IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
CONVERGEONE HOLDINGS, INC., *et al.*,[1]	)	Case No. 24-90194 (CML)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF (I) APPROVAL OF THE DISCLOSURE STATEMENT ON A FINAL BASIS AND (II) CONFIRMATION OF THE JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF CONVERGEONE HOLDINGS, INC. AND ITS DEBTOR AFFILIATES

[1] The Debtors in these Chapter 11 Cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: AAA Network Solutions, Inc. (7602); ConvergeOne Dedicated Services, LLC (3323); ConvergeOne Government Solutions, LLC (7538); ConvergeOne Holdings, Inc. (9427); ConvergeOne Managed Services, LLC (6277); ConvergeOne Systems Integration, Inc. (9098); ConvergeOne Technology Utilities, Inc. (6466); ConvergeOne Texas, LLC (5063); ConvergeOne Unified Technology Solutions, Inc. (2412); ConvergeOne, Inc. (3228); Integration Partners Corporation (7289); NetSource Communications Inc. (6228); NuAge Experts LLC (8150); Providea Conferencing, LLC (7448); PVKG Intermediate Holdings Inc. (4875); Silent IT, LLC (7730); and WrightCore, Inc. (3654). The Debtors' mailing address is 10900 Nesbitt Avenue South, Bloomington, Minnesota 55437.

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The above-captioned debtors and debtors in possession (collectively, the "**Debtors**") submit this memorandum of law in support of (i) final approval of the *Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* [Docket No. 26] (the "**Disclosure Statement**") and (ii) confirmation of the *Joint Prepackaged Chapter 11 Plan of Reorganization for ConvergeOne Holdings, Inc. and Its Debtor Affiliates (Technical Modifications)*, filed contemporaneously herewith (as it may be amended, modified, or supplemented, the "**Plan**").[2]

Preliminary Statement

1. The Plan should be confirmed. It is the culmination of months of arms'-length, hard-fought negotiations and is the best available option for the Debtors and their stakeholders. It contemplates a significant reduction in debt and, through the equity rights offering and exit ABL facility, gives the Reorganized Debtors ample resources to run their business and service their debt. It also leaves vendor, supplier, employee, and contract counterparty claims unimpaired.

2. It is not surprising that the Plan enjoys broad stakeholder support. Holders of Claims in the two voting Classes voted overwhelmingly to accept the Plan.[3] The message from the Debtors' creditors is clear. The terms of the Plan are reasonable and value-maximizing, and the Plan should be confirmed so that the Debtors can exit these Chapter 11 Cases and return to business as usual.

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[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Plan or the Disclosure Statement, as applicable.

[3] *Declaration of Stephenie Kjontvedt of Epiq Corporate Restructuring, LLC, Regarding the Solicitation and Tabulation of Ballots Cast on the Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* (the "**Voting Report**"), filed contemporaneously herewith, ¶ 13 (certifying that over 80% in number and amount of voting Class 3 First Lien Claims accepted the Plan, as did 100% of voting Class 4 Second Lien Claims).

3. The Plan would enjoy universal support if not for an ad hoc group holding, in the aggregate, approximately 11% of the First Lien Claims (the "**Minority AHG**").[4] The members of the Minority AHG voted to reject the Plan and objected to confirmation.[5] Their objection is baseless and should be overruled.

4. The Minority AHG Objection is based on the false premise that the Debtors' decision to propose the Plan is subject to review under a strict entire fairness standard, supposedly made applicable by section 1129(a)(3)'s requirement that "[t]he plan has been proposed in good faith and not by any means forbidden by law." This argument ignores both the facts and the law. The Minority AHG ignores the fact that the Debtors' decision to enter into the RSA and propose the Plan were made by a special committee of the Debtors' board of directors (the "**Special Committee**"). The Special Committee was responsible for reviewing, evaluating, and approving all strategic and financial decisions related to the restructuring of the Debtors. The Special Committee is comprised of three directors, none of whom has any connection to, or financial interest in, the Debtors' private equity sponsor, CVC Capital Partners ("**CVC**"). Two of the three members of the Special Committee are Larry J. Nyhan and Sherman K. Edmiston III, both of whom are independent members of the board (the "**Independent Directors**"). The third member of the Special Committee is the Debtors' CEO, Jeffrey S. Russell.

5. CVC and its affiliated directors played no role on the Special Committee. While it is true that CVC, like nearly all of the Debtors' other stakeholders, supports the Plan, its role in this process was that of a creditor and shareholder. CVC was always represented by its own

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[4] *See Supplemental Verified Statement of the Ad Hoc Group of Excluded Lenders Pursuant to Bankruptcy Rule 2019* [Docket No. 233] (Minority AHG disclosing holdings of approximately $164 million in principal amount of First Lien Claims, out of approximately $1.387 billion of total First Lien Claims).

[5] *See Ad Hoc Group of Excluded Lenders' Objection to Confirmation of Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* [Docket No. 266] (the "**Minority AHG Objection**").

counsel and it had no say in whether the Special Committee accepted the RSA or the Plan. The law is clear that, given these facts, the entire fairness standard is not applicable.

6. But, regardless of what level of scrutiny the Court applies, the evidence at the confirmation hearing will be clear: the Plan is the product of a fair process and achieves the best available outcome for the estates. The Plan was proposed in good faith and the legal requirements for confirmation are easily met.

7. The Minority AHG's disparate treatment argument is likewise baseless. The Minority AHG attempts to conflate the value that members of the First Lien Ad Hoc Group and PVKG Lender will receive on account of the commitment to backstop the Debtors' $245 million Rights Offering with the treatment that those parties will receive on account of their prepetition Claims. But the law is clear that creditors can receive value on account of new-money commitments that is not provided to all creditors in a class. The only requirement is that this value be provided in exchange for the new-money commitment. The evidence will prove that this is the case here. There is no disparate treatment.

8. Perhaps recognizing the fate of its legal arguments, the Minority AHG purports to offer a superior alternative plan. The Minority AHG's proposal is neither superior nor confirmable. It merely shifts value from a supposedly preferred supermajority of creditors to a slim minority of other creditors. It also dilutes recoveries to creditors by proposing additional financing fees for a new, third-party lender, and proposes to prime creditors without their consent. The alternative proposal lacks any meaningful stakeholder support and would extend these Chapter 11 Cases by months, at great cost and potential harm to the Debtors' business. No plan based on this proposal could be confirmed. And unlike the Debtors' Plan, this so-called alternative was not proposed in good faith. The Minority AHG waited to deliver this alternative proposal until three

weeks prior to confirmation—even though members of the Minority AHG knew about the Debtors' potential restructuring transactions by early February 2024. And the Minority AHG's apparent solution to the fact that its proposed alternative has almost no creditor support—and is therefore doomed—is to glibly suggest that it will somehow designate the votes of nearly 90% of the Debtors' capital structure. This is a litigation tactic, not a serious alternative to the Plan. The Court should ignore it.

9. As set forth in this memorandum, and as the evidence will show, the Plan and the Disclosure Statement satisfy all applicable requirements under the Bankruptcy Code. The Debtors respectfully request that the Court overrule the Minority AHG Objection, approve the Disclosure Statement on a final basis, and confirm the Plan.

Background

I. The Restructuring Support Agreement and the Plan

10. The Debtors encountered liquidity challenges in 2023 and early 2024 prior to the commencement of these Chapter 11 Cases, largely as a result of increased interest expense on the Debtors' funded debt.[6] In light of the Debtors' deteriorating liquidity position, in January 2024, the Boards of Directors of Debtors PVKG Intermediate Holdings Inc. and ConvergeOne Holdings, Inc. formed the Special Committee and delegated to it exclusive authority to review and negotiate potential restructuring transactions, including transactions implemented through chapter 11.[7] The Special Committee also received sole authority to determine, on behalf of the Debtors, to enter

[6] *Declaration of Salvatore Lombardi in Support of the Debtors' Chapter 11 Petitions and First Day Relief* [Docket No. 4] (the "**First Day Declaration**") ¶¶ 6, 52-55.

[7] *Id.* ¶ 71.

into any restructuring transaction that was fair, equitable, and in the best interests of the Debtors and their employees, lenders, and other stakeholders.[8]

11. At the direction of the Special Committee, in January 2024, the Debtors and their advisors engaged with the First Lien Ad Hoc Group and the Prepetition ABL Secured Parties regarding the terms of potential restructuring transactions and debtor-in-possession financing facilities. The Debtors and their advisors also engaged with Latham & Watkins LLP, as counsel to the PVKG Lender in its dual capacities as the Holder of First Lien Claims and Existing C1 Interests, on these matters. After making substantial progress with the First Lien Ad Hoc Group, the Prepetition ABL Secured Parties, and PVKG Lender, the Special Committee authorized the Debtors to engage with the Second Lien Ad Hoc Group in February 2024. Negotiations among the Debtors and the Second Lien Ad Hoc Group, the First Lien Ad Hoc Group, the Prepetition ABL Secured Parties, and PVKG Lender culminated in an agreement in early April 2024 on the terms of restructuring transactions and debtor-in-possession financing facilities with overwhelming stakeholder support.

12. On April 3, 2024, at the direction of the Special Committee, the Debtors entered into the RSA with the members of the First Lien Ad Hoc Group, PVKG Lender, and the members of the Second Lien Ad Hoc Group.[9] The signatories to the RSA hold in excess of 81% of the First Lien Claims and 81% of the Second Lien Claims.[10] By entering into the RSA, these parties committed to support the Plan and the Restructuring Transactions that it implements.

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8 *Id.* ¶ 62.

9 *Id.* ¶¶ 72-73.

10 *Id.* ¶ 73; *Verified Statement of the First Lien Ad Hoc Group Pursuant to Bankruptcy Rule 2019* [Docket No. 65]; *Joint Verified Statement of Davis Polk & Wardwell LLP and Haynes and Boone, LLP Pursuant to Federal Rule of Bankruptcy Procedure 2019* [Docket No. 127].

13. The Plan provides that:

- The Company will (i) conduct a $159.25 million Rights Offering that is fully backstopped by certain members of the First Lien Ad Hoc Group and PVKG Lender, and (ii) receive a $85.75 million Direct Investment Commitment from those parties for the New Equity Interests in the Reorganized Debtors (both subject to increase with the consent of the Debtors and the Required Consenting Lenders). As part of these transactions, 95.625% of the New Equity Interests will be distributed to Holders of First Lien Claims and the Backstop Parties. As part of the Rights Offering, 65% of the 95.625% of New Equity Interests will be offered to all Holders of First Lien Claims on a pro rata basis, subject to a 10% Put Option Premium owed to the Backstop Parties and subject to dilution by the Management Incentive Plan. As part of the Direct Investment Commitment, the Backstop Parties have committed to purchase 35% of the 95.625% of New Equity Interests, subject to a 10% Put Option Premium owed to the Backstop Parties and subject to dilution by the Management Incentive Plan. The proceeds of the Rights Offering and Direct Investment Commitment will be used to repay the Term DIP Facility and provide the Reorganized Debtors with working capital.

- Holders of First Lien Claims could elect to receive (a) takeback term loans in a principal amount equal to their First Lien Claims multiplied by 20%, or (b) takeback term loans in a principal amount equal to their First Lien Claims multiplied by 15% and rights to purchase, through the Rights Offering, New Equity Interests in the Reorganized Debtors, subject to dilution by the Management Incentive Plan and fees owed to the Backstop Parties, including the Put Option Premium. As set forth in the RSA, these elections would be adjusted on a pro rata basis, based on oversubscription, so that participation in each option is capped at 50% of the First Lien Claims eligible to participate.

- Holders of Second Lien Claims will receive 4.375% of the New Equity Interests in the Reorganized Debtors, also subject to dilution by the Management Incentive Plan.

- General unsecured creditors will receive either reinstatement of their General Unsecured Claims pursuant to section 1124 of the Bankruptcy Code, or payment in full in cash either on the Effective Date or the date payment is due in the ordinary course of business in accordance with the terms and conditions of the particular transaction giving rise to the General Unsecured Claims.

- All Existing C1 Interests will be cancelled and no distributions will be made on account of such Interests.

- Pursuant to a global settlement of all disputes related to the allowance of Claims arising from the Prepetition PVKG Note Purchase Agreement, PVKG Lender, the RSA signatories, and the Debtors have agreed that PVKG Lender's First Lien Claims on account of the Prepetition PVKG Notes will be allowed in the amount of $213 million.

14. In addition to agreeing to support and vote to accept the Plan, members of the First Lien Ad Hoc Group and PVKG Lender also committed to provide $215 million in Term DIP Loans, backstop the $159.25 million Rights Offering, and fund the $85.75 million Direct Investment Commitment, subject to the terms of the RSA and Plan.[11] Separately, and at the same time as execution of the RSA, the Prepetition ABL Secured Parties delivered a commitment letter agreeing to continue providing access to the Debtors' $250 million ABL Facility during these Chapter 11 Cases, subject to the terms and conditions of the DIP Orders.[12]

15. On April 4, 2024, at the direction of the Special Committee, each of the Debtors commenced the Chapter 11 Cases in this Court. On that date, the Debtors filed the Plan and Disclosure Statement. The restructuring contemplated in the Plan will equitize approximately $1.6 billion of the Debtors' funded debt, enabling the Debtors to emerge from these Chapter 11 Cases significantly de-levered, well-capitalized, and poised for long-term growth and increased profitability, with a stronger balance sheet, adequate funding, and a competitive market position. Critically, confirmation of the Plan will preserve thousands of jobs and facilitate payment in full of all obligations owed to vendors, customers, and other general unsecured creditors in the ordinary course of business.

II. The Solicitation Process and Plan Supplement

16. On April 3, 2024, prior to commencing the Chapter 11 Cases, the Debtors commenced the solicitation of votes on the Plan from Holders of First Lien Claims in Class 3 and Second Lien Claims in Class 4 (the "**Voting Classes**") entitled to vote as of April 1, 2024 (the "**Voting Record Date**"). The Debtors, through their claims, noticing, and solicitation agent, Epiq

[11] First Day Decl. ¶¶ 7-8.

[12] *Id*. ¶¶ 81-86.

Corporate Restructuring, LLC (the "**Claims, Noticing, and Solicitation Agent**"), transmitted solicitation materials (each, a "**Solicitation Package**") to each member of the Voting Classes by electronic mail.[13] The Solicitation Packages contained the Disclosure Statement (including the Plan and all other exhibits), a cover letter, the applicable Class 3 or Class 4 ballot, and, for Holders of Class 3 Claims, an election and subscription form for participation in the Rights Offering and the procedures and instructions for participating in the Rights Offering.[14]

17. The Disclosure Statement and applicable ballot included instructions to cast a vote to accept or reject the Plan.[15] This included the requirement to submit each ballot so that it was actually received by the Claims, Noticing, and Solicitation Agent by April 17, 2024 at 4:00 p.m. (prevailing Central Time) (the "**Voting Deadline**") in order to be counted.[16]

18. On the Petition Date, the Debtors filed the Scheduling Motion,[17] by which the Debtors sought a combined hearing on final approval of the Disclosure Statement and confirmation of the Plan. On April 4, 2024, the Court entered the Scheduling Order, which, among other things, (a) established May 7, 2024 at 4:00 p.m. (prevailing Central Time) as the deadline to file objections to the adequacy of the Disclosure Statement or confirmation of the Plan (the "**Objection**

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[13] Voting Report ¶¶ 8-10 (affirming service of Solicitation Packages); *see also Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Approving the Confirmation Timeline, Solicitation Procedures, Solicitation Package, Notices, the Election and Rights Offering Materials and Election/Subscription Timeline, (IV) Waiving the Requirement to Hold the Creditors' Meeting and File SOFAs, Schedules, and 2015.3 Reports, and (V) Granting Related Relief* [Docket No. 81] (the "**Scheduling Order**") ¶ 14 (approving service and contents of Solicitation Packages).

[14] Voting Report ¶ 8.

[15] *See* Scheduling Order, Ex. 3 at 1-2, 12-15 (form of Class 3 ballot and submission instructions); Ex. 4 at 1-2, 12-15 (form of Class 4 ballot and submission instructions).

[16] *Id*.

[17] "**Scheduling Motion**" means the *Debtors' Emergency Motion For Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Approving the Confirmation Timeline, Solicitation Procedures, Solicitation Package, Notices, the Election and Rights Offering Materials and Election/Subscription Timeline, (IV) Waiving the Requirement to Hold the Creditors' Meeting and File SOFAs, Schedules, and 2015.3 Reports, and (V) Granting Related Relief* [Docket No. 25].

Deadline") and (b) approved the forms of the Solicitation Procedures and Solicitation Packages and the form and manner of notice of the Voting Deadline, Objection Deadline, the hearing to consider final approval of the Disclosure Statement and confirmation of the Plan on May 17, 2024 at 1:00 p.m. (prevailing Central Time) (the "**Combined Hearing**"), and the opportunity to opt-out of certain releases contained in the Plan.[18]

19. On or before April 8, 2024, the Debtors, through the Claims, Noticing, and Solicitation Agent, mailed a notice (the "**Combined Hearing Notice**") to all parties listed on the creditor matrix, which informed recipients of: (a) the Debtors' commencement of these Chapter 11 Cases on April 4, 2024; (b) the scheduling of the Combined Hearing; (c) the key terms of the Plan, including classification and treatment of Claims and Interests; (d) key dates and information regarding approval of the Disclosure Statement and Confirmation of the Plan and the Objection Deadline; (e) the multiple methods by which parties may request copies of the Plan and the Disclosure Statement; and (f) the full text of the release, exculpation, and injunction provisions set forth in the Plan.[19] The Combined Hearing Notice also informed all parties, including Holders or potential Holders of Claims or Interests in non-voting classes, that they could opt out of, or object to, the Third-Party Release contained in **Article VIII.D** of the Plan.[20] The Debtors further caused a notice of the Combined Hearing and the Objection Deadline to be published in the national edition of the New York Times on April 8, 2024 (the "**Publication Notice**").[21]

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[18] Scheduling Order ¶¶ 1-19.

[19] Certificate of Service [Docket No. 153] (the "**Combined Hearing Certificate of Service**") ¶ 2; Scheduling Order, Ex. 2 (form of Combined Hearing Notice).

[20] *Id*.

[21] *See Proof of Publication* [Docket No. 129] (the "**Proof of Publication**").

20. Holders of Claims and Interests that are either unimpaired (and therefore presumed to accept the Plan) or impaired and entitled to no distribution (and therefore presumed to reject the Plan) were not provided a Solicitation Package.[22]

21. On May 10, 2024, the Debtors filed the Plan Supplement, as required by the Plan.[23]

III. Voting Results

22. The Debtors, through their Claims, Noticing, and Solicitation Agent, completed the final tabulation of votes following the Voting Deadline.[24] The Claims, Noticing, and Solicitation Agent reviewed all ballots received before completing the final tabulation.

23. As set forth in the Voting Report, the Voting Classes voted to accept the Plan by overwhelming majorities, and in sufficient number and amount for each Voting Class to accept the Plan under section 1126 of the Bankruptcy Code:[25]

VOTING CLASS	ACCEPT		REJECT	
	AMOUNT (%)	NUMBER (%)	AMOUNT (%)	NUMBER (%)
Class 3 FIRST LIEN CLAIMS	$1,169,183,874.33 **(88.80%)**	281 **(80.98%)**	$147,490,643.25 **(11.20%)**	66 **(19.02%)**
Class 4 SECOND LIEN CLAIMS	$252,000,000.00 **(100.00%)**	61 **(100.00%)**	$0.00 **(0.00%)**	0 **(0.00%)**

[22] Scheduling Order ¶ 16 (providing that the Debtors need not serve Solicitation Packages on Holders of Claims not entitled to vote).

[23] "**Plan Supplement**" means the *Notice of Filing of Plan Supplement for the Joint Prepackaged Plan of Reorganization for ConvergeOne Holdings, Inc. and Its Debtor Affiliates* [Docket No. 295]. The Debtors intend to file an amended Plan Supplement prior to the Combined Hearing.

[24] For additional discussion about, and a certification of, the solicitation and vote tabulation processes, see the Voting Report.

[25] Voting Report, Ex. 8.

24. In addition, even if the Class 3 vote of PVKG Lender is excluded from the vote tabulation on account of PVKG Lender's insider status for purposes of determining whether an impaired, non-insider class has accepted the Plan, Class 3 still accepted the Plan in amount and number well in excess of the requirements of section 1126 of the Bankruptcy Code:

VOTING CLASS	ACCEPT		REJECT	
	AMOUNT (%)	NUMBER (%)	AMOUNT (%)	NUMBER (%)
Class 3 FIRST LIEN CLAIMS (Excluding PVKG Lender's Vote)	$956,183,874.33 **(86.64%)**	280 **(80.92%)**	$147,490,643.25 **(13.36%)**	66 **(19.08%)**

IV. Plan Objections

25. Prior to the Objection Deadline, the Debtors received informal comments on the Plan from several parties in interest, including the United States Trustee. The Debtors resolved all of these comments to the satisfaction of the relevant parties by incorporating technical modifications into the Plan and agreed language into the Proposed Confirmation Order.[26]

26. There is only one objection to confirmation of the Plan: the Minority AHG Objection. The Minority AHG argues that the Plan should not be confirmed because (a) it is subject to review under the heightened "entire fairness" standard and does not pass muster under that standard; (b) it does not provide the same treatment to Holders of Claims in Class 3, as some class members will receive consideration on account of new-money commitments that other members of Class 3 have not provided; and (c) the Minority AHG's alternative proposal is a viable confirmable path forward, assuming the Debtors elect to pursue it and the Court disenfranchises virtually every creditor through a designation remedy that has no precedent and would represent a

[26] The "**Proposed Confirmation Order**" means the proposed *Findings of Fact, Conclusions of Law, and Order (I) Approving the Debtors' Disclosure Statement on a Final Basis and (II) Confirming the Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* [Docket No. 296] (as may be amended, modified, or supplemented).

sea change for chapter 11 practice.[27] The Minority AHG did not object to approval of the Disclosure Statement on a final basis.

Argument

I. The Court Should Overrule the Minority AHG Objection

A. The Proposed Standard of Review Is Inapplicable, and the Plan Satisfies It In Any Event

27. The Minority AHG claims that the Plan is subject to—and fails—the entire fairness standard of review based on PVKG Lender's affiliation with CVC. According to the Minority AHG, the requirement under section 1129(a)(3) of the Bankruptcy Code that a plan has "been proposed in good faith and not by any means forbidden by law" ports state law standards of review relevant to a corporate fiduciary's decisions into the confirmation analysis under section 1129 of the Bankruptcy Code.[28] The Court should reject the Minority AHG's attempt to rewrite plan confirmation standards.

28. The good faith requirement under 1129(a)(3) "does not require the bankruptcy judge to determine whether the ends achieved in the plan contravene non-bankruptcy law."[29] Thus, section 1129(a)(3) of the Bankruptcy Code does not import state law standards relevant to review of a corporate fiduciary's decisions where a plan transaction or settlement involves a statutory insider.[30] Instead, section 1129(a)(3) requires the Court to determine only whether the Plan "is

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[27] *See generally* Minority AHG Obj. ¶¶ 29-60.

[28] Minority AHG Obj. ¶¶ 29-39.

[29] *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 263 (Bankr. S.D. Tex. 2015).

[30] *In re Charter Commc'ns*, 419 B.R. 221, 261 (Bankr. S.D.N.Y. 2009) (rejecting the application of entire fairness review through section 1129(a)(3), finding that the "plain language of section 1129(a)(3) does not require that the Plan's contents comply 'in all respects with the provisions of all nonbankruptcy laws and regulations' because it 'speaks only to the proposal of a plan. . . .'" (quoting *In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 59 (Bankr. S.D.N.Y. 1990))); *see also In re Ocean Shores Community Club, Inc.*, 944 F.2d 909 (Table) (9th Cir. 1991) ("We reject OSLOA's argument that the plan violated state law. Bankruptcy Code section 1129(a)(3) bars confirmation of plans proposed in violation of law, not those that contain terms that may contravene law."); *In re Food City,*

proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success."[31] The Minority AHG does not attempt to address that standard. It notes that the Plan permits a purported insider to receive consideration on account of its new-money commitment, but does not describe how the process of developing the Plan was unfair or subject to the undue influence of any insider. It was not.

29. The limitations of section 1129(a)(3) are well-settled and consistent with the Bankruptcy Code's confirmation scheme. Courts recognize that importing state law into section 1129(a)(3) where a Plan has been accepted by all voting classes would convert a consensual confirmation proceeding into a contested cramdown for the benefit of a lone hold-out creditor.[32] In *Seegrid Corp.*, a single creditor objected to a plan that had been accepted by all voting classes and argued that the court should review the transaction under the entire fairness standard because a statutory insider stood to receive consideration as a creditor.[33] The court overruled the objection, finding that "a new standard of review would be imported into the Code for protection of dissenting creditors in plans that are otherwise fully consensual within the

Inc., 110 B.R. 808, 812-14 (Bankr. W.D. Tex. 1990) (rejecting argument that a plan in violation of state laws cannot be confirmed under section 1129(a)(3)).

[31] *W. Real Estate Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (In re Vill. at Camp Bowie I, L.P.)*, 710 F.3d 239, 247 (5th Cir. 2013).

[32] The Minority AHG relies on a single case holding that section 1129(a)(3) imports Delaware law. Minority AHG Obj. ¶¶ 29-60 (citing *In re Zenith Elecs. Corp.*, 241 B.R. 92, 108 (Bankr. D. Del. 1999)). Later cases have repudiated that holding, to the extent it existed at all. *See* Dec. 18, 2014 Hr'g Tr. 7:4–20, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 2014) [Docket No. 244-3] ("Accordingly, to the extent that the *Zenith* decision stands for the proposition that 1129(a)(3) embodies all of Delaware corporate law, and I'm not certain that it does, but if it does, I respectfully disagree."). The Minority AHG's other cases apply state law to the *proposal* of a plan, not its contents. As their own authority notes, "[t]o allow state law to control governance of a Chapter 11 debtor [during bankruptcy] would be to enable disgruntled shareholders to delay, and possibly short-circuit, the reorganization policy set forth in the Bankruptcy Code." *Nat'l Convenience Stores v. Shields (In re Schepps Food Stores)*, 160 B.R. 792, 799 (Bankr. S.D. Tex. 1993).

[33] Dec. 18, 2014 Hr'g Tr. 3:9-25, *In re Seegrid Corp.*, No. 14-12391 (BLS) (Bankr. D. Del. 2014) [Docket No. 244-3].

meaning of section 1129(a)."[34] The Court explained that the "inquiry into good faith, in particular, focuses on the plan process, and also whether the plan comports with the objective and purposes underlying the Code," but does *not* ask if a plan would "comply in its implementation with the entire fairness standard under Delaware corporate law."[35]

30. But even if this Court were to adopt this new approach to confirmation (it should not), it should still confirm the Plan. As a threshold matter, there is no basis to apply entire fairness on these facts. Even if CVC is treated as a controlling shareholder, as the Minority AHG argues, "[e]ntire fairness is not triggered solely because a company has a controlling stockholder."[36] Unless the parties "engage in a conflicted transaction," the business judgment rule will apply.[37] But here, there was no conflict in the negotiations. The negotiations and transactions embodied in the Plan were authorized by unanimous votes of the Special Committee, which has the exclusive authority to review, negotiate, and approve restructuring matters on behalf of the Debtors.[38] The CVC-affiliated directors did not stand on both sides of the transaction, because all were recused from negotiating and approving the Plan transactions. As the Minority AHG aptly observes, "[t]he Debtors will point to the fact that the Plan, RSA and Equity Rights Offering were approved by the Special Committee as evidence of entire fairness."[39] This is exactly right—because the presence of the Independent Directors making up a majority vote on the Special Committee is the precise

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[34] *Id*. 3:19-4:5; 4:15-6:8.

[35] *Id*. 6:20-25.

[36] *In re Crimson Expl. Inc. Stockholder Litig.*, No. 8541-VCP, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014).

[37] *Id*.

[38] First Day Decl. ¶ 71.

[39] Minority AHG Obj. ¶ 36.

safeguard that courts look to in evaluating whether a transaction is conflicted.[40] The Independent Directors made up two of the three votes on the Special Committee, and neither of them (nor the third member of the Special Committee, Mr. Russell) are affiliated with or controlled by CVC.[41]

31. The Minority AHG's argument that the presence of management on a special committee necessarily taints its independence proves too much. By this logic, no corporate governance measures could preserve business judgment deference. The Debtors and PVKG Lender implemented an appropriate process for the negotiation of the Plan and Restructuring Transactions, including by appointing the Independent Directors, forming the Special Committee, and engaging separate advisors, each of which make entire fairness inapplicable to the Plan.

32. The Minority AHG's attempt to invoke "heightened scrutiny" under the Bankruptcy Code similarly fails.[42] That standard applies to transactions that are *entirely* between a debtor and its insiders—but here, several non-insiders also participated in developing the transaction, including the First Lien Ad Hoc Group and the Second Lien Ad Hoc Group. When numerous third-party, non-insider stakeholders are involved in negotiating and crafting a transaction in good faith, courts apply the deferential business judgment standard.[43]

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[40] *See* Nov. 21, 2019 Hr'g Tr. 290:16-291:19, *In re EP Energy Corp.*, No. 19-35654 (MI) (Bankr. S.D. Tex. 2019) [Docket No. 523] (business judgment review continues to be appropriate given the appointment of an independent special committee).

[41] First Day Decl. ¶ 71.

[42] Minority AHG Obj. ¶ 29 (citing *In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 769 (Bankr. S.D.N.Y. 2020)).

[43] *See, e.g.*, *In re LATAM Airlines Grp. S.A.*, No. 20-11254 (JLG), 2022 WL 790414 at *32 (Bankr. S.D.N.Y. Mar. 15, 2022) (holding that "[w]here, as here, numerous non-insider stakeholders were involved in good faith negotiations of a transaction" and "numerous proposed compromises and settlements of billions of dollars of claims" occurred in the negotiations, the "business judgment standard is appropriately applied") (citing *In re Residential Cap., LLC*, No. 12-12020, 2013 WL 3286198, at *19 (Bankr. S.D.N.Y June 27, 2023)); *see also In re Charter Commc'ns*, 419 B.R. 221, 261 (Bankr. S.D.N.Y. 2009) (holding that the entire fairness standard did not apply when the "negotiations that resulted in the settlement were initiated by [the investment banker] for the benefit of the enterprise, not by [an investor] for his benefit, and that the settlement was approved by independent members of [the debtors'] board").

33. Finally, even if the Court applied entire fairness or heightened scrutiny, the Plan clearly satisfies that standard. Entire fairness has two parts—fair dealing and fair price.[44] "'Fair dealing' focuses on the actual conduct of the corporate fiduciaries in effecting the transaction. . . . 'This includes how the transaction was initiated, structured, and negotiated and the timing of the transaction.'"[45] Fair dealing can be established by providing evidence of careful consideration and process, including, but not limited to, financial analyses, independent advice, and careful deliberation.[46] Fair price "relates to the economic and financial considerations of the transaction. . . . Courts have held that this element requires proof that 'the price offered was the highest value reasonably available under all the circumstances.'"[47]

34. There is ample evidence to satisfy the most exacting review of procedural and substantive fairness here. With respect to process, the Debtors and their independent advisors conducted extensive financial analyses and robust deliberation. The process was transparent and all interested parties were able to participate. With respect to substance, the Special Committee considered comparable fees paid in recent similar cases. As the evidence at the Combined Hearing will show, the Debtors' investment banker, Evercore, reviewed 24 chapter 11 equity rights offerings of more than $100 million consummated since 2018. Out of those equity rights offerings with a specified discount to plan value, the Plan's discount of 35% to plan value is between the mean and high-end range. For those equity rights offerings with a specified holdback, the 35%

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44 *See ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 407 (S.D. Tex. 2008).

45 *Id.* (internal citations omitted).

46 *See, e.g.*, *In re Innkeepers*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) (analyzing the negotiation process and whether the agreement was entered into with "due care"); *Mills Acquisition Co. v. MacMillan*, Inc., 559 A.2d 1261, 1280 (Del. 1989) (focusing on "the actual conduct of corporate fiduciaries in effecting a transaction, such as its initiation, structure, and negotiation"); *Carlson v. Hallinan*, 925 A.2d 506, 531 (Del. Ch. 2006) ("Fair dealing focuses on the actual conduct of corporate fiduciaries in effecting a transaction, such as its initiation, structure, and negotiation.") (internal citations omitted).

47 *ASARCO LLC*, 396 B.R. at 407 (internal citations omitted).

holdback is below the mean of 54.3%. The Put Option Premium of 10% is below the mean of 10.2% and the termination fee of 5% is below the mean of 9.9% for those equity rights offerings with each stated fee. Based on this, the Special Committee appropriately concluded that the Restructuring Transactions presented the best available option, that there were no better available alternatives, and that they would maximize value for the Debtors' estates. For these reasons, the Court should confirm the Plan even under a heightened standard of review.

B. The Plan Provides the Same Treatment of Claims in Class 3

35. Section 1123(a)(4) of the Bankruptcy Code provides that a chapter 11 plan must "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. . . ."[48] The Bankruptcy Code "does not require identical treatment for all class members in all respects under a plan."[49] Instead, "the requirements of section 1123(a)(4) apply only to a plan's treatment on account of particular claims or interests in a specific class—not the treatment that members of the class may separately receive under a plan on account of the class members' other rights or contributions."[50] Section 1123(a)(4) includes no requirement that a debtor provide the same precise economic "opportunity" to every single creditor in a class.[51]

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[48] 11 U.S.C. § 1123(a)(4).

[49] *In re Adelphia Commc'ns Corp*., 368 B.R. 140, 249-50 (Bankr. S.D.N.Y. 2007); *accord In re CHC Grp. Ltd*., No. 16-31854 (BJH), 2017 WL 11093971, at *12 (Bankr. N.D. Tex. Mar. 3, 2017).

[50] *In re Adelphia*, 368 B.R. at 249-50.

[51] *See In re TCI 2 Holdings, LLC*, 428 B.R. 117, 133 (Bankr. D. N.J. 2010) (rejecting argument that a plan provides disparate treatment in violation of section 1123(a)(4) when only certain creditors from a specific class were allowed to backstop a rights offering); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 749 (2d Cir. 1992) ("[T]he 'same treatment' standard of section 1123(a)(4) does not require that all claimants within a class receive the same amount of money."); *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 672 (Bankr. D. D.C. 1992) (distinguishing the treatment of claims regarding plan recoveries, and treatment of claimants or potential claimants regarding releases and injunction).

36. Because section 1123(a)(4) of the Bankruptcy Code applies only to treatment of claims, courts have consistently overruled disparate treatment objections premised upon certain creditors in a class receiving consideration for providing a new financing commitment, even where the opportunity to provide new money is not made available to all holders ratably.[52] This Court (and others) have confirmed numerous plans providing such benefits to some, but not all, holders of claims in a particular class.[53] It is also well-settled that creditors committing new money financing can be required to commit to vote in favor of a plan as a condition to participating in that financing.[54]

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[52] *See In re CHC Grp. Ltd*., 2017 WL 11093971, at *12 (rejecting an argument that a plan provided disparate treatment in violation of section 1123(a)(4) when only certain creditors were permitted to participate in a backstop of a rights offering because all creditors that held the same tranche of debt were classified together and the backstop fees were provided in exchange for the backstop commitment); *In re LATAM Airlines Group S.A.*, No. 20-11254 (JLG), 2022 WL 2206829, at *35-36 (Bankr. S.D.N.Y. July 7, 2022) (holding that "the Plan satisfies both aspects of section 1123(a)(4) because all Holders of Allowed General Unsecured Class 5 Claims have the same opportunity for recovery, are being treated equally, and that the Backstop Fees and Direct Allocation are distributed to the Backstop Parties in consideration for their willingness to backstop the Class C Notes and the ERO Rights Offering, not on account of their General Unsecured Class 5 Claims."); *In re TCI 2 Holdings*, 428 B.R. 117 at 133 ("The Backstop Fee proposed to be paid to the Backstop Parties is not a distribution to the Second Lien Noteholders on account of their Second Lien Note claims. Rather, the Backstop Fee is offered as consideration for the $225 million commitment made by the Backstop Parties, which will be paid only if the $225 million is funded."); *In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *14 (Bankr. D. Del. May 13, 2010) ("To the extent a Backstop Party receives additional or different consideration under the Plan, the Backstop Party receives such consideration in exchange for the commitments of the Backstop Party under the Equity Commitment Agreement or as part of the 9019 Settlement.")

[53] *See, e.g.*, *In re EP Energy Corp.*, No. 19-35654 (MI) (Bankr. S.D. Tex. Aug. 27, 2020) [Docket No. 1411] (confirming the plan and finding the plan did not violate 1123(a)(4) even though backstop parties received a backstop premium); *In re Seadrill Ltd.*, No. 21-30427 (DRJ) (Bankr. S.D. Tex. Oct. 26, 2021) [Docket No. 1158] (confirming plan incorporating non-pro rata backstop); *see also In re Cineworld Grp., PLC*, No. 22-90168 (MI) (Bankr. S.D. Tex. May 2, 2023) [Docket No. 1625] (order approving holdback of 50% of new equity interests for the backstop parties); *In re TPC Grp., Inc.*, No. 22-10493 (CTG) (Bankr. D. Del. Oct. 5, 2022) [Docket No. 934] (order approving holdback of 45% of new equity interests for backstop parties); *In re Talen Energy Supply, LLC*, No. 22-90054 (MI) (Bankr. S.D. Tex. Aug. 29, 2022) [Docket No. 1133] (order approving holdback of 30% of new equity interests for backstop parties).

[54] *In re CHC Group*, No. 16-31854 (BJH) (Bankr. N.D. Tex. Dec. 20, 2016) [Docket No. 1379] ("Pursuant to the Plan Support Agreement, the Consenting Creditor Parties have agreed to support and vote in favor of the Plan. . . ."); *In re TCI 2 Holdings LLC*, No. 09-13654 (JHW) (Bankr. N.J. Jan. 5, 2010) [Docket No. 1076-5] ("Each Investor agrees that, for the duration of the Lock-Up Period, such Investor shall . . . timely vote or cause to be voted its claims arising under the Secured Notes to accept the Noteholder plan . . . ."); *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS) (Bankr. D. Del. Mar. 23, 2010) [Docket No. 1692-1] ("As long as a Termination Event [] has not occurred, or has occurred but has been duly waived . . . the Undersigned Holder agrees for itself that . . . it shall be bound to, and will, timely vote its Aleris Claims (and not revoke or withdraw its vote) to accept the Plan.").

37. The Minority AHG ignores this well-settled law in alleging that giving the Put Option Premium and Direct Investment Commitment to members of the First Lien Ad Hoc Group and PVKG Lender, rather than all Holders of Class 3 Claims, violates section 1123(a)(4) of the Bankruptcy Code.[55] The Put Option Premium and Direct Investment Commitment are not treatment on account of any party's Claims against the Debtors. The Put Option Premium is "*consideration* for the Investors providing the Backstop Commitment" and the Direct Investment Commitment is the Investors' agreed "*obligation*" to directly fund 35% of the $245 million Rights Offering.[56] The consideration provided for the commitment is reasonable, squarely within the range of comparable transactions, and an essential deal term necessary to obtain adequate financing commitments. The Minority AHG tacitly acknowledges this in its proposal, which offers substantially similar economics to the parties agreeing to commit capital under that proposal.[57]

38. The Plan provides identical treatment to each Holder of a Class 3 Claim: each Holder will receive its elected pro rata share of either (a) the Takeback Term Loan Recovery Option or (b) the Rights Offering Rights and Takeback Term Loan Recovery Option, as adjusted for oversubscription.[58] Each member of the Minority AHG, each member of the First Lien Ad Hoc Group, and PVKG Lender will all receive the *same* treatment and recoveries on account of their Class 3 Claims under the Plan, irrespective of the Put Option Premium and Direct Investment Commitment.[59] The Plan therefore satisfies section 1123(a)(4) of the Bankruptcy Code.

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55 RSA, Restructuring Term Sheet, Ex. 3 (Equity Rights Offering Term Sheet), at 3.

56 *Id*. at 6 (emphasis added).

57 *See* Minority AHG Obj., Ex. 2.

58 Plan, Art. III.C.3.

59 *Id.*; *see also* Disclosure Statement, at 5 (summarizing recoveries for Class 3 Claims).

39. *Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership* does not hold to the contrary.[60] In *LaSalle*, the Supreme Court addressed when it is permissible for holders of existing equity interests to receive or retain value on account of that equity interests where senior creditors are not being paid in full and the plan is subject to the cramdown requirements under section 1129(b)(2) of the Bankruptcy Code.[61] The decision does not cite section 1123(a)(4) or consider whether certain holders of claims in an accepting class can receive the exclusive opportunity to provide new capital under a plan transaction accepted by all impaired classes.

40. The Minority AHG asserts, without citing a single case, that *LaSalle* applies wherever a group of creditors receives an exclusive investment opportunity, and argues that the opportunity itself results in disparate treatment under section 1123(a)(4) of the Bankruptcy Code. More specifically, the Minority AHG claims that the "legal tests" in *LaSalle* and section 1123(a)(4) "are identical" because, "just as the absolute priority rule of section 1129(b) prohibits junior stakeholders from receiving property before senior stakeholders '*on account of*' their junior claims or interests, so does the equal treatment rule of section 1123(a)(4) prohibit a plan from providing unequal treatment for claims within the same class '*on account of*' those claims."[62] But, as discussed above, all section 1123(a)(4) requires is that "each claim or interest of a particular class" receives "the *same treatment*."[63] Here, each Class 3 Claim is receiving identical treatment under the Plan and the Put Option Premium and Direct Investment Commitment are not being provided on account of any Claim against the Debtors.

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60 Minority AHG Obj. ¶¶ 44-48 (discussing *LaSalle*, 526 U.S. 434 (1999)).

61 *LaSalle*, 526 U.S. at 437.

62 Minority AHG Obj. ¶ 47 (emphasis added).

63 11 U.S.C. § 1123(a)(4) (emphasis added).

41. The cases cited by the Minority AHG actually undermine the new rule they want to create. The courts in *Pacific Drilling* and *Momentive* did in fact express concern regarding the fairness of backstop premiums in the context of those transactions.[64] But each court ultimately approved the transaction at issue after parties consensually modified the terms to ensure that the backstop parties did not receive an outsized fee relative to their risk.[65] Because the Put Option Premium and Direct Investment Commitment are entirely reasonable under the circumstances, the concern articulated in these other cases is neither relevant nor indicative of disparate treatment under section 1123(a)(4) of the Bankruptcy Code.

C. The Alternative Proposal Is Not Actionable or Confirmable

42. The Minority AHG argues that, even if the Court denies confirmation of the Plan, the Debtors still have a realistic "option[] to restructure as a going concern."[66] The Minority AHG delivered an Alternative Proposal to the Debtors on April 26, 2024, three weeks prior to the Combined Hearing.[67] The Minority AHG knew about the Debtors' potential restructuring no later than February 9, 2024, and has not explained why it waited two and a half months to deliver its Alternative Proposal.[68] Regardless, the Special Committee considered the Alternative Proposal

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64 Minority AHG Obj. ¶¶ 8, 52.

65 *In re Pac. Drilling S.A.*, 2018 WL 11435661, at *1 (Bankr. S.D.N.Y. Oct. 1, 2018) ("Before me is the Debtors' motion for approval of the terms under which additional equity capital will be raised in connection with the proposed plan of reorganization. I will not keep everybody in suspense: I am going to approve the arrangements. . . ."); *In re Momentive Performance Materials, Inc.*, No. 14-22503-RDD (Bankr. S.D.N.Y.), June 19, 2014 Hr'g Tr. (attached as Ex. B to the Minority AHG Obj.) 198:5-11. In addition, the Court in *Momentive* refused to subject approval of the backstop to entire fairness scrutiny where the debtors' private equity sponsor participated in the backstop but was only one of many creditors that participated, and where the backstop was approved by an independent committee of the debtors' board. *In re Momentive Performance Materials*, at 185:24-186:15.

66 Minority AHG Obj. ¶ 54.

67 *Id.* Ex. 2.

68 *Amended Responses and Objections of the Ad Hoc Group of Excluded Lenders to Debtors' First Request For Production of Documents*, Resp. to Debtors' RFP No. 1 ("[T]he Excluded Lenders represent that certain of them became aware of discussions relating to a group of lenders potentially providing new money financing as part of a future restructuring on or around the following dates: . . . Cerberus Capital Management, L.P.: February 9, 2024.").

and on April 29, 2024, rejected it as not providing higher and better recoveries to the Debtors' stakeholders when compared to the Plan.[69] The Minority AHG then modified the Alternative Proposal on May 8, 2024 (approximately one week prior to the Combined Hearing) with a purported commitment for a replacement Term DIP Facility. Again, the Special Committee considered the revisions to the Alternative Proposal and concluded that the modified proposal was not viable and would not be better for the Debtors' stakeholders than proceeding with the Plan.[70] The Minority AHG claims that the Alternative Proposal, as modified, "remed[ies the Plan's] legal infirmities" under section 1123(a)(4) by allowing all Holders of Class 3 First Lien Claims to receive New Equity Interests and to participate in the Exit Term Loan Facility.[71]

43. The proposal itself suffers from the same problem that is the basis of the Minority AHG Objection. It contemplates a 5% backstop fee, taken up by certain group members of the Minority AHG[72] and the third-party financing source they have partnered with to present a replacement DIP commitment at the eleventh hour.[73] Of course, if the Put Option Premium under the Plan is impermissible disparate treatment because "none of that value is available for distribution" to parties not participating in the backstop, this proposed backstop fee would necessarily be impermissible.[74]

44. Regardless, the Alternative Proposal has no prospect of providing for higher or better recoveries for the Debtors' stakeholders. The Special Committee rejected it and determined to continue to pursue confirmation of the Plan because the alternative would force the Debtors to

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69 *Id.* Ex. 3.

70 Letter from D. Hillman to B. Guzina (May 8, 2024); Letter from B. Guzina to D. Hillman (May 10, 2024).

71 Minority AHG Obj. ¶¶ 54-55.

72 *Id.*, Ex. 2, Alternative Proposal Term Sheet at 2.

73 Letter from D. Hillman to B. Guzina (May 8, 2024), Ex. A.

74 Minority AHG Obj. ¶ 42.

linger in bankruptcy without adequate funding or a reasonable prospect of confirming a plan on an acceptable timeline. This would result in significant harm to the business (that creditors will own post-emergence) and a substantial increase in administrative costs. The Alternative Proposal does not offer to fund the extended process or account for these risks. The financing it does propose will require priming Holders of First Lien Claims and Second Lien Claims without their consent, and it will dilute recoveries to those Holders through additional financing fees payable to the members of the Minority AHG and a new third-party lender. And the Alternative Proposal is patently unconfirmable given the lack of any meaningful stakeholder support.

45. The Minority AHG speaks for only 11% in amount of the Class 3 Claims. In contrast, the Plan is fully funded, backstopped, and supported by approximately 89% in amount of Class 3 Claims and 100% in amount of the Class 4 Claims that voted on the Plan. That support is based in part on the opportunity for Class 3 to elect to receive takeback debt and not equity (referred in the Plan's Class 3 Claim treatment as the Takeback Term Loan Recovery Option)—an election made by approximately 10% of the Holders of Class 3 First Lien Claims based in part on fund structures that prevent them from receiving equity. The Minority AHG's proposal lacks this option, further decreasing the likelihood that the alternative will ever enjoy meaningful stakeholder support.

46. The proposals are a transparent effort to activate the Special Committee's fiduciary duties for the purpose of the Plan objection, but they are not serious alternatives to the Plan. The Debtors have always been receptive to serious proposals. The Minority AHG declined to make any proposal until weeks after the Petition Date, and then, with the benefit of a roadmap from the Debtors on how to improve the proposal, declined to offer any aggregate improvement for creditors

relative to the Plan or show any stakeholder support necessary for confirmation. The Special Committee recognized that the decision to continue to pursue the Plan was not even close.

D. The Minority AHG's Vote Designation Request Is Unripe and Meritless

47. The Minority AHG asserts that, if this Court displaces the Debtors' business judgment and requires the Debtors to seek confirmation of the Minority AHG's Alternative Proposal, the members of the First Lien Ad Hoc Group and PVKG Lender are likely to vote to reject that proposal.[75] The Minority AHG then notes that it "intend[s] to seek entry of an order designating" those creditors' rejecting votes.[76] The Court should ignore this unripe and meritless request.

48. The argument assumes a parallel universe in which the Debtors no longer enjoy exclusivity or the Special Committee flips 180 degrees on its view of the Alternative Proposal. In that universe, the Minority AHG states that it would seek to designate the rejecting votes of virtually every voting creditor outside of its group—approximately 90% in aggregate amount of prepetition funded debt claims. The suggestion that the Court should designate votes on an unfiled plan is unripe, as "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[77]

49. But even if the Court considers the prospect of designating votes as a prerequisite to confirm the inferior Alternative Proposal, there is no basis for such a remedy. Vote designation

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[75] Minority AHG Obj. ¶ 58.

[76] *Id*.

[77] *Texas v. U.S.*, 523 U.S. 296, 300 (1998).

is an extreme, "draconian measure" applied only in rare circumstances.[78] A party seeking to disallow votes under section 1126(e) "bears a heavy burden."[79]

50. Courts have explained that bad faith sufficient to designate votes may exist where votes "were cast primarily for some ulterior motive only incidentally related to [a party's] status as a creditor."[80] Impermissible ulterior motives may include the intent to "assume control of the debtor; put the debtor out of business or otherwise gain a competitive advantage; destroy the debtor out of pure malice; or obtain benefits available under a private agreement with a third party which depends on the debtor's failure to reorganize."[81] In sum, designation may be appropriate if votes were cast with the "purpose of obstructing a fair and feasible reorganization[.]"[82]

51. The assertion that a potential future vote by members of the First Lien Ad Hoc Group and PVKG Lender "would not be in good faith as [they] would be motivated by a desire to impermissibly receive value unavailable to the [Minority AHG], despite being in the same class," is rote speculation.[83] The Minority AHG cites no evidence establishing that the members of the First Lien Ad Hoc Group or PVKG Lender have ever acted, or are likely to act, with improper

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78 *See, e.g.*, *In re Heritage Org., LLC*, 376 B.R. 783, 794 (Bankr. N.D. Tex. 2007) (denying "drastic" designation remedy where "designation . . . would only serve a strategic purpose"); *In re Adelphia Commc'ns Corp.*, 359 B.R. 54, 56 (Bankr. S.D.N.Y. 2006) (noting that the "ability to vote on a reorganization plan is one of the most sacred entitlements that a creditor has in a chapter 11 case"); *In re Dune Deck Owners Corp.*, 175 B.R. 839, 844 (Bankr. S.D.N.Y. 1995) ("Designation is the exception rather than the rule, and a creditor is free to vote its self-interest with respect to its claim."); *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 715, 742-44 (Bankr. M.D. La. 1999) ("[I]n order for the court to designate votes, the party requesting such relief must introduce evidence of some act, scheme, plan, or device on the part of the acquiring creditor sufficient to sustain a finding of bad faith.").

79 *In re Indianapolis Downs, LLC*, 486 B.R. 286, 296 (Bankr. D. Del. 2013).

80 *In re Mangia Pizza Investments, LP*, 480 B.R. 669, 682 (Bankr. W.D. Tex. 2012).

81 *Adelphia*, 359 B.R. at 61 (citing *Dune Deck Owners*, 175 B.R. at 844-45); *In re Landing Assocs., Ltd.*, 157 B.R. 791, 803 (Bankr. W.D. Tex. 1993) (unacceptable ulterior motives include "malice, strikes, and blackmail").

82 *In re Dernick*, 624 B.R. 799, 809 (Bankr. S.D. Tex. 2020).

83 Minority AHG Obj. ¶ 58.

intent to "obstruct[]" the Debtors' reorganization,[84] or with some "ulterior motive" unrelated to their interests as creditors of the Debtors,[85] as is required under section 1126(e).[86]

52. To the contrary, over the past several months, the members of the First Lien Ad Hoc Group and PVKG Lender have tirelessly worked with the Debtors to formulate a Plan that maximizes the value of the Debtors' estates, pays trade creditors in full, preserves thousands of employees' jobs, and minimizes the time the Debtors must spend in chapter 11—all to the benefit of each stakeholder of the Debtors, including the members of the Minority AHG. The fact that Class 3 accepted this Plan by over 80% in amount and number is testament to the successful contributions by the First Lien Ad Hoc Group and PVKG Lender to this chapter 11 process—not their obstruction of it. Further, the mere fact that the Plan implements the Put Option Premium and Direct Investment Commitment cannot be evidence of bad faith or an ulterior motive warranting vote designation, or else no plan containing these market-standard provisions could ever be confirmed.[87] To the extent designation is ever properly raised, the Debtors reserve all rights to seek to designate the votes of the members of the Minority AHG, whose obstructionist tactics actually warrant that relief.

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84 *Dernick*, 624 B.R. at 809.

85 *Mangia Pizza*, 480 B.R. at 682.

86 The Minority AHG's failure to cite any evidence in support of vote designation also supports finding that their vote designation argument is waived. "[A]rguments may nonetheless be waived where the party fails to adequately brief its arguments, and support them with facts, evidence, or applicable authority." *Renee F. v. O'Malley*, No. 22-CV-04237, 2024 WL 894964, at *4 (S.D. Tex. Mar. 1, 2024) (internal citations omitted). "Litigants 'must press and not merely intimate' their arguments to avoid waiver." *New Cingular Wireless, LLC v. City of Brownsville, Texas*, No. 19-CV-91, 2019 WL 8499340, at *11 (S.D. Tex. Dec. 20, 2019) (quoting *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994)).

87 *See In re CHC Grp. Ltd.*, 2017 WL 11093971, at *12 (confirming plan of reorganization accepted by creditors participating in a backstop that was not open to all creditors).

II. The Disclosure Statement Should Be Approved on a Final Basis

A. Creditors Received Sufficient Notice of the Combined Hearing and Objection Deadline

53. Under Bankruptcy Rule 3017(a), a hearing on the adequacy of a disclosure statement generally requires twenty-eight (28) days' notice.[88] Similarly, Bankruptcy Rule 2002(b) provides that parties in interest should receive twenty-eight (28) days' notice of the objection deadline and the hearing to consider approval of the disclosure statement.[89] Courts in the Fifth Circuit and elsewhere have adopted the general rule that due process requires that "notice be 'reasonably calculated, under all the circumstances, to inform interested parties of the pendency' of a proceeding."[90] When evaluating whether notice was sufficient, courts will consider "[f]irst, whether the notice apprised the claimant of the pendency of the action, and second, whether it was sufficiently timely to permit the claimant to act."[91] Whether a particular method of notice is reasonably calculated to inform interested parties is determined on a case-by-case basis.[92]

54. Here, the Debtors provided sufficient notice of the Combined Hearing and Objection Deadline under the Bankruptcy Rules. As noted, on April 4, 2024, the Court entered the Scheduling Order, which, among other things, scheduled the Combined Hearing, set the Objection Deadline, and approved the form and manner of notice of the Combined Hearing

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88 *See* Fed. R. Bankr. P. 3017(a) ("[T]he court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest . . . to consider the disclosure statement and any objections or modifications thereto.").

89 *See* Fed. R. Bankr. P. 2002(b).

90 *In re Placid Oil Co.*, 753 F.3d 151, 154 (5th Cir. 2014) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

91 *In re Tex. Tamale Co., Inc.*, 219 B.R. 732, 739-40 (Bankr. S.D. Tex. 1998) (applying two-part test) (citing *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 518 (5th Cir. 1994) (same)).

92 *See In re Hunt*, 146 B.R. 178, 182 (Bankr. N.D. Tex. 1992) ("Whether a particular method of notice is reasonably calculated to reach interested parties depends upon the particular circumstances of each case.").

Notice.[93] The Combined Hearing Notice informed recipients of the commencement of the Chapter 11 Cases, the date and time of the Objection Deadline, and the date and time set for the Combined Hearing. The Debtors, through the Claims, Noticing, and Solicitation Agent, completed service of the Combined Hearing Notice on all entities listed on the Debtors' creditor matrix on April 8, 2024—29 days in advance of the Objection Deadline and 39 days in advance of the Combined Hearing.[94] In addition, the Debtors caused the Publication Notice to be published in the national edition of the *New York Times* on April 8, 2024, which, among other things, disclosed the date of the Combined Hearing and the Objection Deadline.[95] Each of the Combined Hearing Notice and Publication Notice also included instructions on how to obtain the Plan and the Disclosure Statement free of charge through the Claims, Noticing, and Solicitation Agent's website.

55. Given the ample notice the Debtors provided to parties in interest regarding the Objection Deadline and Combined Hearing, the Debtors have satisfied the requirements of the Bankruptcy Rules and due process.

B. The Disclosure Statement Satisfies the Requirements of the Bankruptcy Code

56. The Debtors commenced the solicitation of votes on the Plan from the Voting Classes prior to the Petition Date. To determine whether a prepetition solicitation of votes to accept or reject a plan should be approved, the Court must determine whether the solicitation complied with sections 1125 and 1126(b) of the Bankruptcy Code and Bankruptcy Rules 3017(d), 3017(e), 3018(b), and 3018(c).

57. Section 1125(g) of the Bankruptcy Code provides that:

> [A]n acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with

[93] Scheduling Order ¶¶ 2-9.

[94] Combined Hearing Certificate of Service ¶ 2.

[95] *See* Proof of Publication.

> applicable non-bankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable non-bankruptcy law.[96]

58. Specifically, section 1126(b) of the Bankruptcy Code provides that:

> [A] holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—(1) the solicitation of such acceptance or rejection was in compliance with any applicable non-bankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or (2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.[97]

59. For the reasons set forth herein, the Debtors satisfied the requirements of the Bankruptcy Code and the Bankruptcy Rules in connection with solicitation.

1. The Disclosure Statement Demonstrates That the Debtors Complied With Applicable Non-Bankruptcy Law With Respect to the Prepetition Solicitation

60. Section 1126(b) of the Bankruptcy Code expressly permits a debtor to solicit votes from holders of claims and equity interests prepetition without a court-approved disclosure statement if the solicitation complies with applicable non-bankruptcy law—including generally applicable federal and state securities laws or regulations. Alternatively, if no such laws exist, the solicited holders must simply receive "adequate information" within the meaning of section 1125(a) of the Bankruptcy Code.[98]

61. To the extent that the Debtors' prepetition solicitation was deemed to constitute an offer of new securities, that solicitation was exempt from securities law registration requirements

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[96] 11 U.S.C. § 1125(g).

[97] 11 U.S.C. § 1126(b).

[98] *Id*.

pursuant to section 4(a)(2), Regulation D, Regulation S, Rule 144A, and/or Rule 501 of the Securities Act, or any similar rules, regulations, or statutes, as applicable to any recipient deemed an offeree. Specifically, section 4(a)(2) and Regulation D of the Securities Act create an exemption from the registration requirements under the Securities Act for certain transactions not involving a "public offering," and Regulation S creates an exemption from the registration requirements under the Securities Act for offerings deemed to be executed outside of the United States.

62. The Debtors have complied with the requirements of section 4(a)(2) of the Securities Act, Regulation D, and Regulation S, as applicable, with respect to the requirements for transactions exempt from the registration requirements under the Securities Act in order to address the scenario where the prepetition solicitation of votes would be deemed a private placement of securities. Specifically, the prepetition solicitation was made to those Holders of Class 3 First Lien Claims and Class 4 Second Lien Claims who certified that they were one of the following: (a) a qualified institutional buyer as defined in Rule 144A of the Securities Act, (b) not a U.S. person (as defined in Regulation S of the Securities Act), or (c) an institutional accredited investor (as defined in Rule 501(a)(1), (2), (3), (7), (8), (9), (12), and (13) under the Securities Act of 1933, as amended), and any securities acquired by such party will have been acquired for investment and not with a view to distribution or resale in violation of the Securities Act.

63. Therefore, the Debtors' prepetition solicitation meets the requirements of applicable non-bankruptcy law and complies with section 1126(b)(1) of the Bankruptcy Code. Moreover, no party in interest has objected to final approval of the Disclosure Statement, much less on account of noncompliance with applicable non-bankruptcy law.

2. The Disclosure Statement Contains Adequate Information

64. The Debtors' prepetition solicitation also complied with section 1126(b)(2) of the Bankruptcy Code, which applies the requirements of section 1125(a) to prepetition solicitations.[99] Section 1125(a) requires that a disclosure statement provide "adequate information" to voting creditors that allows them to make an informed decision about whether to vote to accept or reject the plan.[100] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[101] Courts within the Fifth Circuit and elsewhere acknowledge that determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code is committed to the broad discretion of the court.[102]

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99 11 U.S.C. § 1126(b)(2).

100 *See, e.g.*, *In re J.D. Mfg., Inc.*, No. 07-36751, 2008 WL 4533690, at *2 (Bankr. S.D. Tex. Oct. 2, 2008) ("Adequacy' of information is a determination that is relative both to the entity (e.g.[,] assets/business being reorganized or liquidated) and to the sophistication of the creditors to whom the disclosure statement is addressed."); *In re U.S. Brass Corp.*, 194 B.R. 420, 423 (Bankr. E.D. Tex. 1996) ("The purpose of the disclosure statement is . . . to provide enough information to interested persons so they may make an informed choice[.]"); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 831 (Bankr W.D. Tex. 1991) ("A court's legitimate concern under section 1125 is assuring that hypothetical reasonable investors receive such information as will enable them to evaluate for themselves what impact the information might have on their claims and on the outcome of the case[.]") (emphasis in original); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) ("Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing adequate information to enable a creditor to make an informed judgment about the Plan.") (internal quotations omitted); *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote.").

101 11 U.S.C. § 1125(a)(1) ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records[.]"); *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 518 (5th Cir. 1998) ("The legislative history of [section] 1125 indicates that, in determining what constitutes adequate information with respect to a particular disclosure statement, both the kind and form of information are left essentially to the judicial discretion of the court and that the information required will necessarily be governed by the circumstances of the case.") (internal citations omitted); *Floyd v. Hefner*, No. H-03-5693, 2006 WL 2844245, at *30 (S.D. Tex. Sept. 29, 2006) (noting that what constitutes "adequate information" is a "flexible standard"); *Applegate Prop., Ltd.*, 133 B.R. at 829 ("The issue of adequate information is usually decided on a case by case basis and is left largely to the discretion of the bankruptcy court.").

102 *See, e.g.*, *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.").

65. Courts look for certain information when evaluating the adequacy of the disclosures in a proposed disclosure statement, including:

i. the events which led to the filing of a bankruptcy petition;

ii. the relationship of a debtor with the affiliates;

iii. a description of the available assets and their value;

iv. the anticipated future of the company;

v. the source of information stated in the disclosure statement;

vi. the present condition of a debtor while in chapter 11;

vii. the claims asserted against a debtor;

viii. the estimated return to creditors under a chapter 7 liquidation;

ix. the future management of a debtor;

x. the chapter 11 plan or a summary thereof;

xi. the financial information, valuations, and projections relevant to the claimants' decision to accept or reject the chapter 11 claim;

xii. the information relevant to the risks posed to claimants under the plan;

xiii. the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;

xiv. the litigation likely to arise in a non-bankruptcy context; and

xv. the tax attributes of a debtor.[103]

[103] *In re U.S. Brass Corp.*, 194 B.R. at 424-25; *Westland Oil Dev. Corp. v. MCorp Mgmt. Sols., Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993) (listing factors courts have considered in determining the adequacy of information provided in a disclosure statement); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988) (same); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same). Disclosure regarding all topics is not necessary in every case. *In re U.S. Brass Corp.*, 194 B.R. at 425; *In re Phx. Petroleum*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001).

66. The Disclosure Statement contains adequate information. For instance, the Disclosure Statement contains descriptions and summaries of, among other things, the Debtors' corporate history, structure, and business (**Article IV**); the events leading to the commencement of the Chapter 11 Cases (**Article V**); the anticipated events of the Chapter 11 Cases (**Article VI**); the classification and treatment of Claims and Interests (**Article II**); the sources of consideration for Plan distributions and the means for implementing the Plan (**Article VII**); the proposed treatment of executory contracts and unexpired leases (**Article VII**); provisions governing distributions (**Article VII**); procedures for resolving disputed claims (**Article VII**); information relating to releases, injunctions, and related provisions that are conspicuously displayed in accordance with Bankruptcy Rule 3016(c) (**Article VII**); the statutory requirements for confirmation (**Article IX**); risk factors related to the Plan (**Article X**); certain securities law matters (**Article XI**); and certain U.S. federal tax consequences arising from the implementation of the Plan (**Article XII**). In addition, the Disclosure Statement, and the Plan were subject to extensive review and comment by the 1L Ad Hoc Group, the Second Lien Ad Hoc Group, and PVKG Lender.

67. In light of the Disclosure Statement's extensive disclosures, the Disclosure Statement contains adequate information in satisfaction of sections 1125(a) and 1126(b)(2) of the Bankruptcy Code.

C. The Debtors' Solicitation of Votes Complied With the Bankruptcy Code, the Bankruptcy Rules, and Scheduling Order

68. Prior to the Petition Date, the Debtors commenced distribution of the Solicitation Package to Holders of Claims entitled to vote on the Plan and solicited votes to accept or reject the

Plan, in accordance with sections 1125 and 1126 of the Bankruptcy Code.[104] Bankruptcy Rule 3017(d) sets forth the materials that must be provided to Holders of Claims for the purpose of soliciting their votes to accept or reject a plan of reorganization. As set forth in more detail below, the Solicitation Procedures complied with the Bankruptcy Code, the Bankruptcy Rules, and the Scheduling Order.

69. The solicitation was undertaken in accordance with sections 1125 and 1126 of the Bankruptcy Code. In addition, Bankruptcy Rule 3017(d) enumerates those materials that must be provided to holders of claims and interests for the purpose of soliciting votes to accept or reject a plan of reorganization.[105] As set forth in more detail below, the solicitation complied with the Bankruptcy Code and the Bankruptcy Rules.

1. The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied With the Bankruptcy Rules

70. Bankruptcy Rule 3017(d) requires debtors to distribute a ballot that conforms substantially to Official Form No. 314 only to "creditors and equity security holders entitled to vote on the plan."[106] Bankruptcy Rule 3018(c) provides that "[a]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form."[107] The Ballots conformed to Official Form No. 314 and were modified to address the facts of these Chapter 11 Cases and to be appropriate for each Voting Class, in each case as approved by the Scheduling Order. These modifications included bold and capitalized language regarding the

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104 *See* 11 U.S.C. § 1125(g) (debtors may commence solicitation prior to filing chapter 11 petitions); 11 U.S.C. § 1126(b)(2) (holders of claims or interests that accepted or rejected a plan before the commencement of a chapter 11 case are deemed to accept or reject the plan so long as the solicitation provided adequate information).

105 *See* Fed. R. Bankr. P. 3017(d)

106 *Id*.

107 *See* Fed. R. Bankr. P. 3018(c).

Plan's Third-Party Releases and the procedures for opposition to such releases. The Ballots were approved by the Court in the Scheduling Order, and no party has objected to the sufficiency of the Ballots. Accordingly, the Debtors have satisfied Bankruptcy Rules 3017(d) and 3018(c).

2. The Voting Record Date Complied With the Bankruptcy Rules and the Scheduling Order

71. In a prepetition solicitation, the holders of record of the applicable claims against and interests in a debtor entitled to receive ballots and related solicitation materials are to be determined "on the date specified in the solicitation."[108] The Scheduling Order, the Disclosure Statement, and the ballots clearly identify April 1, 2024 as the Voting Record Date for purposes of determining which Holders of Claims were entitled to vote on the Plan. The Court approved the Voting Record Date in the Scheduling Order and no party in interest has objected to the Voting Record Date. Accordingly, the Debtors complied with the Scheduling Order and satisfied the applicable requirements of the Bankruptcy Rules with respect to the Voting Record Date.

3. The Debtors' Solicitation Period Complied With Bankruptcy Rule 3018(b) and the Scheduling Order

72. The Debtors' solicitation period complied with Bankruptcy Rule 3018(b), which requires that a prepetition solicitation not provide an "unreasonably short time" for solicitation.[109] As noted, the Solicitation Packages were transmitted to all Holders of Claims in the Voting Classes on April 3, 2024, which was 14 days in advance of the Voting Deadline. The solicitation period provided sufficient time for voting creditors to return their ballots—as evidenced by the fact that creditors holding approximately 95% of the aggregate Class 3 Claims returned ballots and creditors holding approximately 90% of the aggregate Class 4 Claims returned ballots—and was not

[108] *See* Fed. R. Bankr. P. 3018(b).

[109] Fed. R. Bankr. P. 3018(b).

unreasonably short.[110] Further, the Court approved the length of the solicitation period in the Scheduling Order and no party has objected to the solicitation period. Accordingly, the Debtors' solicitation period complied with the Scheduling Order and satisfied the requirements of Bankruptcy Rule 3018(b).

4. The Debtors' Vote Tabulation Was Appropriate and Complied with the Scheduling Order

73. As described in the Scheduling Motion and Disclosure Statement, the Debtors, through the Claims, Noticing, and Solicitation Agent, used standard tabulation procedures in tabulating votes from Holders of Claims in the Voting Classes. Specifically, the Claims, Noticing, and Solicitation Agent reviewed all ballots received through the Voting Deadline and tabulated valid ballots in accordance with the procedures described in the Scheduling Motion and Disclosure Statement and approved by the Court under the Scheduling Order. The Claims, Noticing, and Solicitation Agent's tabulation of votes, set forth in the Voting Report, confirms that sufficient numbers and amounts of Holders of Claims in the Voting Classes voted to accept the Plan, with the result that Class 3 and Class 4 voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code. The Debtors request that the Court approve the Debtors' tabulation of votes.

5. Waiver of Certain Solicitation Package Mailings Was Reasonable and Appropriate and Complied with the Scheduling Order

74. Certain Holders of Claims and Interests were not provided a Solicitation Package because such Holders are unimpaired under the Plan (and therefore conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code) or are impaired and not entitled to receive a distribution under the Plan (and therefore conclusively presumed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code), each as of the Voting

[110] Voting Report, Ex. 8.

Record Date. Bankruptcy Rule 3017(d) requires transmission of a court-approved disclosure statement to, among other parties, classes of unimpaired creditors and equity security holders unless the court orders otherwise. Because Bankruptcy Rule 3017(d) depends, in relevant part, "[u]pon approval of a disclosure statement," such provision does not apply here in light of the prepetition solicitation employed by the Debtors.[111] Regardless, in the Scheduling Order, the Court approved the Combined Hearing Notice, Non-Voting Status Notice, and Opt-Out Form sent to stakeholders not entitled to vote on the Plan, which apprised them of the Objection Deadline, Combined Hearing, and opportunity to opt-out of the Plan's Third-Party Release.[112]

75. Accordingly, waiver of any applicable requirement to mail Solicitation Packages to unimpaired creditors and equity security holders was reasonable and appropriate, complied with the Scheduling Order, and did not impact those parties' substantive rights with respect to the Plan in light of other notices provided to those parties.

6. Solicitation of the Plan Complied With the Bankruptcy Code and Was in Good Faith

76. Section 1125(e) of the Bankruptcy Code provides that "a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable, on account of such solicitation . . . for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan."[113] Section 1125(e) of the Bankruptcy Code "provides a safe harbor for the disclosure and solicitation process of a

[111] Fed. R. Bankr. P. 3017(d).

[112] Scheduling Order ¶¶ 7, 9-10, 15-17.

[113] 11 U.S.C. § 1125(e).

bankruptcy."[114] Courts in this District frequently enter confirmation orders with protections based on section 1125(e) of the Bankruptcy Code.[115]

77. As set forth in the Goncalves Declaration, the Plan was solicited in good faith by the Debtors, the parties to the RSA, the Agents/Trustees, and each of their Related Parties.[116] In addition, as set forth in the Scheduling Order, the Solicitation Procedures utilized by the Debtors for distribution of the Solicitation Packages satisfy "the applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, the Bankruptcy Local Rules, and any other applicable rules, laws, and regulations, including any applicable registration requirements under the Securities Act, and any exemptions from registration under Blue Sky requirements."[117] Therefore, the Debtors request that the Court determine that the Plan was solicited in good faith pursuant to section 1125(e).

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[114] *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995).

[115] *See, e.g.*, *In re Talen Energy Supply, LLC*, No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 20, 2022) [Docket No. 1760] (approving the protection of the debtors, the directors, managers, and officers of any debtor entity, the parties to the restructuring support agreement, the Official Committee of Unsecured Creditors and its members, the DIP agent and DIP lenders, and certain settling parties, among others, pursuant to section 1125(e) of the Bankruptcy Code); *In re Altera Infrastructure L.P.*, No. 22-90130 (MI) (Bankr. S.D. Tex. Nov. 4, 2022) [Docket No. 533] (approving protection of the debtors' and certain other plan proponents' affiliates, directors, officers, members, managers, employees, and advisors pursuant to section 1125(e) of the Bankruptcy Code); *In re Sungard AS New Holdings, LLC*, No. 22-90018 (DRJ) (Bankr. S.D. Tex. Oct. 17, 2022) [Docket No. 763] (approving of the debtors' and other plan proponents' affiliates, agents, representatives, members, principals, equity holders (regardless of whether such interests are held directly or indirectly), officers, directors, managers, employees, advisors, and attorneys relating to the offer, issuance, sale, and purchase of securities offered and sold under the plan); *see also In re Fieldwood Energy LLC*, No. 20-33948 (MI), 2021 WL 2853151, at *10 (Bankr. S.D. Tex. June 25, 2021) ("Debtors and their directors, officers, employees, members, agents, advisors, and professionals have acted in 'good faith' within the meaning of section 1125(e) of the Bankruptcy Code . . . in connection with all their respective activities relating to the solicitation of acceptances or rejections of the Plan and their participation in the activities . . . and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the exculpation provisions set forth in . . . the Plan.").

[116] *Declaration of Rui Goncalves in Support of (I) Approval of the Debtors' Disclosure Statement and (II) Confirmation of the Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* (the "**Goncalves Declaration**") ¶¶ 5-6, filed contemporaneously herewith.

[117] Scheduling Order ¶ 8.

III. The Plan Satisfies the Bankruptcy Code's Requirements for Confirmation and Should Be Confirmed

78. To obtain confirmation of the Plan, the Debtors must demonstrate by a preponderance of the evidence that the Plan satisfies section 1129 of the Bankruptcy Code.[118] For the reasons set forth below, the Plan satisfies the applicable requirements of section 1129 of the Bankruptcy Code and complies with all other applicable sections of the Bankruptcy Code, the Bankruptcy Rules, and the Bankruptcy Local Rules and should be confirmed.

A. The Plan Complies with the Applicable Provisions of the Bankruptcy Code – § 1129(a)(1)

79. Under section 1129(a)(1) of the Bankruptcy Code, a plan must comply with the applicable provisions of the Bankruptcy Code. This provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and interests and the contents of the plan, respectively.[119]

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

80. The classification requirement of section 1122(a) of the Bankruptcy Code provides, in pertinent part, 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 of such class.[120]

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[118] *See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("[P]reponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.").

[119] *See, e.g., In re Star Ambulance Serv., LLC*, 540 B.R. 251, 260 (Bankr. S.D. Tex. 2015) ("Courts interpret [section 1129(a)(1)] to mean that a plan must meet the requirements of Bankruptcy Code sections 1122 and 1123.") (citing, *inter alia*, *Springs Alliance, Inc. v. WSI (II)-COS, L.L.C. (In re Save Our Springs (S.O.S.) All., Inc.)*, 632 F.3d 168, 174 (5th Cir. 2011)); H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978).

[120] 11 U.S.C. § 1122(a).

81. For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class.[121] Instead, claims or interests placed in a particular class need only be substantially similar to each other.[122] Courts in this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[123] Here, the Plan classifies substantially similar claims in the same class, satisfying section 1122(a) of the Bankruptcy Code.

82. Here, the Plan provides for nine Classes of Claims and Interests: (a) Class 1 (Other Secured Claims); (b) Class 2 (Other Priority Claims); (c) Class 3 (First Lien Claims); (d) Class 4 (Second Lien Claims); (e) Class 5 (General Unsecured Claims); (f) Class 6 (Intercompany Claims); (g) Class 7 (Section 510 Claims) (h) Class 8 (Intercompany Interests); and (i) Class 9 (Existing C1 Interests).[124]

83. The classification scheme set forth in the Plan complies with section 1122(a) of the Bankruptcy Code because each Class contains only Claims and Interests that are substantially

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[121] *See, e.g., Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (Bankr. D. Del. 2006) ("Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class if such claim or interest is substantially similar to the other claims or interests of such class. A classification structure satisfies section 1122 of the Bankruptcy Code when a reasonable basis exists for the structure, and the claims or interests within each particular class are substantially similar.")

[122] *In re Vitro Asset Corp.*, No. 11-32600-HDH, 2013 WL 6044453, at * 5 (Bankr. N.D. Tex. Nov. 14, 2013) ("[A] plan may provide for multiple classes of claims or interests so long as each claim or interest within a class is substantially similar to other claims or interests in that class").

[123] Courts have identified grounds justifying separate classification, including: (a) where members of a class possess different legal rights, and (b) where there are good business reasons for separate classification. *See In re Briscoe Enters.*, 994 F.2d 1160, 1167 (5th Cir. 1993) (recognizing that "there may be good business reasons to support separate classification") (citing *Matter of Greystone*, 948 F.2d 134 (5th Cir.1991); *In re Pisces Energy, LLC*, No. 09-36591-H5-11, 2009 WL 7227880, at *8 (Bankr. S.D. Tex. Dec. 21, 2009) ("[A] plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code provided there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar."); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan.").

[124] Plan, Art. III.

similar to each other. Other Priority Claims, Other Secured Claims, First Lien Claims, Second Lien Claims, General Unsecured Claims, Section 510 Claims, and Intercompany Claims have each been classified separately, respectively, because of the secured or unsecured status of the underlying obligation, the specific collateral (if any) securing such Claims, and the nature and priority of the underlying obligation.[125] The Plan's classification scheme was not proposed to manufacture a consenting impaired class to manipulate voting.[126] Further, Claims (rights to payment) are also classified separately from Interests (representing ownership in the business). Finally, no party in interest has objected to the Plan's classification scheme.

84. Because each Class consists of only similar Claims and Interests, the Court should approve the classification scheme of the Plan as consistent with section 1122(a) of the Bankruptcy Code.

2. The Plan Satisfies the Requirements of Section 1123(a) of the Bankruptcy Code

85. The Plan complies with all subsections of section 1123(a) of the Bankruptcy Code, which sets forth seven requirements that every chapter 11 plan must satisfy.[127]

i. Designation of Classes of Claims and Equity Interests – § 1123(a)(1)

86. For the reasons set forth above, the Plan properly designates Classes of Claims and Interests in accordance with section 1122 of the Bankruptcy Code and thus satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code. The Plan complies with section

[125] Goncalves Decl. ¶ 8.

[126] *Id*.

[127] 11 U.S.C. § 1123(a). Section 1123(a)(8) does not apply in the Chapter 11 Cases because the Debtors are not individuals.

1123(a)(1) by classifying Claims and Interests in **Article III** of the Plan such that each Class consists of substantially similar Claims or Interests, and no party has asserted otherwise.

ii. Specification of Unimpaired Classes – § 1123(a)(2)

87. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan."[128] The Plan meets this requirement by identifying each Unimpaired Class in **Article III** of the Plan, and no party has asserted otherwise.

iii. Treatment of Impaired Classes – § 1123(a)(3)

88. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan."[129] The Plan meets this requirement by setting forth the treatment of each Impaired Class in **Article III** of the Plan, and no party has asserted otherwise.

iv. Equal Treatment Within Classes – § 1123(a)(4)

89. Section 1123(a)(4) of the Bankruptcy Code requires that the 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."[130] The Plan meets this requirement because the Allowed Claims or Interests in each Class will receive the same treatment as the other Allowed Claims or Interests within such Class unless the Holder of such Claim or Interest has agreed to less favorable treatment. In addition, the Minority AHG's assertion that the Plan does not provide equal treatment to Holders of Class 3 Claims lacks merit and should be overruled for the reasons set forth above.

[128] 11 U.S.C. § 1123(a)(2).

[129] 11 U.S.C. § 1123(a)(3).

[130] 11 U.S.C. § 1123(a)(4).

v. Means for Implementation – § 1123(a)(5)

90. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation.[131] The Plan satisfies this requirement because **Article IV** of the Plan, as well as other Plan provisions, provide the means by which the Plan will be implemented. Among other things, **Article IV** of the Plan:

a. constitutes a good faith compromise and settlement of all Claims and Interests and controversies resolved pursuant to the Plan;

b. authorizes the Debtors and/or the Reorganized Debtors to take all actions necessary to effectuate the Plan, including those actions necessary or appropriate to effectuate the Restructuring Transactions, the Rights Offering, the Backstop Agreement, and any restructuring transactions set forth in the Plan Supplement and the Description of Transaction Steps, as the same may be modified or amended from time to time prior to the Effective Date;

c. authorizes the Debtors' entry into, delivery of, and implementation of the Definitive Documents and other transaction documents contemplated by the Plan;

d. sets forth the funding and sources of consideration for the Plan distributions, including the Exit Facilities, the Rights Offering and the Backstop Agreement, the New Equity Interests, and Cash on hand;

e. authorizes the Reorganized Debtors to enter into the Exit Facilities;

f. authorizes the Debtors to distribute the Rights Offering Documents to the Eligible Offerees on behalf of the Reorganized Debtors and to issue the Rights;

g. authorizes the Reorganized Debtors to issue the New Equity Interests;

h. authorizes the Reorganized Debtors to adopt the Governance Documents;

i. provides for the appointment of the members of the New Board;

j. preserves the Debtors' corporate existence following the Effective Date (except as otherwise provided in the Plan);

k. provides for the vesting of Estate assets in the Reorganized Debtors;

[131] 11 U.S.C. § 1123(a)(5).

l. provides for the preservation and vesting of Claims and Causes of Action not released pursuant to the Plan in the Reorganized Debtors;

m. authorizes the Reorganized Debtors to issue, execute, and assume certain contracts and other agreements, including certain agreements with the Debtors' employees and management;

n. provides for the cancellation of existing securities and agreements (except as otherwise provided in the Plan);

o. authorizes and approves all corporate actions contemplated under the Plan; and

p. authorizes the Debtors or Reorganized Debtors to take all actions necessary or appropriate to effectuate the Plan.

91. The precise terms governing the execution of many of these transactions are set forth in greater detail in the applicable Definitive Documents or forms of agreements included in the Plan Supplement. Accordingly, the Plan satisfies section 1123(a)(5), and no party has asserted otherwise.

vi. Issuance of Non-Voting Securities – § 1123(a)(6)

92. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities.[132] To that end, **Article IV.J** of the Plan provides that the Reorganized Debtors' Governance Documents shall contain a provision prohibiting the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code.[133] The Governance Documents filed with the Plan Supplement comply with the Plan and section 1123(a)(6) and prohibit the issuance of non-voting securities.[134] Accordingly, the Plan satisfies section 1123(a)(6), and no party has asserted otherwise.

[132] 11 U.S.C. § 1123(a)(6).

[133] Plan, Art. IV.J.

[134] Plan Suppl., Ex. A.

vii. Disclosure of New Directors and Officers – § 1123(a)(7)

93. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to 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."[135] **Article IV.K** of the Plan outlines the manner of selecting the members of the New Board, which shall consist of members designated in accordance with the Governance Term Sheet. The Plan's manner of selection of members of the New Board accords with applicable state law, the Bankruptcy Code, the interests of creditors and equity security holders, as well as public policy, and no party has asserted otherwise.[136] Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

3. The Plan Complies with Section 1123(b) of the Bankruptcy Code

94. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases; (c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the

[135] 11 U.S.C. § 1123(a)(7).

[136] *See In re Am. Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) ("The debtor's inability to specifically identify future board members does not mean that the debtor has fallen short of the requirement imposed in subsection (a)(5)(A)r(i), because the debtor at this point has no particular individuals whom it proposes should serve, after confirmation, as a director, officer, or voting trustee, other than those whom it has already identified on the record . . . If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i)."); *see also In re Charter Commc'ns*, 419 B.R. 221, 260 n.30 (Bankr. D. Del. 2011) ("Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at [confirmation] the identities of the identities of the known directors.") (emphasis in original).

estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[137] The Plan is consistent with section 1123(b) of the Bankruptcy Code.

i. Impaired and Unimpaired Classes – § 1123(b)(1)

95. Under **Article III** of the Plan, Classes 1 (Other Secured Claims), 2 (Other Priority Claims), and 5 (General Unsecured Claims), are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of, or otherwise provides treatment in accordance with section 1124 to, the Holders of Claims within such Classes.[138] On the other hand, Classes 3 (First Lien Claims), 4 (Second Lien Claims), 7 (Section 510 Claims), and 9 (Existing C1 Interests) are Impaired because the Plan modifies the rights of the Holders of Claims and Interests within such Classes as contemplated by section 1123(b)(1) of the Bankruptcy Code.[139] Additionally, Classes 6 (Intercompany Claims) and 8 (Intercompany Interests) are either Unimpaired or Impaired because the Plan provides that, at the option of the Debtors (with the consent of the Required Consenting Lenders), the legal, equitable, and contractual rights of such Claims and Interests will either be unaltered or otherwise receive treatment in accordance with section 1123(b) of the Bankruptcy Code, or be canceled and released without any distribution in accordance with section 1123(b) of the Bankruptcy Code.[140]

ii. Assumption or Rejection of Executory Contracts and Unexpired Leases – § 1123(b)(2)

96. As set forth in section 1123(b)(2) of the Bankruptcy Code, a plan may provide for the assumption, rejection, or assignment of any executory contract or unexpired lease not

[137] 11 U.S.C. § 1123(b)(1)-(3), (6).

[138] Plan, Art. III.C.

[139] *Id*.

[140] *Id*.

previously rejected.[141] Pursuant to **Article V** of the Plan, as of the Effective Date, each Debtor shall be deemed to have assumed each Executory Contract and Unexpired Lease to which it is a party, unless such contract or lease: (a) was assumed or rejected previously by the Debtors; (b) previously expired or terminated pursuant to its own terms; (c) is the subject of a motion or notice to reject pending as of the Effective Date; or (d) is identified on the Rejected Executory Contract and Unexpired Lease List.[142] The Plan provides that entry of the Confirmation Order by the Bankruptcy Court shall constitute approval of such assumptions and rejections pursuant to sections 365 and 1123 of the Bankruptcy Code as of the Effective Date.[143] By specifying how Executory Contracts and Unexpired Leases will be assumed or rejected, the Plan complies with section 1123(b)(2).

iii. The Plan Appropriately Incorporates Settlements of Claims and Causes of Actions – § 1123(b)(3)

97. Section 1123(b)(3) provides that a plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[144] Courts may approve settlements under a plan if they are "fair, equitable, and in the best interest of the estate."[145] In particular, Fifth Circuit courts apply a five-factor test for considering motions to approve bankruptcy settlements, weighing: "(1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any,

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141 11 U.S.C. § 1123(b)(2).

142 Plan, Art. V.A.

143 *Id*.

144 11 U.S.C. § 1123(b)(3)(A).

145 *See Matter of Assadi*, No. 22-50452, 2022 WL 17819599, at *1 (5th Cir. Dec. 20, 2022) (citing *Am. Can Co. v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 605, 608 (5th Cir. 1980)); Fed R. Bankr. P. 9019.

to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the settlement is truly the product of arms'-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise."[146]

98. Although a debtor bears the burden of establishing that a settlement is fair and equitable based on the balance of the above factors, "the [debtor's] burden is not high."[147] Indeed, a court need only determine that the settlement does not "fall beneath the lowest point in the range of reasonableness."[148]

99. The settlements embodied in the Plan are fair and equitable and satisfy the Bankruptcy Rule 9019 factors as applied in this jurisdiction. **Article IV.A** of the Plan provides for a general settlement of Claims against and Interests in the Debtors.[149] In consideration for the classification, distributions, releases, and other benefits provided under the Plan, all Claims and Interests and controversies will be considered resolved pursuant to the Plan.[150] In addition, **Article IV.B** of the Plan implements the PVKG Notes Claims Settlement, which provides for the PVKG Note Claims to be Allowed in the amount of $213.0 million.[151] The PVKG Notes Claims Settlement is a negotiated resolution of complex issues concerning the amount and allowance of the PVKG Notes Claims, was agreed to among the Debtors, PVKG Lender, the First Lien Ad Hoc

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146 *Matter of Assadi*, No. 22-50452, 2022 WL 17819599, at *1 (citing *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010)).

147 *See In re Roqumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008).

148 *See In re Idearc, Inc.*, 423 B.R. 138, 182 (Bankr. N.D. Tex. 2009); *In re Roqumore*, 393 B.R. at 480 ("The Trustee need only show that his decision falls within the 'range of reasonable litigation alternatives.'" (citations omitted)).

149 Plan, Art. IV.A.

150 *Id*.

151 Plan, Art. IV.B.

Group, and the Second Lien Ad Hoc Group, and avoids complex and value-destructive litigation in these Chapter 11 Cases.[152]

100. In the end, the Plan resolves a host of alleged Claims and Causes of Action, which were thoroughly analyzed by the Debtors, the RSA signatories, and each of their advisors, all of which could have potentially caused extensive delay, cost, and uncertainty in these Chapter 11 Cases, while adversely affecting the Debtors' businesses and operations.[153] As reflected by the overwhelming support of creditors for the Plan, the settlements embodied therein, which were the result of arms'-length negotiations, are in the best interests of creditors and all parties in interest. No party has objected to the settlements embodied in the Plan, and they should be approved pursuant to section 1123(b)(3).

iv. The Plan's Release, Exculpation, and Injunction Provisions Comply With the Bankruptcy Code

101. The Plan includes a Debtor Release, a Third-Party Release, an exculpation provision, and injunction provisions.[154] These provisions comply with the Bankruptcy Code and applicable law because, among other things, they are fair and equitable, are given for valuable consideration, are the product of extensive good faith, arms'-length negotiations, were a material inducement for members of the First Lien Ad Hoc Group, members of the Second Lien Ad Hoc Group, and PVKG Lender to enter into the RSA, and are in the best interests of the Debtors and their Estates.[155] In addition, the Plan's Third-Party Release is consensual[156] and consistent with

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[152] Goncalves Decl. ¶¶ 9, 13-14.

[153] *Id*. ¶¶ 13-14.

[154] *See* Plan, Art. VIII.C (Debtor Release), Art. VIII.D (Third-Party Release), Art. VIII.E (Exculpation), Art. VIII.F (Injunction).

[155] Goncalves Decl. ¶¶ 13-17.

[156] Plan, Art. VIII.D (providing the opportunity to opt-out of the Third-Party Release).

Fifth Circuit precedent. None of the Plan's release, exculpation, or injunction provisions are inconsistent with the Bankruptcy Code and, thus, these provisions are confirmable under section 1123(b)(6) of the Bankruptcy Code.

a. The Debtor Releases Comply With the Bankruptcy Code and Are Appropriate

102. **Article VIII.C** of the Plan provides for a release by the Debtors and the Estates of any and all Causes of Action (the "**Debtor Release**").[157] The Released Parties made significant concessions and contributions to the Chapter 11 Cases in exchange for the Debtor Release and are an integral component of the Debtors' fresh start upon emergence.[158]

103. The Bankruptcy Code supports the inclusion of debtor releases in a chapter 11 plan. Section 1123(b)(3)(A) of the Bankruptcy Code states that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." This provision allows the Debtors to release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[159]

104. In considering the appropriateness of such releases, courts in the Fifth Circuit generally consider whether the release is (a) "fair and equitable" and (b) "in the best interests of the estate."[160] The "fair and equitable" prong is generally interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy

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157 Plan, Art. VIII.C.

158 Goncalves Decl. ¶¶ 13-14.

159 *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (finding that plan release provision "constitute[d] an acceptable settlement under [section] 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan"); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 289 (Bankr. N.D. Tex. 2007); *In re Mirant Corp.*, 348 B.R. 725, 730-39 (Bankr. N.D. Tex. 2006); *In re Gen. Homes Corp. FGMC*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991).

160 *In re Mirant Corp.*, 348 B.R. at 738; *see also In re Heritage Org.*, 375 B.R. at 259.

Code's absolute priority rule.[161] Courts generally determine whether a release is "in the best interests of the estate" by reference to the following factors:

i. the probability of success of litigation;

ii. the complexity and likely duration of the litigation, any attendant expense, inconvenience, or delay, and possible problems collecting a judgment;

iii. the interest of creditors with proper deference to their reasonable views; and

iv. the extent to which the settlement is truly the product of arms'-length negotiations.[162]

Ultimately, courts afford a debtor some discretion in determining for itself the appropriateness of granting plan releases of estate causes of action.[163]

105. The Debtor Release easily meets the controlling standard for approval. As an initial matter, the terms of the Debtor Release are fair and equitable because they comply with the Bankruptcy Code's absolute priority rule. While certain Classes are deemed to have rejected the Plan, as discussed in greater detail below, the Debtor Release does not result in any junior Classes improperly receiving or retaining any property on account of junior Claims or Interests. Thus, the Debtor Release is fair and equitable and in line with Fifth Circuit precedent.

106. In addition to being fair and equitable, the Debtor Release is in the best interest of the Estates. Based on their review, the Debtors are not aware of any claims being released that might reasonably be expected to yield material value for their Estates.[164] Moreover, each Released

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[161] *See In re Mirant Corp.*, 348 B.R. at 738.

[162] *See Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010) (citation omitted); *In re Mirant Corp.*, 348 B.R. at 739-40 (citing *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 355-56 (5th Cir. 1997)).

[163] *See In re Gen. Homes*, 134 B.R. at 861 ("The court concludes that such a release is within the discretion of the Debtor.").

[164] Goncalves Decl. ¶¶ 13-14.

Party has played an integral role in the Chapter 11 Cases, made substantial concessions that underpin the consensual resolution of the Chapter 11 Cases that will allow the Debtors to expeditiously exit bankruptcy with a de-leveraged capital structure, and may be unwilling to support the Plan without the Debtor Release.[165] In addition, the Plan, including the Debtor Release, was negotiated by sophisticated entities that were represented by able counsel and financial advisors.[166] Finally, the overwhelming majority of voting creditors voted to accept the Plan, which includes the Debtor Release; General Unsecured Claims will be paid in full or are otherwise Unimpaired under the Plan; and no party in interest objected to the Debtor Release. The Debtor Release for the Debtors' Related Parties is also appropriate because the Debtors' Related Parties share an identity of interest with the Debtors, supported the Plan and these Chapter 11 Cases, and actively participated in meetings, negotiations, and implementation during these Chapter 11 Cases, and have provided other valuable consideration to the Debtors to facilitate the Debtors' reorganization.

107. Accordingly, the Debtor Release is fair, equitable, and in the best interests of the Estates, is justified under the controlling Fifth Circuit law, and should be approved.

b. The Third-Party Release Is Appropriate and Complies with the Bankruptcy Code

108. **Article VIII.D** of the Plan contains a third-party release provision (the "**Third-Party Release**"). The Third-Party Release provides that each Releasing Party—including all Holders of Claims that do not specifically opt out of or timely object to the Third-Party Release—shall release any and all Causes of Action (including a list of specifically enumerated claims) that such Releasing Parties could assert against the Debtors, the Reorganized Debtors, and the Released

[165] *Id*.

[166] *Id*.

Parties, except for acts or omissions that are found to have been the product of actual fraud, willful misconduct, or gross negligence.[167]

109. Third-party releases are justified and in conformity with Fifth Circuit precedent when the release is consensual.[168] While the Fifth Circuit has not directly defined what constitutes a consensual third-party release, courts within the Fifth Circuit have held that a claimant who received notice of a debtor's chapter 11 filing and the proposed plan, which included a third-party release, but failed to object to the plan, is deemed to have consented to the third-party release.[169] At bottom, courts focus on process—*i.e.*, whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look it over [and] the disclosure is adequate so that they can actually understand[] what they're being asked to do and the options that they're being given."[170]

110. The Plan's Third-Party Release should be approved as a consensual release. Parties in interest were provided notice of these Chapter 11 Cases, the Plan, and the deadline to object to confirmation of the Plan. Both the Disclosure Statement (transmitted to all voting parties and

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167 Plan, Art. VIII.D; Goncalves Decl. ¶¶ 15.

168 *See, e.g.*, *In re CJ Holding Co.*, 597 B.R. 597, 608 (S.D. Tex. 2019) ("The Fifth Circuit does not preclude bankruptcy courts from approving a 'consensual non-debtor release.' Bankruptcy courts within the Fifth Circuit commonly exercise jurisdiction to approve nonparty releases based on agreed plans."); *see also In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-02 (Bankr. W.D. Tex. 2011) ("the Fifth Circuit does allow permanent injunctions so long as there is consent") (emphasis omitted); *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007) ("[m]ost courts allow consensual nondebtor releases to be included in a plan").

169 *See In re CJ Holding*, 597 B.R. at 609 (holding that a claimant who failed to object to confirmation of the plan consented to the plan and the third-party releases contained therein).

170 April 21, 2016 Hr'g Tr. at 47:1-20, *In re Energy & Expl. Partners, Inc.*, No. 15-44931 (RFN) (Bankr. N.D. Tex. 2016) [Docket No. 730] (approving third-party releases as consensual, over objection of the U.S. Trustee, in light of sufficient notice and opportunity to object). Further, the *Procedures for Complex Cases in the Southern District of Texas* (the "**Complex Case Procedures**"), in an effort to ensure proper notice and an opportunity to object, provide: "If a proposed plan seeks consensual pre- or post-petition releases with respect to claims that creditors may hold against non-debtor parties, then a ballot must be sent to creditors entitled to vote on the proposed plan and notices must be sent to non-voting creditors and parties-in-interest. The ballot and the notice must inform the creditors of such releases and provide a box to check to indicate assent or opposition to such consensual releases together with a method for returning the ballot or notice." Complex Case Procedures, ¶ 40. The Debtors' compliance with paragraph 40 of the Complex Case Procedures further evidences that parties received the requisite notice and were provided adequate disclosure.

otherwise publicly available), the Combined Notice (transmitted to parties in interest), and the Non-Voting Status Notice and Opt-Out Form (transmitted to Holders of all non-voting Claims and Interests) expressly state in capitalized, bold-faced, underlined text that Holders of Claims and Interests that do not specifically opt out of or object to the Third-Party Release will be bound by it.[171] Each Ballot, the Combined Notice, the Non-Voting Status Notice, and the Opt-Out Form distributed also contained the full text of **Article VIII.D** of the Plan—the Third-Party Release itself.[172] While approximately 39 parties opted out of the Third-Party Release, no party has objected to its inclusion in the Plan.[173]

111. Ultimately, chapter 11 is a collective proceeding meant to maximize the prospect for a debtor's fresh start, so long as a debtor satisfies its obligations under the Bankruptcy Code in good faith and consistent with due process. Where, as here, a debtor satisfies its due process obligations, parties in interest may waive their rights by failing to participate. Thus, "[i]f a creditor wants to preserve his right to object to confirmation, on whatever ground, he must file an objection. If he does not file an objection, he generally cannot complain about the results of the confirmation proceeding—even if he voted to reject the plan."[174] In addition to informing recipients of key elements in the Chapter 11 Cases, the Solicitation Packages and Combined Hearing Notice detailed the Third-Party Release and provided parties in interest more than an adequate opportunity to opt-

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171 Voting Report, Ex. 1-5.

172 *Id*.

173 Voting Report, Ex. 9.

174 *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 517 (Bankr. E.D. Mo. 2012); *see also In re Camp Arrowhead*, 451 B.R. 678, 702 (Bankr. W.D. Tex. 2011) ("Without an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing[.]") (citing *In re Pac. Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009); *In re Pilgrim's Pride Corp.*, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010)); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

out of the Third-Party Release. Accordingly, the Third-Party Release is appropriate under Fifth Circuit law as a consensual Third-Party Release and should be approved.

c. The Exculpation Provision Complies With the Bankruptcy Code and Is Appropriate

112. **Article VIII.E** of the Plan provides that each Exculpated Party—*i.e.*, the Debtors—shall be released and exculpated from any Claim or Cause of Action that is in any way related to the Chapter 11 Cases or the Debtors' restructuring (each, an "**Exculpated Claim**"), except to the extent "related to any act or omission that is determined in a Final Order to have constituted willful misconduct, gross negligence, or actual fraud" (the "**Exculpation Provision**").[175] The Exculpation Provision limits the liability of Exculpated Parties to a standard of care of willful misconduct, gross negligence, or actual fraud in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors' restructuring.

113. A bankruptcy court may approve an exculpation provision in a chapter 11 plan because a bankruptcy court cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good faith.[176] As such, an exculpation provision represents a legal conclusion resulting from certain findings a bankruptcy court must reach in confirming a plan.[177] Once the court makes its good faith finding, it is appropriate to set the standard of care of the fiduciaries involved in the formulation of that chapter 11 plan.[178] Exculpation provisions appropriately prevent future collateral attacks against the Debtors and are commonly included in chapter 11 plans

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[175] Plan, Art. VIII.E.

[176] *See* 11 U.S.C. § 1129(a)(3); *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 437-38 (5th Cir. 2022); *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000).

[177] *See* 11 U.S.C. § 1129(a)(3); *see also* 28 U.S.C. § 157(b)(2)(L).

[178] *In re Highland Cap. Mgmt.*, 48 F.4th at 437-38; *In re PWS Holding*, 228 F.3d at 246 (observing that creditors and professionals providing services to the debtors are entitled to a "limited grant of immunity" for actions within the scope of their duties).

in this jurisdiction.[179] Accordingly, the Exculpation Provision in the Plan is appropriate because it provides protection to the Debtors, who served as fiduciaries during the restructuring process.

114. The Exculpation Provision is consistent with Fifth Circuit law; namely *Highland Capital*, where the court expressly adopted and applied Fifth Circuit precedent providing qualified immunity to "bankruptcy trustees," which extends to a debtor in possession under section 1107 of the Bankruptcy Code.[180] The Plan therefore appropriately includes the Debtors as Exculpated Parties, consistent with *Highland Capital* and this Court's precedent, for actions taken prior to the Effective Date.

115. The Exculpation Provision is an integral component of the global settlement embodied in the Plan and is the product of good faith, arms'-length negotiations.[181] The Exculpation Provision is narrowly tailored to the Debtors, excludes acts of willful misconduct, gross negligence, and actual fraud, and relates only to acts or omissions in connection with or arising out of the administration of the Chapter 11 Cases or the Debtors' restructuring.[182] Accordingly, the Exculpation Provision is appropriate under the circumstances and should be approved.

d. The Injunction Provision Is Appropriate and Complies with the Bankruptcy Code

116. The injunction provision set forth in **Article VIII.F** of the Plan (the "**Injunction Provision**") is a necessary part of the Plan because it enforces the discharge, Release, and

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[179] *See Highland Cap.*, 48 F.4th at 437-39; *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350] ¶ 39; *In re Pipeline Health Sys., LLC*, No. 22-90291 (MI) (Bankr. S.D. Tex. Jan. 13, 2023) [Docket No. 1041] ¶¶ 44-45; *In re Talen Energy Supply, LLC, et al.*, No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 15, 2022) [Docket No. 1760] ¶ 37; *In re Altera Infrastructure L.P.*, No. 22-90130 (MI) (Bankr. S.D. Tex. Nov. 4, 2022) [Docket No. 533] ¶ 42-43.

[180] *Highland Cap.*, 48 F.4th at 437-39.

[181] Goncalves Decl. ¶ 16.

[182] *Id*.

Exculpation Provisions that are critically important to the Plan. The Injunction Provision affords the Debtors and their stakeholders (including, among others, the Released Parties and the Exculpated Parties) a greater degree of certainty with respect to the Chapter 11 Cases and the Restructuring Transactions implemented by the Plan by requiring the Court's authorization for parties to commence or pursue Claims or Causes of Action that relate to or are reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action subject to the Debtor Releases, the Third-Party Release, or the Exculpation.[183] Further, no party in interest in these Chapter 11 Cases objected to its inclusion in the Plan.[184]

117. The Injunction Provision is an integral component of the Plan, appropriate and necessary under the circumstances, consistent with the Bankruptcy Code, narrowly tailored, and compliant with the applicable case law and precedent in the Fifth Circuit, and should be approved.

B. The Debtors Have Complied With the Applicable Provisions of the Bankruptcy Code – § 1129(a)(2)

118. Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a plan comply "with the applicable provisions of this title."[185] Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent under the Bankruptcy Code.[186] In determining

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[183] *See Highland Cap.*, 48 F.4th at 439 ("Courts have long recognized bankruptcy courts can perform a gatekeeping function. . . . We . . . affirm the inclusion of the injunction and the gatekeeper provisions in the Plan."); *see also In re Party City Holdco Inc.*, No. 23-90005 (DRJ) (Bankr. S.D. Tex. Sept. 6, 2023) [Docket No. 1711] ¶¶ 43-46 (confirming chapter 11 plan that included an injunction and gatekeeper provision); *In re Cineworld Grp. PLC*, No. 22-90168 (MI) (Bankr. S.D. Tex. June 28, 2023) [Docket No. 1982] ¶¶ 52-53 (same); *In re Serta Simmons Bedding, LLC*, No. 23- 90020 (DRJ) (Bankr. S.D. Tex. June 14, 2023) [Docket No. 1071] ¶ 37 (same); *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350] ¶ 39 (same); *In re Talen Energy Supply, LLC*, No. 22-90054 (MI) (Bankr. S.D. Tex. Dec. 20, 2022) [Docket No. 1760] ¶ 37 (same).

[184] *See, In re Camp Arrowhead*, 451 B.R. at 701-02 ("[T]he Fifth Circuit does allow permanent injunctions so long as there is consent . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing[.]") (citations omitted).

[185] 11 U.S.C. § 1129(a)(2).

[186] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[2] (Richard Levin & Henry J. Sommer eds., 16th ed.).

whether a plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code.[187]

119. As set forth above and as evidenced by the Goncalves Declaration, the Voting Report, the Combined Hearing Certificate of Service, and the Proof of Publication, the Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Scheduling Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. In addition, the Debtors and their professionals acted in good faith in all respects in connection with the solicitation of votes on the Plan and the tabulation of such votes. Accordingly, the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.[188]

C. The Plan Was Proposed in Good Faith – § 1129(a)(3)

120. As discussed above, section 1129(a)(3) of the Bankruptcy Code provides that the Court shall confirm a plan of reorganization only if the plan has been "proposed in good faith and not by any means forbidden by law."[189] Section 1129(a)(3) does not define good faith, but courts generally find that a plan is proposed in good faith if there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.[190] "The requirement of good faith must be viewed in light of the totality of the circumstances surrounding

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[187] The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("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.").

[188] *See In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (holding section 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to Plan).

[189] 11 U.S.C. § 1129(a)(3).

[190] *See Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997).

the establishment of a [c]hapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start."[191] The fundamental purpose of chapter 11 is to enable a distressed business to reorganize its affairs to prevent job losses and the adverse economic effects associated with disposing of assets at liquidation value.[192]

121. The plan proponent must also show that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success.[193] Whether a plan is proposed for honest and good reasons depends on "whether the debtor intended to abuse the judicial process, whether the plan was proposed for ulterior motives, or if no realistic probability for effective reorganization exists."[194]

122. The Plan satisfies section 1129(a)(3) of the Bankruptcy Code. Here, the Plan will enable the Debtors to significantly deleverage their balance sheet, leave operational obligations unimpaired, and position the Debtors for long-term success. Under the Plan, the Debtors will substantially reduce their debt load by approximately $1.6 billion, pay in full, in the ordinary course of business, all General Unsecured Claims (including Claims of vendors and suppliers), preserve thousands of jobs, and emerge with adequate capital to operate the reorganized businesses and position the Reorganized Debtors for growth and success. Moreover, the Plan is the product of extensive arms'-length negotiations among the Debtors, their lenders, and other key

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191 *In re Cajun Elec. Power Coop.*, 150 F.3d at 519 (*quoting In re T-H New Orleans*, 116 F.3d at 802); *see also Brite v. Sun Country Dev. (In re Sun Country Dev.)*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999) ("The good faith standard requires that the plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code'" (citations omitted)).

192 *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").

193 *See In re T-H New Orleans*, 116 F.3d at 802 (finding that a court may only confirm a plan for reorganization if the plan has been proposed in good faith and not by any means forbidden by law and that where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied).

194 *In re W.R. & Grace Co.*, 475 B.R. 34, 88 (D. Del. 2012).

stakeholders. The Plan's overwhelming support by the Voting Classes is strong evidence that the Plan is likely to succeed. Finally, the Plan complies with bankruptcy and applicable non-bankruptcy law. These facts are the hallmarks of good faith.[195]

123. Accordingly, the Debtors proposed the Plan with honesty, good intentions, and a reasonable hope of success—all in satisfaction of section 1129(a)(3)'s requirement of good faith.

D. The Plan Provides that the Debtors' Payment of Professional Fees and Expenses Are Subject to Court Approval – § 1129(a)(4)

124. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable. Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the Court as to their reasonableness.[196]

125. All Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code.[197] **Article II.C** of the Plan, moreover, provides that Professionals shall file all final requests for payment of Professional Fee Claims no later than 45 days after the Effective Date, thereby providing a reasonable opportunity for interested parties to review such Professional Fee Claims.

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[195] *See In re Lincolnshire Campus, LLC*, 441 B.R. 524, 530 (Bankr. N.D. Tex. 2010) (holding that a plan was proposed in good faith where plan was developed and negotiated at arms'-length among representatives of debtors and other major parties in interest); *In re Chemtura Corp.*, 439 B.R. 561, 608-09 (Bankr. S.D.N.Y. 2010) (finding that a plan was proposed in good faith where, among other things, the debtor negotiated and reached agreements with several parties in interest to put forward a chapter 11 plan which "in the aggregate" demonstrated "a good faith effort on the part of the debtor to consider the needs and concerns of all major constituencies" in the case).

[196] *See In re Cajun Elec. Power Coop.*, 150 F.3d at 518 ("Section 1129(a)(4) by its terms requires court approval of any payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case.") (internal citations omitted); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

[197] Plan, Art. II.C; *see also* 11 U.S.C. §§ 328(a), 330(a)(1)(A).

126. In addition, the Plan provides that DIP Professional Fees will be paid in accordance with the terms of the DIP Orders.[198] In the Final DIP Order, the Court approved the Debtors' authority to pay all fees required under the DIP Documents, including the payment of all fees to the DIP Agents and the DIP Lenders and the fees and expenses of the professionals retained by the DIP Agents and the DIP Lenders, subject to certain notice requirements.[199] For these reasons, the provisions in the Plan comply with section 1129(a)(4) of the Bankruptcy Code.

E. The Debtors Disclosed All Necessary Information Regarding Directors, Officers, and Insiders – § 1129(a)(5)

127. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors. Section 1129(a)(5)(B) of the Bankruptcy Code further requires a plan proponent to disclose the identity of an "insider" (as defined by section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider. Additionally, section 1129(a)(5)(A)(ii) provides that the appointment or continuance of such officers and directors must be consistent with the interests of creditors and equity security holders and with public policy.

128. These requirements direct the Court to ensure that the post-confirmation governance of the Reorganized Debtors is in good hands. In evaluating compliance with section 1129(a)(5), courts look to whether: (a) the identified directors and officers of the reorganized debtors have experience in the reorganized debtors' business and industry;[200] (b) the

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198 Plan, Art. II.B.

199 *Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Granting Related Relief* [Docket No. 236] ¶ 24(b) (providing for payment of DIP Professional Fees upon expiration of 5-day review and objection period).

200 *See In re Landing Assocs., Ltd.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) ("In order to lodge a valid objection under [section] 1129(a)(5), a creditor must show that a debtor's management is unfit or that the continuance of

identified directors and officers have experience in financial and management matters;[201] (c) the debtors and creditors believe control of the entity by the proposed directors and officers will be beneficial;[202] and (d) the identified directors and officers are not likely to "perpetuate[] incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor."[203] The "public policy requirement would enable [a court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[204]

129. The Debtors have satisfied section 1129(a)(5) of the Bankruptcy Code. As set forth in **Article IV.K** of the Plan, as of the Effective Date, the term of the current members of the board of directors or other governing bodies of Debtors PVKG Intermediate and C1 Holdings shall expire, and the members for the initial term of the New Board shall be appointed in accordance with the Governance Documents. After fulsome negotiations, signatories to the RSA agreed that the New Board would consist of Mr. Russell, the Debtors' CEO, and additional directors to be appointed by lenders holding more than 10% of the fully-diluted New Equity Interests after the Effective Date, as set forth in full in the Governance Documents. The terms in the Plan governing the appointment of the members of the New Board were the result of intense negotiations among the Debtors and the signatories to the RSA, and therefore reflect the interest of creditors and accord

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this management post-confirmation will prejudice the creditors."); *In re Rusty Jones, Inc.*, 110 B.R. 362, 372, 375 (Bankr. N.D. Ill. 1990) (holding that 1129(a)(5) was not satisfied where management had no experience in the debtor's line of business).

201 *See, e.g.*, *In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); *In re Sherwood Square Assocs.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989).

202 *See, e.g.*, *In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990).

203 *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).

204 7 COLLIER ON BANKRUPTCY ¶ 1129.02[5][b].

with public policy.[205] Therefore, the requirements under section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied. Finally, the Debtors will satisfy section 1129(a)(5)(B) of the Bankruptcy Code because the Debtors will publicly disclose the identity of all insiders that the Reorganized Debtors will employ or retain and the nature of any compensation for such insiders in compliance with the Bankruptcy Code on or immediately prior to the Effective Date, to the extent identified and selected prior to that date. Accordingly, section 1129(a)(5) is satisfied here, and no party has objected to the Plan on these grounds.

F. The Plan Does Not Require Governmental Regulatory Approval For Any Rate Changes – § 1129(a)(6)

130. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change provided for in the plan. Section 1129(a)(6) is inapplicable to these Chapter 11 Cases.

G. The Plan Is In the Best Interests of All the Debtors' Creditors – § 1129(a)(7)

131. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity holders. This "best interests" test focuses on individual dissenting creditors, rather than classes of claims.[206] The best interests test requires that each holder of a claim or equity interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor was liquidated under chapter 7 of the Bankruptcy Code.[207]

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[205] *See In re Landing Assocs.*, 157 B.R. at 817 ("Under § 1129(a)(5) the plan proponent must disclose the identity of the individuals that will manage the business post-confirmation, and the participation of these individuals in the debtor's business must be consistent with the interests of creditors."); *see also In re Armstrong World Indus.*, 348 B.R. at 165 (finding disclosure of identities and nature of compensation of persons to serve as directors and officers on the effective date sufficient for section 1129(a)(5) of the Bankruptcy Code).

[206] *See LaSalle*, 526 U.S. at 441 n.13.

[207] 11 U.S.C. § 1129(a)(7).

132. Here, an overwhelming majority of voting creditors have voted to accept the Plan, and all Holders of Claims and Interests in all Impaired Classes will recover at least as much under the Plan as they would in a hypothetical chapter 7 liquidation.[208] As set forth in the Spitzer Declaration[209] and Exhibit E to the Disclosure Statement, the Debtors, with the assistance of their advisors, prepared a Liquidation Analysis that estimates recoveries for Holders of Claims under the Plan. The projected recoveries under the Plan as set forth in the Disclosure Statement are equal to or in excess of the recoveries estimated in a hypothetical chapter 7 liquidation of the Debtors, as reflected in the Liquidation Analysis and the Spitzer Declaration.[210] In addition, no party that rejected the Plan—including the members of the Minority AHG—has asserted that the Plan violates the best interests test. Accordingly, the Plan complies with section 1129(a)(7).

H. The Plan Has Been Accepted by Each Impaired Voting Class – § 1129(a)(8)

133. Subject to section 1129(b) of the Bankruptcy Code, section 1129(a)(8) requires that each class of claims and interests either accept or be unimpaired under the plan of reorganization. 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).[211] As relevant here, a class of claims accepts a plan if the holders of at least two-thirds (2/3) in dollar amount and more

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208 *See In re Neff*, 60 B.R. 448, 452 (Bankr. N.D. Tex. 1985), *aff'd*, 785 F.2d 1033 (5th Cir. 1986) (stating that "best interests" of creditors means "creditors must receive distributions under the Chapter 11 plan with a present value at least equal to what they would have received in a Chapter 7 liquidation of the Debtor as of the effective date of the Plan."); *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("Section 1129(a)(7)(A) requires a determination whether 'a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.'") (citations omitted).

209 "**Spitzer Declaration**" means the *Declaration of Stephen Spitzer in Support of (I) Approval of the Debtors' Disclosure Statement and (II) Confirmation of the Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates*, filed contemporaneously herewith.

210 Disclosure Statement, Ex. E; Spitzer Decl. ¶¶ 8-11.

211 *See* 11 U.S.C. § 1126(f).

than one-half (1/2) in the number of claims in the class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan.[212]

134. Of the Impaired Classes of Claims and Interests under the Plan, Classes 3 (First Lien Claims) and 4 (Second Lien Claims) voted overwhelmingly to accept the Plan.[213] Classes 1 (Other Secured Claims), 2 (Other Priority Claims), and 5 (General Unsecured Claims) are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. However, Class 9 (Existing C1 Interests) is conclusively deemed to reject the Plan, and Classes 6 (Intercompany Claims) and 8 (Intercompany Interests) may be conclusively deemed to reject the Plan at the election of the Debtors and Required Consenting Lenders. Regardless, the Plan may still be confirmed pursuant to section 1129(b) of the Bankruptcy Code, discussed below.

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

135. The Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code, which requires that persons holding priority claims under the Bankruptcy Code receive specified cash payments.[214] The treatment of Administrative Claims (**Article II.A**), DIP Claims (**Article II.B**), Professional Fee Claims (**Article II.C**), Priority Tax Claims (**Article II.D**), Restructuring Expenses (**Article II.E**), and Other Priority Claims (**Article III**) under the Plan is, in each case, consistent with section 1129(a)(9) of the Bankruptcy Code. No party has objected to the Plan's compliance with section 1129(a)(9).

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212 *See* 11 U.S.C. § 1126(c).

213 Voting Report ¶ 13.

214 11 U.S.C. § 1129(a)(9). Under section 1129(a)(9), unless otherwise agreed, a plan must provide that all administrative and priority creditors be paid in full.

J. At Least One Impaired Class Has Accepted the Plan – § 1129(a)(10)

136. Section 1129(a)(10) requires that, to the extent there is a class of Impaired Claims under the Plan, at least one Impaired Class of Claims must accept the plan, excluding the votes of any insiders.[215] As evidenced by the Voting Report, Class 4, which is Impaired, voted to accept the Plan by the requisite number and amount of Claims, determined without including any acceptance of the Plan by any insider (as that term is defined in section 101(31) of the Bankruptcy Code), as specified under the Bankruptcy Code.[216] Class 3 also voted overwhelmingly to accept the Plan even when the votes of PVKG Lender, as an insider, are excluded.[217] As such, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

K. The Plan Is Feasible – § 1129(a)(11)

137. Section 1129(a)(11) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[218] To establish that a plan is feasible, "the [bankruptcy] court need not require a guarantee of success . . . [o]nly a reasonable assurance of commercial viability is required."[219] Indeed, "[a]ll the bankruptcy court must find is that the plan offer[s] 'a reasonable probability of success.'"[220] While a debtor bears

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215 11 U.S.C. § 1129(a)(10).

216 Voting Report ¶ 13.

217 *See*, *supra* ¶ 24.

218 11 U.S.C. § 1129(a)(11).

219 *In re Briscoe Enters.*, 994 F.2d at 1165-66 (quoting *In re Lakeside Global II*, 116 B.R. at 507).

220 *In re T-H New Orleans*, 116 F.3d at 801 (quoting *In re Landing Assocs.*, 157 B.R. at 820).

the burden of proving plan feasibility, the applicable standard is by a preponderance of the evidence, which means presenting proof that a given fact is "more likely than not."[221]

138. Courts have fashioned a series of factors that may be considered when evaluating whether a plan is feasible. These factors traditionally include: (a) the adequacy of the debtor's capital structure, (b) the earning power of its business, (c) existing economic conditions, (d) the abilities of the debtor's management, (e) the probability of the continuation of the same management, and (f) other related matters affecting successful performance under the provisions of the plan.[222]

139. Here, the Financial Projections attached to the Disclosure Statement as Exhibit C and the Spitzer Declaration demonstrate that the Plan is feasible. The Financial Projections demonstrate that the Debtors will have sufficient earnings to meet their obligations under the Plan.[223] Although the Debtors' business operates in a competitive industry and market, and although it is impossible to predict with certainty the precise future profitability of the Debtors' business or industries and markets in which the Debtors operate, confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtors, the Reorganized Debtors, or any successors to the Reorganized Debtors under the Plan.[224] The Plan, negotiated in good faith between the Debtors and their major creditor constituencies,

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221 *In re Briscoe Enters.*, 994 F.2d at 1164; *see also In re T-H New Orleans*, 116 F.3d at 801. Further, a number of courts have held that this standard constitutes a "relatively low threshold of proof." *In re Mayer Pollock Steel Corp.*, 174 B.R. 414, 423 (Bankr. E.D. Pa. 1994) (stating that the debtors "have established that they meet the requisite low threshold of support for the Plan as a viable undertaking.").

222 *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 226-27 (Bankr. D.N.J. 2000) (citing *In re Temple Zion*, 125 B.R. 910, 915 (Bankr. E.D. Pa. 1991)); *In re Toy & Sports Warehouse*, 37 B.R. 141, 151 (Bankr. S.D.N.Y. 1984) (citing *In re Landmark at Plaza Park, Ltd.*, 7 B.R. 653, 659 (Bankr. D.N.J. 1980)); *see also In re T-H New Orleans*, 116 F.3d at 801 (discussing the factors that the bankruptcy court examined in its decision that the debtor's plan was feasible).

223 Disclosure Statement, Ex. C; *see also* Spitzer Decl. ¶¶ 12-13.

224 *Id*.

including the First Lien Ad Hoc Group, the Second Lien Ad Hoc Group, and PVKG Lender, has more than a reasonable likelihood of success because the transactions contemplated under the Plan will enable the Debtors to continue their current operations while generating positive free cash flow and will eliminate approximately $1.6 billion of the Debtors' prepetition funded debt obligations.[225]

140. In formulating the Plan, the Debtors and their financial advisors sought to ensure that the Plan would provide sufficient free cash flow to allow the Debtors to continue to operate their business successfully after emergence and to satisfy all of their obligations under the Plan.[226] By substantially reducing the Debtors' prepetition debt and right-sizing the Debtors' emergence capital structure, the Reorganized Debtors will be better positioned to service ongoing debt obligations and generate cash flow to reinvest in their business.[227]

141. Accordingly, the Plan provides for a workable reorganization, with more than a reasonable likelihood of success, and no party has asserted otherwise. The Plan is feasible and satisfies section 1129(a)(11) of the Bankruptcy Code.

L. All Statutory Fees Have Been or Will Be Paid – § 1129(a)(12)

142. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority status.

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225 *Id.*

226 *Id.*

227 *Id.*

143. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because **Article XII.D** of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid for each quarter (including any fraction thereof) until these Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first. No party, including the U.S. Trustee, has asserted otherwise.

M. The Plan Provides for Post-Effective Date Payment of Retiree Benefits – § 1129(a)(13)

144. Section 1129(a)(13) requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. **Article IV.O** of the Plan provides that, as of the Effective Date, all retiree benefits (as such term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid in accordance with applicable law. The Plan satisfies the requirements of section 1129(a)(13), and no party has asserted otherwise.

N. Sections 1129(a)(14) to 1129(a)(16) Do Not Apply to the Plan

145. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. Since the Debtors are not subject to any domestic support obligations, the requirements of section 1129(a)(14) of the Bankruptcy Code do not apply.[228]

146. Section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code. Because no Debtor is an "individual," the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply.[229]

147. Finally, section 1129(a)(16) of the Bankruptcy Code provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or

[228] Goncalves Decl. ¶ 10.

[229] *Id*.

trust be made in accordance with any applicable provisions of non-bankruptcy law. Because each Debtor is a moneyed, business, or commercial corporation, section 1129(a)(16) is not applicable.[230]

O. Cramdown – § 1129(b)

148. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8), a plan may be confirmed so long as the requirements set forth in section 1129(b) are satisfied. To confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[231]

149. The Bankruptcy Code does not provide a standard for determining "unfair discrimination."[232] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[233] At a minimum, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[234] A plan

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230 *Id*.

231 11 U.S.C. § 1129(b)(1); *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa L.P.)*, 115 F.3d 650, 653 (9th Cir. 1997) ("the [p]lan satisfies the 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b), which requires that the [p]lan 'does not discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the [p]lan.").

232 *See In re Idearc Inc.*, 423 B.R. 138, 171 (Bankr. N.D. Tex. 2009); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 434 (Bankr. S.D. Tex. 2009); *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (citing *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 660 (Bankr. D. Del. 2003), *aff'd*, 308 B.R. 672 (D. Del. 2004) ("[H]allmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination.").

233 *See In re Kolton*, No. 89-53425-C, 1990 WL 87007 at *5 (Bankr. W.D. Tex. Apr. 4, 1990) (citing *In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) (whether or not a particular plan unfairly discriminates is to be determined on a case-by-case basis); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

234 *See Idearc Inc.*, 423 B.R. at 171 ("[T]he unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without

does not unfairly discriminate where it provides different treatment to two or more classes that are comprised of dissimilar claims or interests.[235] Likewise, there is no unfair discrimination if, taking into account the particular facts and circumstances of the case, there is a reasonable basis for the disparate treatment.[236]

150. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects the plan if it follows the "absolute priority rule."[237] The absolute priority rule provides that a junior stakeholder (*e.g.*, an equity holder) may not receive or retain property under a plan of reorganization "on account of" its junior interests unless all senior classes either (a) are paid in full or (b) vote in favor of the plan.[238]

151. Here, Class 6 (Intercompany Claims), Class 7 (Section 510 Claims), Class 8 (Intercompany Interests), and Class 9 (Existing C1 Interests), to the extent Impaired under the Plan, have been deemed to reject the Plan. The Plan may nonetheless be confirmed over the 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 the rejecting Impaired Classes.

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compelling justifications for doing so."); *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 654 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

235 *See In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d at 655; *In re Aztec Co.*, 107 B.R. at 589-91; *In re Johns-Manville Corp.*, 68 B.R. at 636.

236 *Aztec Co.*, 107 B.R. at 590.

237 *See* 11 U.S.C. § 1129(b)(2)(B)(ii); *see also DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 88 (2d Cir. 2011) (the absolute priority rule "provides that a reorganization plan may not give 'property' to the holders of any junior claims or interests 'on account of' those claims or interests, unless all classes of senior claims either receive the full value of their claims or give their consent") (citations omitted); *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005) ("Under the statute, a plan is fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class's claims in full, or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan 'on account of' such claims or interests.") (citations omitted).

238 11 U.S.C. § 1129(b)(2)(B)(ii).

152. ***First***, the Plan does not unfairly discriminate against these Classes. Under the Plan, all similarly situated Holders of Claims and Interests will receive substantially similar treatment. Additionally, the Plan's classification scheme rests on a legally acceptable rationale because it separates substantively dissimilar Claims into separate Classes. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code. No party has asserted otherwise.

153. ***Second***, the Plan is fair and equitable with respect to the rejecting Impaired Classes. The Plan satisfies the "fair and equitable" requirement because there is no Class of equal priority receiving more favorable treatment and no Class that is junior to such Classes will receive or retain any property on account of the Claims or Interests in such Class. Again, no party has asserted otherwise.

154. For these reasons, the Plan satisfies section 1129(b) of the Bankruptcy Code and may be confirmed notwithstanding the rejecting Impaired Classes.

P. The Debtors Have Complied with Section 1129(d) of the Bankruptcy Code

155. As set forth in the Goncalves Declaration, the purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act.[239] Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code, and no party has asserted otherwise.

Q. Modifications to the Plan

156. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as the modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy

[239] Goncalves Decl. ¶ 11.

Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[240]

157. The Debtors have made certain technical modifications to the Plan (collectively, the "**Technical Modifications**") after solicitation in response to informal comments from certain parties in interest.[241] The Technical Modifications are either immaterial or do not adversely impact the way creditors or other stakeholders are treated, and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. Accordingly, no additional solicitation or disclosure is required on account of the Technical Modifications, and the Technical Modifications should be deemed accepted by all creditors that previously accepted the Plan.

Waiver of Stay of Effectiveness Is Appropriate

158. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory

[240] *See, e.g.*, *In re Am. Solar King Corp.*, 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988) (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not require additional disclosure or resolicitation); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 857 (Bankr. S.D. Tex. 2001) (same); *see also In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation).

[241] The Debtors have filed a redline showing the limited Technical Modifications contemporaneously with the filing of this memorandum.

contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

159. The Debtors submit that good cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the Confirmation Order will be effective immediately upon its entry. The restructuring contemplated in the Plan was extensively negotiated among sophisticated parties and is premised on preserving the value of the Debtors as a going concern. In addition, to the extent necessary to facilitate closing of the Restructuring Transactions, the Debtors require the ability to immediately begin making any payments required under the Plan.

160. Accordingly, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

Conclusion

161. For all of the reasons set forth herein, and as will be further shown at the Combined Hearing, the Debtors respectfully request that the Court approve the Disclosure Statement on a final basis and confirm the Plan by entering the Confirmation Order and granting such other and further relief as is just and proper.

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Dated: May 14, 2024
Houston, Texas

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Certificate of Service

I certify that on May 14, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles R. Koster
Charles R. Koster