UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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IN RE:	Chapter 11 Cases
RED LOBSTER MANAGEMENT LLC,[1]	Case No. 6:24-bk-02486-GER Lead Case
	Jointly Administered with
RED LOBSTER RESTAURANTS LLC,	Case No. 6:24-bk-02487-GER
RLSV, INC.,	Case No. 6:24-bk-02488-GER
RED LOBSTER CANADA, INC.,	Case No. 6:24-bk-02489-GER
RED LOBSTER HOSPITALITY LLC,	Case No. 6:24-bk-02490-GER
RL KANSAS LLC,	Case No. 6:24-bk-02491-GER
RED LOBSTER SOURCING LLC,	Case No. 6:24-bk-02492-GER
RED LOBSTER SUPPLY LLC,	Case No. 6:24-bk-02493-GER
RL COLUMBIA LLC,	Case No. 6:24-bk-02494-GER
RL OF FREDERICK, INC.,	Case No. 6:24-bk-02495-GER
RED LOBSTER OF TEXAS, INC.,	Case No. 6:24-bk-02496-GER
RL MARYLAND, INC.,	Case No. 6:24-bk-02497-GER
RED LOBSTER OF BEL AIR, INC.,	Case No. 6:24-bk-02498-GER
RL SALISBURY, LLC,	Case No. 6:24-bk-02499-GER
RED LOBSTER INTERNATIONAL HOLDINGS LLC,	Case No. 6:24-bk-02500-GER
Debtors.	
_____/	

MEMORANDUM OF LAW IN SUPPORT OF
CONFIRMATION OF DEBTORS' AMENDED JOINT CHAPTER 11 PLAN

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number are Red Lobster Management LLC (6889); Red Lobster Sourcing LLC (3075); Red Lobster Supply LLC (9187); RL Kansas LLC (2396); Red Lobster Hospitality LLC (5297); Red Lobster Restaurants LLC (4308); RL Columbia LLC (7825); RL of Frederick, Inc. (9184); RL Salisbury, LLC (7836); RL Maryland, Inc. (7185); Red Lobster of Texas, Inc. (1424); Red Lobster of Bel Air, Inc. (2240); RLSV, Inc. (6180); Red Lobster Canada, Inc. (4569); and Red Lobster International Holdings LLC (4661). The Debtors' principal offices are located at 450 S. Orange Avenue, Suite 800, Orlando, FL 32801.

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I. INTRODUCTION

The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this memorandum of law (the "Memorandum") in support of (i) final approval of the *Disclosure Statement for the Joint Chapter 11 Plan of Red Lobster Management LLC and its Debtor Affiliates* [Docket No. 734] (as further modified, revised, supplemented and amended, the "Disclosure Statement") pursuant to section 1125 of title 11 of the United States Code (as modified or amended, the "Bankruptcy Code") and (ii) confirmation of the *Amended Joint Chapter 11 Plan for Red Lobster Management LLC and Its Debtor Affiliates* [Docket No. 941, Exhibit H] (as further modified, revised, supplemented and amended, the "Plan") pursuant to sections 1123 and 1129 of the Bankruptcy Code. In addition, as set forth herein, the Debtors request a waiver of the 14-day stay of the order confirming the Plan imposed by Rule 3020(e) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").[2]

This Memorandum, approval of the Disclosure Statement and confirmation of the Plan, and entry of the proposed Confirmation Order are supported by, *inter alia*, the following documents:

(i) *Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral On a Limited Basis, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Granting Related Relief*, entered June 14, 2024 [ECF No. 393] (the "Final DIP Order");

(ii) *Order (I) Approving Bidding Procedures for the Sale of Substantially All of the Debtors' Assets; (II) Authorizing the Debtors to Enter Into Stalking Horse Agreement and to Provide Bidding Protections Thereunder, (III) Scheduling an Auction and Approving the Form and Manner of Notice Thereof, (IV) Approving Assumption and Assignment Procedures, (V) Scheduling a Sale Hearing and*

[2] Capitalized terms used, but not otherwise defined herein, shall have the meanings ascribed to such terms in the Plan.

Approving the Form and Manner of Notice Thereof, and (VI) Granting Related Relief, entered June 14, 2024 [ECF No. 386] (the "Bidding Procedures Order");

(iii) *Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases and Any Cure Costs Associated Therewith in Connection with Sale of Debtors' Assets*, filed June 28, 2024 [ECF No. 476], as further supplemented by the *First Supplemental Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases and Any Cure Costs Associated Therewith in Connection with Sale of Debtors' Assets* [ECF No. 484] (collectively, the "Cure Notice");

(iv) *Order Granting Debtors' Expedited Motion for Entry of an Order (I) Conditionally Approving Disclosure Statement For the Proposed Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates, (II) Approving the Solicitation and Voting Procedures with Respect to Confirmation of the Proposed Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates, and (III) Granting Related Relief*, entered July 29, 2024 [ECF No. 736] (the "Solicitation Procedures Order");

(v) The Disclosure Statement;

(vi) The Plan;

(vii) *Notice of Joint Hearing to Consider (I) Final Approval Concerning Adequacy of the Disclosure Statement for Debtors' Joint Chapter 11 Plan of Red Lobster Management LLC and its Debtor Affiliates and (II) Confirmation of Debtors' Joint Chapter 11 Plan of Red Lobster Management LLC and its Debtor Affiliates (Including the Approval of Certain Release, Exculpation, and Injunction Provisions Contained Therein)* [ECF No. 737] ("Confirmation Hearing Notice");

(viii) *Certificate of Service re Affidavit of Publication in the Wall Street Journal With Respect to Notice of Joint Hearing to Consider (I) Final Approval Concerning Adequacy of the Disclosure Statement for Debtors' Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates and (II) Confirmation of Debtors' Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates (Including the Approval of Certain Release, Exculpation, and Injunction Provisions Contained Therein)*, filed August 2, 2024 [ECF No. 777] (the "Proof of Publication");

(ix) *Notice of (I) Cancellation of Auction and (II) Designation of Successful Bidder*, filed July 22, 2024 [ECF No. 645] ("Auction Cancellation Notice");

(x) *Notice of Filing Plan Supplement*, filed August 22, 2024 [ECF No. 941] (the "Plan Supplement") which, among other things, appends a schedule of Retained Causes of Action as Exhibit C, Amended Assumed Executory Contracts and Unexpired Leases Lists as Exhibit D, a Plan Administrator Agreement as Exhibit E and a GUC Trust Agreement as Exhibit F;

(xi) *Debtors' Notice of Filing Proposed Findings of Fact, Conclusions of Law, and Order (I) Approving the Adequacy of the Disclosure Statement on a Final Basis and (II) Confirming the Joint Chapter 11 Plan for Red Lobster Management LLC and its Debtor Affiliates* [ECF No. 939] ("Proposed Confirmation Order");

(xii) *Declaration of Nicholas Haughey in Support of the Joint Chapter 11 Plan for Red Lobster Management LLC and Its Debtor Affiliates*, filed August 29, 2024 [ECF No. 1039] (the "Haughey Declaration");

(xiii) *Declaration of Teri Stratton in Support of the Joint Chapter 11 Plan for Red Lobster Management LLC and Its Debtor Affiliates*, filed August 29, 2024 [ECF No. 1040] (the "Stratton Declaration"); and

(xiv) The affidavits or other proofs of service of notices with respect to the Confirmation Hearing, cure amounts (the "Cure Amounts") of Executory Contracts and Unexpired Leases to be assumed, and solicitation of voting on the Plan (the "Solicitation Service Filings").

II. PRELIMINARY STATEMENT

1. The Debtors operate the largest North American seafood restaurant chain, known as Red Lobster.™ Red Lobster operates restaurants across the United States and Canada, and acts as franchisor to certain franchised locations in Mexico, Ecuador, Japan and Thailand. The Debtors serve over 64 million customers per year and account for more than half of all casual dining seafood chain locations.

2. In the period leading up to the Chapter 11 Cases, the Debtors faced a number of financial and operational challenges, including a difficult macroeconomic environment (including inflationary pressure and cost of capital increases), underperforming restaurant footprint, failed or ill-advised strategic initiatives, and increased competition within the restaurant industry.

3. On May 9, 2024, the Debtors and the Prepetition Term Loan Lenders entered into a Restructuring Support Agreement ("RSA"), a true and correct copy of which is attached to the *Declaration of Jonathan Tibus in Support of Debtors' Chapter 11 Petitions and First Day Relief* [ECF No. 6]. Under the terms of that RSA, the Prepetition Term Loan Lenders agreed to provide DIP financing to the Debtors to finance operations and the costs of these Chapter 11 Cases. The

Prepetition Term Loan Lenders also agreed to serve as stalking horse purchaser to allow the Debtors to conduct a fulsome sale process pursuant certain agreed-upon milestones as set forth in the RSA.

4. As a result of various financial challenges, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on May 19, 2024 (the "Petition Date"), with the intent to conduct a sale of substantially all of the assets of the Debtors to the DIP Secured Parties or, if a superior offer emerged, to a third-party buyer. As part of an agreement to support the DIP financing, the DIP Secured Parties, the Official Committee of Unsecured Creditors (the "Committee"), and the Debtors reached a resolution in which the DIP Secured Parties agreed, in their capacity as stalking horse purchaser, to provide funding and other consideration for a chapter 11 plan that creates a trust for the benefit of general unsecured creditors.

5. As set forth in the Stratton Declaration, following entry by the Court of the Bidding Procedures Order, which included approval of a stalking horse purchase agreement with Purchaser (in such capacity, the "Stalking Horse Bidder"), the Debtors, with the assistance of Hilco Corporate Finance LLC ("HCF"), the Debtors' investment banker, and the Debtors' other professionals, continued to diligently market the Debtors' business as a going-concern sale in preparation for an auction to be held on July 23, 2024. Over the course of the pre- and post-petition marketing process, HCF contacted a targeted list of over 240 potential interested parties, including both strategic and financial investors with access to sufficient capital. Sixty-five (65) of these parties executed a non-disclosure agreement and were given access to the virtual data room. HCF instructed such prospective bidders to submit proposals prior to the Bid Deadline in accordance with the Bidding Procedures. *See* Stratton Declaration at ¶ 11.

6. Ultimately, however, the Debtors did not receive any "Qualified Bids" under the Bidding Procedures, except the Qualified Bid (as defined in the Bidding Procedures Order) received from the Stalking Horse Bidder, by the Bid Deadline (as defined in the Bidding Procedures Order). As a result, the Debtors pivoted to consummating a sale with the Stalking Horse Bidder—either through the previously approved asset sale structure pursuant to section 363 of the Bankruptcy Code or through a sale approved via chapter 11 plan. *See* Stratton Declaration at ¶ 12.

7. On July 22, 2024, the Debtors filed a notice of cancellation of the Auction [ECF No. 645] and indicated their intent to pursue the transaction contemplated by the Stalking Horse Purchase Agreement. Accordingly, the Debtors, HCF and the Debtors' advisors focused their efforts on confirming the restructuring embodied in the Debtors' proposed Plan. *See* Stratton Declaration at ¶ 13.

8. On July 19, 2024, the Debtors filed their proposed *Joint Chapter 11 Plan for Red Lobster Management LLC and its Debtor Affiliates* [ECF No. 631]. Subsequently, on July 29, 2024 and August 22, 2024, respectively, the Debtors filed further revised versions of their proposed Plan.

9. The Plan is the culmination of the Debtors' substantial efforts over the past several months to bring these Chapter 11 Cases to a value maximizing close through either (i) a successful sale of substantially all of the Debtors' assets or (ii) a successful reorganization of the Debtors' estates.

10. The Purchaser has elected to consummate the Restructuring Transactions through the Reorganized Equity Sale. As a result, all or substantially all of the assets of Red Lobster Management LLC, a Delaware limited liability company ("RL Management"), RLSV, Inc., a Florida corporation ("RLSV"), and Red Lobster International Holdings LLC, a Delaware limited

liability company ("RL International"), and the reorganized equity interests in the other Debtors shall be sold to Purchaser pursuant to section 1129 of the Bankruptcy Code, the Purchase Agreement, and the Plan.

11. The DIP Secured Parties have reserved the right to credit bid their debt in connection with any Sale Transaction and in full and final satisfaction, settlement, release, and discharge of, and in exchange for, each Allowed DIP Claim.

12. The Plan also contemplates the creation of the GUC Trust, which shall be established to receive the GUC Fund and the Equityholder Litigation Claims, and to distribute proceeds thereof in accordance with the Plan. The Equityholder Litigation Claims include claims or causes of action, if any, against (i) direct and indirect equityholders of the Debtors and (ii) former officers and directors of the Debtors (other than the officers and directors of the Debtors as of the Petition Date). The holders of Allowed Class 4 General Unsecured Claims will receive their *pro rata* share of forty percent (40%) of the net proceeds recovered by the GUC Trust from the Equityholder Litigation Claims. As a result, projected recoveries to general unsecured creditors of the Debtors are currently unknown and tied to the litigation recoveries.

13. The Plan provides for six Classes of Claims against and/or Interests in the Debtors and provides the treatment described in the Plan, *see* Plan Article III, summarized in the following table:

Summary of Classification and Treatment of Classified Claims and Interests

Class	Claim	Status	Voting Rights
1	Miscellaneous Secured Claims	Unimpaired	Deemed to Accept
2	Other Priority Claims	Unimpaired	Deemed to Accept
3	Prepetition Term Loan Claims	Impaired	Entitled to Vote
4	General Unsecured Claims	Impaired	Entitled to Vote
5	Intercompany Claims	Impaired	Deemed to Reject

6	Interests	Impaired	Deemed to Reject

14. Pursuant to the Solicitation Procedures Order, the Debtors solicited the votes of holders of Claims in the two classes of impaired claims that would receive distributions under the Plan: (a) Class 3, which consists of the Allowed Claims of the Prepetition Term Loan Lenders in their own subclasses, and the Debtors' anticipate the holders of which will vote unanimously in favor of the Plan; and (b) Class 4, which consists of Allowed General Unsecured Claims. The Plan qualifies for confirmation under all applicable provisions of chapter 11 of the Bankruptcy Code.

15. The Plan is supported by the Debtors' key stakeholders, including the Prepetition Term Loan Parties, the DIP Secured Parties and the Committee and represents a consensual, comprehensive resolution of all disputes and issues relating to the Debtors and a responsible final closure for all interested constituents.

III. PENDING OBJECTIONS

16. The Debtors have received certain objections to the Plan and will endeavor to resolve these objections consensually, if possible. To the extent any objections are not resolved, the Debtors will file a reply brief in accordance with the deadlines set forth in the Solicitation Procedures Order, which will summarize and respond to any objections that remain outstanding at such time.

IV. MODIFICATION OF THE PLAN

17. A plan proponent may modify its plan at any time before confirmation if the modified plan meets the requirements of Bankruptcy Code sections 1122 and 1123. *See* 11 U.S.C. § 1127(a). Once filed, "the plan as modified becomes the plan." *Id.* Pursuant to 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. Fed. R. Bankr. P. 3019; *see, e.g.*, *Enron Corp. v. The New Power Co. (In re The New Power Co.),* 438 F.3d 1113, 1117-18 (11th Cir. 2006) (same; holding that "Enron has appealed the district court's affirmance of the bankruptcy court's approval of New Power's Second Amended Plan. Because we find that the modifications made were not material and adverse, and therefore that the bankruptcy court could properly deem Enron's vote in favor of a prior plan to be a vote in favor of the modified plan, and because we find that the interim distribution provision does not violate the equal treatment provision of the Bankruptcy Code, we AFFIRM." *Id.* at 1123); *In re Royal Palm, LLC,* No. 18-19441-EPK, 2020 WL4785543, at *4-5 (Bankr. S.D. Fla. Jan. 14, 2020) ("A modification is material if a creditor or interest holder who accepted the plan, if it knew of the modification, would be likely to reconsider its acceptance in light of the modification. *In re Am. Solar King Corp.*, 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988). In order to trigger further disclosure and solicitation, the modification must be both material and adverse to creditors. Applying this standard, the Court rules that the modifications presented by the Third Amended Plan, as compared to the First Amended Plan, do not necessitate additional disclosure or solicitation."); *JM Convenience Corp. v. Split Second Towing & Transport, Inc. (In re Split Second Towing & Transport, Inc.),* No. 8:09-cv-2479-24, 2010 WL 3385482, at *4 (M.D. Fla. Aug. 26, 2010) (Section 1127(a) is "designed to implement the negotiation process, which is the essence of the formulation of any plan of reorganization."); *In re Winn–Dixie Stores, Inc.*, 377 B.R. 322, 335 (M.D.Fla.2007) (quoting Collier Bankruptcy Manual, 3d Ed. Revised § 1127.03) ("The rule prevents a plan proponent from securing votes of acceptance from creditors and then making a material change in the plan after the votes are in hand. If a plan proponent makes a "material" change in a plan, she must re-solicit the plan and provide new notice. The rule, in essence, prevents a plan proponent from pulling a bait and switch. The interests protected by §

1127 are not implicated in this case. No bait and switch occurred. JM Convenience Corp. rejected the plan before it was modified, and then rejected it again after it was modified.") (internal citation to *The New Power Co., supra*, omitted); *Peltz v. Worldnet Corp. (In re USN Communs.)*, 280 B.R. 573, 596 (Bankr. D. Del. 2002); *In re Tropicana Entm't, LLC*, No. 08-10856 (KJC) (Bankr. D. Del. May 5, 2009), Docket No. 2001; *In re U.S. Fidelis, Inc*., 481 B.R. 503, 524 (Bankr. E.D. Mo. 2012) ("[T]he change was so minor that it is not a materially adverse change. Accordingly, pursuant to Bankruptcy Rule 3019, such modifications do not require additional disclosure under § 1125 of the Bankruptcy Code or resolicitation of votes under § 1126 of the Bankruptcy Code, nor do they require that holders of Claims or Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan."); *In re American Trailer & Storage*, 419 B.R. 412, 419 (Bankr. W.D. Mo. 2009) ("If modifications made to a plan prior to confirmation (but after the ballots have been counted) are minor, impact only a creditor who has been fully involved, and do not adversely impact any other creditor, then it is not necessary to solicit new acceptances").

18. As discussed above, the Debtors filed an amended version of the Plan on August 22, 2024. *See* ECF No. 941, Exhibit H. The modifications made to the Plan do not materially or adversely impact the treatment of creditors and, for the avoidance of doubt, the GUC Litigation Proceeds and potential recovery to holders of Allowed Class 4 General Unsecured Claims remain unchanged by such modifications. Accordingly, no additional solicitation or disclosure is required on account of the modifications, and the modifications should be deemed accepted by all holders of claims who have previously accepted the Plan.

V. THE DISCLOSURE STATEMENT SATISFIES THE REQUIREMENTS OF SECTION 1125 OF THE BANKRUPTCY CODE

19. The Debtors request that the Court approve the Disclosure Statement as containing "adequate information" in accordance with section 1125 of the Bankruptcy Code on a final basis.

Section 1125(b) of the Bankruptcy Code states that "[a]n acceptance or rejection of a plan may not be solicited . . . unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). In turn, section 1125(a) of the Bankruptcy Code defines "adequate information" as:

> 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, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a).

20. The primary purpose of a disclosure statement is to provide information that is "reasonably practicable" to permit an "informed judgment" by creditors and interest holders entitled to vote on the plan. *See In re Go-Go's Greek Grille, LLC*, 617 B.R. 394, 395 (Bankr. M.D. Fla. 2020); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *see also Century Glove, Inc. v. First Am. Bank 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.").

21. Bankruptcy courts have broad discretion in determining whether a disclosure statement contains adequate information based on the unique facts and circumstances of each case. *See Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of §1125 we discern that adequate information will be determined by the

facts and circumstances of each case."); *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 507 (D.N.J. 2005), aff'd, 241 Fed. App'x. 1 (3d Cir. Aug. 2, 2007) ("Section 1125 affords the Bankruptcy Court substantial discretion in considering the adequacy of a disclosure statement.").

22. In accordance with §1125 of the Bankruptcy Code, the Disclosure Statement provides "adequate information" to allow holders of Claims entitled to vote to make an informed decision on the Plan. The Disclosure Statement is the product of the Debtors' extensive review and analysis of their business, assets and liabilities, and circumstances leading to the Chapter 11 Cases. The Disclosure Statement provides information regarding: (a) the terms of the Plan, including a summary of the classifications and treatment of all Classes of Claims and Interests (Article I, §1.1); (b) the distributions to holders of Allowed Claims (Article V, §5.3); (c) the effect of the Plan on holders of Claims and Interests and other parties in interest thereunder (Article I, §1.1 and Article V, sections 5.2, 5.4 and 5.5); (d) the Claims asserted against the Debtors and the estimated amount of Claims that will ultimately be Allowed (Article I, §1.1); (e) certain risk factors to consider that may affect the Plan (Article VII, sections 7.2 and 7.3); (f) certain tax issues related to the Plan and distributions (Article IX, §9.1) ; and (g) the means for implementation of the Plan (Article V, §5.1). Accordingly, the Debtors believe that the Disclosure Statement complies with all aspects of §1125 of the Bankruptcy Code, contains more than sufficient information for a hypothetical reasonable investor to make an informed judgment about the Plan, and therefore should be approved on a final basis.

VI. THE PLAN SATISFIES EACH OF THE REQUIREMENTS FOR CONFIRMATION UNDER THE BANKRUPTCY CODE

23. The Bankruptcy Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed. The Bankruptcy Court has jurisdiction over these Chapter 11 Cases pursuant to 28 U.S.C. §§157 and

1334. Venue is proper pursuant to 28 U.S.C. §§1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. §157(b) and the Bankruptcy Court may enter a final order consistent with Article III of the United States Constitution.

24. The Plan complies with all relevant sections of the Bankruptcy Code and the Bankruptcy Rules relating to confirmation. The Debtors bear the burden of proof on elements necessary for confirmation. *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 221 (Bankr. D.N.J. 2000) (plan proponents bear burden of establishing compliance with Bankruptcy Code §1129). The standard of proof required is the "preponderance of the evidence" standard. *See In re Union Meeting Partners*, 165 B.R. 553, 574 n.17 (Bankr. E.D. Pa. 1994), *aff'd mem.*, 52 F.3d 317 (3d Cir. 1995) (adopting preponderance standard with respect to Bankruptcy Code §1129 requirements); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616 n. 23 (Bankr. D. Del. 2001) ("the proponent must show that a plan is fair and equitable by a preponderance of the evidence").

25. As set forth more specifically below, the Plan complies with each requirement of Bankruptcy Code §§1123 and 1129. Pursuant to Fed. R. Bankr. P. 9017 (incorporating Fed. R. Evid. 201 (Judicial Notice of Adjudicative Facts)), the Debtors request that the Bankruptcy Court take judicial notice of the docket of the Chapter 11 Cases maintained by the Clerk of the Bankruptcy Court, including, without limitation, all pleadings and other documents filed and orders entered thereon, as well as all evidence proffered or adduced and all arguments made at the hearings held before the Bankruptcy Court during the pendency of the Chapter 11 Cases.

A. <u>The Plan Satisfies Bankruptcy Code §1129(a)(1)</u>

26. Bankruptcy Code §1129(a)(1) provides that a plan may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. §1129(a)(1). The legislative history of Bankruptcy Code §1129(a)(1) indicates that the primary focus of this requirement is to ensure that the plan complies with Bankruptcy Code §§ 1122 and 1123, which govern classification

of claims and interests and the contents of a plan, respectively. *See* S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5913 (1978); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5962, 6368 (1977); *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988). The Plan complies with these provisions in all respects.

(1) The Plan Meets the Requirements of Bankruptcy Code Section 1122

27. The Plan satisfies Bankruptcy Code §1122, which provides that "a plan may place a claim or interest in a particular Class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. §1122(a). This subsection does not require that similar claims be classified together, only that claims grouped together in a class should be similar. *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 585 (6th Cir. 1986). Plan proponents have significant flexibility in placing similar claims into different classes under Bankruptcy Code §1122, provided there is a rational basis to do so and it is not done to gerrymander a consenting impaired class. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987) (observing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes."); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956-57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis; separate classification based on bankruptcy court-approved settlement); *Aetna Cas. & Sur. Co. v. Clerk of the U.S. Bankr. Ct. (In re Chateaugay Corp.)*, 89 F.3d 942, 950 (2d Cir. 1996) (classification proper since the plan did not classify similar claims separately to gerrymander an impaired assenting class); *In re Adelphia Communications Corp.*, 368 B.R. 140, 246–47 (Bankr. S.D.N.Y. 2007) ("When considering assertions of gerrymandering, courts in the Second Circuit have inquired whether a

plan proponent has classified substantially similar claims in separate classes for the sole purpose of obtaining at least one impaired assenting class.").

28. The Plan provides for a total of six Classes of Claims and Interests and provides the treatment described in the Plan. *See* Plan, Article III. As the foregoing descriptions of the Classes reflect, valid reasons exist for classifying the various Classes of Claims and Interests in the manner provided in the Plan. Namely, the Plan provides for the separate classification of Claims against the Debtors and Interests in the Debtors based upon the differences in the priority of distribution and/or legal rights of such Claims and Interests, and all Claims and Interests within each Class have the same or similar rights against the Debtors. Accordingly, the Plan properly classifies Claims and Interests, satisfying the requirements of Bankruptcy Code § 1122.

(2) <u>The Plan Meets the Requirements of Bankruptcy Code Section 1123(a)</u>

29. Bankruptcy Code § 1123(a) sets forth seven requirements that every chapter 11 plan must comply with. The Plan satisfies each of these requirements.

30. ***Designation of Classes of Claims.*** Bankruptcy Code §1123(a)(1) requires that a plan designate classes of claims, other than claims with the priority specified in Bankruptcy Code § 507(a)(2), (3) and (8). The Plan satisfies this requirement by designating classes of Claims and Interests, and by not classifying Administrative Expense Claims (entitled to priority under Bankruptcy Code §507(a)(2)) or Priority Tax Claims (entitled to priority under Bankruptcy Code §507(a)(8)). *See* Plan, Article III. Separately, the Plan specifies the statutorily required treatment for Administrative Expense Claims and Priority Tax Claims. *See* 11 U.S.C. §1129(a)(9) and Plan, Article II.

31. ***Specification of Unimpaired Classes and Treatment of Impaired Classes.*** Bankruptcy Code § 1123(a)(2) and (a)(3) require that a plan specify those classes or interests that are not impaired and specify treatment for those classes of claim or interests that are impaired. The

Plan satisfies this requirement by specifying that Class 1 (Miscellaneous Secured Claims) and Class 2 (Other Priority Claims) are unimpaired and specifying that Class 3 (Prepetition Term Loan Claims), Class 4 (General Unsecured Claims), Class 5 (Intercompany Claims) and Class 6 (Interests) are impaired and providing the treatment for those four classes. *See* Plan, Article III.

32. ***Equal Treatment.*** Bankruptcy Code § 1123(a)(4) requires that a plan provide the same treatment for each claim in a particular class, unless the holder of a claim in that class agrees to less favorable treatment for such claim. The Plan satisfies this requirement by providing identical treatment for all holders of Claims or Interests within each Class unless a holder of a Claim in such Class agreed to less favorable treatment for such Claim. *See* Plan, Article III (the holders of deficiency Prepetition Term Loan Claims consented to receiving no recovery in their capacity as holders of Class 4 Claims and will only receive a distribution in their capacity as holders of Class 3 Claims).

33. ***Means for Implementation.*** Bankruptcy Code § 1123(a)(5) of the Bankruptcy Code requires that a plan provide adequate means for its implementation. The Plan satisfies this requirement by setting forth the means of its implementation in, among other provisions, Article IV of the Plan. *See* 11 U.S.C. §1123(a)(5)(B) ("transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan" and (J) ("issuance of securities . . . of any entity referred to in subsection (B) . . . of this paragraph . . . in exchange for claims . . ., or for any other appropriate purpose").

34. ***Non-Voting Stock.*** Bankruptcy Code § 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate organizational documents prohibit the issuance of nonvoting equity securities. The proposed Amended and Restated Charters of Red Lobster of Bel Air, Inc., RL of Frederick, Inc. and RL Maryland, Inc., the only Reorganized Debtors that are corporations, satisfy

this requirement by prohibiting the issuance of nonvoting shares of stock. *See* Plan Supplement, Exhibit B.

35. ***Selection of Officers and Directors.*** Bankruptcy Code §1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, directors, or trustee under the plan . . . ." 11 U.S.C. § 1123(a)(7). This provision is supplemented by §1129(a)(5) of the Bankruptcy Code, which directs the scrutiny of the court to the methods by which the management of the reorganized debtor is to be chosen to provide adequate representation of those whose investments are involved in the reorganization—*i.e.*, creditors and equity holders. *See* 7 Alan N. Resnick *et al*., COLLIER ON BANKRUPTCY ¶ 1123.01[7] (16th ed. rev. 2010).

36. The Plan appoints (i) the Plan Administrator as RL Management's and the Wind-Down Debtors' sole manager and officer following the Effective Date and (ii) the New Board as the new board members of the Reorganized Debtors (excluding RL Management), as applicable. This appointment is consistent with the interests of creditors and equity security holders as the Wind-Down Debtors are liquidating and the remaining matters for the Reorganized Debtors will involve implementing the Restructuring Transactions. *See Notice of (I) Filing Exhibit 1 to Plan Supplement; and (II) Selection of Plan Administrator* filed on August 26, 2024, which discloses the identities of and provides biographies for the officers and directors of Reorganized Debtors and the Plan Administrator [ECF No. 972] (the "Management Disclosures").

B. The Plan Complies With the Discretionary Provisions of Bankruptcy Code Section 1123(b)

37. Bankruptcy Code §1123(b) sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, §1123(b) 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 estates, (d) provide for the sale of all or substantially all of the property of the estate, and (e) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11. *See* 11 U.S.C. § 1123(b)(1)-(4) and (6).

38. The Plan is consistent with Bankruptcy Code §1123(b). Specifically, under Article III of the Plan, Classes 1 and 2 are unimpaired because the Plan provides the holders of such claims with the treatment required under the Bankruptcy Code. On the other hand, Classes 3, 4, 5 and 6 are impaired because the Plan modifies the rights of the holders of Claims and Interests within such Classes. In addition, pursuant to Bankruptcy Code §1123(b)(2), Article V of the Plan provides for the assumption of certain Executory Contracts and Unexpired Leases. Further, following the filing of the Auction Cancellation Notice, the Court entered an agreed Order continuing the hearing on the Sale Transaction to the hearing on confirmation of the Plan.

39. The Plan's discretionary provisions additionally include certain discharge, release, exculpation, and injunction provisions. First, Article VIII.A.1 of the Plan provides the Reorganized Debtors with a discharge of debts under the Bankruptcy Code §§ 524 and 1141(d)(1)(A). Second, Article VIII.A.2 provides for the Debtors' release of the Released Parties, except for the Released Parties' actual fraud, willful misconduct or gross negligence (the "Debtor Releases"). Third, Article VIII.A.3 of the Plan provides for consensual releases by Releasing Parties of the Released Parties, except for the Released Parties' actual fraud, willful misconduct or gross negligence (the "Consensual Third-Party Releases", and together with the Debtor Releases, the "Releases") and provides that the Plan constitutes a compromise and settlement in this regard. Fourth, Article VIII.A.4 of the Plan provides for exculpation of the Exculpated Parties, except for the Exculpated Parties' actual fraud, willful misconduct or gross negligence ("Exculpation Provisions"). Fifth,

Article VIII.A.5 of the Plan provides for a customary injunction provision ("Injunction Provision"). As addressed further below, these provisions are appropriate and consistent with the applicable provisions of chapter 11.

(i) The Debtor Releases Are Appropriate

40. The Debtor Releases are appropriately tailored under the facts and circumstances of these Chapter 11 Cases, supported by ample consideration, comprise an integral part of the Plan, and provide appropriate levels of protection to the Released Parties. Accordingly, the Debtor Releases represent the sound and valid exercise of the Debtors' business judgment and are permissible under Bankruptcy Code §1123(b)(6).

41. Bankruptcy Code § 1123(b)(3)(A) provides that a Chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." *See In re Winn-Dixie Stores, Inc*., 356 BR 239, 260 (Bankr. M.D. Fla. 2006); *Coram Healthcare*, 315 B.R. at 334 ("The standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019 . . . ."); s*ee also* Disclosure Statement, Article V, § 5.1(a) ("Pursuant to sections 363 and 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, after the Plan Effective Date, the provisions of the Plan shall constitute a good-faith compromise and settlement of all Claims and Interests and controversies resolved pursuant to the Plan."). Generally, bankruptcy courts approve a settlement by a debtor if the settlement "exceed[s] the lowest point in the range of reasonableness." *See, e.g.*, *In re Exaeris, Inc*., 380 B.R. 741, 746–47 (Bankr. D. Del. 2008) (citing *Coram Healthcare*, 315 B.R. at 330). Furthermore, a debtor may release claims under Bankruptcy Code § 1123(b)(3)(A) "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of

the estate." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion. Inc.)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010).

42. Bankruptcy courts also assess the propriety of a debtor release in the context of a chapter 11 plan in light of five "*Zenith* factors":

(a) an identity of interest between the debtor and the third party, such that a suit against the third party is, in essence, a suit against the debtor or will deplete assets of the estate;

(b) substantial contribution by the third party to the plan;

(c) the essential nature of the release to the debtor's plan;

(d) an agreement by a substantial majority of creditors to support the plan and the release; and

(e) provision in the plan for payment of all or substantially all of the claims of the creditors and interest holders under the plan.

In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del 1999); s*ee also In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013). No factor is dispositive, nor is a proponent required to establish each factor required for the release to be approved. *See In re Washington Mutual., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) ("These factors . . . simply provide guidance in the [c]ourt's determination of fairness."); *In re Exide Techs*., 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that factors are not exclusive or conjunctive requirements).

43. As to the *Zenith* factors, first, an identity of interest exists between the Debtors and a majority of the parties to be released as Released Parties. The Released Parties are all critical stakeholders and participants in the Plan process and all share a common goal with the Debtors in seeing the Plan succeed. The Debtors' loan documents and organizational documents, as applicable, also require the Debtors to indemnify several of the Released Parties, which further satisfies this factor. *See Indianapolis Downs*, 486 B.R. at 303 ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the nondebtor receiving the release.").

There is also an identity of interests between the Debtors, Prepetition Term Loan Parties, the Committee, the Purchaser and the DIP Secured Parties and their respective Related Persons based on their "common goal of confirming [the Plan][.]" *See In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) (noting that an identity of interest between the debtors and the settling parties where such parties "share[d] the common goal of confirming the DCL Plan and implementing the DCL Plan Settlement"), *modified*, 464 B.R. 208 (Bankr. D. Del. 2011); *see also Zenith*, 241 B.R. at 110 (concluding that certain released parties who "were instrumental in formulating the Plan" shared an identity of interest with the debtor "in seeing that the Plan succeed and the company reorganize").

44. Second, the Debtor Releases are predicated on substantial contributions by the parties benefitting from those releases other than the Debtors. In the first instance, the Released Parties include parties that have provided direct benefits to these Chapter 11 Cases through diligently discharging their duties and contributing to the overall success of the Chapter 11 Cases, including by the Prepetition Term Loan Parties consenting to the Debtors' use of their cash collateral to pay administrative expenses, their agreement to provide the DIP Facility, as well as helping enable a potential recovery for Class 4 General Unsecured Creditors. When measured against the uncertain, speculative, and unknown value of the released claims at issue, such agreements constitute "substantial consideration" supporting the Debtor Releases here. Additionally, the Debtors' current officers, managers and directors provided direct benefits to these Chapter 11 Cases by maintaining ordinary course operations and assisting in the plan process to maximize the value of the Debtors' estates.

45. Third, the Debtor Releases are critical to the Plan itself. The non-Debtor Released Parties who were involved in the Plan negotiations agreed to certain treatment and Plan provisions

on the premise that they would receive releases in exchange for consideration to be provided to the Debtors. Without such releases, the Debtors would not have been able to build the extraordinary level of consensus with respect to the Plan and consummate the transactions contemplated thereby. *See* Haughey Declaration at ¶ 30. Importantly, the Debtor Releases were the product of arms'-length negotiations between and among the Debtors and their key stakeholders and are limited in scope. The Debtors do not believe they are releasing any material claims. The Debtors are not releasing the Equityholder Litigation Claims, as such claims serve as the means of potential recovery for the holders of Allowed Class 4 General Unsecured Creditors.

46. Fourth, the Debtors' anticipate that the Debtors' stakeholders will overwhelmingly support the Plan. Additionally, the Committee, as a fiduciary for all General Unsecured Creditors in the Chapter 11 Case, actively negotiated the terms of the Plan, and supports the Plan in its current form, including the release, exculpation and injunction provisions. Given the critical nature of the Debtor Releases to the Plan, this degree of consensus evidences the Debtors' stakeholders' support for the Debtor Releases and the Plan.

47. Fifth, the Plan provides beneficial treatment of Class 4 General Unsecured Claims. The Plan provides a potential recovery to such Class, which is greater than the zero-recovery expected if these Chapter 11 Cases were converted to chapter 7 cases. *See* Disclosure Statement, Article I, § 1.14 and Exhibit B (Hypothetical Liquidation Analysis); Haughey Declaration at ¶¶ 45 through 51.

48. Given the foregoing, the Debtor Releases are properly approved by the Court.

(ii) <u>The Consensual Third-Party Releases Are Appropriate</u>

49. The Consensual Third-Party Releases are fair and reasonable, consistent with the Supreme Court's recent ruling in *Purdue Pharma* and Eleventh Circuit precedent and, therefore, should be approved. *See Harington v. Purdue Pharma L.P.*, 144 S.Ct. 2071, 2074 (2024) ("Nothing

in the opinion should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan"); *Winn-Dixie*, 356 BR at 260-61 ("Consensual releases have been routinely upheld by courts").

50. Generally, where releasing parties have consented to a provision in a plan of reorganization that releases claims against non-debtors, such releases will be approved on the basis of general principles of contract law. *See First Fid. Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993) (noting that a consensual third-party release is no different from any other settlement or contract and does not implicate section 524(e)). Accordingly, numerous courts have recognized that a Chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual. *See Purdue Pharma L.P.*, 144 S.Ct. at 2074; *In re PG & E Corp.*, 617 B.R. 671, 683 (Bankr. N.D. Cal. 2020); *In re Wyly*, 2019 WL 2590035, at *6 (Bankr. N.D. Tex. June 22, 2019).

51. In this case, Article I of the Plan defines "Releasing Party" as including "in its capacity as such, each of: (a) the DIP Lenders and the DIP Agent; (b) the Prepetition Term Loan Parties; (c) all holders of Claims eligible to vote on the Plan that vote to accept the Plan; (d) the Purchaser; (e) the Committee and those individual members of the Committee, solely in their capacities as such, who vote to accept the Plan; and (f) the Plan Administrator and GUC Trustee." *See* Plan, Article I.

52. Article VIII.A.3 of the Plan provides that: "each Released Party is, and is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably and forever, released by each Releasing Party from any and all Causes of Action…" with exceptions for "actual fraud, willful misconduct, or gross negligence. . .". *See* Plan, Article VIII.A.3.

53. At the request of the U.S. Trustee and upon direction from the Court at the hearing on July 26, 2024 to consider conditional approval of the Disclosure Statement, the Debtors limited

the creditors included in the definition of "Releasing Party" (other than the DIP Lenders, DIP Agent and Prepetition Term Loan Parties) to those creditors that vote to accept the Plan. *See* July 26, 2024 Hearing Trans. at 30:6-11, 32:10-12.

54. Additionally, the Consensual Third-Party Releases are appropriate here because:

a. The current directors, officers and managers have acted in an exemplary fashion in maximizing the value for creditors by prudently and efficiently marketing the Debtors' assets and have put creditors' interests ahead of their own.

b. There is no suggestion whatsoever of any meritorious claims against the current directors, officers or managers of the Debtors.

c. The Debtors' Estates benefit from the Consensual Third-Party Releases of the Prepetition Term Loan Parties and DIP Secured Parties because each such party has indemnification claims against the Debtors. The Plan provides a release for Prepetition Term Loan Parties and DIP Secured Parties and in return such parties are releasing their indemnity reserve collateral which, in turn, benefits the Debtors' Estates.

d. The Debtors understand that an overwhelming number of creditors, in both number and amount, have voted in favor of the Plan.

55. For the reasons set forth above, the Consensual Third-Party Releases should be approved.

(iii) <u>The Exculpation Provision Is Appropriate</u>

56. The Plan's Exculpation Provision complies with and satisfies the requirements of applicable law. Under the Plan, the Exculpated Parties, in their capacities as such, include "(a) the directors and officers of each of the Debtors and the members of any board of managers or directors of each Debtor, and in each case, who served the Debtors in such capacities at any time between the Petition Date and the Plan Effective Date; (b) all Professionals and agents retained by the Debtors in the Debtors' Chapter 11 Cases; (c) the Committee and those individual members of the Committee who vote to accept the Plan; (d) all Professionals and agents retained by the Committee in the Debtors' Chapter 11 Cases; (e) the Plan Administrator and GUC Trustee; and (f) with respect

to each Person described in clauses (a) through (e) of this definition, each of such Person's employees, directors, managers, partners, committee members, attorneys, representatives, successors, assigns, heirs, executors, estates, and nominees, solely in their capacity as such." *See* Plan, Article I.A.

57. Consistent with a bankruptcy court's good-faith finding, it is appropriate to exculpate the parties involved in formulating the plan and to protect them from collateral attacks. *See* 11 U.S.C. § 1129(a)(3) (discussed below). As Judge Shannon stated in *Indianapolis Downs*, "a creditors' committee, its members, and estate professionals may be exculpated under a plan for their actions in the bankruptcy case except for willful misconduct or gross negligence." 486 B.R. at 306 (quoting *Washington Mutual*., 442 B.R. at 350).

58. Exculpation provisions are appropriate where the exculpated parties have participated in good faith and provided substantial contributions to a debtor's reorganization, *see In re Winn-Dixie Stores*, 356 B.R. at 261 (finding an exculpation provision that extended to Debtors' attorneys, the reorganized debtors, the creditors' committee and certain others was appropriate in light of the significant contributions made to the case by the beneficiaries of the exculpation clause), or where the exculpation provision is reasonable under the circumstances and in the best interests of the estate. *See Murphy v. Weathers*, 2008 WL 4426080 at *12-13 (M.D. Ga. Sept. 25, 2008) (stating that the standard applicable to, in part, exculpation provisions, is "whether the provisions are reasonable under the circumstances and in the best interests of the estate"). Further, unlike a release, the effect of an exculpation provision is not to eliminate a claim, but rather to set a reasonable standard of care that provides fiduciaries and, in some instances, others, with an appropriate level of protection. *See In re Nickels Midway Pier*, No. 03-49462, 2010 WL 2034542, at *14 (Bankr. D.N.J. May 21, 2010) (citing *PWS Holding Corp*., 228 F.3d at 235); *In re*

Health Diagnostic Lab., Inc., 551 B.R. 218, 234 (Bankr. E.D. Va. 2016) (stating that exculpation provisions do "not alter or release claims held by third parties against non-debtors in contravention of § 524(e) of the Bankruptcy Code"); Brief for American College of Bankruptcy as Amicus Curiae, p. 10, *Purdue Pharma L.P*., 144 S. Ct. 2071 (2024) ("The question presented in this case—whether the Bankruptcy Code permits nonconsensual releases of pre-bankruptcy claims—is entirely different from whether an exculpation clause in a chapter 11 plan is an 'appropriate provision'").

(iv) The Injunction Provision Is Appropriate.

59. The Injunction Provision is necessary to effectuate the Releases and Exculpation Provision contained in the Plan and to protect the Released Parties and Exculpated Parties from any potential litigation from prepetition creditors after the Effective Date. Any such litigation would hinder the efforts of the Plan Administrator to fulfill his responsibilities effectively as contemplated under the Plan and, thereby, undermine the Debtors' efforts to maximize value for all holders of Claims and Interests. The Injunction Provision therefore is a key provision of the Plan because it enforces the Release and Exculpation Provisions that are critical to the Plan. As such, to the extent the Court finds that the Releases and Exculpation Provisions are appropriate, the Debtors respectfully request that the Injunction Provision be approved in conjunction therewith.

C. The Debtors Have Satisfied Bankruptcy Code §1129(a)(2)

60. Bankruptcy Code §1129(a)(2) requires the proponent of a plan to comply with "applicable provisions of the Bankruptcy Code." The principal purpose of §1129(a)(2) is to ensure that a plan proponent has complied with the disclosure and solicitation requirements of Bankruptcy Code sections 1125 and 1126. *See In re PWS Holdings Corp.*, 228 F.3d 224, 248 (3d Cir. 2000) (Bankruptcy Code §1129(a)(2) requires plan proponent to comply with adequate disclosure

requirements of Bankruptcy Code §1125); *see also In re Lapworth*, No. 97-34529DWS, 1998 Bankr. LEXIS 1383, at *10 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of §1129(a)(2) specifically identifies compliance with the disclosure requirements of §1125 as a requirement of §1129(a)(2)."); *Official Comm. v. Michelson (In re Michelson)*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) ("Compliance with the disclosure and solicitation requirements is the paradigmatic example of what the Congress had in mind when it enacted section 1129(a)(2)."); *In re Texaco Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988) (stating that the "principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of section 1125 in the solicitation of acceptances to the plan"); S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (1978) ("Paragraph (2) of [section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977). Additionally, the Debtors are proper debtors under Bankruptcy Code § 109.

(1) <u>The Debtors Have Complied With the Requirements of Bankruptcy Code §1125</u>

61. The Debtors have complied with Bankruptcy Code §1125. Pursuant to the Solicitation Procedures Order, the Court determined on an interim basis that the Disclosure Statement contained adequate information within the meaning of Bankruptcy Code §1125. *See* Solicitation Procedures Order, ¶ 3.

(2) <u>The Debtors Have Complied With the Requirements of Bankruptcy Rules 3017(d) and 3018(c)</u>

62. Bankruptcy Rules 3017 and 3018 require, in relevant part, that a debtor transmit its plan and disclosure statement to all affected creditors and equity security holders, that it adopt effective procedures for the transmission of its plan and disclosure statement to beneficial owners of securities, and that it afford creditors and equity security holders a reasonable period of time in

which to accept or reject the proposed plan. Bankruptcy Rule 3017(d) requires that, unless a court orders otherwise, a debtor must transmit to all creditors, equity security holders, and the Office of the United States Trustee: the plan, or a court-approved summary of the plan; the disclosure statement approved by the court; notice of the time within which acceptances and rejections of such plan may be filed; and such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. Bankruptcy Rule 3017 also requires that the debtor give notice of the time fixed for filing objections to the proposed disclosure statement and for the hearing on confirmation to all creditors and equity security holders and that a debtor mail a ballot to each creditor and equity security holder entitled to vote on the plan. Bankruptcy Rule 3018(c) governs the form of ballot for accepting or rejecting a plan, providing in relevant part that an "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." The Debtors respectfully submit that they have met all such requirements.

63. Only Classes 3 and 4 of the Plan are entitled to vote pursuant to Bankruptcy Code §1126. Although "[t]he holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan," 11 U.S.C. § 1126(a), "a class that is not impaired under a plan, and each holder of a claim or interest in such class, are conclusively presumed to have accepted the plan," *id.* 11 U.S.C. § 1126(f)), and "a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests." 11 U.S.C. §1126(g). Classes 1 and 2 are unimpaired under the Plan, and thus are deemed to have

accepted the Plan. Classes 5 and 6 are impaired under the Plan, but do not vote and are deemed to have rejected the Plan because they will receive no distributions under the Plan.

64. The Debtors have satisfied Bankruptcy Rules 3017 and 3018 by following the procedures in the Solicitation Procedures Order for noticing matters with respect to confirmation of the Plan and soliciting acceptances of the Plan. The Disclosure Statement, Ballots (approved as to form by the Solicitation Procedures Order), and Confirmation Hearing Notice provided clear notice of the deadline to submit the Ballots, which the Court established as August 28, 2024 at 4:00 p.m. (Prevailing Eastern Time). *See* Solicitation Procedures Order, § 8.1. The Debtors did not solicit acceptances or rejections of the Plan from any Claim or Interest holder before the conditional approval of the Disclosure Statement by the Bankruptcy Court.

(3) Bankruptcy Code §1126 (c) and (d) and Bankruptcy Rule 3018(a) Were Satisfied

65. As to tabulating votes for impaired classes, subject to designation of claims under Bankruptcy Code §1126(e), a plan is accepted (a) by a class of claims if at least two-thirds in dollar amount and one-half in number of holders of allowed claims vote to accept the plan and (b) by a class of interests if at least two-thirds in amount of allowed interests vote to accept the plan. *See* 11 U.S.C. §1126(c) and (d). Also, Bankruptcy Rule 3018(a) and (c) and the Solicitation Procedures Order establish that holders of claims and interests entitled to vote are those as of the Voting Record Date of July 28, 2024, who must vote in the manner and by using the form sanctioned for these purposes.

66. The Debtors complied with the requirements of Bankruptcy Code §1126(c) and (d) and Bankruptcy Rule 3018(a) and (c); namely, that the Debtors' anticipate that Class 3 voted to accept the Plan. In light of the evidence adduced above, reflecting that the Debtors' solicitation satisfies the requirements of Bankruptcy Code sections 1125 and 1126 and Bankruptcy Rules

3017(d) and (e), and 3018(a) and (c), the Debtors request that the Court grant the protections provided under Bankruptcy Code §1125(e).

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

67. Bankruptcy Code § 1129(a)(3) requires that a plan be proposed in good faith and not by any means forbidden by law. Although the term "good faith" is not defined in the Bankruptcy Code, "[w]here the plan is proposed with legitimate and honest purpose to reorganize and has a reasonable hope of success the good faith requirements of Section 1129(a)(3) are satisfied." *In re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995); *see also In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000) (quoting *In re Abbott Dairies of Pennsylvania*, 788 F.2d 143, 150 n.5 (3d Cir. 1986) (courts have determined that "[f]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives of the Bankruptcy Code."); *In re General Dev. Corp.*, 135 B.R. 1002, 1007 (Bankr. S.D. Fla. 1991) (citations omitted) (explaining that the "plan's proposal, as opposed to the contents of the plan, be in good faith and in compliance with all nonbankruptcy laws"). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the proposal of a chapter 11 plan. *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012). In determining whether the plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the plan itself. *See In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988) (concluding that the good-faith test provides courts with significant flexibility and is focused on examination of the plan itself, rather than external factors), *aff'd in part and remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990).

68. One must view the requirement of good faith in the context of the totality of the circumstances surrounding the formulation of a Chapter 11 plan. *See McCormick v. Banc One Leasing Corp. (In re McCormick),* 49 F.3d 1524, 1526 (11th Cir. 1995) ("The focus of a court's inquiry is the plan itself, and courts must look to the totality of the circumstances surrounding the plan."); *In re Block Shim Dev. Co*., 939 F.2d 289, 292 (5th Cir. 1991) (finding that the good faith requirement "is viewed in the context of the circumstances surrounding the plan").

69. The Plan, which is the result of extensive arms-length negotiations between the Debtors, the Prepetition Term Loan Lenders, the DIP Lenders, the Purchaser and the Committee as described above, has been proposed in good faith. *See In re Eagle-Picher Indus., Inc.,* 203 B.R. 256, 274 (S.D. Ohio 1996) (finding that a plan of reorganization was proposed in good faith when, among other things, it was based on extensive arms-length negotiations among plan proponents and other parties in interest). The Debtors anticipate that the holders of impaired claims in Classes 3 voted to accept the Plan and thereby implements a result that is in keeping with – and, indeed, central to – the goals of the Bankruptcy Code: maximizing the assets available for distribution and to distributing them equitably. Further, the Plan contains only provisions that are consistent with the Bankruptcy Code. In light of the foregoing, the Plan complies with Bankruptcy Code §1129(a)(3).

E. Payments for Services and Expenses (Bankruptcy Code §1129(a)(4))

70. Bankruptcy Code § 1129(a)(4) requires that the Debtors not make any payment for services, costs, or expenses in connection with these Chapter 11 Cases unless such payments are disclosed and subject to bankruptcy court approval as reasonable. Pursuant to the Plan and other orders of the Court, all Professional Fee Claims are subject to Court approval. *See* Plan, Article II.B. Accordingly, the Plan complies with the requirements of §1129(a)(4) of the Bankruptcy Code.

F. Directors and Officers (Bankruptcy Code §1129(a)(5))

71. Bankruptcy Code §1129(a)(5) requires that the Debtors disclose the identity and affiliations of the individuals proposed to serve after confirmation as a director or officer and that the identity and nature of any insider compensation be disclosed. The Debtors have complied with Bankruptcy Code §1129(a)(5) as a result of the appointment of the Plan Administrator and the New Board. *See, e.g.*, Plan, Articles IV.B.4 and VI.B.2(f).; Exhibit I to the Plan Supplement. The Debtors submit that the foregoing provisions are "consistent with the interests of creditors and equity security holders and with public policy." Therefore, the Bankruptcy Code § 1129(a)(5) requirements are satisfied. *See, e.g.*, *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 165 (Bankr. D. Del. 2006) (holding that the disclosure of the identities and, with respect to insiders, the nature of compensation, of persons to serve as directors and officers on the effective date was sufficient under Bankruptcy Code § 1129(a)(5) of the Bankruptcy Code). *See* the Management Disclosures.

G. Rate Changes (Bankruptcy Code §1129(a)(6))

72. Bankruptcy Code §1129(a)(6) 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. Bankruptcy Code §1129(a)(6) is inapplicable in these cases.

H. The Plan Satisfies the "Best Interests" Test (Bankruptcy Code § 1129(a)(7))

73. The "best interests of creditors" test of Bankruptcy Code §1129(a)(7) requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a present value, as of the effective date of the plan, of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time. The best interests test focuses on individual creditors' claims rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n. 13 (1999). The test requires that "if the holder of

a claim impaired under a plan of reorganization has not accepted the plan, then such holder must 'receive . . . on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under chapter 7 . . . on such date.'" *Id.* at 441; *United States v. Reorganized CF&I Fabricators of Utah, Inc*., 518 U.S. 213, 228 (1996); *In re Adelphia Commc'ns Corp*., 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007) ("In determining whether the best interests standard is met, the court must measure what is to be received by rejecting creditors in the impaired classes under the plan against what would be received by them in the event of liquidation under chapter 7."), *appeal dismissed*, 371 B.R. 660 (S.D.N.Y. 2007), *aff'd*, 544 F.3d 420 (2d Cir. 2008). The best interests of creditors test is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization. *See 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'." (quoting *In re Sierra-Cal*, 201 B.R. 168, 171-72 (Bankr. E.D. Cal. 1997)); *see also Genesis Health Ventures*, 266 B.R. at 610–11.

74. Under Bankruptcy Code §1129(a)(7), the best interests of creditors test applies only to non-accepting holders of Impaired Claims or Interests. For the reasons discussed in Article VIII, §8.3 of the Disclosure Statement and, as reflected in the Liquidation Analysis attached as Exhibit B thereto, it is clear that the best interests of creditors test is satisfied as to all holders of Claims and Interests in impaired Classes under the Plan. The Liquidation Analysis reflects that the distribution each holder of a Claim or Interest is projected to receive or retain under the Plan is not less than the distribution that such holder is projected and estimated to receive if the Chapter 11

Cases were converted to chapter 7 of the Bankruptcy Code. *See* Haughey Declaration at ¶¶ 45 to 51. Because the non-accepting holders of the Impaired Claims or Interests would not receive any greater recovery in a chapter 7 liquidation than under the Plan, the Plan satisfies the "best interests" of creditors test.

I. Acceptance by Classes (Bankruptcy Code §1129(a)(8))

75. Bankruptcy Code § 1129(a)(8) requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. As set forth above, Classes 1 and 2 are unimpaired, holders of claims therein were not entitled to vote, and those Classes are deemed to have accepted the Plan pursuant to the conclusive presumption mandated by Bankruptcy Code §1126(f). Also, the Debtors anticipate that based on votes tabulated in accordance with Bankruptcy Code §1126(c) and (d) and Bankruptcy Rule 3018 (a) and (c), the Plan will be accepted by at least Class 3. Thus, as to the Impaired and accepting Claims in Class 3, the requirements of §1129(a)(8) of the Bankruptcy Code have, likewise, been satisfied.

76. The Debtors understand that the Holders of Claims in Class 4 voted to reject the Plan. Additionally, Class 5 (Intercompany Claims) and Class 6 (Interests) are not entitled to receive or retain any property from the Debtors' estates under the Plan on account of their Claims and Interests and, therefore, are deemed to reject the Plan pursuant to Bankruptcy Code §1126(g). The Plan nonetheless may be confirmed under the "cram down" provisions of Bankruptcy Code §1129(b), as discussed below.

J. Treatment of Priority Claims (Bankruptcy Code Section 1129(a)(9))

77. Bankruptcy Code §1129(a)(9) contains a number of requirements concerning the payment of priority claims. First, Bankruptcy Code §1129(a)(9)(A) requires, *inter alia*, that claims of a kind specified in Bankruptcy Code §507(a)(2), which provides first priority to certain administrative expenses, be paid in full in cash on the effective date of a plan. Second, Bankruptcy

Code §1129(a)(9)(B) requires that claims of a kind specified in Bankruptcy Code §507(a)(1), (4), (5), (6) and (7) receive cash or, if the class accepts the plan, deferred cash payments equal to the allowed amount of such claims on the effective date. Third and finally, Bankruptcy Code §1129(a)(9)(C) requires that the holder of a claim of a kind specified in Bankruptcy Code §507(a)(8) of the Bankruptcy Code—priority tax claims—must receive regular installment payments in cash of the total value equal to the allowed amount of such claim over a period ending not later than five years after the petition date that comprises treatment no less favorable than provided under the plan for any other non-priority, unsecured claim (other than claims in any administrative convenience class).

78. The Plan satisfies Bankruptcy Code §1129(a)(9) because it provides that: (a) any unpaid Administrative Expense Claims (as to which Bankruptcy Code §1129(a)(9)(A) applies), once Allowed, will, unless the holder of such Administrative Expense Claim agrees to less favorable treatment, be paid in full: (1) if such Administrative Expense Claim is Allowed on or prior to the Plan Effective Date, on the Plan Effective Date; (2) if such Administrative Expense Claim is not Allowed as of the Plan Effective Date, no later than thirty (30) days after the date on which such Administrative Expense Claim is Allowed; (3) if such Allowed Administrative Expense Claim is based on liabilities incurred by the Debtors in the ordinary course of their business after the Petition Date, in accordance with the terms and conditions of the particular transaction or course of business giving rise to such Allowed Administrative Expense Claim; or (4) at such time and upon such terms as set forth in a Final Order of the Bankruptcy Court (*see* Plan, Article II.A); (b) Allowed Non-Priority Tax Claims receive treatment mirroring that which is permissible under Bankruptcy Code §1129(a)(9)(B) (*see* Plan, Article III.B.2); and (c) Allowed

Priority Tax Claims receive treatment mirroring that which is permissible under Bankruptcy Code §1129(a)(9)(C) (*see* Plan, Article II.D.).

79. Accordingly, the Plan satisfies the requirements set forth in Bankruptcy Code §1129(a)(9).

K. Acceptance by at Least One Impaired Class (Bankruptcy Code §1129(a)(10))

80. Bankruptcy Code §1129(a)(10) requires as a condition of confirmation that if a class of Claims is Impaired under a plan, at least one class of claims that is impaired under such plan has accepted the plan, determined without including any acceptance of the plan by any insider. The Debtors anticipate that holders of claims that voted in Class 3, exclusive of any claims of Insiders (as defined in the Bankruptcy Code) that cast accepting votes, will have voted in favor of the Plan. Class 3 holds claims against each of the Debtors. Therefore, the requirements of Bankruptcy Code §1129(a)(10) will be satisfied.

L. The Plan Is Feasible Pursuant to Bankruptcy Code §1129(a)(11)

81. Bankruptcy Code §1129(a)(11) provides that a plan may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtors or any successor to the debtors under the plan, unless such liquidation or reorganization is proposed in the plan."

82. Courts generally have held that the determination of the feasibility requirement contemplates "'the probability of actual performance of the provisions of the plan.'" *Clarkson v. Cooke Sale & Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *Chase Manhattan Mortgage & Realty Trust v. Bergman (In re Bergman)*, 585 F.2d 1171, 1179 (2d Cir. 1978) ("The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.'"); *see also In re Orlando Investors, L.P.*, 103 B.R. 593, 600 (Bankr. E.D. Pa. 1989) ("Feasibility does not require that substantial consummation of the plan be

guaranteed; rather the plan proponent must demonstrate that there be a reasonable assurance of compliance with plan terms."). Only a reasonable assurance of success is required. *Johns-Manville Corp*., 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *W.R. Grace & Co*., 475 B.R. at 115 (same); *In re Flintkote Co*., 486 B.R. 99, 139 (Bankr. D. Del. 2012) (same). Further, "'a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility.'" *In re Prussia Assocs*., 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting Collier on Bankruptcy, ¶ 1129.03[1] (15th rev. ed. 2005)); *see also In re Tribune Co*., 464 B.R. 126, 185 (Bankr. D. Del.), modified, 464 B.R. 208 (Bankr. D. Del. 2011).

83. Bankruptcy Code §1129(a)(11) requires that the Bankruptcy Court find that confirmation is not likely to be followed by the liquidation of the Reorganized Debtors or by the need for further financial reorganization, unless the plan contemplates such liquidation.

84. The Plan expressly provides for the liquidation of the Wind-Down Debtors' remaining assets. Therefore, Bankruptcy Code §1129(a)(11) is satisfied with respect to the Wind-Down Debtors.

85. In connection with the development of the Plan and for purposes of determining whether the Plan satisfies the feasibility standard with respect to the Reorganized Debtors, the Debtors analyzed their ability to satisfy their financial obligations while maintaining sufficient liquidity and capital resources. The Debtors prepared financial information and projections for fiscal years 2025 through 2027 (the "Financial Projections"). The Financial Projections, together with the assumptions upon which they are based, are attached to the Disclosure Statement as Exhibit B. In general, as illustrated by the assumptions of the Financial Projections, with the deleveraged capital structure provided under the Plan and the improved operational performance,

the Reorganized Debtors will have sufficient cash flow and cash on hand to make all payments required pursuant to the Plan while conducting ongoing business operations. *See* Haughey Declaration at ¶¶ 55 through 60.

86. Further, following consummation of the Plan, the Purchaser and its newly acquired subsidiaries will continue to operate the Debtors' reorganized business and continue to employ more than 30,000 full and part-time employees. *See* Haughey Declaration at ¶ 57. As will be detailed prior to the confirmation hearing, the Purchaser will commit an additional equity infusion of up to $70.0 million upon the Plan Effective Date and will be well positioned to satisfy Reorganized Debtors' obligations under the Plan without the need for further reorganization. *See* Haughey Declaration at ¶ 57.

87. Confirmation of the Plan and effectiveness of the Plan is, therefore, not likely to be followed by the liquidation or further reorganization of the Reorganized Debtors. Accordingly, the Plan satisfies the feasibility requirement of Bankruptcy Code §1129(a)(11).

M. Payment of Certain Fees (Bankruptcy Code §1129(a)(12))

88. Bankruptcy Code §1129(a)(12) requires that certain fees listed in 28 U.S.C. §1930, determined by the Court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. The Plan includes a provision reflecting that all outstanding fees payable to the Office of the United States Trustee under §1930 shall be paid by the Debtors on or before the Effective Date in compliance with Bankruptcy Code §1129(a)(12). Consequently, Bankruptcy Code § 1129(a)(12) is satisfied.

N. Continuation of the Debtors' Obligations to Pay Retiree Benefits (Bankruptcy Code §1129(a)(13))[3]

89. Bankruptcy Code §1129(a)(13) is inapplicable to the Plan, as it requires that a plan of reorganization provide for the continuation of all retiree benefits at the level established by agreement or by court order pursuant to Bankruptcy Code §111 at any time prior to confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits. The Debtors have no retiree benefit plans. Accordingly, §1129(b)(13) of the Bankruptcy Code is inapplicable to the Plan.

O. The "Cramdown" Requirements of Bankruptcy Code §1129(b)(1)

90. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where not all impaired classes of claims and interests accept a plan, as required by §1129(a)(8), which is referred to as "cramdown:"

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. §1129(b)(1).

91. Thus, under §1129(b) of the Bankruptcy Code, a bankruptcy court may "cram down" a plan over the rejection (or deemed rejection) of a plan by an impaired class of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such class. *See Johns-Manville Corp*., 843 F.2d at 650 (2d Cir. 1988); *John Hancock Mut. Life*

[3] The remaining elements of Bankruptcy Code § 1129 (a), namely, subsections (a)(14) (domestic obligations), (15) (individual debtors) and (16) (nonprofit entities), are inapplicable to the Debtors and will not be discussed. *See* 11 U.S.C. § 1129(a)(14), (a)(15) and (a)(16).

Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 157 n.5 (3d Cir. 1993); *Zenith,* 241 B.R. at (explaining that "[w]here a Class of creditors or shareholders has not accepted a plan of reorganization, the court shall nonetheless confirm the plan if it does not discriminate unfairly and is fair and equitable").

92. The "unfair discrimination" standard of §1129(b)(1) of the Bankruptcy Code requires that a dissenting class receive "treatment which allocates value to the [dissenting] class in a manner consistent with the treatment afforded to other classes with similar legal claims against the debtor," so that "a dissenting class will receive relative value equal to the value given to all other similarly situated classes." 11 U.S.C. §1129(b)(1). Generally speaking, §1129(b)(1) of the Bankruptcy Code is intended to prevent a plan proponent from "segregat[ing] two similar claims or groups of claims into separate classes and provide disparate treatment for those classes." *Id*.; *see also In re Buttonwood Partners, Ltd*., 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990) ("some courts hold that for discriminatory treatment of claims to be fair, four tests must be satisfied: (i) there is a reasonable basis for discriminating, (ii) the debtor cannot consummate the plan without discrimination, (iii) the discrimination is proposed in good faith, and (iv) the degree of discrimination is in direct proportion to its rationale"); *Zenith,* 241 B.R. at 105 (Bankr. D. Del. 1999) (explaining that '[w]here a class of creditors or shareholders has not accepted a plan. . . , the court shall nonetheless confirm the plan if it 'does not discriminate unfairly and is fair and equitable'"); *In re TCI 2 Holdings, LLC,* 428 B.R. 117, 157 (Bankr. D.N.J. 2010) (citing *Armstrong World Indus*., 348 B.R. at 121).

93. Under the foregoing standards, the Plan does not "discriminate unfairly" against any holder of a Claim or Interest in a Class that is deemed or has voted to reject the Plan (the "Rejecting Class"). The treatment of holders of Claims and Interests in the Rejecting Class is

proper because all similarly situated holders of Claims and Interests will receive the same treatment under the Plan unless such holder consented to less favorable treatment.

94. Sections 1129(b)(2)(B) and 1129(b)(2)(C) set forth the requirements of the "fair and equitable" test with respect to unsecured creditors and equity holders, with each subsection specifying an alternative requirement. A chapter 11 plan must satisfy the applicable requirement to be found to be fair and equitable with respect to a dissenting class of unsecured creditors or equity interests. *See In re P.J. Keating Co.*, 168 B.R. 464, 468 (Bankr. D. Mass. 1994) (noting that the "test under Section 1129(b)(2)(C) is an alternative one").

95. The Bankruptcy Code states that a plan is "fair and equitable" with respect to a class of unsecured claims if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. . . ." 11 U.S.C. §1129(b)(2)(B)(ii). Further, a plan is fair and equitable with respect to a class of interests if the plan provides that "the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property." *Id.*, § 1129(b)(2)(C)(ii).

96. As stated above, the Debtors anticipate that less than two-thirds of the holders of Class 4 Claims by amount voted to accept the Plan. Notwithstanding, the Court can properly "cram down" the Plan, in respect of the proposed treatment of Class 4 Claims, as authorized by Bankruptcy Code §1129(b) because the Plan does not unfairly discriminate and is fair and equitable with respect to Class 4. Specifically, the Plan does not unfairly discriminate because all holders of General Unsecured Claims are treated the same, and the Plan is fair and equitable because no Class junior to Class 4 will receive a distribution under the Plan. *See* 11 U.S.C. §1129(b)(2)(B)(ii) ("[T]he condition that a plan be fair and equitable with respect to a class

includes the following requirements: . . . [w]ith respect to a class of unsecured claims–the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.").

97. Accordingly, the Plan does not unfairly discriminate and is "fair and equitable" with respect to the Rejecting Class and, thus, satisfies Bankruptcy Code §1129(b).

P. The Plan Is The Only Plan in these Chapter 11 Cases (Bankruptcy Code §1129(c))

98. The Plan satisfies Bankruptcy Code §1129(c), which provides that, with a limited exception, a bankruptcy court may only confirm one plan. The Plan is the only plan that has been filed in these Chapter 11 Cases and is the only plan that satisfies the requirements of subsections (a) and (b) of §1129. Accordingly, the requirements of Bankruptcy Code §1129(c) are satisfied.

Q. The Plan's Purpose Is Consistent With the Bankruptcy Code (Bankruptcy Code §1129(d))

99. Bankruptcy Code §1129(d) provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of section 5 of the Securities Act of 1933, 15 U.S.C. §77(e). The principal purpose of the Plan is not avoidance of taxes or avoidance of the requirements of section 5 of the Securities Act of 1933. Instead, the Plan reflects extensive arm's-length negotiations with various stakeholders in furtherance of reorganizing the Debtors as a going-concern business.

R. Good Cause Exists to Waive the Stay of the Confirmation Order

100. The Debtors respectfully request that the Court cause the Confirmation Order to become effective immediately upon its entry notwithstanding the 14-day stay imposed by operation of Bankruptcy Rule 3020(e), which states 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." Fed. R. Bankr. P 3020(e); *see also* Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend. (stating

that a "court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately"). According to the Advisory Committee notes to the 1999 amendments to the Bankruptcy Rules, the purpose of Bankruptcy Rule 3020(e) is to permit a party in interest to request a stay of the confirmation order pending appeal before the plan is implemented and an appeal becomes moot. Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend. To the extent a party wishes to seek an appeal, it may seek to stay the effectiveness of the Confirmation Order in connection with the appeal.[4] As a result, the Debtors respectfully request that the Court cause the Confirmation Order to become effective immediately upon entry.

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[4] If for some reason a party in interest appeals the Confirmation Order, such party is on notice that the Debtors are asking the Court for a waiver of the stay imposed by Bankruptcy Rule 3020(e). Therefore, such party is on notice that it must request a stay pending appeal immediately after the entry of the Confirmation Order. *See, e.g.*, *Nordhoff Invs., Inc. v. Zenith Elecs. Corp*., 258 F.3d 180, 187 (3d Cir. 2001) (noting that all parties were on notice that plan called for "Immediate Effectiveness," allowing appellants the opportunity to seek a stay immediately upon confirmation of the plan).

VII. CONCLUSION

WHEREFORE, for the reasons set forth in this Memorandum, which confirm that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and all remaining unresolved objections to the Plan as of the commencement of the Confirmation Hearing should be overruled, the Debtors respectfully request that the Court enter an order confirming the Plan, substantially in the form of the Proposed Confirmation Order, subject to any revisions made thereto in advance of the Confirmation Hearing.

Dated: August 29, 2024

Respectfully submitted,

/s/ Paul Steven Singerman

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Filer's Attestation: Pursuant to Local Rule 1001-2(g)(3) regarding signatures, Paul Steven Singerman attests that concurrence in the filing of this paper has been obtained.

Counsel for Debtors and Debtors-in-Possession