basis exists for the classification"); *In re Main Line Corp.*, 335 B.R. 476, 479 (Bankr. S.D. Fla. 2005) (noting that separate classification of similar claims is permissible if supported by a legitimate business reason); *In re SunCruz Casinos, LLC*, 298 B.R. 833, 837 (Bankr. S.D. Fla. 2003) (same). In brief, separate classification of substantially similar claims is generally allowed, so long as a reasonable justification for separate classification exists and the classification is not for an improper purpose. *See Aetna Cas. & Sur. Co.* v. *Chateaugay Corp. (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996); *Holywell*, 913 F.2d at 880; *Winn-Dixie Stores*, 356 B.R. at 253.

65. Here, the Plan appropriately classifies Claims and Interests in the following nine Classes:

Class	Designation	Treatment	Entitled to Vote?
1	Other Secured Claims	Unimpaired	No; Deemed to Accept the Plan
2	Other Priority Claims	Unimpaired	No; Deemed to Accept the Plan
3	Protective Advance Secured Claims	Impaired	Yes; Entitled to Vote
4	Senior Credit Agreement Term Loan Secured Claims	Impaired	Yes; Entitled to Vote

Class	Designation	Treatment	Entitled to Vote?
5	HoldCo Credit Agreement Term Loan Unsecured Claims	Impaired	Yes; Entitled To Vote
6	General Unsecured Claims	Impaired	Yes; Entitled To Vote
7	Intercompany Claims	Impaired	No; As Plan Proponents, deemed to accept the Plan
8	Other Subordinated Claims	Impaired and No Distribution	No; Deemed To Reject the Plan
9	Existing Equity Interests	Impaired	No; Deemed To Reject the Plan

66. In determining whether claims are "substantially similar", courts have identified a number of independent, reasonable bases, including the unique underling "legal character of the claim as it relates to the assets of the debtor." *In re W.R. Grace & Co.*, 729 F.3d 311, 326 (3d Cir. 2013) (quoting *In re AOV Indus., Inc.*, 792 F.2d 1140, 1150 (D.C. Cir. 1986)) (citing cases); *In re Johnson*, 21 F.3d 323, 328 (9th Cir. 1994); *Phoenix Mut. Life Ins. Co*. v. *Greystone III Joint Venture (In re Greystone III)*, 995 F.2d 1274, 1278 (5th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S. Ct. 72, 121 L.Ed.2d 37 (1992); *In re Global Travel International, Inc.*, Case No. 6:22-bk-438-TPG, 2022 WL 4690426, at *5 (Bankr. M.D. Fla. Sept. 30, 2022) (Subchapter V case). With respect to the voting Classes, the Claims in each of Classes 3, 4, 5 and 6 hold different legal rights as against the assets of the Debtors, as briefly summarized in the following table:[25]

[25] The Debtors have not included in the chart the Classes that are deemed (i) to accept the Plan (*i.e.*, Class 1 (Other Secured Claims), Class 2 (Other Priority Claims) and Class 7 (Intercompany Claims)), or (ii) to reject the Plan (*i.e.*, Class 8 (Subordinated Claims) and Class 9 (Existing Equity Interests)). If requested by the Court, the Debtors are prepared to justify the rationale of separately classifying these Claims and Interests.

Class	Rationale for Separate Classification
Class 3 Protective Advance Secured Claims	• Secured Claims held by a sub-group of the Senior Credit Agreement Lenders • Subject to separate debt documents (*i.e.*, the Senior Credit Agreement Loan Documents) governing rights and obligations of the Senior Credit Agreement Lenders • Hold liens on substantially all of the Debtors' assets subject to security documents • Repayment right contractually superior under the Senior Credit Agreement Loan Documents to any payment on (i) Senior Credit Agreement Term Loan Secured Claims (Class 4), (ii) HoldCo Credit Agreement Term Loan Unsecured Claims (Class 5), and (iii) General Unsecured Creditors (Class 6)
Class 4 Senior Credit Agreement Term Loan Secured Claims	• Secured Claims held by the Senior Credit Agreement Lenders • Subject to separate debt documents (*i.e.*, the Senior Credit Agreement Loan Documents) governing rights and obligations of the Senior Credit Agreement Lenders • Hold liens on substantially all of the Debtors' assets subject to security documents • Repayment right contractually subordinated under the Senior Credit Agreement Loan Documents to the payment in full of the Protective Advance Secured Claims (Class 3) • Repayment right contractually superior under the Senior Credit Agreement Loan Documents to any payment on (i) HoldCo Credit Agreement Term Loan Unsecured Claims (Class 5) and (ii) General Unsecured Claims (Class 6)
Class 5 HoldCo Credit Agreement Term Loan Unsecured Claims	• Unsecured loans held by HoldCo Credit Agreement Lenders • Subject to separate debt documents (*i.e.*, the HoldCo Credit Agreement Loan Documents) governing rights and obligations of the HoldCo Credit Agreement Lenders • Repayment right contractually subordinated under the Senior Credit Agreement Loan Documents and the HoldCo Credit Agreement Loan Documents to the payment in full of the Protective Advance Secured Claims (Class 3) and the Senior Credit Agreement Term Loan Secured Claims (Class 4)

Class	Rationale for Separate Classification
Class 6 General Unsecured Claims	• Trade creditors • Rejection damage claims with respect to Executory Contracts rejected during the Chapter 11 Cases (*e.g.*, leases of non-residential real property) or not assumed and assigned to the Buyer in the sale

67. Because the holders of the Claims in each of the four Impaired voting Classes generally possess different sets of legal rights with respect to the Debtors' assets, it is entirely reasonable for the Debtors to separately classify each of the creditors in Classes 3, 4, 5, and 6 of the Plan.

68. In sum, the Plan's classification scheme comfortably satisfies the requirements of section 1122. The Plan provides for the separate classification of Claims against and Interests in the Debtors based upon the differences in the priority of distribution and/or legal rights of such Claims and Interests. All Claims and Interests within each Class have the same or similar rights against the Debtors. *See* Phillips Declaration, ¶ 22. Accordingly, the Debtors respectfully submit that the classification framework reflected in the Plan complies with section 1122 of the Bankruptcy Code and should be approved by the Court.[26]

2. The Plan Complies with Section 1123 of the Bankruptcy Code.

69. Section 1123 of the Bankruptcy Code sets forth both mandatory and optional provisions that a chapter 11 plan must and may include. As set forth below, the Plan: (a) satisfies each of the mandatory requirements of section 1123(a) of the Bankruptcy Code; (b) includes several of the optional provisions permitted under section 1123(b) of the Bankruptcy Code; and

[26] Section 1122(b) of the Bankruptcy Code is an elective, not mandatory, provision allowing the designation of a class of *de minimis* claims for administrative convenience. The Plan does not include a *de minimis* convenience class of claims. Therefore, section 1122(b) of the Bankruptcy Code is inapplicable.

(c) includes other provisions not inconsistent with other applicable provisions of the Bankruptcy Code within the meaning of section 1123(b)(6) of the Bankruptcy Code.

(a) *The Plan Satisfies the Mandatory Provisions of Section 1123(a) of the Bankruptcy Code.*

70. Section 1123(a) of the Bankruptcy Code sets forth seven applicable requirements which the proponent of a chapter 11 plan must satisfy.[27] 11 U.S.C. § 1123(a). The Plan satisfies each of these requirements.

71. ***Specification of Classes, Impairment, and Treatment***. The first three requirements of section 1123(a) are that a plan specify: (a) the classification of claims and interests; (b) whether such claims and interests are impaired or unimpaired; and (c) the precise nature of their treatment under the plan. 11 U.S.C. § 1123(a)(1)-(3). The Plan properly designates Classes of Claims and Interests, identifies which Classes are Impaired and Unimpaired, and specifies the treatment of each Class. *See* Plan, Arts. III and IV.

72. ***Equal Treatment***. Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The Plan satisfies this requirement because the holders of Allowed Claims or Interests will receive the same rights and treatment as other holders of Allowed Claims or Interests within each such holders' respective class. *See* Plan, Art. IV.

73. ***Means for Implementation.*** Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation. 11 U.S.C. § 1123(a)(5); *see In re Stuart Glass & Mirror, Inc.*, 71 B.R. 332, 334 (Bankr. S.D. Fla. 1987) (stating that the proper test

[27] 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 and is not applicable to these Chapter 11 Cases.

is whether the plan provides adequate means for its execution, as required by section 1123(a)(5) of the Bankruptcy Code, not whether alternative means might or might not be available). The Plan satisfies this requirement by providing for, among other things, the following:

- the sources for distributions under the Plan; *see* Plan, Art. I.A.56, 90 and 121; Art. X;
- the provisions governing distributions under the Plan; *see* Plan, Art. VII;
- the creation of the Liquidating Trust and the vesting of the Winddown Assets in the Liquidating Trust; *see* Plan, Art. X;
- the appointment of the Liquidating Trustee; *see* Plan, Art. X;
- the provisions governing the post-Effective Date winding down of the Debtors; *see* Plan, Art. VI;
- the procedures for disputed Claims; *see* Plan, Art. VIII; and
- the rejection or assumption of any remaining Executory Contracts; *see* Plan, Art. IX.

74. ***Non-Voting Stock***. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of nonvoting equity securities. 11 U.S.C. § 1123(a)(6). As a liquidating plan, the Plan does not provide for the issuance of non-voting equity securities, and therefore, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

75. ***Selection of Officers and Directors.*** Section 1123(a)(7) of the Bankruptcy Code requires that the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123(a)(7). The Plan satisfies section 1129(a)(7) because:

- as reflected in the Initial Plan Supplement, the Debtors have provided the proposed Liquidating Trust Agreement;

- as reflected in the Second Plan Supplement, the Debtors have disclosed that Joseph J. Luzinski has been proposed to serve as the Liquidating Trustee; and

- as set for in Article VI.B of the Plan ("Post-Effective Date Governance of the Debtors"), effective as of immediately prior to the Effective Date, automatically and without further action, each existing member of the board of managers of the Debtors will be deemed to have resigned or will be deemed to have been terminated. On and after the Effective Date, but subject to the terms of the Liquidating Trustee Agreement, (a) the Liquidating Trustee, in substitution for the management and the board of managers of the Debtors, shall be authorized and empowered, without action of the Debtors' respective members, or boards of managers, or managers (if any), to take any and all such actions as the Liquidating Trustee may determine are necessary or appropriate in the Liquidating Trustee's business judgment to implement, effectuate, consummate and perform any and all actions, documents, or transactions contemplated by the Plan or the Confirmation Order as reasonably required to implement the Plan and the wind up the Debtors, and (b) the Liquidating Trustee shall act for the Debtors in the same fiduciary capacity as applicable to the board of managers of the Debtors existing immediately prior to the Effective Date. Prior to the Effective Date, one or more of the Debtors may provide the Liquidating Trustee with one or more Debtor's Power of Attorney. On and after the Effective Date, the Liquidating Trustee shall elect such additional managers and officers, in consultation with the DIP Agent and the Senior Credit Agreement Agent, as the Liquidating Trustee deems necessary to implement the Plan and the actions contemplated in the Plan. The Liquidating Trustee shall also have the power, in consultation with the DIP Agent and the Senior Credit Agreement Agent, to act by written consent to remove any managers or officer at any time with or without cause.

76. Accordingly, the Plan contains all of the provisions required by section 1123(a) of the Bankruptcy Code.

(b) *The Plan Satisfies the Discretionary Provisions of Section 1123(b) of the Bankruptcy Code.*

77. Section 1123(b) of the Bankruptcy Code sets forth permissive provisions that may be incorporated into a chapter 11 plan. 11 U.S.C. § 1123(b). Each provision of the Plan is consistent with section 1123(b):[28]

[28] The Plan does not provide for the sale, transfer, or assignment of all or substantially all of the Debtors' property and, therefore, section 1123(b)(4) of the Bankruptcy Code is not applicable to these Chapter 11 Cases.

- as contemplated by section 1123(b)(1) of the Bankruptcy Code and pursuant to section 1124 of the Bankruptcy Code, Articles III and IV classify and describe the treatment for Claims and Interests under the Plan, and identify which Claims and Interests are Impaired or Unimpaired;

- as permitted under section 1123(b)(2) of the Bankruptcy Code, Article IX provides for the rejection of executory contracts and unexpired leases that have not been previously assumed or rejected under section 365 of the Bankruptcy Code, unless expressly otherwise provided in the Plan; *see* Plan, Article IX;

- pursuant to section 1123(b)(3)(A) and (B) of the Bankruptcy Code, the Plan (a) is premised on the GUC Distribution Framework negotiated by and among the Debtors, the DIP Lender, Senior Credit Agreement Lenders, and the HoldCo Credit Agreement Lenders, and (b) provides that, unless expressly released in Article XII, all of the Debtors' Causes of Action will vest in the Liquidating Trust which will retain, and may enforce, prosecute or settle all such Causes of Action; *see* Plan, Articles V.F and X and Exhibit B; and

- as permitted by section 1123(b)(5) of the Bankruptcy Code, Article III modifies the rights of holders of Claims in (i) Class 3 (Protective Advance Secured Claims), (ii) Class 4 (Senior Credit Agreement Term Loan Secured Claims), (iii) Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims), (iv) Class 6 (General Unsecured Claims), Class 7 (Intercompany Claims), Class 8 (Subordinated Claims), and Class 9 (Existing Equity Interests) and leaves Unimpaired the rights of holders of Claims in the remaining Classes (*i.e.*, Class 1 (Other Secured Claims) and Class 2 (Other Priority Claims)).

(c) *The Plan Contains Other Provisions Permitted by Section 1123(b)(6) of the Bankruptcy Code.*

78. In addition to the specified discretionary provisions set forth in subsections (b)(1)-(5) of section 1123 of the Bankruptcy Code, section 1123(b)(6) of the Bankruptcy Code authorizes the inclusion of "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code.]" 11 U.S.C. § 1123(a)(6). As described herein, the Plan includes several such provisions including releases and exculpation provisions. *See* Plan, Arts. XII.H, I and J.; *In re Astria Health*, 623 B.R. 793, 803 (E.D. Wash. 2021) ("nondebtor releases are a feature permissibly included in the plan pursuant to Bankruptcy Code section 1123(b)(6)"); *In re Maremont Corp.*, 601 B.R. 1, 19-20 (Bankr. D. Del. 2019) (noting in confirmation order that the

plan included additional appropriate provisions under section 1123(b)(6), including release and exculpation provisions). As previously discussed herein, the release provisions result from meaningful, good faith and arm's-length negotiations by and among the Debtors and the Released Parties. *See* Phillips Declaration, ¶ 25. Such provisions comply with applicable case law and precedent, are consistent with the Bankruptcy Code in all respects and should be approved as integral components of the Plan.

79. Accordingly, the Plan contains all of the provisions required by section 1123(a) of the Bankruptcy Code.

(d) *The Plan's Cure Process is Appropriate Under Section 1123(d) of the Bankruptcy Code.*

80. Section 1123(d) of the Bankruptcy Code provides that amounts necessary to cure defaults under executory contracts proposed to be assumed shall be "determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). As a liquidating plan, and other than as already approved by the Court as a part of the sale process or in the Second Plan Supplement, or the relief requested in the last section of this Memorandum ("*Assumption & Assignment of Assumed Contracts Prior to the Effective Date of the Plan*"), or any other motion to assume an Executory Contract pending as of the Confirmation Date, the Debtors do not intend to assume and assign any of the Debtors' other remaining Executory Contracts. However, to the extent that the Debtors identify prior to the Confirmation Date additional Executory Contracts that the Debtors may assume and assign to one of more third parties, Article IX.B of the Plan provides for the satisfaction of cure Claims associated with each Executory Contract or Unexpired Lease to be assumed in accordance with section 365(b)(1) of the Bankruptcy Code. *See* 11 U.S.C. § 365(b)(1). Specifically, the Debtors or the Liquidating Trustee, as applicable, shall pay any cure amount on, as applicable, the Effective Date, or if a dispute arises

between any of the Debtors and the non-debtor party over the proposed assumption, per the terms of a Final Order of the Court resolving the dispute and approving the assumption and assignment. *See* Plan Art. IX.B. As such, the Plan provides that the Debtors will cure, or provide adequate assurance that the Debtors will promptly cure, defaults with respect to assumed Executory Contracts in compliance with section 365(b)(1) of the Bankruptcy Code, and therefore, the Plan complies with section 1123(d) of the Bankruptcy Code.

81. Based upon the foregoing, the Plan complies fully with sections 1122 and 1123, and therefore satisfies the requirements of section 1129(a)(1) of the Bankruptcy Code.

B. <u>The Plan Satisfies Section 1129(a)(2) of the Code</u>.

82. Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent must comply with the disclosure and voting requirements of sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 412 ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *In re Rosewood at Providence, LLC*, 470 B.R. 619, 629 (Bankr. M.D. Ga. 2011). As discussed herein, and in the Epiq Declaration and the Plan Proponents' Report, the Debtors have satisfied the requirement of section 1129(a)(2) of the Bankruptcy Code.

1. The Debtors Provided Adequate Information About the Plan to Stakeholders as Required Under Section 1125 of the Bankruptcy Code.

83. Section 1125 of the Bankruptcy Code governs the requirements for a disclosure statement that is to be issued to classes of claims and interests entitled to vote on a chapter 11 plan and provides in pertinent part:

> (b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written

> disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .

11 U.S.C. § 1125(b). Section 1125 ensures that parties-in-interest have sufficient information in order to make an informed decision on whether or not to accept the plan. *See In re America-CV Station Group, Inc*., 56 F.4th 1302, 1309 (11th Cir. 2023).

84. By entering the Disclosure Statement Order, the Court approved the Disclosure Statement and the Solicitation Packages as containing "adequate information" pursuant to section 1125(b) of the Bankruptcy Code. On April 3, 2023, the Debtors commenced their solicitation of votes to accept the Plan [ECF No. 395]. Concurrently with the filing of this Memorandum, the Debtors are filing the Epiq Declaration which reflects, among other things, that Epiq solicited the votes in accordance with the Disclosure Statement Order. The Debtors did not solicit acceptances of the Plan from any holder of Claim or Interest prior to the transmission of the Disclosure Statement, thereby complying with section 1125(b) of the Bankruptcy Code. *See* Epiq Declaration; Phillips Declaration, ¶ 43. By distributing the Disclosure Statement and soliciting acceptances of the Plan through Epiq in accordance with the Disclosure Statement Order, the Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code, as well as Bankruptcy Rules 3017 and 3018.

2. The Debtors Only Solicited Parties Entitled to Vote Under Section 1126 of the Bankruptcy Code.

85. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan….
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

> (g) Notwithstanding 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(a), (f), (g).

86. As set forth in the Disclosure Statement and the Epiq Declaration, the Debtors solicited acceptances of the Plan from the holders of all Claims in the following four Impaired Classes entitled to vote on the Plan: (i) Class 3 (Protective Advance Secured Claims); (ii) Class 4 (Senior Credit Agreement Term Loan Secured Claims); (iii) Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims); and (iv) Class 6 (General Unsecured Claims). The Debtors did not solicit votes to accept or reject the Plan from the following five remaining Classes:

- Unimpaired Claims (Classes 1 and 2): The Plan includes two Unimpaired Classes that are conclusively presumed to accept the Plan, including: (i) Class 1 (Other Secured Claims) and Class 2 (Other Priority Claims);[29]

- Intercompany Claims (Class 7): Intercompany Claims includes potential claims of one Debtor against another Debtor, and given the fact that the Debtors are the proponents of the Plan, Class 7 is deemed to accept the Plan;

- Subordinated Claims (Class 8): The Class of Subordinated Claims will receive no distributions and is deemed to reject the Plan under section 1126(g) of the Bankruptcy Code and is not entitled to vote on the Plan;[30] and

- Existing Equity Interests (Class 9): The Class of Existing Equity Interests is and Impaired Class of Interests in the Debtors and are unlikely to receive any distributions, and so the Class is deemed to have rejected the Plan.

[29] The Debtors' records reflect that there are no Claims in Class 1 and only $6,200 in Claims in Class 2. *See* Liquidation Analysis.

[30] The Debtors' records reflect that there are no Claims in Class 8. Pursuant to Article III.E of the Plan ("Elimination of Vacant Classes"), Class 8 is vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. *See* Liquidation Analysis; Plan, Art. III.E.

87. Section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired classes entitled to vote to accept or reject a plan:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

As evidenced by the Epiq Declaration and the Plan Proponents' Report, holders of Claims in Classes 3, 4, 5, and 6 against the Debtors, in excess of two-thirds in amount and one-half in number of those who timely voted to accept or reject the Plan in each such Class accepted the Plan. Specifically, as set forth in the Plan Proponents' Report:

- 100% of the creditors in Class 3 (Protective Advance Secured Claims), in number and in dollar amount, voted to accept the Plan (as this Class is composed solely of Insiders, the Debtors are not counting it for purposes of satisfying the voting requirements of the Bankruptcy Code);
- 100% of the creditors in Class 4 (Senior Credit Agreement Term Loan Secured Claims), in number and dollar amount, voted to accept the Plan;[31]
- 100% of the creditors in Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims), in number and dollar amount, voted to accept the Plan; [32] and
- 94% of the creditors in Class 6 (General Unsecured Claims) in number, holding 99.94% of the dollar amount of the Allowed Claims casting Ballots, voted to accept the Plan.

As set forth above, the Debtors did not solicit acceptances from creditors holding claims in Class 8 (Subordinated Claims) as no creditors exist in such class and holders of Interests in Class 9

[31] With respect to Class 4, the Debtors have counted the ballots submitted by affiliates of the four known non-insiders (the amounts of the Allowed Claims are in parentheses): (i) Capital Southwest Corporation ($1,776,350.80); (ii) Stepstone CC Opportunities Fund, LLC-Series A ($1,027,402.00); (iii) SC Co-Investments Private Debt Fund L.P. ($1,310,880.00); and (iv) Swiss Capital Co-Investments Private Debt (Offshore) ($306,418.00).

[32] With respect to Class 5, the Debtors have counted the ballots submitted by affiliates of the four known non-insiders (the amounts of the Allowed Claims are in parentheses): (i) Capital Southwest Corporation ($1,746,432.40); (ii) Stepstone CC Opportunities Fund, LLC-Series A (Class 5 ($1,010,159.00)); (iii) SC Co-Investments Private Debt Fund L.P. ($1,288,880.00); and (iv) Swiss Capital Co-Investments Private Debt (Offshore) ($301,275.00).

(Existing Equity Interests). Nevertheless, as set forth below, and, to the extent applicable, pursuant to section 1129(b) of the Bankruptcy Code, the Plan may be confirmed over the "deemed" rejection of Classes 8[33] and 9 because the Plan does not discriminate unfairly and is fair and equitable with respect to each of these two Classes. Based upon the foregoing, the Debtors submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

C. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law in Compliance with Section 1129(a)(3) of the Bankruptcy Code.

88. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the term "good faith" is left undefined in the Bankruptcy Code, "courts have interpreted 'good faith' as requiring that there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Code." *See In re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995); *In re Holley Garden Apartments, Ltd*., 238 B.R. 488, 492 (Bankr. M.D. Fla. 1999) (stating rule and finding that liquidating plan, in which $60,000 would be made available for proposed distributions to holders of administrative expenses claims, with any surplus not used to pay such claims to be distributed to general unsecured claims, was proposed in good faith). Furthermore, the requirement of good faith must be viewed in light of the totality of the circumstances surrounding the proposal of a chapter 11 plan. *See McCormick*, 49 F.3d at 1526. In addition, section 1129(a)(3) of the Bankruptcy Code "requires only that the plan's proposal, as opposed to the contents of the plan, be in good faith and in compliance with all nonbankruptcy laws." *In re General Dev. Corp.*, 135 B.R. 1002, 1007 (Bankr. S.D. Fla. 1991) (citations omitted).

[33] As stated previously, the Debtors' records reflect that there are no Claims in Class 8. Pursuant to Article III.E of the Plan ("Elimination of Vacant Classes"), Class 8 is vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class.

89. Here, the Debtors proposed the Plan in good faith and solely for the legitimate and beneficial purpose of liquidating the Debtors' remaining assets in an orderly fashion and in an effort to maximize recoveries for creditors. *See* Phillips Declaration, ¶ 46. The Plan, and the related GUC Distribution Framework which forms the basis of the Plan, are the result of extensive arms-length negotiations between and among the Debtors, the DIP Agent, the Senior Credit Agreement Agent, and the HoldCo Credit Agreement Agent. The Debtors believe that each of these parties has acted in good faith. The Plan provides that the holders of Allowed Class 6 Claims (General Unsecured Claims) will receive a substantial initial distribution in Cash from the General Unsecured Claim Cash Recovery ($250,000) with possible additional recoveries from the Liquidating Trustee's pursuit of Causes of Action.

90. Additionally, as evidenced by the universal acceptance of the Plan by Class 3 (Protective Advance Secured Claims), Class 4 (Senior Creditor Agreement Term Loan Secured Claims), and Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims), as well as the near universal acceptance of the Plan by Class 6 (General Unsecured Claims), the Plan accomplishes the goals embodied in the Bankruptcy Code. In particular, the Plan achieves one of the primary objectives underlying a chapter 11 case: the equitable distribution of value to creditors through an efficient liquidation of the Chapter 11 Cases. *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 520 (Bankr. E.D. Mo. 2012) (confirming liquidating plan and stating "an orderly liquidation is a valid use of chapter 11 and one of its chief purposes—to ensure the best return for the unsecured creditors—should be promoted"). Further, the limited releases and exculpation provided in Article XII of the Plan have been agreed to in good faith and represent a valid exercise of the Debtors' business judgment, are fair and reasonable, and in the best interests of the Estates and creditors. Inasmuch as the Plan promotes the objectives and purposes of the Bankruptcy Code, while also

providing for recoveries to creditors, the Plan and the related documents have complied with the requirement of section 1129(a)(3) of the Bankruptcy Code that the Plan be proposed in good faith.

D. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments in Compliance with Section 1129(a)(4) of the Bankruptcy Code.

91. Bankruptcy Code Section 1129(a)(4) requires that "[a]ny payment made or to be made by the proponent, by the debtor . . . 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); *see, e.g., In re Miami Trucolor Offset Service Co.*, 187 B.R. 767, 772 (Bankr. S.D. Fla. 1995) (finding section 1129(a)(4) satisfied because the plan required court approval of professional fees prior to disbursement).

92. Pursuant to the interim compensation procedures established in these Chapter 11 Cases, the Bankruptcy Court has authorized the payment of certain fees and expenses of the Debtors' counsel, subject to approval for reasonableness by the Bankruptcy Court under section 330. *See Order Granting Debtors' Motion for Order Establishing Procedures for Monthly and Interim Compensation and Reimbursement of Expenses for Professionals* [ECF No. 200] (the "**Interim Compensation Order**"). Also, the Disclosure Statement Order and Article II.B of the Plan provides that the Debtors' counsel was required to file with the Bankruptcy Court a final fee application seeking approval of all fees and expenses from the Petition Date through the Confirmation Hearing, and such fee application is subject to review and approval by the Court.[34]

93. On April 18, 2023, the undersigned counsel filed with the Court its first and final fee application seeking, among other relief, an award of compensation and reimbursement of

[34] The Debtors' Interim Chief Executive Officer, who has been retained by the Debtors pursuant to section 105(a) and 363(b) of the Bankruptcy Code, is not required to file a fee application. *See Corrected Final Order Granting Debtors' Application for Approval of Agreement with Getzler Henrich & Associates to Provide the Services of (I) Edward A. Phillips as Interim Chief Executive Officer, and (II) Certain Support Personnel, Effective as of the Petition Date* [ECF No. 205] ("**GHA Retention Order**").

expenses subject to the applicable reasonableness standards set forth in the Bankruptcy Code and relevant case law.[35] *See* ECF No. 401 (the "**Fee Application**"). The undersigned counsel that may receive any such payments awarded by the Court has made substantial contributions to ensure the success of the Plan. Furthermore, the Plan also provides that this Court will retain jurisdiction after the Effective Date of the Plan to hear and determine all applications for allowance of compensation or reimbursement of expenses of professional Fee Claims and any other fees and expenses authorized to be paid or reimbursed under the Plan. *See* Plan, Art. XIII.(h). Accordingly, the Debtors submit that the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

E. The Debtors Have Complied with the Governance Disclosure Requirements in Compliance with Section 1129(a)(5) of the Bankruptcy Code.

94. Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer or voting trustee of the debtor . . . or a successor to the debtor under the plan." 11 U.S.C. § 1129(a)(5)(A)(i). As discussed herein, the Plan is a liquidating plan and a Liquidating Trustee will be appointed to liquidate the Chapter 11 Debtors after the Effective Date through the Liquidating Trust. In the Second Plan Supplement, the Debtors have disclosed that Joseph J. Luzinski of Development Specialists, Inc. will, subject to this Court's approval, be appointed as the Liquidating Trustee.

95. Section 1129(a)(5)(A)(ii) requires that the service of such individuals be "consistent with the interests of creditors and equity security holders and with public policy." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992) (citations omitted). Mr. Luzinski is a highly-respected restructuring professional and he has substantial

[35] As authorized by the Disclosure Statement Order, the undersigned counsel may file one or more supplements to the Fee Application prior to the Confirmation Hearing. *See* Disclosure Statement Order, ¶ 6.

experience in matters of this sort. Mr. Luzinski also has the requisite skill and ability to fulfill his position as the Liquidating Trustee. As such, the Debtors submit that the appointment of Mr. Luzinski as the Liquidating Trustee is in the best interests of creditors and consistent with public policy. *See id*.

96. Also, section 1129(a)(5)(B) of the Bankruptcy Code provides that a court may confirm a plan only if the plan 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). As reflected in Art. VI.B of the Plan, effective as of immediately prior to the Effective Date, automatically and without further action, each existing member of the board of managers of the Debtors will be deemed to have resigned or will be deemed to have been terminated. *See* Plan, Art. VI.B. On and after the Effective Date, but subject to the terms of the Liquidating Trustee Agreement, (a) the Liquidating Trustee, in substitution for the management and the board of managers of the Debtors, shall be authorized and empowered, without action of the Debtors' respective members, or boards of managers, or managers (if any), to take any and all such actions as the Liquidating Trustee may determine are necessary or appropriate in the Liquidating Trustee's business judgment to implement, effectuate, consummate and perform any and all actions, documents, or transactions contemplated by the Plan or the Confirmation Order as reasonably required to implement the Plan and the wind up the Debtors, and (b) the Liquidating Trustee shall act for the Debtors in the same fiduciary capacity as applicable to the board of managers of the Debtors existing immediately prior to the Effective Date. *Id.* Prior to the Effective Date, one or more of the Debtors may provide the Liquidating Trustee with one or more Debtor's Power of Attorney. *Id.* On and after the Effective Date, the Liquidating Trustee shall elect such additional managers and officers, in consultation with the DIP

Agent and the Senior Credit Agreement Agent, as the Liquidating Trustee deems necessary to implement the Plan and the actions contemplated in the Plan and/or the Confirmation Order. *Id.* The Liquidating Trustee shall also have the power, in consultation with the DIP Agent and the Senior Credit Agreement Agent, to act by written consent to remove any managers or officer at any time with or without cause. *Id.*

97. On and after the Effective Date, but subject to the terms of the Liquidating Trust Agreement, Joseph J. Luzinski will serve as the Liquidating Trustee, and his compensation is set forth in the proposed engagement letter that that will be filed by the Debtors prior to the Confirmation Hearing. Based upon the foregoing, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code. *See* Phillips Declaration, ¶ 48. Accordingly, the Debtors submit that the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

F. The Plan Does Not Require Governmental Regulatory Approval of Rate Changes and Therefore Complies with Section 1129(a)(6) of the Bankruptcy Code.

98. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the rates charged by a reorganized debtor approve any rate change in the Plan. The Plan does not provide for any such rate changes by the Debtors, and additionally, the Plan is a liquidating plan, and therefore, section 1129(a)(6) of the Bankruptcy Code does not apply to the Plan.

G. The Plan is in the Best Interests of Creditors and Holders of Interests in Accordance with Section 1129(a)(7) of the Bankruptcy Code.

99. Section 1129(a)(7) of the Bankruptcy Code requires that each individual holder of an impaired claim or equity interest has either accepted the plan or will receive or retain on account of their claim or interest property having, as of the effective date of the plan, a present value of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time. 11 U.S.C. § 1129(a)(7). This is commonly known as the "best

interests" test. The best interests test is satisfied where the estimated recoveries under a proposed plan for a debtor's stakeholders that reject that plan are greater than or equal to the recoveries such stakeholders would receive in a hypothetical chapter 7 liquidation. *Adelphia Commc'ns Corp.*, 368 B.R. at 252 ("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"). Because the best interests test by its terms does not apply to Unimpaired Classes under the Plan, it is not relevant for Class 1 (Other Secured Claims) or Class 2 (Other Priority Claims). Similarly, Class 7 (Intercompany Claims) is comprised of Claims (if any) associated with the proponents of the Plan (*i.e.*, the Debtors), and therefore, is deemed to have accepted the Plan.

100. The "best interests test" requires a determination of what the holders of Allowed Claims and Allowed Interests in each impaired class would receive in a hypothetical liquidation of the Debtors' assets and properties in the context of a liquidation under chapter 7 of the Bankruptcy Code. To determine if the Plan is in the best interests of holders of Allowed Claims and Interests in each Impaired Class, the value of the distributions from the proceeds of the hypothetical liquidation of the Debtors' assets and properties is compared with the value offered to such classes of Claims and Interests under the Plan. Exhibit "2" of the Disclosure Statement contains the liquidation analysis that the Debtors' Interim Chief Executive Officer, along with other advisors of the Debtors, performed in connection with the Plan (the "**Liquidation Analysis**"). As described more fully in the Phillips Declaration, the Debtors carefully completed the Liquidation Analysis after extensive due diligence. *See* Phillips Declaration, ¶ 51. Subject to the assumptions and qualifications contained therein, the Liquidation Analysis establishes that all holders of Claims and Interests in Impaired Classes will receive or retain property under the Plan

valued, as of the Effective Date, in an amount greater than or equal to the value of what they would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code, as illustrated in the following table:

Class	**Claim/Interest**	**Estimated Plan Recovery**	**Estimated Chapter 7 Liquidation Recovery**
3	Protective Advance Secured Claims	19.3%-100%[36]	0%
4	Senior Credit Agreement Term Loan Secured Claims	0%	0%
5	HoldCo Credit Agreement Term Loan Unsecured Claims	0%	0%
6	General Unsecured Claims	2.1%-20%	0%
7	Intercompany Claims (*not a voting class; deemed to accept*)	0%	0%
8	Other Subordinated Claims (*not a voting class; deemed to reject; the Debtors believe there are no creditors in this Class*)	0%	0%
9	Existing Equity Interests (*not a voting class; deemed to reject*)	0%	0%

See Liquidation Analysis; Phillips Declaration, ¶ 55.

101. As demonstrated by the Liquidation Analysis, if the Chapter 11 Cases were converted to cases under chapter 7 of the Bankruptcy Code, the holders of Claims and Interests in the Impaired Classes would receive no recovery. *See* Liquidation Analysis; Phillips Declaration, ¶ 56. This is because distributable value would be insufficient to repay the Debtors' DIP Facility in full. *Id*. As reflected in the Epiq Declaration and the Plan Proponents' Report, all of the holders of Claims entitled to vote on the Plan received the Liquidation Analysis, together with the

[36] As reflected in the Liquidation Analysis, "The (lower) recovery percentage of 19.3% in the Chapter 11 Cases arises from the fact that $5 million (principal) of Protective Advance Secured Claims represent the Credit Bid Amount under the Asset Purchase Agreement [ECF No. 111, § 3.2(a)]".

Disclosure Statement, and were provided ample time to consider the contents thereof. *See* Epiq Declaration and Plan Proponents' Report.

102. Accordingly, the Debtors submit that the Plan fully complies with and satisfies the "best interests test" and all other requirements of section 1129(a)(7) of the Bankruptcy Code.

H. At Least One Impaired Class of Claims Has Accepted the Plan as Required by Section 1129(a)(8) of the Bankruptcy Code.

103. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either have accepted the plan or not be impaired under the plan. A class of claims or interests that is not impaired under a plan is "conclusively presumed" to have accepted the plan and need not be further examined under section 1129(a)(8) of the Bankruptcy Code. *See id.* § 1126(f). As set forth above, Classes 3, 4, 5, and 6 have each voted to accept the Plan. Specifically, well in excess of two-thirds in amount and one-half in number of holders of Claims entitled to vote in such Classes who voted on the Plan voted to accept the Plan. *See* Epiq Declaration and Plan Proponents' Report. However, Class 8[37] (Subordinated Claims) and Class 9 (Existing Equity Interests) are deemed to reject the Plan under section 1126(g) of the Bankruptcy Code because holders of Claims and Interests in these two Classes will not receive or retain any property under the Plan. As such, section 1129(a)(8) of the Bankruptcy Code has not been satisfied with respect to these two Classes. However, the Plan is nevertheless confirmable because, as discussed below, it satisfies section 1129(b) of the Bankruptcy Code with respect to these rejecting classes.

[37] As stated above, the Debtors' records reflect that there are no Claims in Class 8. Pursuant to Article III.E of the Plan ("Elimination of Vacant Classes"), Class 8 is vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. *See* Liquidation Analysis; Plan, Art. III.E.

I. The Plan Treats Administrative Expense Claims and Priority Tax Claims in Accordance with Section 1129(a)(9) of the Bankruptcy Code.

104. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that holders of certain other priority claims receive deferred cash payments, unless such holders agree to different treatment for such claim. 11 U.S.C. § 1129(a)(9). In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code (*i.e.*, administrative expense claims allowed under section 503(b) of the Bankruptcy Code) must receive on the effective date cash equal to the allowed amount of such claims. 11 U.S.C. § 1129(a)(9)(A). Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code (generally, domestic support obligations, wage, employee benefit, and deposit claims entitled to priority) must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan) or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). 11 U.S.C.§ 1129(a)(9)(B)(i), (ii). Finally, section 1129(a)(9)(C) of the Bankruptcy Code provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code (*i.e.*, priority tax claims) must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim. 11 U.S.C. § 1129(a)(9)(C)(i), (ii).

105. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code because:

- *First*, the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because Articles II.A and B provides that each holder of an Allowed Administrative Claim, including but not limited to any Fee Claim, will receive payment in full on the later of (a) the Effective Date and (b) the first Business Day after the date an Administrative Expense Claim becomes an Allowed Administrative Expense Claim. *See* Plan, Art. II.A, B.

- *Second*, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no holders of the types of Claims specified by section 1129(a)(9)(B) are Impaired under the Plan and such Claims have been paid in the ordinary course. *See* Plan, Art. II.A.

- *Third*, the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because Article II.C specifically provides that the holders of Allowed Priority Tax Claims will be paid in full on the later of (a) the Effective Date, (b) the first Business Day after the date that is thirty (30) calendar days after the date such Priority Claim becomes an Allowed Priority Claim, and (c) the date such Allowed Priority Claim is due and payable in the ordinary course. *See* Plan, Art. II.C.

106. Based upon the foregoing, the Debtors submit that the Plan satisfies Section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Was Accepted by at Least One Impaired Class as Required by Section 1129(a)(10) of the Bankruptcy Code.

107. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one Class of Impaired Claims, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10); *JPMCC 2007-C1 Grasslawn Lodging, LLC* v. *Transwest Resort Props., Inc. (In the Matter of Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018) ("once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan"). Class 6 (General Unsecured Claims) affirmatively – and almost universally – accepted the Plan. Out of the 33 ballots cast in Class 6, 94% in number (*i.e.*, 31 ballots out of the 33 ballots cast) and 99.94% in amount (*i.e.*, $6.112 million in Allowed Claims) voted to confirm the Plan. *See* Epiq Declaration and Plan Proponents' Report. In addition, Class 4 (Senior Credit Agreement Term Loan Secured Claims) and Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims) each universally accepted the Plan.[38] *Id.*

[38] With respect to Class 4 and Class 5, the Debtors have counted the ballots submitted in each Class by affiliates of the four known non-insiders (Allowed Claims are in parentheses): (i) Capital Southwest Corporation (Class 4

108. Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

K. The Plan is Feasible Within the Meaning of Section 1129(a)(11) of the Bankruptcy Code.

109. Section 1129(a)(11) of the Bankruptcy Code provides that the Plan be feasible to be confirmed. 11 U.S.C. § 1129(a)(11). Specifically, the Court must determine that:

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

11 U.S.C. § 1129(a)(11).

110. The feasibility test set forth in section 1129(a)(11) of the Bankruptcy Code requires the Bankruptcy Court to determine whether the debtor can realistically carry out provisions of the plan and whether the plan offers reasonable prospects of success. *In re IPC Atlanta Ltd. P'Ship*, 142 B.R. 547, 559-60 (Bankr. N.D. Ga. 1992). In the context of liquidating plans, courts have found the feasibility requirement is satisfied where "the successful performance of [the plan's] terms is not dependent or contingent upon any future, uncertain event". *See In re Novinda Corp.*, 585 B.R. 145, 160-161 (B.A.P. 10th Cir. 2018) (quoting *In re Heritage Organization, L.L.C.*, 375 B.R. 230, 311 (Bankr. N.D. Tex. 2007) (discussing case law)); *but see In re Pero Bros. Farms, Inc.*, 90 B.R. 562, 563 (Bankr. S.D. Fla. 1988) (Britton, J.) ("The feasibility test has no application to a liquidation plan"). "The purpose of the feasibility test is to determine whether there is a reasonable probability that creditors will receive the payments provided for in the plan." *Novinda*, 585 B.R. at 160-161.

($1,776,350.80) and Class 5 ($1,746,432.40)); (ii) Stepstone CC Opportunities Fund, LLC-Series A (Class 4 ($1,027,402) and Class 5 ($1,010,159.00)); (iii) SC Co-Investments Private Debt Fund L.P. (Class 4 ($1,310,880) and Class 5 ($1,288,880.00)); and (iv) Swiss Capital Co-Investments Private Debt (Offshore) (Class 4 ($306,418) and Class 5 ($301,275.00)).

111. If the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code applies to the Plan (a liquidating plan), the Debtors submit that the Plan satisfies such feasibility requirement thereof as evidenced by the Liquidation Analysis set forth in Exhibit "2" to the Disclosure Statement and the Phillips Declaration, including but not limited to the fact that the Estates will have sufficient funds to (i) pay all Allowed Administrative Expense and Allowed Priority Tax Claims in full, (ii) provide a $250,000 distribution to the holders of Allowed Claims in Class 6 (General Unsecured Claims) and (iii) to fund an additional $250,000 to establish the Liquidating Trust and permit it to pursue Causes of Action and to winddown and to close the Chapter 11 Cases.

112. Accordingly, the Debtors submit that the Plan would satisfy the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Complies with Section 1129(a)(12) of the Bankruptcy Code.

113. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of Title 28, as determined by the court at the hearing on confirmation of the Plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930] of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). Article XIV.A of the Plan provides that on the Effective Date, the Debtors shall pay, in full in Cash, any fees due and owing to the U.S. Trustee at the time of Confirmation. Thereafter, the Liquidating Trustee shall pay all U.S. Trustee fees due and owing under section 1930 of title 28 of the United States Code, in the ordinary course until the earlier of (a) the entry of a final decree closing the applicable Debtor's Chapter 11 Case, or (b) the Bankruptcy Court enters an order converting or dismissing the applicable Debtor's Chapter 11 Case. The Plan therefore complies with section 1129(a)(12) of the Bankruptcy Code.

M. Sections 1129(a)(13)-(16) are Inapplicable to the Debtors.

114. Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for the continuation of payment of retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(3). Inasmuch as debtors are not obligated now, nor will they become obligated in the future, to pay retiree benefits, section 1129(a)(13) is inapplicable.

115. The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in these cases. 11 U.S.C. § 1129(a)(14).

116. None of the Debtors is an individual, and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable. 11U.S.C. § 1129(a)(15).

117. Finally, each of the Debtors is a moneyed, business, or commercial corporation or trust, and therefore, section 1129(a)(16) of the Bankruptcy Code, which provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust be made in accordance with any applicable provisions of nonbankruptcy law, is not applicable to the Debtors. 11 U.S.C. § 1129(a)(16).

N. The Plan Satisfies the "Cram Down" Requirements Under Section 1129(b) of the Bankruptcy Code for Non-Accepting Classes.

118. Section 1129(b) of the Bankruptcy Code provides a mechanism (known as "cramdown") for confirmation of a chapter 11 plan in circumstances where not all impaired classes of claims and equity interests accept a plan. 11 U.S.C. § 1129(b)(1). Under section 1129(b)(1), the court may "cram down" a plan over the dissenting vote of an impaired class or classes of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class or classes. *Id.*; *see also New Midland Plaza Associates*, 247 B.R. at 897.

119. As explained herein, all of the Impaired Classes entitled to vote on the Plan have voted to confirm the Plan. However, there are two Impaired Classes that are deemed to have rejected the Plan—Class 8[39] (Subordinated Claims) and Class 9 (Existing Equity Interests). The Debtors respectfully submit that the Plan may nonetheless be confirmed over the presumptive rejection by such Classes pursuant to section 1129(b) of the Bankruptcy Code because the Plan does not discriminate unfairly and is fair and equitable with respect to both deemed non-accepting Impaired Classes.

1. The Plan Does Not Discriminate Unfairly.

120. Section 1129(b)(1) does not prohibit any discrimination between classes. Rather, it prohibits discrimination that is unfair, and no unfair discrimination exists in the Plan. *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006); *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990). Under 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. *See, e.g.*, *In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to the debtor's reorganized business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination).

121. As between two classes of claims, or two classes of equity interests, there is no unfair discrimination if (a) the classes are comprised of dissimilar claims or interests, *see, e.g.*, *In*

[39] As stated above, the Debtors' records reflect that there are no Claims in Class 8. Pursuant to Article III.E of the Plan ("Elimination of Vacant Classes"), Class 8 is vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. *See* Liquidation Analysis; Plan, Art. III.E.

re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987); *Ambanc*, 115 F.3d at 656–57; *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989), or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment, *see, e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 714, 715 (Bankr. S.D.N.Y. 1992) (separate classification and treatment was rational where members of each class "possess[ed] different legal rights"); *Aztec*, 107 B.R. at 590. Rather, "a plan unfairly discriminates 'when it treats similarly situated classes differently without a reasonable basis for the disparate treatment'". *See, e.g., In re Clearpoint Chemicals, LLC*, Case No. 20-12274-JCO-11, 2021 WL 4189699, at *16 (Bankr. S.D. Ala. Sept. 14, 2021) (citations omitted).

122. Here, the Plan does not discriminate unfairly with respect to any Class and the Debtors' classification scheme is permissible and justifiable because the Claims and Interests in the two deemed rejecting Classes are not similarly situated to any other Classes, given their distinctly legal character from all other Claims and interests**.** *See* Phillips Declaration, ¶ 64. Specifically, and even though there are no Claims in, or expected to be in, Class 8 (Subordinated Claims), such Class consists entirely of Claims that may be subordinated pursuant to section 510(b) of the Bankruptcy Code or other relevant law. *See* Plan, Art.I.A.116 (definition of "Subordinates Claims"); *In re R.E. Loans, LLC*, No. 11-35865-BJH, 2012 WL 2411877, at *9 (Bankr. N.D. Tex. June 26, 2012) (finding that plan did not discriminate unfairly with respect to holders of subordinated claims, in part, because there was no disparate treatment of similar claims under the plan). Due to the fact that such Claims would be subordinated by operation of law or relevant case law to other Claims and/or Interests permits holders of such Claims to receive different treatment than Claims that are not subordinated. Moreover, as the sole Class of subordinated Claims, there

is no disparate treatment of subordinated claims under the Plan. Nor does the Plan "discriminate unfairly" with respect to Class 9 (Existing Equity Interests), which is the only Class containing Interests in any of the Debtors and such Interests, therefore, are appropriately classified in their own Class and have the treatment appropriate to the lowest level of statutory priority of distribution under the Bankruptcy Code. Thus, the Debtors submit that the Plan does not discriminate unfairly with respect to Class 8 (Subordinated Claims) and Class 9 (Existing Equity Interests).

123. Accordingly, because the Plan does not discriminate unfairly with respect to Classes that are deemed to have rejected the Plan, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code.

2. The Plan is Fair and Equitable.

124. Section 1129(b)(2) sets forth the standards for determining whether a plan is "fair and equitable" with respect to impaired dissenting claims or interests. Sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if, under the plan, no holder of a claim or interest junior thereto will receive or retain property under the plan on account of such junior claim or interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii), (C)(ii). This central tenet of bankruptcy law, known as the "absolute priority rule," requires that if the holders of claims in a particular class receives less than full value for their claims, no holders of claims or interests in a junior class may receive any property under the plan. *See Bank of Am. Nat. Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999). "A corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims." *Genesis Health Ventures*, 266 B.R. at 612.

125. Pursuant to the Plan, holders of Claims in Class 8 (Subordinated Claims) and Interests in Class 9 (Existing Equity Interests) are each deemed to have rejected the Plan. Pursuant to the GUC Distribution Framework set forth in Plan, the holders of Claims in Class 3 (Protective

Advance Secured Claims) and Class 4 (Senior Credit Agreement Term Loan Secured Claims) have consented to the recoveries that the Plan provides to the holders of Claims junior to them (*i.e.*, the General Unsecured Claims in Class 6) through their Class vote to accept the Plan. In addition, holders of Claims in Class 5 (HoldCo Credit Agreement Term Loan Unsecured Claims)—a class of unsecured claims with equal priority of repayments as General Unsecured Claims in Class 6—have affirmatively consented through the acceptance of the Plan to receive no distribution under the Plan until, among other things, the holders of Claims in Class 6 (General Unsecured Claims) have received a total distribution in the amount of twenty (20%) percent of their Allowed General Unsecured Claims. Finally, Class 9 (Existing Equity Interests) is the sole Class of Interests in the Plan.

126. As such, the "fair and equitable" rule is satisfied as to the two Classes that are deemed to reject the Plan (*i.e.*, Classes 8[40] (Subordinated Claims) and Class 9 (Existing Equity Interests)), as no Claims and Interests junior to each such Class, as applicable, will receive or retain any property under the Plan on account of such junior Claims or Interests. Moreover, no senior creditor will receive in excess of the full value of its Claims under the Plan. *See, e.g., Order Confirming the Debtors' Amended Joint Plan of Liquidation with Technical Modifications, Dated February 17, 2021, As Amended*, dated March 19, 2021 (*In re TAM Winddown LLC and UP Winddown LLC,* Case No. 20-23346-PDR [ECF. 496], ¶ MM) (confirming plan proposing similar distribution framework, including finding that plan was "fair and equitable").

[40] As stated above, the Debtors' records reflect that there are no Claims in Class 8. Pursuant to Article III.E of the Plan ("Elimination of Vacant Classes"), Class 8 is vacant, deemed eliminated from the Plan for purposes of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. *See* Liquidation Analysis; Plan, Art. III.E.

127. Thus, the Plan is "fair and equitable" and, therefore, consistent with the requirements of section 1129(b) of the Bankruptcy Code.[41]

O. The Plan is the Only Plan for Purposes of Section 1129(c) of the Bankruptcy Code.

128. Section 1129(c) of the Bankruptcy Code provides that the bankruptcy court may confirm only one plan. 11 U.S.C. § 1129(c). Because the Plan is the only plan before the Court, section 1129(c) is satisfied.

P. The Plan's Principal Purpose is Not Avoidance of Taxes or Section 5 of the Securities Act as Prohibited by Section 1129(d) of the Bankruptcy Code.

129. 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. *See* Phillips Declaration, ¶ 71. Article II.C of the Plan contemplates the payment of all Allowed Priority Tax Claims. Moreover, no Governmental Unit or any other party has requested that the 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. *Id*. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

Q. Section 1129(e) of the Bankruptcy Code Does Not Apply to the Plan.

130. The provisions of section 1129(e) of the Bankruptcy Code apply only to a "small business case" as defined therein. 11 U.S.C. § 1129(e). These Chapter 11 Cases are not "small business cases." Accordingly, section 1129(e) of the Bankruptcy Code has no application to the Plan.

[41] Again, if the Court finds that the Debtors are required to invoke section 1129(b) of the Bankruptcy Code with respect to any other Class, the Debtors reserve the right to amend and supplement this Memorandum or the Plan, and/or present argument at the hearing on the confirmation of the Plan.

131. According, the Plan complies fully with sections 1122, 1123 and 1129 of the Bankruptcy Code. As a result, the Plan should be confirmed.

IV. ASSUMPTION & ASSIGNMENT OF ASSUMED CONTRACTS PRIOR TO THE EFFECTIVE DATE OF THE PLAN

A. The Court Has Previously Authorized the Debtors to Assume and Assign the Assumed Contracts to the Buyer Upon the Sale Closing.

132. On March 29, 2023, the Court entered the *Order Granting Debtors' Motion for Entry of an Order (I) Approving Stalking Horse Bid Agreement and Authorizing the Sale of Certain Assets of the Debtors Outside the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Claims and Encumbrances Except for Permitted Liens and Assumed Liabilities, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* [ECF No. 305] (the "**Sale Order**").

133. The Sale Order authorized the sale of the Debtors' assets related to the Debtors' three remaining inpatient or outpatient, substance use disorder treatment facilities which the Debtors operate in Massachusetts and New Jersey (as defined in the Sale Order, the "**Sale**").

134. Specifically, the Sale Order, among other things, approved that certain *Asset Purchase Agreement*, dated February 19, 2023 (as may be amended or otherwise modified from time to time and including all related instruments, documents, exhibits, schedules, and agreements thereto, collectively, the "**Stalking Horse Bid Agreement**"), substantially in the form attached as Exhibit "A" to the *Debtors' Notice of Filing (I) Revised Stalking Horse Bid Agreement and (II) Sellers' Disclosure Schedules* [ECF No. 111][42] (the "**Stalking Horse Bid Agreement/Schedules**

[42] The Stalking Horse Bid Agreement also includes the schedules filed as a part of the (i) *Debtors' Notice of Filing Schedule Supplement to Sellers' Disclosure Schedules*, filed on March 6, 2023 [ECF No. 182], (ii) the *Debtors' Notice of Filing Second Schedule Supplement to Sellers' Disclosure Schedules*, filed on March 24, 2023 [ECF No. 234], (iii) the *Debtors' Notice of Filing Third Schedule Supplement to Sellers' Disclosure Schedules*, filed on March 28, 2023 [ECF No. 267], and (iv) such other Schedule Supplements (as defined in the Stalking Horse Bid Agreement) that the Debtors may file from time to time prior to the Sale closing.

Notice"), between and among various parties, including the three of the above-captioned, affiliated, debtors and debtors-in-possession (each, a "**Seller**" and collectively, the "**Sellers**")[43] and (b) Delphi Lender AcquisitionCo LLC (together with each of its permitted successors, assigns and designees, the "**Stalking Horse Bidder**" or "**Buyer**"). *See* Sale Order, p. 3.

135. In compliance with the Bidding Procedures Order,[44] the Debtors have filed with the Court three separate lists of prepetition executory agreements which the Buyer has identified as potentially to be assumed and assigned by the Debtors to the Buyer upon the Sale closing (collectively, and as defined in the Bidding Procedures Order, the "**Available Contracts**").[45]

136. Not later than three business days prior to the date of the Sale closing, the Buyer must determine and identify to the Debtors the final list of Available Contracts which the Buyer wishes to have the Debtors assume and assign to it (collectively, and as defined in the Bidding Procedures Order, the "**Assumed Contracts**"). *See* Bidding Procedures Order, ¶¶ 21, 23; Sale Order, ¶ 22.

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[43] The Sellers are the following Debtors: (i) Union Fresh Start LLC (d/b/a Serenity at Summit); (ii) Summit Behavioral Health Limited Liability Company (d/b/a Summit Behavioral Health); and (iii) SBH Haverhill, LLC (d/b/a Serenity at Summit).

[44] *See Order Granting Debtors' Expedited Motion for Entry of an Order (I) Authorizing and Approving the Debtors' Entry into the Stalking Horse Bid Agreement with the Stalking Horse Bidder, Subject to the Bidding Procedures and the Sale Hearing, (II) Approving Bidding Procedures, (III) Scheduling the Bid Deadlines and the Auction, (IV) Scheduling a Hearing to Consider the Transaction, (V) Approving the Form and Manner of Notice Thereof, (VI) Approving Contract Procedures, and (VII) Approving a Deadline for Interested Parties to Submit Bids to Purchase Any of the Debtors' Remaining Assets Which Are Not Purchased Assets Subject to the Stalking Horse Bid Agreement, and (VIII) Granting Related Relief* [ECF No. 191] (the "**Bidding Procedures Order**"). The Bidding Procedures Order sets forth the procedures for the parties to follow with respect to the assumption and assignment of prepetition agreements from the Debtors to the Stalking Horse Bidder. *See* Bidding Procedures Order, ¶¶ 20-32.

[45] *See* (i) *Notice of Assumption and Cure Amount with Respect to Executory Contracts or Unexpired Leases Potentially to be Assumed and Assigned in Connection with Sale of Debtors' Assets* [ECF No. 193] (the "**First Assumption Notice**"); (ii) *Supplemental Notice of Assumption and Cure Amount with Respect to Executory Contracts or Unexpired Leases Potentially to be Assumed and Assigned in Connection with Sale of Debtors' Assets* [ECF No. 341] (the "**Supplemental Assumption Notice**"); and (iii) *Supplemental Notice of Assumption and Cure Amount with Respect to Executory Contracts or Unexpired Leases Potentially to be Assumed and Assigned in Connection with Sale of Debtors' Assets* [ECF No. 413] (the "**Second Supplemental Assumption Notice**" and together with the First Assumption Notice and the Supplemental Assumption Notice, collectively, the "**Assumption Notices**").

137. In turn, the Debtors are required to file with the Court, not later than two business days prior to the Sale closing, the final list of Assumed Contracts. *See* Bidding Procedures Order, ¶ 23.

B. The Sale Closing Will Take Place After the Confirmation Hearing But Prior to the Effective Date of the Plan.

138. The Debtors now expect the Sale closing will take place after the date of the Confirmation Hearing, which is scheduled for May 15, 2023.

139. Given that the Sale closing is expected to occur during late May, the following events will occur after the date of the Confirmation Hearing: (i) the decision by the Buyer as to which of the Available Contracts will be the Assumed Contracts; (ii) the filing by the Debtors of the notice with the Court setting forth the final list of Assumed Contracts; and (iii) the assumption and assignment under the authorization provided by the Sale Order of the Assumed Contracts to the Buyer.

C. The Plan Provides for Rejection on the Effective Date of Any Executory Contract Not Otherwise Assumed.

140. Article IX.A of the Plan provides, in full as follows:

> On the Effective Date, except as otherwise provided in the Plan, each Executory Contract not previously rejected, assumed, or assumed and assigned shall be deemed automatically rejected pursuant to sections 365 and 1123 of the Bankruptcy Code, unless such Executory Contract: (i) is identified for assumption in the Plan Supplement; (ii) as of the Effective Date is subject to a pending motion to assume such Executory Contract; (iii) is a contract, instrument, release, indenture, or other agreement or document entered into in connection with the Plan; or (iv) is a D&O Policy.

(emphasis supplied.)

141. On May 9, 2023, the Debtors filed the Second Plan Supplement.

142. In the Second Plan Supplement, the Debtors referenced therein all three Assumption Notices (which incorporate by reference the related Available Contracts).

D. The Bankruptcy Code and Relevant Case Law Authorize the Debtors Post-Confirmation (i) to Decide Which Available Contracts Will be Assumed Contracts and (ii) to Assume and Assign the Assumed Contracts to the Buyer Upon the Sale Closing.

143. Section 365(d)(2) of the Bankruptcy Code provides that a debtor has until plan confirmation to determine whether it will assume or reject executory contracts. 11 U.S.C. § 365(d)(2); *In re Airport Executive Center, Ltd*., 138 B.R. 628, 629 (Bankr. M.D. Fla. 1992) (indicating that section 365 does not apply to executory contracts entered into by a debtor postpetition). Additionally, section 1123(b)(2) states that, subject to section 365, a plan may provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of a debtor not previously rejected under section 365. 11 U.S.C. § 1123(b)(2).

144. Court decisions interpreting these statutory provisions have authorized debtors to decide post-confirmation whether to assume or reject prepetition contracts. *See, e.g., ReGen Capital I, Inc.* v. *UAL Corporation (In re UAL Corporation)*, 635 F.3d 312, 321 (2d Cir. 2011) (appellate court affirms bankruptcy court confirmation order where debtors filed, in advance of the confirmation hearing, a list of potential prepetition contracts that the debtors may assume, but assumption of any individual contract would not occur, if at all, unless and until the debtor chose to cure any outstanding default on it after plan confirmation); *DJS Properties L.P.* v. *Simplot*, 397 B.R. 493, 498-501 (D. Idaho 2008) (district court states that sections 365 and 1123 implicitly permit post-confirmation assumption or rejection of prepetition executory contract and affirms bankruptcy court's confirmation order authorizing post-confirmation resolution of dispute as to whether a prepetition agreement was executory, and if so, whether the debtor would assume or reject it); *In re Claar Cellars LLC and RC Farms LLC*, 623 B.R. 578, 607 (Bankr. E.D. Wash. 2021) (bankruptcy court, reading sections 363(d)(2) and 1123(b)(2) together, confirms creditor's plan which authorizes plan agent until sixty days after the plan's effective date to determine

whether to assume or reject executory contracts and leases); *see also Alberts* v. *Human Health Plan, Inc. (In re Greater Southeast Community Hospital Corp.)*, 327 B.R. 26, 34 (Bankr. D.C. 2005) (describing confirmed plan where conditional assumption of prepetition agreements was authorized subject to debtor's retained right to reject if cure amounts proved unacceptable); 3 COLLIER ON BANKRUPTCY ¶ 365.05[2] (16th ed. rev. 2020) ("[a]ssumption or rejection is permitted postconfirmation").

145. Pursuant to reading together sections 365 and 1123 of the Bankruptcy Code, combined with the above cited case law, as well as the authorization provided to the Debtors in the Sale Order with respect to the assumption and assignment of executory contracts and the unique fact that the closing of the Sale will occur after the Confirmation Hearing, the Debtors submit that ample authority exists for the Debtors post-confirmation (i) to decide which Available Contracts will be Assumed Contracts, and (ii) to assume and assign the Assumed Contract to the Buyer upon the Sale closing. First, the Court has already entered the Sale Order approving the Sale Motion and authorizing the Debtors and the Buyer to undertake a careful and organized process for determining at any time prior to the closing of the Sale which Available Contracts will become Assumed Contracts and for the assumption and assignment of such Assumed Contracts from the Debtors to the Buyer, pursuant to section 365 of the Bankruptcy Code, upon the Sale closing. Second, the Debtors have filed the Second Plan Supplement, which includes the three Assumption Notices listing the Available Contracts, so that the assumption and assignment of such prepetition agreements will be governed by both sections 365 and 1123.

146. Third, not a single non-debtor counter-party to one of the Available Contracts will be prejudiced in any way by the post-confirmation decision by the Buyer to determine which of the Available Contracts will become Assumed Contracts, and the Debtors' assumption and

assignment to the Buyer of the Assumed Contracts, because such non-debtor counter-parties were never promised a particular deadline on which these actions and the Sale closing would occur. On the other hand, the Debtors submit that severe prejudice would be caused to the Debtors and the Estates by mandating that the Debtors finalize the list of Assumed Contracts prior to the Confirmation Date because that is not the business deal that was agreed upon by the Debtors and the Buyer, as reflected in the Asset Purchase Agreement and the Sale Order, and imposing such a requirement could cause enormous disruption in what is the final leg of the Sale process. Accordingly, the Debtors respectfully request that the Court grants what amounts, in reality, to a ministerial request for relief by the Debtors, given the unique facts of the Debtors' cases, permitting the Sale process to conclude in an orderly fashion by reaffirming in any order confirming the Plan the assumption and assignment procedures previously approved by the Court in the Sale Order and providing for the Debtors post-confirmation (i) to decide which Available Contracts will be Assumed Contracts, and (ii) to assume and assign the Assumed Contract to the Buyer upon the Sale closing.

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CONCLUSION

The Plan complies with and satisfies each applicable requirement of section 1129 of the Bankruptcy Code. Accordingly, the Debtors request that the Court confirm the Plan and provide the additional relief requested herein.

Dated: May 9, 2023

Respectfully submitted,

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