LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Telephone: (212) 906-1200
Facsimile: (212) 751-4864
George A. Davis
George Klidonas
Anupama Yerramalli
Randall C. Weber-Levine
Scott Yousey

Proposed Counsel to the Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
2U, Inc., *et al.*,	Case No. 24-11279 (MEW)
Debtors.[1]	(Jointly Administered)

MEMORANDUM OF LAW IN SUPPORT OF (A) APPROVAL OF DEBTORS' DISCLOSURE STATEMENT AND (B) CONFIRMATION OF SECOND AMENDED JOINT PREPACKAGED PLAN OF REORGANIZATION OF 2U, INC. AND ITS DEBTOR AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: 2U, Inc. (5939); edX LLC (8554); 2U GetSmarter, LLC (9643); 2U Harkins Road LLC (N/A); 2U NYC, LLC (N/A); 2U KEIH Holdco, LLC (3837); CritiqueIt, Inc. (5532); edX Boot Camps LLC (8904); and 2U GetSmarter (US), LLC (9802). The Debtors' mailing address is 2345 Crystal Drive, Suite 1100, Arlington, Virginia 22202.

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The debtors and debtors in possession (collectively, the "***Debtors***") in the above-captioned cases (the "***Chapter 11 Cases***") hereby submit this memorandum of law and omnibus reply (this "***Memorandum***") in support of their request for entry of an order (a) approving the *Disclosure Statement for the Joint Prepackaged Plan of Reorganization of 2U, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 20] (the "***Disclosure Statement***") and (b) confirming the *Second Amended Joint Prepackaged Plan of Reorganization of 2U. Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 90] (as further amended, modified, or supplemented from time to time, the "***Plan***"),[2] including the agreements and other documents attached to notices of Plan Supplement [Docket Nos. 71, 92, 118, 121 & 135] (collectively, and as may be further amended, modified, or supplemented from time to time, the "***Plan Supplement***").

PRELIMINARY STATEMENT[3]

1. In fewer than 50 days after entering chapter 11, the Debtors are prepared, with the overwhelming support of all their major constituents, to confirm the Plan. The Plan not only reduces the Debtors' outstanding debt by approximately $486.3 million, but also (a) funds the

[2] Capitalized terms used but not defined herein shall have the same meanings ascribed to such terms in, as applicable, the Plan, the *Motion of Debtors for Entry of an Order (A) Scheduling a Combined Hearing to Consider Approval of the Disclosure Statement and Confirmation of the Plan; (B) Establishing the Voting Record Date, Voting Deadline, and Other Dates; (C) Approving Procedures for Soliciting, Receiving, and Tabulating Votes on the Plan and for Filing Objections to the Disclosure Statement or the Plan; (D) Approving the Manner and Forms of Notice and Other Related Documents; (E) Approving Equity Rights Offering Documents; (F) Conditionally Waiving Requirement of Filing Schedules and Statements and of Convening Section 341 Meeting of Creditors; and (G) Granting Related Relief* [Docket No. 5] (the "***Solicitation Procedures Motion***"), or the *Amended Order (A) Scheduling a Combined Hearing to Consider Approval of the Disclosure Statement and Confirmation of the Plan; (B) Establishing the Voting Record Date, Voting Deadline, and Other Dates; (C) Approving Procedures for Soliciting, Receiving, and Tabulating Votes on the Plan and for Filing Objections to the Disclosure Statement or the Plan; (D) Approving the Manner and Forms of Notice and Other Related Documents; (E) Approving Equity Rights Offering Documents; (F) Conditionally Waiving Requirement of Filing Schedules and Statements and of Convening Section 341 Meeting of Creditors; and (G) Granting Related Relief* [Docket No. 50] (the "***Solicitation Procedures Order***").

[3] Capitalized terms used but not defined in the Preliminary Statement shall have the meanings ascribed to such terms elsewhere in this Memorandum.

Debtors' go-forward operating needs through approximately $384 million of first lien exit financing, $66.5 million of second lien exit financing, and $46.5 million of additional cash from the Equity Rights Offering, (b) provides full recoveries to the Holders of General Unsecured Claims so as to maintain the Debtors' valuable relationships with their university partners, vendors, and customers, (c) secures the employment of thousands of individuals worldwide, and (d) ensures the long-term continuation of the Debtors' brand and operations. Ultimately, the Plan will enable the Debtors to emerge from the Chapter 11 Cases as a stronger company, less burdened by debt, so that they can focus on what they do best: providing technology and services to enable nonprofit colleges and universities to offer online education programs and expanding access to high-quality education to millions of learners around the world.

2. In light of the many benefits provided under the Plan, it is unsurprising—but validating—that the Debtors are seeking to confirm the Plan on an almost entirely consensual basis. Indeed, the Debtors have received votes in favor of the Plan from Holders of approximately 96.34% in amount of Class 3 First Lien Claims (and 100.00% of Holders of Class 3 First Lien Claims that submitted Ballots) in addition to 91.12% in amount of Class 4 Unsecured Notes Claims (and 94.44% of Holders of Class 4 Unsecured Notes Claims that submitted Ballots). Moreover, only four parties filed a formal objection to confirmation of the Plan, only one party filed a joinder to one of those objections, and only three parties provided informal comments with respect to confirmation of the Plan. As shown in the response chart attached hereto as **Exhibit A**, all objections and comments, other than the objection of the United States Trustee [Docket No. 99] (the "***United States Trustee Objection***"), have been resolved. Thus, as of the date hereof, the Plan is overwhelmingly supported by the Voting Creditors (none of whom objected to the Plan), and there is only one objection remaining, which was filed by an entity that has no financial stake in

the restructuring. These facts speak volumes regarding the fairness of the Plan and the good-faith efforts by which it was crafted.

3. This level of consensus was made possible by months of prepetition, good-faith, arm's-length negotiations between the Debtors, the First Lien Ad Hoc Lender Group, the Ad Hoc Noteholder Group, and Greenvale. Those prepetition negotiations culminated in the execution of the Restructuring Support Agreement, dated July 24, 2024, pursuant to which the Consenting Stakeholders agreed to support the Plan and the restructuring contemplated thereby.

4. For the reasons set forth herein and in the Confirmation Declarations (as defined below), the Debtors submit that the Disclosure Statement satisfies the requirements of sections 1125 and 1126(b) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("***Bankruptcy Rules***") 3017 and 3018. The Debtors further submit that the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code. Accordingly, the Debtors respectfully request that the Court approve the Disclosure Statement and confirm the Plan.

BACKGROUND

A. THE RESTRUCTURING SUPPORT AGREEMENT

5. The Restructuring Support Agreement, which provided the framework for the Plan and the Debtors' reorganization, was the culmination of months of hard work and arm's-length, good-faith negotiations among the Debtors and the Consenting Stakeholders (collectively, the "***RSA Parties***").[4] Starting in November 2023, the Debtors, the Ad Hoc Noteholder Group, Greenvale, and their respective advisors began to evaluate and explore options to deleverage the Debtors' balance sheet, including (but not limited to) potential refinancing, sale, and exchange

[4] Norden First Day Decl. (as defined below) ¶ 12; Norden Confirmation Decl. (as defined below) ¶¶ 10.

transactions.[5] While the Debtors explored these various transactions over the course of the following months, they continued to engage in parallel negotiations with the Ad Hoc Noteholder Group and Greenvale: one set of negotiations focused on an out-of-court restructuring and a second set of negotiations focused on an in-court restructuring.[6] As the Debtors' negotiations progressed with the Ad Hoc Noteholder Group and Greenvale, the Debtors began, in late May of 2024, arm's-length and good-faith negotiations with the First Lien Ad Hoc Group.[7] Around mid-June of 2024, the RSA Parties determined that an out-of-court restructuring was likely not feasible and, even if it were, would not maximize value like a prepackaged chapter 11 plan would.[8]

6. On July 24, 2024, the RSA Parties entered into the Restructuring Support Agreement. By executing the Restructuring Support Agreement, the RSA Parties committed to: (a) fund the Chapter 11 Cases with the $64 million DIP Facility and consensual Cash Collateral usage; and (b) support the Plan, which would, *inter alia*, reduce total principal funded debt by approximately $486 million. In particular, the Plan supported by the RSA Parties would, *inter alia*, (x) convert the approximately $527 million in principal amount of Unsecured Notes Claims into 100% of New Common Interests (subject to dilution); (y) convert the approximately $414 million in principal amount of First Lien Claims into approximately $414 million of Amended and Restated Loans, which would be paid down by (i) $30 million on the Effective Date, (ii) $20 million on the fifteen (15) month anniversary of the Effective Date, and (iii) $20 million on the twenty-one (21) month anniversary of the Effective Date; and (z) convert DIP Claims into Exit

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5 Norden First Day Decl. ¶ 64.

6 *Id.* ¶¶ 66-67.

7 *Id.* ¶ 71.

8 *Id.* ¶ 72.

Loans in the principal amount of up to approximately $66.5 million. The Plan would accomplish all of this while satisfying General Unsecured Claims in the ordinary course of business.

7. The significant reduction in debt but preservation of General Unsecured Claims was a critical component of the Restructuring Support Agreement. It was important to the RSA Parties that the Debtors emerge from chapter 11 as a leaner company that has maintained all of its key relationships with university partners, suppliers, and customers, and is, thus, well positioned to succeed.

B. THE SOLICITATION PROCESS

8. On July 24, 2024, prior to commencing the Chapter 11 Cases, and as more fully described in the Combined Hearing Motion,[9] the Debtors commenced the solicitation of votes on the Plan from the Holders of Claims in Class 3 and Class 4 (the "***Voting Classes***")—*i.e.*, the only Classes of Claims or Interests entitled to vote on the Plan. Specifically, the Debtors, through their claims, balloting, and noticing agent—Epiq Corporate Restructuring, LLC (the "***Voting and Claims Agent***")—transmitted copies of a solicitation package (the "***Solicitation Package***") to eligible Holders of Claims in the Voting Classes.[10] Each Solicitation Package contained a copy of:

(a) the Combined Notice;

(b) the Disclosure Statement and the Plan;

(c) the proposed Solicitation Procedures Order (without exhibits attached);

(d) a cover letter from the Debtors explaining the solicitation process and urging Holders of Claims in the Voting Classes to vote to accept the Plan; and

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[9] The facts and the legal arguments set forth in the Solicitation Procedures Motion are incorporated by reference herein in their entirety.

[10] *See Certificate of Service of Solicitation Documents*, Aug. 20, 2024 [Docket No. 81] filed by the Voting and Claims Agent (the "***Certificate of Prepetition Service***").

(e) the applicable Ballot in substantially the form attached to the Solicitation Procedures Order (with instructions attached thereto).

9. The Voting and Claims Agent distributed the Solicitation Package to all eligible Holders of Claims in the Voting Classes via electronic mail on July 24, 2024, and on July 25, 2024, also distributed the Solicitation Package to certain nominees of Holders of Claims in Class 4 via next day service.[11] The Disclosure Statement, among other case-related pleadings and information, was also made available on the Voting and Claims Agent's case website, https://dm.epiq11.com/2U.

10. Among other things, the Solicitation Package advised applicable recipients that the date for determining which Holders of Claims in the Voting Classes were entitled to vote to accept or reject the Plan was July 22, 2024 (the "***Voting Record Date***"). Additionally, following entry of the Solicitation Procedures Order, the Debtors sent supplemental notices to Holders of Claims in the Voting Classes (the "***Supplemental Notices***"), informing them that, among other things (a) the voting deadline for eligible Holders of Claims in the Voting Classes was August 26, 2024, at 5:00 p.m. (prevailing Eastern Time) (the "***Voting Deadline***"), and (b) they would not be deemed to grant the releases set forth in the Plan unless they voted to Accept the Plan. The Solicitation Package further advised recipients (a) in Class 3 that each Ballot must be either (i) returned to the Voting and Claims Agent by first class mail, overnight courier, or hand delivery to an address specified on the Ballot, (ii) submitted through an online balloting portal on the Voting and Claims Agent's case website, or (iii) submitted, in PDF format, by email to tabulation@epiqglobal.com with a reference to "2U Ballots" in the subject line; and (b) in Class 4 that each Ballot must be (i) returned to such Holder's applicable nominee in accordance with the instructions provide to them

[11] *See id.*

by the nominee, or (ii) if such Holder's nominee pre-validated its Ballot, submitted to the Voting and Claims Agent. Each Ballot also contained detailed instructions regarding how to complete it. The Voting Record Date and the Voting Deadline were clearly identified in the Disclosure Statement and each Ballot.[12]

11. The materials in the Solicitation Package also established and communicated how the Voting and Claims Agent would tabulate the votes and elections contained in the Ballots. The tabulation rules provided, among other things, that the following Ballots would not be counted in determining the acceptance or rejection of the Plan:

- any Ballot received after the Voting Deadline, unless the Debtors granted an extension of the Voting Deadline in writing with respect to such Ballot;
- any Ballot that is illegible or contains insufficient information to permit the identification of the claimant;
- any Ballot cast by a person or entity that does not hold a Claim in a Voting Class;
- any Ballot that is properly completed, executed and timely filed, but (a) does not indicate an acceptance or rejection of the Plan, (b) indicates both an acceptance and rejection of the Plan, or (c) partially accepts and partially rejects the Plan;
- any Ballot submitted by facsimile or any electronic means other than as outlined in the respective Ballot;
- any unsigned Ballot, provided that any Ballot submitted through the Voting and Claims Agent's "E-Ballot" portal will be deemed to contain a valid signature;
- any Ballot sent to the Debtors, the Debtors' agents/representatives (other than the Voting and Claims Agent) or the Debtors' financial or legal advisors; or

[12] While the Ballots initially included forms to allow the Holders of Claims in the Voting Classes to affirmatively opt out of the Third-Party Release contained in Article IX of the Plan, following entry of the Solicitation Procedures Order, the Debtors amended the Plan to (1) delete the opt-out mechanism, and the Debtors distributed to the Holders of Claims in the Voting Classes the Supplemental Notices informing such Holders that they will not be bound by the Third-Party Release unless they vote in favor of the Plan, and (2) update the Voting Deadline from 5:00 p.m. prevailing Eastern time on August 21, 2024, to 5:00 p.m. prevailing Eastern time on August 26, 2024, as set forth in the Supplemental Notice to Holders of Claims in Classes 3 and 4 that are Entitled to Vote to Accept or Reject Plan. *See* Solicitation Procedures Order ¶ 2 & Certificate of Postpetition Service.

- any Ballot not cast in accordance with the procedures described in the Solicitation Procedures Order.[13]

12. The tabulation rules and procedures followed by the Debtors with respect to the Voting Classes were consistent with the requirements of Bankruptcy Rule 3018 and the *Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York*, as further described herein.

C. THE CHAPTER 11 CASES

I. Commencement of the Chapter 11 Cases, Filing of the Disclosure Statement and the Solicitation Plan, and Entry of the Solicitation Procedures Order

13. On July 25, 2024 (the "***Petition Date***"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "***Court***"), thereby commencing the Chapter 11 Cases. The Debtors also filed, *inter alia*, the solicitation version of the Plan [Docket No. 19] (the "***Solicitation Plan***"), the Disclosure Statement, and the Combined Hearing Motion on the Petition Date. When the Debtors commenced the Chapter 11 Cases, Holders of approximately 82% of the First Lien Claims and 89.2% of the Unsecured Notes Claims had agreed to support the Plan pursuant to the Restructuring Support Agreement.[14]

14. On July 30, 2024, the Court entered the Solicitation Procedures Order. Among other things, the Solicitation Procedures Order: (a) scheduled the hearing to approve the Disclosure Statement and confirm the Plan (the "***Combined Hearing***") for 11:00 a.m. (prevailing Eastern Time) on September 6, 2024; (b) specified the Voting Record Date and the Voting Deadline; (c) scheduled the deadline for filing and serving objections to the Disclosure Statement

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[13] *See* Solicitation Procedures Order ¶ 32.

[14] Norden First Day Decl. ¶¶ 12, 18.

or confirmation of the Plan as 4:00 p.m. (prevailing Eastern Time) on August 26, 2024 (the "***Objection Deadline***") and the deadline to file a reply to any such objections as September 4, 2024 (the "***Reply Deadline***"); (d) authorized the continuation of the solicitation that the Debtors had commenced prepetition and approved the procedures with respect thereto; (e) approved the Solicitation Package, including the manner and forms of notices and other related documents (such as the Combined Notice); (f) approved the Equity Rights Offering Documents and authorized the commencement of the Equity Rights Offering; (g) conditionally approved the Disclosure Statement as having adequate information as required by section 1125 of the Bankruptcy Code; (h) conditionally waived the requirements to (i) hold the meeting of creditors under section 341(e) of the Bankruptcy Code and (ii) file schedules of assets and liabilities, statements of financial affairs, and the initial reports of financial information in respect of entities which their chapter 11 estates hold a controlling interest, as set forth in Bankruptcy Rule 2015.3; and (i) granted related relief.

15. Following entry of the Solicitation Procedures Order, the Debtors also caused the Combined Notice to be published in the national edition of *The Wall Street Journal* on August 5, 2024, and the global edition of the *Financial Times* on August 6, 2024.[15]

II. The Plan and the Plan Supplement

16. On August 2, 2024, the Debtors filed an amended version of the Plan [Docket No. 55] (the "***First Amended Plan***") and a redline of the First Amended Plan against the Solicitation Plan [Docket No. 56]. As shown in that redline, the First Amended Plan, *inter alia*, revised the

[15] *See Aff.* and *Aff. of Publ'n*, Aug. 14, 2024 [Docket No. 61] (the "***Affidavits of Publication***") filed by the Voting and Claims Agent.

Plan such that claimants are not bound by the Third-Party Release contained in Article IX of the Plan unless they vote in favor of the Plan or otherwise opt-in to the Third-Party Release.

17. On August 16 and August 23, 2024, the Debtors filed, respectively, the initial Plan Supplement [Docket No. 71] and the first amended Plan Supplement [Docket No. 92]. Those filings included the following exhibits: (a) the Equity Rights Offering Procedures; (b) the Schedule of Retained Causes of Action; (c) the Schedule of Rejected Executory Contracts and Unexpired Leases; (d) the Amended and Restated Credit Documents; (e) the Restructuring Transactions Memorandum; (f) a summary of the key terms of the Exit Facility Documents; and (g) the New Corporate Governance Documents for the Reorganized Debtors' subsidiaries.

18. On August 23, 2024, the Debtors filed a further amended version of the Plan [Docket No. 90] (the "***Second Amended Plan***") in addition to a redline of the Second Amended Plan against the First Amended Plan and a redline of the Second Amended Plan against the Solicitation Plan [Docket No. 91]. The Second Amended Plan reflects comments that the Debtors received from various governmental agencies, including the United States Trustee and the Securities and Exchange Commission.

19. On September, 2024, the Debtors filed further amended versions of the Plan Supplement [Docket Nos. 118, 121 & 135]. Those filings included the following exhibits: (a) the revised Schedule of Rejected Executory Contracts and Unexpired Leases; (b) the revised Restructuring Transactions Memorandum; (c) the updated members of the New Board; (d) additional Exit Facility Documents; (e) the New Corporate Governance Documents for the Reorganized Parent; and (f) additional New Corporate Governance Documents for the Reorganized Debtors' subsidiaries.

20. Notably, none of the modifications to the Solicitation Plan materially or adversely affect the treatment of, or recoveries to, the Classes of Claims that voted in favor of or are deemed to accept the Plan.[16] Thus, as further described herein, the modifications do not require the Debtors to resolicit acceptances for the Plan.

21. The Plan provides that specific classes of Claims against and Interests in the applicable Debtors are deemed to accept or reject the Plan. Specifically, the Plan provides that Claims in Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), and Class 5 (General Unsecured Claims) are Unimpaired. Pursuant to section 1126(f) of the Bankruptcy Code, each holder of a claim or equity interest in an unimpaired class is "conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class . . . is not required."[17] Accordingly, the Holders of Claims in Classes 1, 2, and 5 (collectively, the "***Presumed-to-Accept Classes***") are conclusively presumed to accept the Plan and their votes were not solicited.

22. Claims and Interests in Class 8 (Existing Equity Interests) and Class 9 (Subordinated Claims) (together, the "***Deemed-to-Reject Classes***") are not expected to receive any recovery, and the Holders of such Claims or Interests are thus deemed to reject the Plan. Pursuant to section 1126(g) of the Bankruptcy Code, each holder of a claim or equity interest "is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests."[18]

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[16] 11 U.S.C. § 1127(a) ("The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.").

[17] *Id.* § 1126(f).

[18] *Id.* § 1126(g).

23. In addition, Claims and Interests in Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) (together with the Presumed-to-Accept Classes and the Deemed-to-Reject Classes, collectively, the "***Non-Voting Classes***") are either Unimpaired or Impaired, and the Holders of such Claims or Interests are deemed to have accepted the Plan if Unimpaired or deemed to have rejected the Plan if Impaired.

24. Thus, the Holders of Claims and Interests in each of the above-mentioned Non-Voting Classes are conclusively deemed to have either accepted or rejected the Plan, as applicable, and the Debtors accordingly did not solicit votes from the Holders of Claims and Interests in the Non-Voting Classes. Accordingly, the Debtors did not send such Holders the Solicitation Package.

25. Instead, on July 31, 2024, the Debtors (in accordance with the Solicitation Procedures Order) sent to each of the Holders of Claims or Interests in the Deemed-to-Reject Classes tailored packages (the "***Opt-In Packages***") consisting of, among other things: (a) Opt-In Forms; (b) notices of non-voting status ("***Notices of Non-Voting Status***"); and (c) the Combined Notice, which in turn included (i) notice of the filing of the Plan, (ii) instructions regarding the Combined Hearing and how to obtain a copy of the Solicitation Package (other than a Ballot) free of charge, and (iii) detailed directions for filing objections to the Disclosure Statement or Confirmation of the Plan.[19] In addition, on July 31, 2024, the Debtors sent the Holders of Claims in the Presumed-to-Accept Classes similar packages (together with the Opt-In Packages, the "***Non-Voting Packages***"), except such packages did not include Opt-In Forms because such Holders are not able to opt into the Third-Party Release.[20]

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[19] *See Am. Certificate of Service*, August 21, 2024 [Docket No. 84] (the "***Certificate of Postpetition Service***") filed by the Voting and Claims Agent.

[20] *See id.*

26. As noted above, the restructuring contemplated under the Plan results in a significant deleveraging of the Debtors' capital structure through the exchange of approximately $527 million in principal amount of Unsecured Notes Claims for 100% of the New Common Interests (subject to dilution). The restructuring will ultimately result in the elimination of approximately $486 million of debt.

27. The following table provides a summary of the classification and treatment of Claims and Interests and the projected recoveries to the Holders of Allowed Claims and Interests under the Plan.

SUMMARY OF EXPECTED RECOVERIES			
Class	**Claim/Interest**	**Treatment of Claim/Interest**	**Projected Recovery Under the Plan**
1	Other Secured Claims Expected Amount: N/A	Except to the extent that a Holder of an Allowed Other Secured Claim agrees to less favorable treatment of its Allowed Other Secured Claim, in full and final satisfaction, settlement, release, and discharge of and in exchange for each Allowed Other Secured Claim, on the Effective Date, each Holder of such Allowed Other Secured Claim shall receive, at the Debtors' option and subject to the consent of the Required Consenting Creditors (with such consent to not be unreasonably withheld), either (i) payment in full in Cash, (ii) delivery of the collateral securing such Allowed Other Secured Claim, (iii) Reinstatement of such Allowed Other Secured Claim, or (iv) such other treatment rendering such Allowed Other Secured Claim Unimpaired in accordance with section 1124 of the Bankruptcy Code.	100%
2	Other Priority Claims Expected Amount: N/A	Except to the extent that a Holder of an Allowed Other Priority Claim agrees to less favorable treatment of such Allowed Other Priority Claim, in full and final satisfaction, settlement, release, and discharge of and in exchange for each Allowed Other Priority Claim, on the Effective Date, each Holder of such Allowed Other Priority Claim shall receive treatment in a manner consistent with section 1129(a)(9) of the Bankruptcy Code.	100%
3	First Lien Claims Expected Amount: $414.3 million	Except to the extent that a Holder of an Allowed First Lien Claim agrees to less favorable treatment of its Allowed First Lien Claim, in full and final satisfaction, settlement, release, and discharge of each Allowed First Lien Claim, on the Effective Date, each Holder of such Allowed First Lien Claim	100%

SUMMARY OF EXPECTED RECOVERIES			
Class	**Claim/Interest**	**Treatment of Claim/Interest**	**Projected Recovery Under the Plan**
		shall receive its Pro Rata share of the Amended and Restated Loans.	
4	Unsecured Notes Claims Expected Amount: $527 million	Except to the extent that a Holder of an Allowed Unsecured Notes Claim agrees to less favorable treatment of its Allowed Unsecured Notes Claim, in full and final satisfaction, settlement, release, and discharge of such Allowed Unsecured Notes Claim, on the Effective Date, each Holder of such Allowed Unsecured Notes Claim shall receive (i) the right to participate in the Equity Rights Offering in accordance with the Equity Rights Offering Procedures, and (ii) its Pro Rata share of the New Common Interests (subject to dilution on account of the New Common Interests issued pursuant to (A) the MIP, and (B) the Equity Rights Offering).	37.7%
5	General Unsecured Claims Expected Amount: N/A	The legal, equitable, and contractual rights of the Holders of Allowed General Unsecured Claims are unaltered by the Plan. Except to the extent that a Holder of an Allowed General Unsecured Claim agrees to less favorable treatment, on and after the Effective Date, the Reorganized Debtors shall continue to pay each Allowed General Unsecured Claim in the ordinary course of business; *provided* that each Landlord Claim shall be subject to the cap set forth in section 502(b)(6) of the Bankruptcy Code.	100%
6	Intercompany Claims Expected Amount: N/A	On the Effective Date, Intercompany Claims shall be, at the option of the applicable Debtor and subject to the consent of the Required Consenting Creditors (with such consent to not be unreasonably withheld), either: (i) Reinstated; or (ii) set off, settled, distributed, contributed, merged, canceled, or released, in each case, in the discretion of the Debtors.	N/A
7	Intercompany Interests Expected Amount: N/A	On the Effective Date, Intercompany Interests shall be, at the option of the applicable Debtor and subject to the consent of the Required Consenting Creditors (with such consent to not be unreasonably withheld), either: (i) Reinstated; or (ii) set off, settled, distributed, contributed, merged, canceled, or released, in each case, in the discretion of the Debtors and subject to the consent of the Required Consenting Creditors (with such consent to not be unreasonably withheld).	N/A
8	Existing Equity Interests Expected Amount: $0	On the Effective Date, all Existing Equity Interests will be canceled, released, and extinguished and will be of no further force and effect. No Holders of such Existing Equity Interests will receive any property or distribution under the Plan.	0%

SUMMARY OF EXPECTED RECOVERIES			
Class	**Claim/Interest**	**Treatment of Claim/Interest**	**Projected Recovery Under the Plan**
9	Subordinated Claims Expected Amount: $0	On the Effective Date, all Subordinated Claims will be canceled, released, and extinguished and will be of no further force and effect. No Holders of such Subordinated Claims will receive any property or distribution under the Plan.	0%

III. Voting Results

28. On September 4, 2024, the Debtors filed the *Declaration of Jane Sullivan on Behalf of Epiq Corporate Restructuring, LLC Regarding Tabulation of Ballots Cast on the Second Amended Joint Prepackaged Plan of Reorganization of 2U, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 131], which reports the voting results for the Plan (the "***Voting Certification***").

29. As shown in the Voting Certification, the Debtors have received votes in favor of the Plan from 100.00% in amount and number of Class 3 First Lien Claims that submitted Ballots in addition to 99.99% in amount and 94.44% in number of Class 4 Unsecured Notes Claims that submitted Ballots. Further, the favorable votes in Class 3 represent approximately 96.34% of the amount of Class 3 First Lien Claims eligible to vote, and the favorable votes in Class 4 represent approximately 91.12% of the amount of Class 4 Unsecured Notes claims eligible to vote.

ARGUMENT

30. This Memorandum is divided into two sections. In the first section, the Debtors present their case in chief that the Disclosure Statement and the solicitation procedures satisfy all applicable requirements under the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules and comply with the Solicitation Procedures Order. In the second section, the Debtors present their case in chief that the Plan satisfies section 1129 of the Bankruptcy Code.

31. Other than the United States Trustee, no other party has objected, or otherwise provided comments with respect, to the approval of the Disclosure Statement. Moreover, four parties filed a formal objection to confirmation of the Plan, one party filed a joinder to one of those objections, and only three parties provided informal comments with respect to confirmation of the Plan (collectively, the "***Objections***"). All of the Objections, other than the United States Trustee's Objection to the Disclosure Statement and the Plan, have been resolved. For the convenience of this Court, the Debtors have attached as **Exhibit A** hereto a response chart summarizing the material arguments raised in each Objection and how the Debtors resolved each Objection.

32. The Debtors respectfully refer the Court to:

- the Plan;
- the Disclosure Statement;
- the Voting Certification;
- the *Declaration of Matthew Norden, Chief Legal Officer and Chief Financial Officer of the Debtors, in Support of Confirmation of Second Amended Joint Prepackaged Plan of Reorganization for 2U, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* filed contemporaneously herewith (the "***Norden Confirmation Declaration***");
- the *Declaration of Ivona Smith in Support of Confirmation of the Joint Prepackaged Plan of Reorganization for 2U Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* filed contemporaneously herewith (the "***Smith Declaration***");
- the *Declaration of William Kocovski in Support of (A) Confirmation of the Second Amended Joint Prepackaged Plan of Reorganization of 2U, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code; (B) Entry of a Final Order Approving the DIP Motion; and (C) the Backstop Motion* filed contemporaneously herewith (the "***Kocovski Confirmation Declaration***");
- the *Declaration of Barak Klein in Support of (A) the Equity Rights Offering Backstop Motion; and (B) Confirmation of the Second Amended Joint Prepackaged Plan of Reorganization of 2U, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* filed contemporaneously herewith (the "***Klein Declaration***" and, together with the Voting

Certification, the Norden Confirmation Declaration, the Smith Declaration, and the Kocovski Confirmation Declaration, the "***Confirmation Declarations***");

- the Certificate of Prepetition Service (regarding the service of the Solicitation Package);
- the Certificate of Postpetition Service (regarding the service of the Non-Voting Packages);
- the *Declaration of Matthew Norden, Chief Legal Officer and Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions* [Docket No. 3] (the "***Norden First Day Declaration***"), for an overview of the Debtors' businesses; and
- the record of the Chapter 11 Cases for other relevant facts that may bear on approval of the Disclosure Statement and confirmation of the Plan.

The Confirmation Declarations and any testimony and other declarations that may be adduced or submitted at or in connection with the Combined Hearing are herein incorporated in full.

A. APPROVAL OF THE DISCLOSURE STATEMENT IS WARRANTED

33. 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 2002, 3017(d), 3017(e), 3018(b), and 3018(c).

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

> an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.[21]

35. 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

[21] 11 U.S.C. § 1125(g).

> solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy 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.[22]

36. Prepetition solicitations must, therefore, either comply with applicable federal or state securities laws and regulations (including the registration and disclosure requirements thereof) or, if such laws and regulations do not apply, the solicited holders must receive "adequate information" as defined in section 1125(a) of the Bankruptcy Code. As discussed below, the Debtors have satisfied the applicable Bankruptcy Rules and sections 1125(g) and 1126(b) of the Bankruptcy Code.

I. The Disclosure Statement Contains Adequate Information

37. The primary purpose of a disclosure statement is to provide "adequate information" to allow parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[23] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[24] Courts within the Second Circuit and elsewhere

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22 *Id.* § 1126(b).

23 *See In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994); *see also In re Amfesco Indus., Inc.*, No. CV-88-2952 (JBW), 1988 WL 141524, at *5 (E.D.N.Y. Dec. 21, 1988) ("Under section 1125 of the Bankruptcy Code, a reasonable and typical creditor or equity security holder must be provided 'adequate information' to make an informed judgment regarding a proposed plan" (citation omitted)); *BSL Operating Corp. v. 125 E Taverns, Inc. (In re BSL Operating Corp.)*, 57 B.R. 945, 950 (Bankr. S.D.N.Y. 1986) ("Section 1125 might be described as a non-rigid 'how-to-inform' section . . . . A disclosure statement . . . is evaluated only in terms of whether it provides sufficient information to permit enlightened voting by holders of claims or interests.").

24 11 U.S.C. § 1125(a)(1) ("'adequate 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"); *see also In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 29 (Bankr. S.D.N.Y. 1995) (holding that adequacy of a disclosure statement "is to be determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties" (citation omitted)); *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) (holding that the adequacy of a disclosure statement is to be "determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties").

acknowledge that determination of what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code resides within the broad discretion of the court.[25] Section 1125 of the Bankruptcy Code also states that information must be adequate for a typical hypothetical investor who, among other things, is able to obtain relevant information on the debtor in addition to what the disclosure statement provides.[26]

38. Here, the Disclosure Statement is extensive, comprehensive, and contains adequate information. In fact, the Disclosure Statement contains numerous categories of information that courts consider "adequate information," including:

Category	Description	Location in Disclosure Statement
Disclaimer	Provides in bold and capitalized font that Voting Creditors who vote to accept the Plan are deemed to have granted the Third-Party Release.	Pgs. viii - ix
Executive Summary	An overview of the Disclosure Statement and the Plan, including that the Plan contains settlement, release, and exculpation provisions with a note in bold that "[i]t is important to read such provisions carefully so that you understand the implications of these provisions with respect to your Claim or Interest such that you may cast your vote accordingly."	Pgs. 1 - 18
Solicitation and Voting Procedures	A description of the procedures for soliciting votes to accept or reject the Plan.	Article I

[25] *See Kirk v. Texaco, Inc.*, 82 B.R. 678, 682 (S.D.N.Y. 1988) ("The legislative history could hardly be more clear in granting broad discretion to bankruptcy judges under § 1125(a): 'Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case.'" (quoting H.R. Rep. No. 95-595, at 408–09 (1977) (1978 U.S.C.C.A.N. 5963, 5787-6365)); *see also In re PC Liquidation Corp.*, 383 B.R. 856, 865 (E.D.N.Y. 2008) (explaining that "what constitutes 'adequate information' in any particular situation is determined on a case-by-case basis . . . with the determination being largely within the discretion of the bankruptcy court" (citations omitted)). This grant of discretion was intended to permit courts to tailor the disclosures made in connection with a plan of reorganization to facilitate the efficient reorganization of debtors in a broad range of businesses and circumstances. *See* H.R. Rep. No. 95-595, at 409 ("In reorganization cases, there is frequently great uncertainty. Therefore, the need for flexibility is greatest.").

[26] 11 U.S.C. § 1125(a)(2)(C).

Category	Description	Location in Disclosure Statement
Debtors' Corporate History, Business Operations, and Corporate and Capital Structure	An overview of the Debtors' corporate history, business operations, corporate structure, and capital structure.	Article II
Prepetition Restructuring Efforts	An overview of the Debtors' liquidity issues and successive efforts to work constructively with the Consenting Stakeholders to develop a long-term solution to deleverage the Debtors' capital structure and enable them to focus on implementing their business plan and growth initiatives.	Article III
Summary of the Plan	An overview of the key provisions of the Plan, including the release and exculpation provisions.	Article V
Confirmation and Consummation of the Plan	A description of confirmation procedures and statutory requirements for confirmation and consummation of the Plan.	Article VI
Risk Factors	A description of certain risks associated with the Debtors' businesses, as well as certain risks associated with forward-looking statements, and an overall disclaimer as to the information provided by and set forth in the Disclosure Statement. The Risk Factors include disclosure of the release, injunction, and exculpation provisions set forth in the Plan, and the risk that the Court may not confirm such provisions.	Article VII
Certain Securities Laws Matters	A description of the applicability of section 1145 of the Bankruptcy Code and the issuance of New Common Interests under the Plan.	Article IX
Certain U.S. Federal Income Tax Consequences of the Plan	A description of certain U.S. federal income tax law consequences of the Plan.	Article X
Recommendation	A recommendation by the Debtors that the Holders of Claims in the Voting Classes should vote to accept the Plan.	Page 152
The Plan	A copy of the Solicitation Plan.	Exhibit A

Category	Description	Location in Disclosure Statement
The Restructuring Support Agreement	A copy of the Restructuring Support Agreement.	Exhibit B
Financial Projections	An overview of the Debtors' financial projections for the remainder of 2024 through the end of 2028.	Exhibit C
Liquidation Analysis	An analysis of the liquidation value of the Debtors.	Exhibit D
Organizational Structure	A detailed organizational chart depicting the Company's organizational structure as of the Petition Date.	Exhibit E
Equity Rights Offering Procedures	A description of the procedures applicable to the Equity Rights Offering	Exhibit F

39. Contrary to the United States Trustee's assertion that no parties were given the chance to weigh in on the adequacy of the Disclosure Statement or propose amendments to the Disclosure Statement prior to the commencement of Solicitation,[27] the Disclosure Statement and the Plan were, in fact, subject to review and comment by the Consenting Stakeholders prior to the commencement of Solicitation. Given that the Holders of approximately 82% in principal amount of First Lien Claims and the Holders of approximately 89.2% in principal amount of Unsecured Notes Claims are Consenting Stakeholders that, as RSA Parties, had the opportunity to provide input on the Disclosure Statement and the Plan, it is unsurprising that no one (other than the United States Trustee) has objected to the Disclosure Statement. Indeed, no party (other than the United States Trustee) has even asked for additional information or informally disputed that the Disclosure Statement contains information sufficient for impaired claimants to be able to cast an informed vote on the Plan despite having over thirty days to do so.

[27] *See* United States Trustee Objection at 19.

40. Accordingly, the Debtors submit that the Disclosure Statement contains adequate information, within the meaning of section 1125(a) of the Bankruptcy Code and in satisfaction of section 1126(b) of the Bankruptcy Code, and should therefore be approved.

II. The Debtors' Solicitation of Votes Complies with the Bankruptcy Code, the Bankruptcy Rules, and All Requirements Set Forth in the Solicitation Procedures Order

41. As noted above, on July 30, 2024, the Court entered the Solicitation Procedures Order, which, among other things, scheduled the Combined Hearing, established the Voting Record Date, Voting Deadline, Objection Deadline, and Reply Deadline, and approved the forms and manner of the solicitation procedures, the Ballots, the Opt-In Forms, and voting tabulation procedures.[28] As set forth below, the Debtors have complied with the procedures approved by the Solicitation Procedures Order.

(a) The Debtors Complied with the Notice Requirements Set Forth in the Solicitation Procedures Order and Bankruptcy Rules 2002(b) and 3017(a) or There Is Cause to Shorten Such Requirements

42. The Debtors have satisfied the notice requirements set forth in the Solicitation Procedures Order and Bankruptcy Rule 3017 (which requires a minimum of 28 days' notice prior to a hearing on a disclosure statement).[29] In addition, as set forth in further detail below, the Debtors believe they have satisfied the notice requirements set forth in Bankruptcy Rule 2002(b) (which requires a minimum of 28 days' notice prior to the deadline to object to a disclosure statement and plan).[30]

43. *First*, on July 24, 2024, the Debtors caused their Voting and Claims Agent to commence the distribution of Solicitation Packages—which included a cover letter, the

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[28] *See* Solicitation Procedures Order.

[29] Fed. R. Bankr. P. 3017(a).

[30] Fed. R. Bankr. P. 2002(b).

Solicitation Plan, the Disclosure Statement and all exhibits thereto, the proposed Solicitation Procedures Order, the Combined Notice, and a copy of the Ballot—to the eligible Holders of Claims in the Voting Classes.[31]

44. *Second*, on the Petition Date, the Debtors filed the Solicitation Plan, the Disclosure Statement and all exhibits thereto, and the proposed Solicitation Procedures Order. On that same date, the Debtors caused (a) all of such filings to be made publicly available on the Voting and Claims Agent's public website, and (b) the Voting and Claims Agent to distribute the Disclosure Statement (with the Plan attached as Exhibit A thereto) to the Debtors' master service list.

45. *Third*, on July 31, 2024, the Debtors caused their Voting and Claims Agent to distribute the Non-Voting Packages (including the Opt-In Forms where applicable) to the Holders of Claims and Interests in the Deemed-to-Reject Classes and the Presumed-to-Accept Classes.[32] The Non-Voting Packages informed the Holders of Claims and Interests in the Deemed-to-Reject Classes that they would not be bound by the Third-Party Release unless they affirmatively opted into the Third-Party Release.

46. *Fourth*, on July 31, 2024, the Debtors caused their Voting and Claims Agent to serve by email, first class mail, or (in the case of nominees acting for security holders in Classes 4, 8, and 9) via next day delivery, the Combined Notice upon the Debtors' entire Creditor Matrix, the Debtors' master service list, and all of the Holders of Claims and Interests in the Voting Classes and Non-Voting Classes.[33] The Combined Notice informed recipients of, among other things: (x) the commencement of the Chapter 11 Cases; (y) the date and time set for the Combined Hearing; and (z) the Objection Deadline.

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[31] *See* Certificate of Prepetition Service.

[32] *See* Certificate of Postpetition Service.

[33] *Id.*

47. *Fifth*, in accordance with the terms of the Solicitation Procedures Order, the Debtors caused the Combined Notice to be published in the national edition *The Wall Street Journal* on August 5, 2024, and the global edition of the *Financial Times* on August 6, 2024.[34] The Combined Notice also included instructions regarding how to obtain the Plan and the Disclosure Statement free of charge through the Voting and Claims Agent's website for the Chapter 11 Cases, https://dm.epiq11.com/2U.

48. Based on the foregoing, the Debtors submit that all parties in interest received sufficient notice of the Combined Hearing and the Objection Deadline in accordance with the Solicitation Procedures Order, the Bankruptcy Rules, and the Local Rules. In particular, given that the Disclosure Statement and Plan were served on the Voting Creditors and other key parties on July 24, 2024 and July 25, 2024, the Debtors submit that all of the key parties in interest had notice of the proposed approval of the Disclosure Statement and confirmation of the Plan at least forty-three (43) days prior to the Combined Hearing and thirty-two (32) days prior to the Objection Deadline, in compliance with both Bankruptcy Rule 3017(a) and Bankruptcy Rule 2002(b).[35]

49. To the extent that the Court determines that the Debtors have not satisfied the notice requirements set forth in Bankruptcy Rule 2002(b), the Debtors respectfully request that the Court waive the notice requirement under Bankruptcy Rule 2002(b) as there is cause to do so under Bankruptcy Rule 9006(c). As set forth above, the Debtors caused their Voting and Claims Agent to, on July 31, 2024, serve by email, first class mail, or (in the case of nominees acting for security holders in Classes 4, 8, and 9) via next day delivery, the Combined Notice upon the Debtors' entire Creditor Matrix, the Debtors' master service list, and all of the Holders of Claims and Interests in

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[34] *See* Affidavits of Publication.

[35] *See* Certificate of Postpetition Service.

the Voting Classes and Non-Voting Classes.[36] Thus, all parties in interest should have received notice of the proposed approval of the Disclosure Statement and confirmation of the Plan, at the latest, thirty-eight (38) days prior to the Combined Hearing and twenty-seven (27) days prior to the Objection Deadline.[37] The Debtors could not distribute such materials any earlier because the Solicitation Procedures Order, which authorized such distribution, was not entered until the late afternoon on July 30, 2024. Critically, these notice periods enable the Debtors to comply with the milestones set forth in the Restructuring Support Agreement, and no party has objected to the sufficiency of the notice periods. This is not surprising given the substantial consensus among parties in interest and the fact that General Unsecured Claims will be unimpaired under the Plan. For these reasons, the Debtors respectfully submit that there is cause to shorten the notice requirements under Bankruptcy Rule 2002(b).[38]

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[36] *See id.*

[37] *See id.*

[38] Courts in this district have approved similar requests in other complex prepackaged chapter 11 cases. *See, e.g.*, *In re Automotores Gildemeister SpA*, No. 21-10685 (LGB) [Docket No. 67] (Bankr. S.D.N.Y. Apr. 28, 2021) (start of solicitation: April 9, 2021; petition date: April 12, 2021; voting deadline: May 18, 2021; combined hearing: May 27, 2021); *In re Lakeland Tours LLC*, No. 20-11647 (JLG) [Docket No. 63] (Bankr. S.D.N.Y. Aug. 1, 2020) (start of solicitation: July 14, 2020; petition date: July 20, 2020; voting deadline: July 28, 2020; combined hearing: August 19, 2020); *In re Internap Tech. Sol. Inc.*, No. 20-22393 (RDD) [Docket No. 42] (Bankr. S.D.N.Y. Mar. 19, 2020) (start of solicitation: March 15, 2020; petition date: March 16, 2020; voting deadline: April 12, 2020; combined hearing: May 4, 2020); *In re Sungard Availability Servs. Capital, Inc.*, No. 19-22915 (RDD) [Docket No. 45] (Bankr. S.D.N.Y. May 2, 2019) (start of solicitation: April 5, 2019; petition date: May 1, 2019; voting deadline: April 26, 2019; combined hearing: May 2, 2019); *In re Walter Inv. Mgmt.*, No. 17-13446 (JLG) [Docket No. 77] (Bankr. S.D.N.Y. Dec. 7, 2017) (start of solicitation: November 6, 2017; petition date: November 30, 2017; voting deadline: November 28, 2018; combined hearing: January 12, 2018); *In re SquareTwo Fin. Servs.*, No. 17-10659 (JLG) [Docket No. 225] (Bankr. S.D.N.Y. May 12, 2017) (start of solicitation: March 3, 2017; petition date: March 19, 2017; voting deadline: March 17, 2017; combined hearing: May 12, 2017); *In re Atlas Res. Partners L.P.*, No. 16-12149 (SHL) [Docket No. 41] (Bankr. S.D.N.Y. July 29, 2016) (start of solicitation: July 26, 2016; petition date: July 27, 2016; voting deadline: August 23, 2016; combined hearing: August 26, 2016).

(b) **The Ballots/Opt-In Forms Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Solicitation Procedures Order and the Bankruptcy Rules**

50. Bankruptcy Rule 3017(d) requires the Debtors to transmit a form of ballot, which substantially conforms to Official Form No. 314, only to "creditors and equity security holders entitled to vote on the plan."[39] 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."[40]

51. Here, the form of ballot used to solicit votes on the Plan from the Voting Classes complies with the Bankruptcy Rules and was approved by the Court pursuant to the Solicitation Procedures Order.[41] No party has objected to the sufficiency of the Ballots/Opt-In Forms. Based on the foregoing, the Debtors submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rules 3017(d) and 3018(c).

(c) **The Debtors' Solicitation Period Complied with the Solicitation Procedures Order and Bankruptcy Rule 3018(b)**

52. The Debtors' solicitation period complied with the Solicitation Procedures Order and Bankruptcy Rule 3018(b). *First*, as detailed above and in the Combined Hearing Motion, the Plan and Disclosure Statement were transmitted to all eligible Holders of Claims entitled to vote on the Plan.[42] *Second*, the solicitation period, which lasted from July 24, 2024, through August 26, 2024 (*i.e.*, more than 28 days from the commencement of solicitation), complied with the Solicitation Procedures Order, Bankruptcy Rule 3018(b), and Part VII.A of the *Procedural*

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39 Fed. R. Bankr. P. 3017(d).

40 *Id.* 3018(c).

41 *See* Solicitation Procedures Order ¶ 11.

42 *See* Certificate of Prepetition Service.

Guidelines for Prepackaged Cases in the United States Bankruptcy Court for the Southern District of New York and was adequate under the particular facts and circumstances of the Chapter 11 Cases.[43] *Third*, there have been no objections to the length of the solicitation period. Accordingly, the Debtors submit that they complied with the Solicitation Procedures Order and satisfied the requirements of Bankruptcy Rule 3018(b).

(d) **The Debtors' Vote Tabulation Was Appropriate**

53. The Debtors request that the Court find that the Debtors' tabulation of votes complied with the Solicitation Procedures Order. The Debtors' Voting and Claims Agent used standard tabulation procedures in tabulating votes from the Holders of Claims in the Voting Classes. Specifically, the Voting and Claims Agent reviewed all Ballots received in accordance with the procedures described in the Combined Hearing Motion and the Disclosure Statement[44] and subsequently approved in the Solicitation Procedures Order.[45] Because the Voting and Claims Agent complied with all of the solicitation procedures, the Debtors respectfully submit that the Court should approve the Debtors' tabulation of votes confirming that, in Class 3 and Class 4, the requisite majorities in amount and number of Claims voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code.

(e) **Waiver of Certain Solicitation Package Mailings Is Reasonable and Appropriate**

54. As further described in the Combined Hearing Motion, certain of the Holders of Claims and Interests were not provided a Solicitation Package because (a) such Holders are Unimpaired under, and conclusively deemed to accept, the Plan under section 1126(f) of the

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[43] *See id*.

[44] *See generally* Voting Certification.

[45] *See* Solicitation Procedures Order ¶¶ 31-37.

Bankruptcy Code, or (b) such Holders are not entitled to receive or retain any property under the Plan on account of such Claims or Interests and are, therefore, conclusively deemed to reject the Plan under section 1126(g) of the Bankruptcy Code. In the Solicitation Procedures Order, the Court approved the Debtors' solicitation procedures, which provided that the Debtors would not mail a copy of the Solicitation Package to the Holders of Claims and Interests deemed to accept or reject the Plan.[46] As set forth above, in lieu of Solicitation Packages, such Holders received either tailored Non-Voting Packages, each of which included a Notice of Non-Voting Status (which, in the case of the Deemed-to-Reject Classes, also included the Opt-In Form) and the Combined Notice, which in turn included (x) notice of the filing of the Plan, (y) instructions regarding the Combined Hearing and how to obtain a copy of the Solicitation Package (other than a Ballot) free of charge, and (z) detailed directions for filing objections to the Disclosure Statement or Confirmation of the Plan.[47]

(f) **Solicitation of the Plan Complied with the Bankruptcy Code and Was Conducted in Good Faith**

55. 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.[48]

56. As set forth in the Confirmation Declarations, the Norden First Day Declaration, and the Combined Hearing Motion, and as demonstrated by the Debtors' compliance with the Solicitation Procedures Order, the Debtors at all times engaged in arm's-length, good-faith

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[46] *See id.* ¶ 16-18.

[47] *See* Certificate of Postpetition Service.

[48] 11 U.S.C. § 1125(e).

negotiations and took appropriate actions in connection with the solicitation of the Plan in compliance with section 1125 of the Bankruptcy Code.[49] Therefore, the Debtors respectfully request that the Court grant the parties engaged in the solicitation all of the protections provided under section 1125(e) of the Bankruptcy Code.

57. For the foregoing reasons, the Debtors respectfully request that the Court approve the Disclosure Statement.

B. THE PLAN SATISFIES THE REQUIREMENTS FOR CONFIRMATION AND SHOULD BE APPROVED

58. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[50] Through filings with the Court, the Confirmation Declarations, and any evidence that may be adduced at the Combined Hearing, the Debtors will demonstrate that the Plan complies with all relevant sections of the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code. Each such requirement is addressed individually below.

I. Section 1129(a)(1): The Plan Complies with All Applicable Provisions of the Bankruptcy Code

59. Section 1129(a)(1) of the Bankruptcy Code provides that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]."[51] The legislative history of

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[49] *See* Smith Decl. ¶¶ 13, 28; Norden Confirmation Decl. ¶¶ 27-28.

[50] *See In re Bally Total Fitness of Greater N.Y., Inc*., No. 07-12395 (BRL), 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) ("The Debtors, as proponents of the plan, have the burden of proving the satisfaction of the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence"); *see also 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) ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown").

[51] 11 U.S.C. § 1129(a)(1).

section 1129(a)(1) of the Bankruptcy Code explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of a plan, respectively.[52] As described below, the Plan fully complies with the requirements of sections 1122 and 1123 and all other applicable provisions of the Bankruptcy Code.[53]

II. Section 1122: The Plan Satisfies the Confirmation Requirements

60. 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 interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.[54]

61. Additionally, section 1122(b) of the Bankruptcy Code expressly permits separate classification of certain claims for purposes of administrative convenience.[55] For a classification structure to satisfy section 1122 of the Bankruptcy Code, it is not necessary that all substantially similar claims or interests be designated to the same class, but only that all claims or interests designated to a particular class be substantially similar to each other.[56]

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[52] H.R. Rep. No. 95-595, at 412; *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988) (suggesting that Congress intended the phrase "'applicable provisions' in [section 1129(a)(1)] to mean provisions of Chapter 11 . . . such as section 1122"); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("The legislative history of § 1129(a)(1) explains that this provision embodies the requirements of §§ 1122 and 1123, respectively, governing classification of claims and the contents of the Plan" (citations omitted)); *In re Simplot*, No. 06-00002 (TLM), 2007 WL 2479664, at *14 (Bankr. D. Idaho Aug. 28, 2007) (noting that the objective of section 1129(a)(1) is to ensure compliance with the sections of the Bankruptcy Code governing classification and the contents of a plan reorganization).

[53] *See* Norden Confirmation Decl. ¶¶ 14-52.

[54] 11 U.S.C. § 1122(a).

[55] *Id*. § 1122(b).

[56] *See In re Sabine Oil & Gas Corp*., 555 B.R. 180, 310 (Bankr. S.D.N.Y. 2016); *In re Drexel Burnham Lambert*, 138 B.R. at 757 ("Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar classes be grouped together, but merely that any groups be homogenous or share some attributes." (citations omitted)).

62. The Plan provides for the separate classification of Claims and Interests based upon differences in the legal nature and/or priority of such Claims and Interests. As set forth in Article III thereof, the Plan designates the following nine Classes of Claims and Interests:[57] Class 1 (Other Secured Claims); Class 2 (Other Priority Claims); Class 3 (First Lien Claims); Class 4 (Unsecured Notes Claims); Class 5 (General Unsecured Claims); Class 6 (Intercompany Claims); Class 7 (Intercompany Interests); Class 8 (Existing Equity Interests); and Class 9 (Subordinated Claims). The Plan contemplates there being a separate plan of reorganization for each Debtor entity; therefore, the Plan does not contemplate substantive consolidation of the Debtors. Instead, each Class of creditors is being treated under the Plan on a per-Debtor basis.[58]

63. A plan proponent is afforded significant flexibility in classifying claims and interests into different classes, provided that there is a rational legal or factual basis to do so and all claims or interests within a particular class are substantially similar.[59] The classification structure of the Plan is rational and complies with the Bankruptcy Code. All Claims and Interests within a given Class have the same or similar rights against the applicable Debtors. The Plan provides for the separate classification of Claims against and Interests in each Debtor based upon

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[57] Administrative Claims, Professional Fee Claims, DIP Claims, and Priority Tax Claims are not classified and are separately treated under the Plan.

[58] *See* Preamble to Plan ("Although proposed jointly for administrative purposes, this Plan constitutes a separate Plan for each Debtor for the treatment and resolution of outstanding Claims against, and Interests in each Debtor pursuant to the Bankruptcy Code").

[59] *See, e.g.*, *In re Lightsquared Inc*., 513 B.R. 56, 82-83 (Bankr. S.D.N.Y. 2014) ("Courts that have considered the issue [of classification], including the Court of Appeals for the Second Circuit as well as numerous courts in this District, have concluded that the separate classification of otherwise substantially similar claims and interests is appropriate so long as the plan proponent can articulate a 'reasonable' (or 'rational') justification for separate classification." (collecting cases)); Hr'g Tr. 122:25-123:4, *In re Reader's Digest Ass'n*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 575] (approving a plan of reorganization where the debtor provided a reasonable basis for differing classification of general unsecured claims); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 957 (2d Cir. 1993) (finding separate classification appropriate because classification scheme and "discriminatory terms of the Plan attacked by [plan opponents] ha[d] a rational basis"); *In re 500 Fifth Ave. Assocs*., 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) ("[T]he proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case." (citation omitted)); *In re Ionosphere Clubs, Inc.* 98 B.R. 174, at 177–78 (S.D.N.Y. 1989) (same).

the differences in legal nature and/or priority of such Claims and Interests.[60] The Debtors separately classified the Unsecured Notes Claims and the General Unsecured Claims because of the inherent differences between such Claims: the Unsecured Notes Claims are contractual funded debt Claims that are guaranteed while the General Unsecured Claims are Claims that arise from the Debtors' operations. Moreover, the classification scheme generally tracks the Debtors' prepetition capital structure: secured debt, unsecured debt, and equity are classified separately.[61] Finally, it is important to note that this classification scheme was a necessary part of the Restructuring Support Agreement, pursuant to which the Consenting Stakeholders agreed to satisfy General Unsecured Claims in the ordinary course of business to maintain the Debtors' valuable relationships with their university partners, vendors, and customers, and position the Reorganized Debtors to succeed.

64. Accordingly, the classification scheme of the Plan complies with section 1122 of the Bankruptcy Code and, in any event, does not affect the outcome of the votes on the Plan.

III. Section 1123(a): The Plan Satisfies the Seven Requirements Set Forth in This Section

65. Section 1123(a) of the Bankruptcy Code sets forth seven requirements that every chapter 11 plan must satisfy.[62] As explained below, the Plan fully complies with each such requirement.

(a) Section 1123(a)(1): Designation of Classes of Claims and Interests

66. Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and classes of equity interests subject to section 1122 of the Bankruptcy Code.[63] As

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60 *See* Plan Art. III.

61 *See* Norden Confirmation Decl. ¶ 15.

62 *See* 11 U.S.C. § 1123(a).

63 *See id.* § 1123(a)(1).

discussed above, Article III of the Plan designates Classes of Claims and Interests as required under section 1123(a)(1) of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

(b) **Section 1123(a)(2): Specification of Unimpaired Classes of Claims and Interests**

67. Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify which classes of claims or interests are unimpaired by the plan.[64] Article III of the Plan specifies that Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), and Class 5 (General Unsecured Claims) are Unimpaired, and Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) are Unimpaired in the event that the Debtors, at their option and with the consent of the Required Consenting Creditors, determine such Claims and Interests shall be Reinstated. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

(c) **Section 1123(a)(3): Treatment of Impaired Classes of Claims and Interests**

68. Section 1123(a)(3) of the Bankruptcy Code requires that a plan specify how classes of claims or interests that are impaired by the plan will be treated.[65] Article III of the Plan sets forth the treatment of Impaired Claims in Class 3 (First Lien Claims), Class 4 (Unsecured Notes Claims), Class 8 (Existing Equity Interests), and Class 9 (Subordinated Claims), in addition to and Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) in the event that the Debtors, at their option and with the consent of the Required Consenting Creditors, determine such Claims and Interests shall be set off, settled, distributed, contributed, merged, canceled, or released. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

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[64] *See id.* § 1123(a)(2).

[65] *See id.* § 1123(a)(3).

(d) **Section 1123(a)(4): Equal Treatment Within Each Class of Claims or Interests**

69. Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members.[66] Pursuant to the Plan, the treatment of each Claim against, or Interest in, the Debtors is the same as the treatment of each other Claim or Interest in the same Class.[67] More specifically, (a) all Claims in each of Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), and Class 5 (General Unsecured Claims) are Unimpaired; (b) all Claims and Interests in Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) are Unimpaired or Impaired; (c) all Claims and Interests in each of Class 8 (Existing Equity Interests) and Class 9 (Subordinated Claims) are Impaired and will be cancelled as of the Effective Date; (d) all Claims in Class 3 (First Lien Claims) are Impaired, but will each receive its Pro Rata share of the Amended and Restated Loans; and, finally, (e) all Claims in Class 4 (Unsecured Notes Claims) are Impaired, but will each receive (i) the right to participate in the Equity Rights Offering in accordance with the Equity Rights Offering Procedures, and (ii) its Pro Rata share of the New Common Interests (subject to dilution on account of the New Common Interests issued pursuant to (A) the MIP and (B) the Equity Rights Offering). Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

(e) **Section 1123(a)(5): Adequate Means for Implementation of the Plan**

70. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation."[68] The Plan provides adequate and proper means for the

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66 *See id.* § 1123(a)(4).

67 Plan Art. III.B.

68 *See* 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) of the Bankruptcy Code requires a plan to provide for "adequate means" for the plan's implementation, "such as—

implementation of the Plan, including, among other things: (a) the Restructuring Transaction to be implemented under Article IV.C of the Plan and the Plan Supplement; (b) the continued corporate existence of the Debtors and the vesting of assets in the Reorganized Debtors under Articles IV.D and IV.E of the Plan; (c) the entry by the Reorganized Debtors into the Amended and Restated Credit Documents and the Exit Facility Documents, as detailed in Article IV.F and IV.G of the Plan; (d) the issuance and distribution of New Common Interests (including through the Equity Rights Offering) in accordance with the terms of the Plan, as detailed in Articles IV.H, IV.I, and IV.J of the Plan; (e) the implementation of the MIP, as described in Article IV.K of the Plan; (f) the release and discharge of all Liens, Claims, mortgages, deeds of trust, or other security interests against the assets or property of the Debtors or the Estates, except as otherwise provided in the Plan or in any contract, instrument, release or other agreement or document entered into pursuant to the Plan, on the Effective Date and concurrently with the applicable distributions made pursuant to the Plan, and as detailed in Article IV.M of the Plan; (g) the adoption of the New Corporate Governance Documents that will govern the Reorganized Debtors and the process for

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(A) retention by the debtor of all or any part of the property of the estate;

(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;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate . . . among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose."

appointment of the New Board of the Reorganized Debtors, as provided in Articles IV.N and IV.O of the Plan and the Plan Supplement; (h) the full release, cancellation, surrender, and discharge of all notes, bonds, indentures, certificates, securities, purchase rights, options, warrants, collateral agreements, subordination agreements, or other instruments or documents directly or indirectly evidencing, creating, or relating to any indebtedness or obligations of the Debtors giving rise to any rights or obligations relating to Claims against or Interests in the Debtors, as detailed in Article IV.Q of the Plan; (i) the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases to which any Debtor is a party, as detailed in Article V of the Plan; (j) the various discharges, releases, injunctions, indemnifications and exculpations provided in Article IX of the Plan; and (k) the preservation of certain Causes of Action by the Reorganized Debtors pursuant to Article IX.F of the Plan.

71. Accordingly, the Plan, together with the documents and agreements contemplated by the Plan and the Plan Supplement, provides the means for implementation of the Plan as required by and in satisfaction of section 1123(a)(5) of the Bankruptcy Code.

(f) **Section 1123(a)(6): Issuance of Non-Voting Securities**

72. Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of non-voting equity securities and requires that a debtor's corporate governance documents contain a provision prohibiting the issuance of non-voting equity securities.[69] It also requires that a corporation's governance documents provide an appropriate distribution of voting power among the classes of securities possessing voting power.[70] The Plan does not provide for the issuance of non-voting equity securities, and the form of amended and restated organizational documents for the

[69] *See* 11 U.S.C. § 1123(a)(6).

[70] *Id*.

Reorganized Parent, attached as Exhibit H-2 to the First Amended Plan Supplement, prohibits the issuance of non-voting capital stock of any class, series, or other designation to the extent prohibited by section 1123(a)(6) of the Bankruptcy Code.[71] Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

(g) **Section 1123(a)(7): Provisions Regarding Directors and Officers**

73. Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee."[72] Article IV.O of the Plan provides that the New Board will initially consist of the Debtors' current Chief Executive Officer and other members who will be designated in accordance with the terms of the Restructuring Support Agreement and the New Corporate Governance Documents. The Debtors will disclose the identity of the New Board at or prior to the Combined Hearing to the extent known at such time. The Plan Supplement provides the mechanism by which the Debtors will select those Persons, and the Debtors have disclosed in Article IV.O of the Plan that (a) the existing directors of each of the Debtors' subsidiaries shall remain in their current capacities as directors of the applicable Reorganized Debtor until replaced or removed in accordance with the organizational documents of the applicable Reorganized Debtors, and (b) the existing officers of the Debtors as of the Effective Date shall remain in their current capacities as officers of the Reorganized Debtors, subject to their right to resign and the ordinary rights and powers of the New Board to remove or

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[71] First Amended Plan Supplement [Docket No. 92], Ex. H-2.

[72] *See* 11 U.S.C. § 1123(a)(7).

replace them in accordance with the New Corporate Governance Documents and any applicable employment agreements that are assumed pursuant to the Plan.

74. All such directors and officers are qualified for their respective positions and capable of carrying out their duties under applicable law. The manner of selecting the officers and directors of the Reorganized Debtors is consistent with the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. Therefore, the Debtors respectfully submit that the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

IV. Section 1123(b): The Plan Incorporates Certain Permissive Provisions

75. Section 1123(b) of the Bankruptcy Code sets forth certain permissive 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 estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[73] The contents of the Plan are consistent with these provisions.

(a) Section 1123(b)(1): Impairment/Unimpairment of Claims and Interests

76. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests."[74] Claims in Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), and Class 5 (General Unsecured Claims) are Unimpaired, and Claims and Interests in Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) are Unimpaired in the event that the Debtors, at their option and with the

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[73] *See* 11 U.S.C. § 1123(b)(1)–(3), (6).

[74] *See id.* § 1123(b)(1).

consent of the Required Consenting Creditors, determine such Claims and Interests shall be Reinstated.[75] Further, Claims in Class 3 (First Lien Claims), Class 4 (Unsecured Notes Claims), Class 8 (Exiting Equity Interests), and Class 9 (Subordinated Claims) are Impaired, and Claims and Interests in Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) are Impaired in the event that the Debtors, at their option and with the consent of the Required Consenting Creditors, determine such Claims and Interests shall be set off, settled, distributed, contributed, merged, canceled, or released.[76] Accordingly, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

(b) **Section 1123(b)(2): Assumption or Rejection of Executory Contracts and Unexpired Leases**

77. Section 1123(b)(2) of the Bankruptcy Code allows a plan to provide for assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code.[77] Article V.A of the Plan provides that, as of the Effective Date, the Debtors shall be deemed to have assumed each Executory Contract and Unexpired Lease to which any Debtor is a party unless otherwise provided in the Plan or identified in the Plan Supplement. These provisions of the Plan are permitted by section 1123(b)(2) of the Bankruptcy Code.

(c) **Section 1123(b)(3): Retention of Causes of Action by the Debtors**

78. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to

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[75] Plan Art. III.B.

[76] *Id*.

[77] 11 U.S.C. § 1123(b)(2).

the estate."[78] As discussed in greater detail below, Article IX.B of the Plan provides for a release of certain claims and Causes of Action owned by the Debtors.

79. Section 1123(b)(3)(B) of the Bankruptcy Code provides that a plan may provide for "*the retention and enforcement by the debtor*, by the trustee, or by a representative of the estate appointed for such purpose" of any claim or interest.[79] In this case, the Plan preserves the Reorganized Debtors' rights to enforce any claims, rights, or Causes of Action that the Debtors may hold against any person or entity, except those Causes of Action that are explicitly released under the Plan.[80] A non-exclusive list of such preserved and retained claims was included in the Plan Supplement.[81] These provisions of the Plan are expressly permitted by section 1123(b)(3) of the Bankruptcy Code and, for the reasons discussed more fully below, are appropriate in the Chapter 11 Cases.

(d) **Section 1123(b)(5): Modification of Rights of Holders**

80. Section 1123(b)(5) of the Bankruptcy Code provides that a plan may modify the rights of holders of secured claims or holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.[82] As permitted by section 1123(b)(5) of the Bankruptcy Code, the Plan modifies the rights of Holders of Claims or Interests in the Impaired Classes, and leaves unaffected the rights of Holders of Claims or Interests in the Unimpaired Classes.

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78 *Id.* § 1123(b)(3)(A).

79 *Id.* § 1123(b)(3)(B) (emphasis added).

80 *See* Plan Art. IX.F.

81 *See* Initial Plan Supplement [Docket No. 71], Ex. B.

82 11 U.S.C. § 1123(b)(5).

(e) **Section 1123(b)(6): Other Plan Provisions Not Inconsistent with the Bankruptcy Code**

81. Section 1123(b)(6) of the Bankruptcy Code permits a plan to "include . . . any other appropriate provision not inconsistent with the applicable provisions of" the Bankruptcy Code.[83] Here, all provisions of the Plan are consistent with the Bankruptcy Code, including, but not limited to, (a) the provisions exempting securities to be issued under the Plan from securities law registration requirements set forth in Article IV.L of the Plan and (b) the release, discharge, exculpation, and injunction provisions set forth in Article IX of the Plan. As described in more detail below, the release, discharge, exculpation, and injunction provisions are essential to the reorganization and consistent with the applicable provisions of the Bankruptcy Code and the law in this Circuit.

(i) *Article IV.L of the Plan – Exemption from Securities Laws*

82. Article IV.L of the Plan provides that "[t]he offering and sale by the Reorganized Parent of any New Common Interests to the Holders of Unsecured Notes Claims pursuant to the Equity Rights Offering, the Equity Rights Offering Backstop Commitment Letter or otherwise in exchange for Claims pursuant to Article III [of the Plan] and the Combined Order may be exempt from the registration requirements of Section 5 of the Securities Act and any other applicable United States, State, or local law requiring registration for the offer or sale of a security pursuant to section 1145(a) of the Bankruptcy Code. To the extent section 1145 is not applicable, the Reorganized Parent may rely upon Section 4(a)(2) of the Securities Act, and/or any other exemption from registration under the Securities Act."

[83] *Id.* § 1123(b)(6).

83. Section 1145(a)(1) of the Bankruptcy Code provides:

> Except with respect to an entity that is an underwriter as defined in subsection (b) of this section, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security do not apply to (1) the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan (A) ***in exchange for*** a claim against, an interest in, or ***a claim for an administrative expense in the case*** concerning, the debtor or such affiliate; or (B) principally in such exchange and ***partly for cash*** or property.[84]

84. The Debtors respectfully submit that all of the New Common Interests to be distributed pursuant to the Plan satisfy the requirements of section 1145(a) of the Bankruptcy Code and/or Section 4(a)(2) of the Securities Act.

85. Under the Plan, New Common Interests will be distributed to the Holders of Class 4 Unsecured Notes Claims, in exchange for each Allowed Unsecured Notes Claim, and each Holder of Class 4 Unsecured Notes Claims that elects to purchase, through the Equity Rights Offering, New Common Interests for an aggregate purchase price equal to the Equity Rights Offering Amount at the Plan Discount. The Unsecured Notes Claims constitute Allowed Claims against the Debtors and, accordingly, the distribution of the New Common Interests to the Holders of Unsecured Notes Claims in exchange for their Allowed Unsecured Notes Claims satisfies the requirements of section 1145(a)(1)(A) of the Bankruptcy Code. In addition, the distribution of the New Common Interests through the Equity Rights Offering is for cash in satisfaction of the requirements of section 1145(a)(1)(B) of the Bankruptcy Code.

86. To the extent that section 1145(a) of the Bankruptcy Code does not apply to the distribution of New Common Interests to the Holders of Class 4 Unsecured Notes Claims, the

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[84] *Id.* § 1145(a) (emphasis added).

Debtors respectfully submit that such issuances fall within the exemptions from registration provided by Section 4(a)(2) of the Securities Act. Section 4(a)(2) exempts from registration "transactions by an issuer not involving any public offering."[85]

87. All Holders of Class 4 Unsecured Notes Claims that are party to the Restructuring Support Agreement represented, among other representations regarding such Holders' sophistication regarding investments of this type and the sufficiency of their investment evaluation, that it (a) is an "accredited investor" as such term is defined in Rule 501(a) of the Securities Act, and (b) is a "qualified institutional buyer" as such term is defined in Rule 144A of the Securities Act.[86] In addition, to participate in the Equity Rights Offering backstop, the Holders of Class 4 Unsecured Notes Claims were required to sign the Equity Rights Offering Backstop Commitment Letter, which included, among other representations regarding such Holders' sophistication regarding investments of this type and the sufficiency of their investment evaluation, a representation that each subscribing party is an "accredited investor" within the meaning of sections 501(a) of the Securities Act.[87] Accordingly, to the extent that section 1145(a) of the Bankruptcy Code is not available the issuance of New Common Interests to the Holders of Class 4 Unsecured Notes Claims is exempt from the registration requirements under Section 5 of the Securities Act and any other applicable U.S. state or local law, because such issuances are being made in a private placement without a public offering pursuant to Section 4(a)(2) of the Securities Act.

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85 15 U.S.C. § 77d(a)(2).

86 *See* Restructuring Support Agreement ¶ 25.

87 *See* Equity Rights Offering Backstop Commitment Letter ¶ 5(b)(vi).

(ii) *The Debtor Release Is Appropriate, Complies with Applicable Law, and Should Be Approved*

88. The Plan provides for a release of each Released Party (as defined below), its respective Related Parties (as defined below), and their respective assets and properties by the Debtors and the Reorganized Debtors, in their respective individual capacities and as debtors in possession, as more fully set forth in Article IX.B of the Plan (the "***Debtor Release***"). Under the Plan, the terms "Released Parties," "Releasing Parties," and "Related Parties" are defined in Article I.A as follows:

> "***Released Parties***" means, collectively, each of, and in each case in its capacity as such: (a) each Debtor; (b) each Reorganized Debtor; (c) each Non-Debtor Affiliate; (d) each of the Debtors' and Non-Debtor Affiliates' current and former directors, officers and proxyholders; (e) the Agents/Trustees; (f) the Consenting Stakeholders; (g) the DIP Lenders; (h) if applicable, each Consenting Stakeholder in its capacity as a Holder of Existing Equity Interests; (i) the Equity Rights Offering Backstop Parties; (j) each of the Releasing Parties; and (k) with respect to each of the foregoing (a) through (x), each such Entities' (i) Related Parties and (ii) their current and former Affiliates' Related Parties; *provided*, that in each case, an Entity shall not be a Released Party if it: (x) elects to opt out of the Releases; or (y) timely Files with the Bankruptcy Court on the docket of these Chapter 11 Cases an objection to the Releases that is not resolved before Confirmation.
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> "***Releasing Parties***" means, collectively, each of, and in each case in its capacity as such: (a) each Debtor; (b) each Reorganized Debtor; (c) each Non-Debtor Affiliate; (d) each of the Debtors' and Non-Debtor Affiliates' current and former directors, officers and proxyholders; (e) the Agents/Trustees; (f) the Consenting Stakeholders; (g) the DIP Lenders; (h) if applicable, each Consenting Stakeholder in its capacity as a Holder of Existing Equity Interests; (i) each other Holder of Claims or Interests that is entitled to vote on this Plan and votes to accept this Plan; (j) each other Holder of Claims or Interests that is deemed to reject this Plan and elects to opt into the Releases; and (k) with respect to each of the foregoing (a) through (k), each such Entities' current and former Affiliates, and such Entities' and their current and former Affiliates' Related Parties; *provided*, that, for the avoidance of doubt, an Entity described in clauses (j) through (k) above shall not be a Releasing Party if it: (x) elects to opt out of the Releases; or (y) timely Files

> with the Bankruptcy Court on the docket of these Chapter 11 Cases an objection to the Releases that is not resolved before Confirmation; *provided further*, that, for the avoidance of doubt, any opt-out election made by a Consenting Stakeholder, or Holder of Claims or Interests that is entitled vote on this Plan and votes to accept this Plan, will be void *ab initio*.
>
> "***Related Parties***" means, with respect to an Entity, each of, and in each case solely in its capacity as such, such Entity's current and former Affiliates, and such Entity's and such Affiliates' current and former members, directors, managers, officers, proxyholders, control persons, investment committee members, special committee members, members of any governing body, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds (including any beneficial holders for the account of whom such funds are managed), predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, investment managers, and other professionals and advisors, each in their capacity as such, and any such Person's or Entity's respective heirs, executors, estates, and nominees.[88]

89. Pursuant to the Debtor Release, the Debtors have determined to release their own claims and Causes of Action (including any derivative claims and Causes of Action) against each Released Party. Importantly, the Debtor Release expressly excludes "any Causes of Action arising from an act or omission determined by Final Order to constitute gross negligence, willful misconduct, or intentional fraud."[89]

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[88] Plan Art. I.A.

[89] *See* Plan Art. IX.B.

90. It is well-settled that a debtor is authorized to settle or release its claims in a chapter 11 plan.[90] Such releases are granted by courts in the Second Circuit where they are in the "best interest of the estate."[91] In determining whether such a release is within the best interests of the estate, the court need not conduct a "'mini-trial' of the facts or the merits underlying [each] dispute" and "the settlement need not be the best that the debtor could have obtained."[92] Under the applicable standard, the "court should instead 'canvass the [settled] issues [to] see whether the settlement falls below the lowest point in the range of reasonableness.'"[93] Courts in the Second Circuit consider the following factors to determine whether a settlement is within the range of reasonableness: (a) the balance between the claim's possibility of success and the settlement's benefits; (b) the likelihood of complex and protracted litigation, including attendant expense, inconvenience, and delay; (c) the interests of creditors; (d) whether other interested parties support the settlement; (e) the nature and breadth of releases; (f) the competency and experience of counsel supporting, and the experience and knowledge of the judge reviewing, the settlement; and (g) the extent to which the settlement is the product of arm's-length bargaining.[94]

91. Here, the Debtor Release is a vital component of the Plan and constitutes a sound exercise of the Debtors' business judgment. During the course of the Restructuring Support Agreement and Plan negotiations, it became apparent that the Debtor Release would be a necessary

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[90] *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 263 n.289 (Bankr. S.D.N.Y. 2007) (holding the debtor may release its own claims); *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (noting that a debtor's release of its own claims is permissible).

[91] *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 257 (Bankr. S.D.N.Y. 2009) ("When reviewing releases in a debtor's plan, courts consider whether such releases are in the best interest of the estate." (citation omitted)).

[92] *In re NII Holdings, Inc.*, 536 B.R. 61, 99 (Bankr. S.D.N.Y. 2015) (quoting *In re Adelphia*, 368 B.R. at 225).

[93] *Id.* at 100.

[94] *Id.* (citing *Motorola, Inc. v. Off. Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 462 (2d Cir. 2007)).

condition of the Restructuring Support Agreement and consummation of the Restructuring Transactions embodied in the Plan.[95] Without the Debtor Release, the Debtors and their stakeholders would not have been able to secure the substantial benefits provided by the Plan, including the significant reduction of debt, the funding for these Chapter 11 Cases and post-emergence working capital needs provided by the Consenting Stakeholders who are among the Released Parties, nor the expedited timeframe in which the Debtors propose to exit bankruptcy.[96]

92. Furthermore, on May 22, 2024, the board of directors (the "***Board***") of 2U, Inc. established a transaction committee (the "***Transaction Committee***"), composed of four of the Board's independent directors chaired by Ms. Ivona Smith, that is responsible for "reviewing, considering and, if appropriate, recommending [to the full Board] potential in-court or out-of-court strategic alternatives available to the Company, including (without limitation) seeking financing or refinancing or undertaking a restructuring, reorganization, recapitalization, business combination, sale of equity or assets, or change of control of the Company, whether by sale, merger, consolidation or otherwise."[97] In her capacity as an independent director and chair of the Transaction Committee, Ms. Smith commenced, prior to the Petition Date, an independent investigation (the "***Independent Investigation***") into whether the Estates hold any viable and/or valuable claims and causes of action against any of the Debtors' current or former equity holders, affiliates, directors, managers, officers, or other related parties or stakeholders (the "***Investigated Parties***") that are worthy of pursuit in the context of the Chapter 11 Cases.[98] On June 14, 2024, Ms. Smith retained Katten Muchin Rosenman LLP ("***Katten***") as independent legal counsel to

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95 Norden Confiramtion Decl. ¶ 55.

96 *Id.*

97 *See* Smith Decl. ¶ 5.

98 *See id*. ¶ 6.

conduct the Independent Investigation and to provide advice and legal services in connection with the exercise of Ms. Smith's fiduciary duties.[99] At the conclusion of the Independent Investigation, Ms. Smith (with the assistance of Katten) determined that the Debtor Release in the plan is appropriate and should be approved because, among other reasons, the Estates do not have viable or valuable claims or causes of action against the Investigated Parties that are worthy of pursuit in the Chapter 11 Cases, the Debtor Release was an integral part of obtaining support for the Plan, and the Released Parties have provided valuable consideration in exchange for such Releases.[100]

93. Despite the United States Trustee's bald assertion that the Debtor Release improperly releases claims that belong to the estate without proper consideration,[101] the Released Parties have provided significant consideration for the Debtor Release. The Plan is governed by New York law,[102] pursuant to which consideration for any provision of a contract is evaluated by looking at the entirety of the contract.[103] Here, the consideration included, but was not limited to, (a) providing reciprocal releases for the Debtors, (b) negotiating and participating in the restructuring, (c) providing needed consents throughout the Chapter 11 Cases, (d) cooperating with the Independent Investigation, (e) with respect to the Holders of First Lien Claims, agreeing to certain covenant modifications and to the extension of the maturity of their debt for twenty-seven (27) months after the Effective Date, (f) with respect to the Holders of Unsecured Notes, agreeing to the impairment of their Claims, and (g) with respect to certain of the Consenting Stakeholders,

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99 *See id*. ¶ 7.

100 *See id*. ¶¶ 14-17.

101 *See* United States Trustee Objection at 25.

102 *See* Plan, Art. XI.M.

103 *See, e.g.*, *Marciano v. DCH Auto Grp.*, 14 F. Supp. 3d. 322, 337 (S.D.N.Y. 2014) (finding that additional consideration was not necessary to find a specific provision binding because the "Agreement by itself contains sufficient consideration because, as discussed, it mutually binds both parties to submit claims exclusively to arbitration").

agreeing to the cancellation of Existing Equity Interests.[104] Absent such significant consideration, the Debtors would not be in the position they are in now—on the verge of confirming a consensual reorganization that cuts their debt load by about $486.3 million.

94. Thus, simply put, the Debtors do not believe that they have material Causes of Action against any of the Released Parties that would justify the risk, expense, and delay of pursuing any such causes of action as compared to the results and benefits achieved under the Plan; indeed, the Debtors do not believe that they have any Cause of Action against any Released Party that is of significant value.[105] Importantly, the Debtor Release provides finality and avoidance of significant delay in consummating the Plan. Therefore, the inclusion of the Debtor Release is worthwhile and inures to the benefit of all of the Debtors' stakeholders. For these reasons, the Debtors' agreement to provide the Debtor Release constitutes a sound exercise of the Debtors' business judgment.[106]

95. In addition to being in the best interest of the Estates, the Debtor Release is fair and equitable: (a) the vast majority in both number and amount of Claims in the Voting Classes voted in favor of the Plan, including the Debtor Release; (b) the Holders of Claims or Interests in Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), Class 5 (General Unsecured Claims), and Class 6 (Intercompany Claims), and Class 7 (Intercompany Interests) are not bound by the Debtor Release or the Third-Party Release; (c) the Holders of Claims or Interests in Class 8 (Existing Equity Interests) and Class 9 (Subordinated Claims) are also not bound by the Debtor Release or the Third-Party Release except to the limited extent they are Releasing Parties (*i.e.*, those who opt-in to the Third-Party Release); and (d) the Plan, including the Debtor Release, was negotiated by

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[104] *See* Smith Decl. ¶ 15.

[105] *See id*. ¶ 12.

[106] Norden Confirmation Decl. ¶ 55; Smith Decl. ¶ 14.

sophisticated entities that were represented by able advisors and that each conditioned their support for the Plan and entry into the Restructuring Support Agreement on, among other things, the grant of the Debtor Release. The resulting compromise reflects an impartial, arm's-length negotiation process. Accordingly, the Debtor Release is fair, equitable, and in the best interest of the Debtors' Estates and, as such, the Debtor Release should be approved.

(iii) *The Third-Party Release Is Appropriate, Complies with Applicable Law, and Should Be Approved*

96. Article IX.C of the Plan provides for the release of the Released Parties from any claims or Causes of Action (including any derivative claims and Causes of Action) held by each Releasing Party (the "***Third-Party Release***"). To address comments raised by the Court, and in the interest of achieving a consensual Confirmation, the Debtors amended the defined term "Releasing Parties" in the Plan. The Solicitation Plan had included in the definition of "Releasing Parties" all Holders of Claims or Interests that (a) abstain from voting on the Plan, vote to reject the Plan, or are deemed to reject the Plan, and (b) do not elect to opt out of the Releases. As discussed at the First Day Hearing and reflected in the Supplemental Notices, however, the definition was revised in the First Amended Plan (and remained in the Second Amended Plan) such that Holders of Claims or Interests that abstain from voting on the Plan or vote to reject the Plan (collectively, the "***Non-Accepting Parties***") are not bound by the Third-Party Release and Holders of Claims or Interests that are deemed to reject the Plan (together with the Non-Accepting Parties, the "***Non-Releasing Parties***") are only bound by the Third-Party Release if they affirmatively opt into the Release. As a result, parties that have not (a) voted to accept the Plan or (b) opted into the Third-Party Release will not be deemed to grant the Third-Party Release.

97. The Third-Party Release explicitly describes the nature and type of claims and Causes of Action being released, including those "based on or relating to, or in any manner arising from, in whole or in part":

> (i) the management, ownership, or operation of the Debtors or the Non-Debtor Affiliates (including any dividends or other distributions); (ii) the purchase, sale, or rescission of any security of the Debtors or the Non-Debtor Affiliates; (iii) the subject matter of, or the transactions, events, circumstances, acts or omissions giving rise to, any Claim or Interest that is treated in the Restructuring Transactions, including the negotiation, formulation, or preparation of the Restructuring Transactions; (iv) the business or contractual arrangements between any Debtor or Non-Debtor Affiliate and any other entity; (v) the Debtors' and Non-Debtor Affiliates' in- or out-of-court restructuring efforts; (vi) Intercompany Transactions; (vii) the Restructuring Support Agreement, the Definitive Documents, these Chapter 11 Cases, or any Restructuring Transaction; (viii) any contract, instrument, release, or other agreement or document created or entered into in connection with the Restructuring Support Agreement, the Restructuring Term Sheet, the DIP Documents, the Definitive Documents, or the Restructuring Transactions, including the issuance or distribution of Securities pursuant to the Plan; (ix) the distribution of property under the Plan or any other related agreement; or (x) any other act, or omission, transaction, agreement, event, or other occurrence relating to any of the foregoing and taking place on or before the Effective Date.

98. Importantly, the Third-Party Release expressly excludes "any Causes of Action arising from an act or omission determined by Final Order to constitute gross negligence, willful misconduct, or intentional fraud."[107]

99. The Third-Party Release should be approved because it is consensual. The Third-Party Release is consensual because each of the non-Debtor Releasing Parties was fully informed of the contents of the Third-Party Release and affirmatively elected to grant the Third-Party Release. Even if the Non-Releasing Parties were not expressly carved out from the Third-Party

[107] *See* Plan Art. IX.C.

Release, the release would nonetheless be consensual as to such parties because they were provided ample notice of the release and opt-in mechanism, and nothing contained herein or in the Plan or Combined Order shall be deemed to waive any party's rights to assert that the Third-Party Release is consensual as to parties that were afforded the opportunity to opt into providing such release and affirmatively elected to do so.

100. Courts in the Second Circuit have stated that a third-party release may be approved with the ***consent*** of the affected party.[108] Although the United States Trustee insists that a third-party release is non-consensual when it is granted via a vote to accept a plan,[109] the United States Trustee's position is contrary to the law in this District. Indeed, the courts in this District generally agree that an affirmative vote to accept a plan that contains a third-party release constitutes an express consent to such release.[110] This Court even overturned the United States Trustee's very same objection in *In re GBG USA, Inc.*, stating:

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[108] *See, e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) ("Nondebtor releases may also be tolerated if the affected creditors consent") (citing *In re Specialty Equip. Cos*., 3 F.3d 1043, 1047 (7th Cir. 1993)); *In re Adelphia*, 368 B.R. at 268 ("The Seventh Circuit held in *Specialty Equipment* that consensual releases are permissible, and the *Metromedia* court did not quarrel with that view" (citation and footnote omitted)); *In re Spiegel, Inc*., No. 03-11540 (BRL), 2006 WL 2577825, at *7 (Bankr. S.D.N.Y. Aug. 16, 2006) (holding that nondebtor releases are tolerated if the creditors consent (citing *In re Metromedia*, 416 F.3d at 142)), *appeal dismissed*, No. 06-09385 (NRB), 2007 WL 656902 (S.D.N.Y. Feb. 28, 2007), *aff'd*, 269 F. App'x 56 (2d Cir. 2008); *In re Oneida*, 351 B.R. at 94 (approving consensual release provisions (citing *In re Metromedia*, 416 F.3d at 142)).

[109] *See* United States Trustee Objection at 19-20.

[110] *See, e.g.*, *In re Chassix Holdings*, 533 B.R. 64, 79-80 (Bankr. S.D.N.Y. 2015) (stating "case law in this District and elsewhere supports the conclusion that the creditors' vote for the Plan constitutes a consent to the releases"); Confirmation Hr'g Tr. 105:9-16, *In re Acorda Therapeutics, Inc.*, No. 24-22284 (DSJ) (Bankr. S.D.N.Y. Aug. 7, 2024) [Docket No. 449] (finding that an affirmative vote to accept a plan is an express "manifestation of consent" to non-debtor releases); *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) (collecting cases); Confirmation Hr'g Tr. 62:16-19, *In re BearingPoint, Inc.*, No. 09-10691 (REG) (Bankr. S.D.N.Y Dec. 17, 2009) [Docket No. 1586]; *see also In re Genco Shipping & Trading Ltd*., 513 B.R. 233, 271 (Bankr. S.D.N.Y. 2014) (granting third-party release with respect to affected parties that consented to the releases by voting in favor of the plan); *In re Adelphia*, 368 B.R. at 268 (upholding non-debtor releases for creditors who voted to accept the plan because creditors consented to the releases through their vote to support the plan); *In re Crabtree & Evelyn, Ltd*., No. 09-14267 (BRL), 2010 WL 3638369, at *8 (Bankr. S.D.N.Y. Jan. 14. 2010) (finding that where creditors have accepted the plan and the non-debtor releases were appropriately disclosed by the debtors in both the disclosure statement and the ballot, the creditors have expressly consented to the non-debtor releases and, therefore, the non-debtor releases satisfy the standards set forth in *Metromedia* for granting non-debtor releases

> I think the caselaw is as the Debtors have said, that ***a vote is a consent***. I'm not saying you're crazy to argue otherwise, but I think that is what the caselaw says and I have upheld that in other cases, and I think ***I will stick to my own precedents in this circuit and count the yes votes as a consent to the releases***.[111]

Courts in this District have also approved third-party releases as consensual where a plan provided for a third-party release and the affected parties voted to reject the plan or abstained from voting on the plan but opted into providing such release.[112]

101. Nevertheless, the United States Trustee invites this Court to reconsider its longstanding practice of finding consent to a third-party release when parties vote in favor of a plan in light of the Supreme Court's recent decision in *Purdue*.[113] In particular, the United States Trustee urges this Court to take the view that, even when a creditor votes in favor of a plan, the creditor is still silent on a third-party release therein (like a creditor who fails to opt out of a third-party release with an opt-out mechanism) because the vote "is not a writing expressly agreeing to such a release."[114]

102. As set forth in greater detail in **Exhibit A**, the United States Trustee Objection should be overruled. To begin, nothing in *Purdue* supports, much less mandates, revisiting the

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and are fair to the releasing parties); *In re Lear Corp*., No. 09–14326 (ALG), 2009 WL 6677955, at *7 (Bankr. S.D.N.Y. Nov. 5, 2009) (finding that non-debtor releases for creditors who voted to accept the plan were permissible); *In re Calpine Corp*., No. 05-60200 (BRL), 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) (same).

111 Hr'g. Tr. 18:6-20, *In re GBG USA Inc.*, No. 21-11369 (MEW) (Bankr. S.D.N.Y. Feb. 10, 2022) [Docket No. 527] (emphasis added).

112 *In re Chassix Holdings, Inc.*, 533 B.R. 64, 80 (Bankr. S.D.N.Y. 2015) ("[C]reditors who rejected the Plan, but who nevertheless 'opted in' to the releases, have consented to those releases. A clearer form of 'consent' can hardly be imagined."); *see also In re SAS AB*, No. 22-10925 (MEW) (Bankr. S.D.N.Y. Mar. 22, 2024) [Docket No. 2347] (concluding that a process requiring parties to affirmatively opt into third-party releases is consensual); *In re Voyager Digit. Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. Mar. 8, 2023) [Docket No. 1159] (same); *In re Celsius Network LLC*, No. 22-10964 (MG) (Bankr. S.D.N.Y. Nov. 9, 2023) (same) [Docket No. 3972]; *In re GTT Commc'ns, Inc.*, No. 21-11880 (MEW) (Bankr. S.D.N.Y. Dec. 28, 2022) [Docket No. 821] (same).

113 *See* United States Trustee Objection at 19–21.

114 *Id.* at 21.

longstanding practice in this Court of holding votes in favor of the Plan to be consent to third-party releases. In *Purdue*, the Supreme Court held that the Bankruptcy Code does not allow for the inclusion of ***non-consensual*** third-party releases in chapter 11 plans (outside the context of section 524(g) of the Bankruptcy Code) but stressed that its holding does not affect or alter established law relating to ***consensual*** third-party releases. Indeed, the Supreme Court stated decisively:

> As important as the question we decide today are ones we do not. ***Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan***; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. ***Nor do we have occasion today to express a view on what qualifies as a consensual release*** or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.[115]

103. Given that the Supreme Court's decision in *Purdue* does not change the well-established precedent within this District that a vote in favor of the Plan constitutes consent to the Third-Party Release, it is not surprising that the United States Trustee relies solely on non-binding out-of-District cases to make its argument. But its reliance on these cases is misplaced. For example, the United States Trustee points to *In re Tonawanda Coke Corp.*[116] and *Mahwah Bergen Retail Grp., Inc.*[117] to bolster its position that a vote in favor of the Plan cannot be construed as consent to the Third-Party Release, but those cases disapproved of plans in which creditors would have been deemed to grant a release if they ***failed to opt-out*** of the release. That is the mechanism the Debtors removed from the Plan.

104. It is also perplexing that the United States Trustee quotes *Tonawanda Coke* for the following proposition—"[a]bsent a writing expressly agreeing to a release of non-debtors,

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[115] *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2087-88 (2024) (emphasis added).

[116] No. 18-12156 (Bankr. W.D.N.Y. Aug. 27, 2024) (Bucki, C.J.) [Docket No. 790].

[117] 636 B.R. 641, 686 (E.D. Va. 2022).

creditors have not given consent as required by the Supreme Court in *Harrington v. Purdue Pharma*"—because that is the exact construct of the Third-Party Release. Pursuant to the Solicitation Procedures Order and the Ballots, a Ballot is only counted if it is signed (or, in the case of Ballots submitted through the e-Ballot portal, electronically signed) by the applicable creditor.[118] And the Ballots (a) replicated the full text of the Releases in **BOLD AND CAPITALIZED FONT**, and (b) clearly indicated, in **BOLD AND CAPITALIZED FONT**, that if a creditor voted to accept the Plan, then they would grant the Third-Party Release.[119] Accordingly, by signing (or electronically signing) and submitting a Ballot to accept the Plan, creditors who voted to accept the Plan affirmatively signed a writing under which they expressly agreed to discharge the non-debtor parties.

105. Even if the United States Trustee's citations were not misplaced, the United States Trustee's argument would still miss the mark. A vote in favor of the Plan is the precise opposite of silence. It is explicit and affirmative acquiescence to the Plan and the Third-Party Release. This is especially true here, where the Plan in no way coerces votes and, thus, in no way coerces the Releases. For example, the Plan consideration for a given Voting Creditor was not conditioned or contingent on such creditor voting to accept the Plan. Any given Voting Creditor that was not party to the Restructuring Support Agreement could have abstained from voting or voted to reject the Plan and, thereby, not have granted the Third-Party Release but still have received the same Plan treatment and recovery. Moreover, the Plan is governed by New York law,[120] pursuant to which parties have a duty to read the contract they are signing, and are presumed to understand,

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[118] *See* Solicitation Procedures Order, Ex. 2 at 6, 12-17; Solicitation Procedures Order, Ex. 3-A at 7, 14-19.

[119] *See* Solicitation Procedures Order ¶¶ 30, 33.

[120] *See* Plan, Art. XI.M.

the contents of such contract.[121] By signing and submitting the Ballots (or in the case of creditors who voted through the e-Ballot portal, e-signed), creditors who voted in favor of the Plan are properly presumed to have read and understood the Third-Party Release.

106. Simply put, the Third-Party Release is consensual, as the Releasing Parties here have affirmatively consented to the Third-Party Release.[122] The Third-Party Release was subject to robust and conspicuous disclosure and, therefore, parties in interest did obtain a full and fair opportunity to understand the Third-Party Release and the opt-in mechanism. All parties in interest received notice of the Third-Party Release. The Third-Party Release was conspicuously disclosed in boldface type in the Plan,[123] the Disclosure Statement,[124] the Combined Notice,[125] the Ballots,[126] the Opt-In Forms,[127] and the Supplemental Notices.[128] Moreover, the Supplemental Notices plainly notified the Voting Creditors that if they vote to accept the Plan, they will be granting the Third-Party Release. In particular, those notices, which were distributed to all Voting Creditors, stated in bold and capitalized text:

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[121] *See Marciano v. DCH Auto Grp.*, 14 F. Supp. 3d. 322, 330 (S.D.N.Y. 2014); *In re Lehman Brothers Inc.*, 478 B.R. 570 (S.D.N.Y. 2012) ("A party's failure to read or understand a contract that it signs does not relieve it of its obligations to be bound by the contract."); *Shklovskiy v. Khan*, 273 A.D.2d 371, 372, 709 N.Y.S.2d 208, 209 (2000) ("a party will not be excused from his failure to read and understand the contents of a release").

[122] The Releasing Parties include, among others: (a) the Consenting Stakeholders and DIP Lenders who negotiated and drafted the Third-Party Release as part of the Restructuring Support Agreement; (b) the Agents/Trustees; (c) the Holders of Claims in the Voting Classes who voted in favor of the Plan and thereby affirmatively consented to the Third-Party Release; or (d) Holders of Claims or Interests in Classes deemed to reject the Plan that affirmatively elected to provide the Third-Party Release by checking the appropriate box on the applicable Opt-In Form.

[123] Plan Art. IX.C.

[124] Disclosure Statement Art. V.B.

[125] *See* Solicitation Procedures Order, Ex. 1.

[126] *See id.*, Exs. 2 & 3.

[127] *See id.*, Ex. 6.

[128] *See id.*, Ex. 8.

> **IF YOU VOTE TO ACCEPT THE PLAN, THEN YOU WILL ALSO BE GRANTING THE THIRD-PARTY RELEASE CONTAINED IN ARTICLE IX OF THE PLAN.**
>
> **IF YOU VOTE TO REJECT THE PLAN OR ABSTAIN FROM VOTING, THEN YOU WILL NOT BE DEEMED TO CONSENT TO THE THIRD-PARTY RELEASE CONTAINED IN ARTICLE IX OF THE PLAN.**[129]

107. Likewise, the Opt-In Forms also plainly notified the Holders of Claims and Interests in the Deemed-to-Reject Classes that they will be bound by the Third-Party Release if they affirmatively opt into the Third-Party Release and disclosed the process for making such election. Specifically, the Opt-In Forms stated in bold and capitalized text:

> **PLEASE TAKE NOTICE THAT ARTICLE IX OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS. AS A HOLDER OF A CLASS 8 EXISTING EQUITY INTEREST OR CLASS 9 UNSUBORDINATED CLAIM, YOU ARE A "RELEASING PARTY" UNDER THE PLAN IF YOU OPT-IN TO THE RELEASES CONTAINED IN THE PLAN BY CHECKING THE BOX BELOW TO ELECT TO GRANT THE THIRD-PARTY RELEASE CONTAINED IN ARTICLE IX OF THE PLAN. YOU WILL BE CONSIDERED A "RELEASING PARTY" UNDER THE PLAN ONLY IF (A) THE COURT DETERMINES THAT YOU HAVE THE RIGHT TO OPT-IN TO THE RELEASES AND (B) YOU CHECK THE BOX BELOW AND SUBMIT THE OPT-IN NOTICE BY THE OPT-IN DEADLINE AS SET FORTH IN THE OPT-IN NOTICE ACCOMPANYING THIS FORM.**[130]

108. Members of each Voting Class had the opportunity to abstain from voting or submit a vote to reject the Plan. Non-Consenting Stakeholders were not obligated to vote in favor of the Plan, and in fact, two (2) Holders of Unsecured Notes voted to reject the Plan and did not provide the Third-Party Release. Consenting Stakeholders made the informed decision to execute the

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[129] *Id.* at 2.

[130] *See id*. Ex. 6.

Restructuring Support Agreement to support the Plan holistically, which includes voting in favor and assenting to the Third-Party Release through such vote.

109. Furthermore, as mentioned above, on June 14, 2024, Ms. Smith retained Katten as independent legal counsel to conduct the Independent Investigation and to provide advice and legal services in connection with the exercise of Ms. Smith's fiduciary duties.[131] At the conclusion of the Independent Investigation, Ms. Smith (with the assistance of Katten) determined that the Third-Party Release in the plan is appropriate and should be approved because, among other reasons, the Third-Party Release is consensual, critical for a successful restructuring, and the Releasing Parties have received consideration in exchange such Release.[132]

110. In sum, the Third-Party Release is a critical, negotiated term of the Plan, necessary for the resolution of these Chapter 11 Cases, and important to the success of the Plan. Importantly, no economic stakeholder with the right to vote has objected to the Third-Party Release. Accordingly, the Third-Party Release complies with the Second Circuit standards and is appropriate and justified under the circumstances and should be approved.

(iv) *The Exculpation Clause Is Appropriate, Complies with Applicable Law, and Should Be Approved*

111. Article IX.E of the Plan sets forth an exculpation provision exculpating the Exculpated Parties[133] from enumerated claims (the "***Exculpation***"). The Exculpation is an integral part of the Plan and satisfies the governing standards in the Second Circuit. The Exculpation provides necessary and customary protections to those parties in interest (whether Estate

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131 *See* Smith Decl. ¶ 7.

132 *See id.*. ¶¶ 19-22.

133 Pursuant to the Plan, "***Exculpated Parties***" means, collectively: (a) the Debtors; (b) the Reorganized Debtors; (c) the Consenting Stakeholders; (d) the Agents/Trustees; (e) the DIP Lenders; and (f) with respect to the foregoing clauses (a) through (e), each such Entity's or Person's Related Parties.

fiduciaries or otherwise) whose efforts were, and continue to be, vital to formulating and implementing the Plan, which has garnered overwhelming support from the Debtors' voting creditors, and the restructuring more broadly. Moreover, an exculpation provision is "a commonplace provision in Chapter 11 plans" that "does not affect the liability of [the exculpated] parties, but rather states the standard of liability under the [Bankruptcy] Code."[134]

112. Courts in the Second Circuit evaluate an exculpation provision based upon a number of factors, including whether the plan was proposed in good faith, whether the provision is integral to the plan, and whether such exculpation from liability was necessary for plan negotiations.[135] Where a court finds that a plan has been proposed in good faith and meets the other requirements of confirmation, approval of an exculpation provision is appropriate.[136] Such courts have also specified that exculpation is appropriate when the exculpated entities are parties to "unique transactions" and "contribute[] substantial consideration to the reorganization."[137]

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134 *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000).

135 *See In re Bally Total Fitness*, 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *In re Enron Corp.*, 326 B.R. 497, 501, 503 (S.D.N.Y. 2005) (approving an exculpation provision where it was necessary to effectuate the plan and excluded gross negligence and willful misconduct; also noting that excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition"); *In re WorldCom, Inc.*, No. 02–13533 (AJG), 2003 WL 23861928 at *28 (Bankr. S.D.N.Y. Oct 31, 2003) (approving an exculpation provision where it "was an essential element of the Plan formulation process and negotiations"); *see also In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d. 285, 293 (2d Cir. 1992); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 239, 260-61 (Bankr. M.D. Fla. 2006) (approving an exculpation provision where the beneficiaries made significant contributions and expected an exculpation provision would be included in the plan).

136 *See In re WorldCom*, 2003 WL 23861928, at *28.

137 *See In re Adelphia*, 368 B.R. at 268; *see also In re Res. Cap., LLC*, 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013) (confirming plan that contained exculpations for parties that were "instrumental to the successful prosecution of the Chapter 11 Cases or their resolution pursuant to the Plan, and/or provided a substantial contribution to the Debtors").

113. In the Second Circuit, exculpation provisions that extend to prepetition conduct and cover non-estate fiduciaries are approved regularly.[138] Indeed, this Court has held that exculpation provisions should extend to prepetition conduct in the context of a prepackaged reorganization.[139]

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[138] *See, e.g.*, Confirmation Hr'g Tr. 99:13-16, *In re Acorda Therapeutics, Inc.*, No. 24-22284 (DSJ) (Bankr. S.D.N.Y. Aug. 7, 2024) [Docket No. 449] ("there's a host of case law, in fact, its routinely approved by this court, that parties who are not fiduciaries can be protected by exculpation provisions in appropriate circumstances, which I find here"); *In re Windstream Holdings, Inc.*, No. 19-22312 (RDD) (Bankr. S.D.N.Y. June 26, 2020) [Docket No. 2243]; *In re Seabras 1 USA, LLC*, No. 19-14006 (SMB) (Bankr. S.D.N.Y. June 30, 2020) [Docket No. 298]; *In re Deluxe Media*, No. 19-23774 (RDD) (Bankr. S.D.N.Y. Oct. 25, 2019) [Docket No. 96]; *In re Hollander Sleep Prods., LLC*, No. 19-11608 (MEW) (Bankr. S.D.N.Y. Sept. 5, 2019) [Docket No. 356]; *In re Nine West Holdings, Inc.*, No. 18-10947 (SCC) (Bankr. S.D.N.Y. Feb. 27, 2019) [Docket No. 1308]; *In Re Fullbeauty Brands Holdings Corp.*, No. 19-22185 (RDD) (Bankr. S.D.N.Y. Feb. 5, 2019) [Docket No. 39]; *In re Sungard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD) (Bankr. S.D.N.Y. May 3, 2019) [Docket No. 48]; *In re Cenveo, Inc.*, No. 18-22178 (Bankr. S.D.N.Y Aug. 21, 2018) [Docket No. 685] (overruling United States Trustee objection to exculpation of both estate fiduciaries and non-fiduciaries from liability for "any cause of action for any claim related to any act or omission in connection with, relating to, or arising out of, the chapter 11 cases . . . or the filing of the Restructuring Support Agreement and related prepetition transactions"); *In re Glob. A&T Elecs. Ltd.*, No. 17-23931 (Bankr. S.D.N.Y. Dec. 22, 2017) [Docket No. 62]; *In re Avaya, Inc.*, No. 17-10089 (SMB) (Bankr. S.D.N.Y. Nov. 28, 2017) [Docket No. 1579]; *In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 26, 2017) [Docket No. 591]; *In re Answers Holdings, Inc.*, No. 17-10496 (SMB) (Bankr. S.D.N.Y. Apr. 10, 2017) [Docket No. 120]; *In re Oneida*, 351 B.R. at 94, n.22 (considering an exculpation provision covering a number of prepetition actors with respect to certain prepetition actions, as well as postpetition activity); *In re Eastman Kodak Co.*, No. 12-10202 (ALG) (Bankr. S.D.N.Y. Aug. 23, 2013) [Docket No. 4966] (overruling United States Trustee objection to exculpation of both estate fiduciaries and non-fiduciaries from liability for "any prepetition or postpetition act taken or omitted to be taken in connection with, or arising from or relating in any way to, the chapter 11 cases"); *In re Metro-Goldwyn-Mayer Studios Inc.*, No. 10-15774 (SMB) (Bankr. S.D.N.Y. Dec. 6, 2010) [Docket No. 173] (approving exculpation provision); *In re Charter Commc'ns*, No. 09-11435 (JMP) (Bankr. S.D.N.Y. Nov. 17, 2009) [Docket No. 921] (approving exculpation of estate fiduciaries and non-fiduciaries for "any pre-petition or postpetition act taken or omitted to be taken in connection with, or related to . . . the restructuring of the Company"); *In re Cengage Learning, Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014) [Docket No. 1225] (approving exculpation provision for estate fiduciaries and non-fiduciaries for "any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating, soliciting, preparing, disseminating, confirming, implementing, or consummating the Plan"); *In re Res. Cap., LLC*, No. 12-12020 (MG) (Bankr. S.D.N.Y. Dec. 11, 2013) [Docket No. 6066] (approving exculpation of certain prepetition lenders); *In re Almatis, B.V.*, No. 10-12308 (MG) (Bankr. S.D.N.Y. Sept. 20, 2010) [Docket No. 444] (approving exculpation of debtors' prepetition lenders and holders of senior secured notes for both pre- and post-petition conduct); *In re Uno Rest. Holdings Corp.*, No. 10-10209 (MG) (Bankr. S.D.N.Y. July 6, 2010) [Docket No. 559] (approving exculpation of certain prepetition lenders from liability related to acts taken, among other things, "in connection with, or arising out of, the chapter 11 cases, the formulation, dissemination, confirmation, consummation, or administration of the Plan, property to be distributed under the Plan…the Plan, [or] the Disclosure Statement"); *In re Bally Total Fitness*, 2007 WL 2779438, at *8 (exculpation of prepetition noteholders and new investors); *In re Granite Broad. Corp.*, 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation of controlling shareholder as well as estate fiduciaries); *In re Enron Corp.*, 326 B.R. at 500 (upholding exculpation provision that precluded liability for, *inter alia*, "any act taken or omitted to be taken in connection with and subsequent to the commencement of the chapter 11 cases"); *In re Trico Marine Servs., Inc.*, No. 04-17985 (SMB) (Bankr. S.D.N.Y. Jan. 21, 2005) [Docket No. 52] (approving exculpation provisions).

[139] *See In re Stearns Holdings, LLC,* 607 B.R. 781, 790 (Bankr. S.D.N.Y. 2019) (endorsing the Debtors' observation that "in the Second Circuit, exculpation provisions that extend to prepetition conduct and cover non-estate

Confirmation Hr'g Tr. 77:17-79:4, *In re Automotores Gildemeister SPA*, No. 21-10685 (LGB) (Bankr. S.D.N.Y. May 27, 2021) [Docket No. 156] ("I think in a prepack, it's pretty hard to say, at least from my perspective, that you shouldn't get exculpated for prepetition conduct . . . I just think you're really giving people insufficient exculpation if I did that."). This is because, in a prepackaged chapter 11, "the whole thing starts prepetition, it was negotiated prepetition, it was launched prepetition . . . [and so the Exculpated Parties] did a lot of things towards getting plan confirmation, things that would normally get exculpated on if this all had happened during a Chapter 11 proceeding."[140]

114. In approving these provisions, courts consider a number of factors, including whether the beneficiaries of the exculpation have participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan.[141] In light of the

fiduciaries are regularly approved because courts have recognized the appropriateness of extending exculpation to parties who make a substantial contribution to a debtor's reorganization and play an integral role in building consensus in support of a debtor's restructuring"); *In re Windstream Holdings, Inc.*, No. 19-22312 (RDD) (Bankr. S.D.N.Y. June 26, 2020) [Docket No. 2243] (confirming plan containing exculpation provision extending to appropriately-tailored prepetition conduct); *In re Seabras 1 USA, LLC*, No. 19-14006 (SMB) (Bankr. S.D.N.Y. June 30, 2020) [Docket No. 298] (same); *In re Nine West Holdings, Inc.*, No. 18-10947 (SCC) (Bankr. S.D.N.Y. Feb. 27, 2019) [Docket No. 1308].

[140] Confirmation Hr'g Tr. 77:17-79:4, *In re Automotores Gildemeister SPA*, No. 21-10685 (LGB) (Bankr. S.D.N.Y. May 27, 2021) [Docket No. 156].

[141] *See, e.g.*, *In re BearingPoint, Inc.*, 453 B.R. 486, 494 (Bankr. S.D.N.Y. 2011) ("Exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers . . . ."); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (same), *aff'd*, No. 09-10156 (LAK), 2010 WL 1223109 (S.D.N.Y. May 24, 2010), *aff'd in part*, *rev'd in part*, 634 F.3d 79 (2d Cir. 2011); *In re Bally Total Fitness*, 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *In re WorldCom*, 2003 WL 23861928, at *28 (approving an exculpation provision where it "was an essential element of the [p]lan formulation process and negotiations"); *In re Enron Corp.*, 326 B.R. at 503 (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

bankruptcy policy in favor of consensual chapter 11 plans and the negotiations that create them, exculpation provisions are essential to the chapter 11 process and should be approved.[142]

115. Here, the Debtors respectfully submit that the Court has an ample record before it to conclude that the Exculpated Parties are entitled to the Exculpation proposed in the Plan and that the protections afforded therein are reasonable and appropriate.[143] *First*, the Debtors propose to exculpate only the Exculpated Parties, all of whom have made contributions and concessions that made the Plan possible and played a critical role in achieving an almost-entirely consensual Plan on an expedited basis. Indeed, the Exculpation represents an integral piece of the overall settlement embodied in the Plan and is the product of good-faith, arm's-length negotiations.[144] Given that the Exculpated Parties played a critical role in formulating the Plan—and that most of these negotiations occurred prior to the Petition Date—in order to bring these parties to the table, it was critical that the Exculpation extend to prepetition liability related to the Chapter 11 Cases.[145] The Exculpation was an important element in achieving the consensus and settlements embodied in the Plan, and failure to include the Exculpation—and to include prepetition conduct therein—could have deterred the Exculpated Parties from collaborating with the Debtors to develop a

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[142] *See In re Jartran, Inc.*, 44 B.R. 331, 363 (Bankr. N.D. Ill. 1984) ("the spirit of Chapter 11 [is] to promote consensual plans. . . ."); *see also In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) (stating that the Bankruptcy Code has an overall policy of fostering consensual plans of reorganization).

[143] In its objection, the United States Trustee objects to the scope of the Exculpation by improperly relying upon *In re Aegean Marine Petroluem Network*, 599 B.R. 717 (Bankr. S.D.N.Y. 2019). United States Trustee Objection at 26-27. The Debtors believe that the facts of this case are clearly distinguishable from those in *Aegean Marine*. First, *Aegean Marine* was not a prepackaged bankruptcy case. Second, unlike in *Aegean Marine,* the filing of these Chapter 11 Cases and entry into the Restructuring Support Agreement was the product of extensive negotiations and discussions between the Debtors and certain Consenting Stakeholders that took place over the months prior to the Petition Date. It is entirely appropriate for the Exculpation to cover this prepetition conduct of all the parties involved in negotiating and effectuating the restructuring transaction contemplated by the Restructuring Support Agreement.

[144] *See* Norden Confirmation Decl. ¶ 60.

[145] *Id*.

consensual restructuring.[146] Such exculpation provisions are routinely approved in plans of reorganization in cases similar to the Chapter 11 Cases, which could not have progressed as quickly and as productively absent the significant contributions of the Exculpated Parties both prior and subsequent to the Petition Date.[147]

116. *Second*, the Exculpation is narrowly tailored. It relates only to acts or omissions in connection with or arising out of the Debtors' restructuring, and ultimately inures to the benefit of only those parties traditionally considered estate fiduciaries or those that have made similar contributions to the Debtors' restructuring.[148] Moreover, the Exculpation does not exculpate "acts or omissions determined by Final Order to constitute gross negligence, willful misconduct, or intentional fraud."[149] Thus, the scope of the Exculpation itself and the composition of the

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146 *Id.* ¶¶ 60-61.

147 *See, e.g.*, *In re Windstream Holdings, Inc.*, No. 19-22312 (RDD) (Bankr. S.D.N.Y. June 26, 2020) [Docket No. 2243]; *In re Seabras 1 USA, LLC*, No. 19-14006 (SMB) (Bankr. S.D.N.Y. June 30, 2020) [Docket No. 298]; *In re Deluxe Media*, No. 19-23774 (RDD) (Bankr. S.D.N.Y. Oct. 25, 2019) [Docket No. 96]; *In re Hollander Sleep Prods., LLC*, No. 19-11608 (MEW) (Bankr. S.D.N.Y. Sept. 5, 2019) [Docket No. 356]; *In re Nine West Holdings, Inc.*, No. 18-10947 (SCC) (Bankr. S.D.N.Y. Feb. 27, 2019) [Docket No. 1308]; *In re Fullbeauty Brands Holdings Corp.*, No. 19-22185 (RDD) (Bankr. S.D.N.Y. Feb. 5, 2019) [Docket No. 39]; *In re Sungard Availability Servs. Capital, Inc.*, No. 19-22915 (RDD) (Bankr. S.D.N.Y. May 3, 2019); *In re Cenveo, Inc.*, No. 18-22178 (Bankr. S.D.N.Y Aug. 21, 2018) [Docket No. 685]; *In re Glob. A&T Elecs. Ltd.*, No. 17-23931 (Bankr. S.D.N.Y. Dec. 22, 2017) [Docket No. 62]; *In re Avaya, Inc.*, No. 17-10089 (SMB) (Bankr. S.D.N.Y. Nov. 28, 2017) [Docket No. 1579]; *In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 26, 2017) [Docket No. 591]; *In re Answers Holdings, Inc.*, No. 17-10496 (SMB) (Bankr. S.D.N.Y. Apr. 10, 2017) [Docket No. 120]; *In re Enron*, 326 B.R. at 500 (upholding exculpation provision that precluded liability for, *inter alia*, "any act taken or omitted to be taken in connection with and subsequent to the commencement of the Chapter 11 Cases"); *In re Adelphia Commc'ns Corp.*, No. 02-41729 (REG) (Bankr. S.D.N.Y. Jan. 5, 2007) [Docket No. 12952] (approving exculpation for, *inter alia*, "all prepetition activities leading up to the promulgation and confirmation of this Plan," as well as for "any act or omission in connection with, or arising out of the Debtors' restructuring, including, without limitation, the negotiation and execution of this Plan, the Reorganization Cases . . . and . . . all documents ancillary thereto"); *In re Ampex Corp.*, No. 08-11094 (AJG) (Bankr. S.D.N.Y. July 31, 2008) [Docket No. 386] (same).

148 *See* Plan Art. IX.E.

149 *Id.; see, e.g.*, *In re Oneida*, 351 B.R. at 94 n.22 (approving exculpation provision except in cases of gross negligence, willful misconduct, fraud, or criminal conduct over an objection that was raised but "not pursue[d] at the confirmation hearing" and noting that the language "generally follows the text that has become standard in this district, is sufficiently narrow to be unexceptionable"); *see also In re Cengage Learning, Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014) [Docket No. 1225] (approving exculpation provision the extended to estate fiduciaries and non-fiduciaries that excluded gross negligence and willful misconduct); *In re DJK Residential, LLC*, No. 08-10375 (JMP) (Bankr. S.D.N.Y. May 7, 2008) [Docket No. 497] (approving an exculpation provision that excluded gross negligence and willful misconduct).

Exculpated Parties are entirely consistent with established practice in this and other jurisdictions.[150]

117. *Third*, the Exculpation serves an important purpose: it protects deserving parties from parties that would (absent the Exculpation) attempt to bring belated claims and causes of action through back-door methods and thereby thwart the finality and closure provided by the Plan in resolving the Chapter 11 Cases.[151]

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[150] *See, e.g.*, *In re Seabras 1 USA, LLC*, No. 19-14006 (SMB) (Bankr. S.D.N.Y. June 30, 2020) [Docket No. 298]; *In re Deluxe Media*, No. 19-23774 (RDD) (Bankr. S.D.N.Y. Oct. 25, 2019) [Docket No. 96]; *In re Hollander Sleep Prods., LLC*, No. 19-11608 (MEW) (Bankr. S.D.N.Y. Sept. 5, 2019) [Docket No. 356]; *In re Nine West Holdings, Inc.*, No. 18-10947 (SCC) (Bankr. S.D.N.Y. Feb. 27, 2019) [Docket No. 1308]; *In re Fullbeauty Brands Holdings Corp.*, No. 19-22185 (RDD) (Bankr. S.D.N.Y. Feb. 5, 2019) [Docket No. 39]; *In re Sungard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD) (Bankr. S.D.N.Y. May 3, 2019) [Docket No. 48]; *In re Cenveo, Inc.*, No. 18-22178 (Bankr. S.D.N.Y Aug. 21, 2018) [Docket No. 685]; *In re Glob. A&T Elecs. Ltd.*, No. 17-23931 (Bankr. S.D.N.Y. Jan. 25, 2018) [Docket No. 89]; *In re Avaya, Inc.*, No. 17-10089 (SMB) (Bankr. S.D.N.Y. Nov. 28, 2017) [Docket No. 1579]; *In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 26, 2017) [Docket No. 591]; *In re Answers Holdings, Inc.*, No. 17-10496 (SMB) (Bankr. S.D.N.Y. Apr. 10, 2017) [Docket No. 120]; *In re Citadel Broad. Corp.*, No. 09-17442 (BRL) (Bankr. S.D.N.Y. May 19, 2010) [Docket No. 369]; *In re Reader's Digest Ass'n*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 19, 2010) [Docket No. 574]; *In re Ion Media Networks, Inc.*, No. 09-13125 (JMP) (Bankr. S.D.N.Y. Dec. 3, 2009) [Docket No. 453]; *In re DBSD N. Am., Inc.*, No. 09-13061 (REG) (Bankr. S.D.N.Y. Nov. 23, 2009) [Docket No. 547]; *In re Charter Commc'ns, Inc.*, No. 09-11435 (JMP) (Bankr. S.D.N.Y. Nov 17, 2009) [Docket No. 921]; *In re Lear Corp.*, No. 09-14326 (ALG) (Bankr. S.D.N.Y. Nov. 5, 2009) [Docket No. 1070]; *In re DJK Residential LLC*, No. 08-10375 (JMP) (Bankr. S.D.N.Y. May 7, 2008) [Docket No. 497]; *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 19, 2007) [Docket No. 7256]; *In re Source Enters., Inc.*, No. 06-11707 (AJG), 2007 WL 2903954, at *13 (Bankr. S.D.N.Y. Oct. 1, 2007) (approved exculpation provision because provision was in the best interests on the debtors' estates and the creditors); *In re Bally Total Fitness*, 2007 WL 2779438, at *8 (finding that the exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *In re Oneida*, 351 B.R. at 94 n.22 (in overruling objection to exculpation clause court noted that exculpation language that "generally follows the text that has become standard in this district, is sufficiently narrow to be unexceptionable").

[151] *See* Confirmation Hr'g Tr. 116:8-117:8, *In re Global A&T Elecs. Ltd.*, No. 17-23931 (RDD) (Bankr. S.D.N.Y. Dec. 21, 2017) [Docket No. 66] ("So, I actually think 1125(e) can well apply to third parties who aren't necessarily fiduciaries as long as they're participating in the exchange. Now here, the people who really participated all sort of are releasing each other, but I guess I appreciate your point that this probably doesn't add anything but I don't think it adds anything in a bad way, either. I think it's consistent with the statute and the case law and, again, it's to prevent strike suits. It's to not give anyone a back door and particularly given the fact that the releases themselves say, "to the extent permitted by applicable law", you know, that's a potential loophole that the exculpation closes . . . It's basically to protect that finding that this was good faith so you can't go back and sue some third party who said, you know, you didn't act in good faith, because it's already been found.").

118. In light of the foregoing, the Debtors submit that the Exculpation is reasonable and appropriate under the circumstances of the Chapter 11 Cases and respectfully request that the Court approve the Exculpation set forth in Article IX.E of the Plan.

(v) *The Injunction Clause Is Necessary and Narrowly Tailored, Complies with Applicable Law, and Should Be Approved*

119. The injunction provision set forth in Article IX.G of the Plan (the "***Injunction Provision***") implements the Plan's discharge, release, and exculpation provisions. The Injunction Provision permanently enjoins all Persons and Entities from commencing or continuing any action or other proceeding against the Debtors, the Reorganized Debtors, the Released Parties, or the Exculpated Parties on account of, in connection with, or with respect to any such Claims, Interests, Causes of Action, or liabilities discharged, released, settled, or exculpated under the Plan. The Injunction Provision is thus a key provision of the Plan, because it is necessary to preserve and enforce the discharge provisions in the Plan, the Debtor Release, the Third-Party Release, and the Exculpation that are central to the Plan, and it is narrowly tailored to achieve that purpose.[152] As such, to the extent the Court finds that the Debtor Release, the Third-Party Release, and the Exculpation provisions are appropriate, the Court should approve the Injunction Provision.[153]

V. Section 1123(d): Curing of Defaults

120. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law."[154] Article V.A of the Plan provides for the assumption of all Executory Contracts and Unexpired Leases—including all modifications,

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[152] *See In re Drexel Burnham Lambert*, 960 F.2d at 293 (holding that a court may approve injunction provision where such provision "plays an important part in the debtor's reorganization plan").

[153] *See* Norden Confirmation Decl. ¶ 62.

[154] 11 U.S.C. § 1123(d).

amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto—without the need for any further notice to or action, order, or approval of the Court, as of the Effective Date, under sections 365 and 1123 of the Bankruptcy Code except any Executory Contract or Unexpired Lease (a) identified on the Schedule of Rejected Executory Contracts and Unexpired Leases (which shall initially be Filed with the Bankruptcy Court) as an Executory Contract or Unexpired Lease to be rejected, (b) that is the subject of a separate motion or notice to reject pending as of the Effective Date, or (c) that previously expired or terminated pursuant to its own terms (disregarding any terms the effect of which is invalidated by the Bankruptcy Code). Article V.B of the Plan further provides for the payment in Cash of any monetary default under an Executory Contract or Unexpired Lease to be assumed on the Effective Date or in the ordinary course of business, or as otherwise agreed by the parties to such Executory Contract or Unexpired Lease, such that the Debtors will satisfy all cure amounts in accordance with section 1123(d) of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1123(d) of the Bankruptcy Code.

VI. Section 1129(a)(2): The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code

121. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]."[155] The legislative history of section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy

[155] *Id.* § 1129(a)(2).

Code.[156] As discussed in greater detail in Part A of this brief, the Debtors have complied with such provisions in all respects.[157]

(a) Section 1125: The Debtors Have Provided Stakeholders with Adequate Information

122. Section 1125(b) of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan "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."[158] It ensures that parties in interest have sufficient information regarding the debtor and the plan to allow them to make an informed decision whether to approve or reject the plan.[159]

123. As discussed in Part A of this brief, the Debtors received conditional approval of the Disclosure Statement and approval of the solicitation procedures detailed therein, and complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code, and no party has asserted otherwise.[160]

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[156] *See* H.R. Rep. No. 95-595, at 412 ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as Section 1125 regarding disclosure."); *see also In re Lapworth*, No. 97-34529 (DWS), 1998 WL 767456, at *3 (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)."); *In re Worldcom, Inc.*, 2003 WL 23861928 at *49 (stating that section 1129(a)(2) of the Bankruptcy Code requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code").

[157] *See* Norden Confirmation Decl. ¶¶ 27-28.

[158] 11 U.S.C. § 1125(b).

[159] *See In re Cajun Elec. Power Co-op., Inc.* 150 F.3d 503,518 (5th Cir. 1998) ("adequate information" includes "information of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan."); *see also In re Applegate Prop., Ltd.*, 133 B.R. 827, 831 (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 . . . .").

[160] *See* Solicitation Procedures Order ¶ 22; Voting Certification.

(b) **Section 1126: The Voting Classes Have Accepted the Plan**

124. Section 1126 of the Bankruptcy Code sets forth the procedures for soliciting votes on a chapter 11 plan and determining acceptance thereof. Pursuant to section 1126, only holders of allowed claims or equity interests in impaired classes of claims or equity interests that will receive or retain property under a given plan on account of such claims or equity interests may vote to accept or reject such plan.[161]

125. As set forth in Part A of this brief, the Debtors solicited acceptances of the Plan only from the Holders of Claims in the Voting Classes.[162] The Debtors did not solicit votes to accept or reject the Plan from the Holders of Claims and Interests in the Non-Voting Classes—all of which are either (a) Unimpaired and, therefore, deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code, or (b) Impaired and, therefore, deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code.

126. Section 1126(c) of the Bankruptcy Code specifies that holders of an impaired class of claims must vote in favor of a plan by "at least two-thirds in amount and more than one-half in number of the allowed claims of such class" to accept the plan.[163] As described above, the Holders of Allowed Claims in the Voting Classes voted in favor of the Plan, giving the Debtors acceptances from the Impaired Classes comprising Claims against all of the Debtors.[164] Specifically, the Debtors have received votes in favor of the Plan from Holders of approximately 96.34% in amount of Class 3 First Lien Claims (and 100.00% of Holders of Class 3 First Lien Claims that submitted Ballots) in addition to 91.12% in amount of Class 4 Unsecured Notes Claims (and 94.44% of

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[161] 11 U.S.C. § 1126(a), (f), (g).

[162] *See generally* Voting Certification.

[163] *See* 11 U.S.C. § 1126(c).

[164] *See generally* Voting Certification.

Holders of Class 4 Unsecured Notes Claims that submitted Ballots). Accordingly, the Debtors submit that the requirements of sections 1125 and 1126 of the Bankruptcy Code have been satisfied, and, thus, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

VII. Section 1129(a)(3): The Debtors Have Proposed the Plan in Good Faith and Not by Any Means Forbidden by Law

127. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law."[165] The Second Circuit has construed this good faith standard as requiring a showing that "the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'"[166] Additionally, courts generally hold that "good faith" should be evaluated in light of the totality of the circumstances surrounding confirmation.[167] The plan must also achieve a result consistent with the Bankruptcy Code.[168] In particular, courts in this District and elsewhere have noted that 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.[169]

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[165] 11 U.S.C. § 1129(a)(3); *see also In re Gaston & Snow*, Nos. 93-8517 (JGK), 1996 WL 694421, at *9 (S.D.N.Y. Dec. 4, 1996).

[166] *See, e.g.*, *In re Johns-Manville*, 843 F.2d at 649 (citations omitted); *see also In re Texaco, Inc*., 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988), *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1998) ("in the context of a Chapter 11 reorganization . . . a plan is considered proposed in good faith if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code" (citations and internal quotation marks omitted)).

[167] *See, e.g.*, *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994) (collecting cases).

[168] *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (citations omitted).

[169] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *B.D. Int'l Discount Corp. v. Chase Manhattan Bank, N.A. (In re B.D. Int'l Discount Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) (stating that "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start" (citations omitted)).

128. Here, the Debtors have proposed the Plan in good faith and not by any means forbidden by law. The Plan, Plan Supplement, and all documents necessary to effect the Plan were developed after months of analysis and negotiations between the Debtors and other key constituents and were proposed with the legitimate and honest purpose of maximizing the value of the Debtors' Estates and effectuating a successful reorganization of the Debtors. By reducing the Debtors' indebtedness by approximately $486.3 million and improving liquidity across their entire enterprise, the Plan preserves the Debtors' value as a going concern, which will, in turn, inure to the benefit of all stakeholders and position the Debtors for long-term success.[170]

129. Moreover, the Plan is the product of extensive arm's-length negotiations among the Debtors and the Consenting Stakeholders, and is supported by all such stakeholders.[171]

130. Acceptance of the Plan by 96.34% in amount of Claims in Class 3 (and 100.00% of Holders of Class 3 Claims that submitted Ballots) in addition to 91.12% in amount of Claims in Class 4 (and 94.44% of Holders of Class 4 Claims that submitted Ballots) not only evidences widespread belief in the Plan's likelihood of success, but also reflects the Plan's inherent fairness and the Debtors' good-faith efforts to achieve the objectives of chapter 11.[172] Further, all Class 5 General Unsecured Claims are Unimpaired under the Plan, and the Debtors have determined in good faith such un-impairment would minimize disruptions to their businesses, as the Holders of such Claims include university partners, vendors, and customers that are necessary to the Debtors' ability to operate on a go-forward basis.[173]

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170 *See* Norden Confirmation Decl. ¶ 30.

171 *See id.*

172 *See* Voting Certification Ex. A.

173 *See* Norden Confirmation Decl. ¶ 13.

131. Finally, the Plan is "not by any means forbidden by law," but rather in full compliance with the Bankruptcy Code and applicable nonbankruptcy law. Accordingly, the Debtors respectfully submit that they have proposed the Plan in good faith in compliance with section 1129(a)(3) of the Bankruptcy Code.

VIII. Section 1129(a)(4): The Plan Provides for the Payment of Certain Administrative Payments

132. 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 bankruptcy court as reasonable.[174] Courts have construed this section to require that all payments of claims to professionals, including the Professional Fee Claims here, paid out of estate assets be subject to review and approval by the court as to their reasonableness.[175]

133. Here, all payments made or to be made by the Debtors for Professional services rendered and expenses incurred during the Chapter 11 Cases (*i.e.*, all Professional Fee Claims) are subject to approval by the Court as reasonable. In addition, Article II.A.2 of the Plan provides that all final requests for payment of Professional Fee Claims shall be filed no later than thirty (30) days after the Effective Date. Only following entry of a Final Order whereby such Claims are Allowed, in accordance with the procedures established by the Bankruptcy Code and prior Court orders, will Professional Fee Claims be paid. Accordingly, the Debtors respectfully submit that the Plan fully complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.[176]

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[174] 11 U.S.C. § 1129(a)(4).

[175] *See, e.g.*, *In re Worldcom, Inc.*, 2003 WL 23861928, at *54; *In re Drexel Burnham Lambert*, 138 B.R. at 760.

[176] *See* Norden Confirmation Decl. ¶¶ 31-32.

IX. Section 1129(a)(5): The Debtors Have Disclosed Necessary Information Regarding Directors and Officers of the Debtors

134. 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.[177] Section 1129(a)(5)(B) of the Bankruptcy Code 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.[178] Additionally, the Bankruptcy Code provides that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[179] Article IV.O of the Plan and the Plan Supplement provide information about the New Board, as well as the mechanism for how such members will be chosen, and the boards of the Reorganized Debtors. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(a)(5) of the Bankruptcy Code, and no party has asserted otherwise.[180]

X. Section 1129(a)(6): Inapplicable

135. Section 1129(a)(6) of the Bankruptcy Code requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."[181] No such regulatory commission has jurisdiction over the Debtors. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(a)(6) of the Bankruptcy Code, and no party has asserted otherwise.

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177 11 U.S.C. § 1129(a)(5)(A)(i).

178 *Id.* § 1129(a)(5)(B).

179 *Id.* § 1129(a)(5)(A)(ii).

180 *See* Norden Confirmation Decl. ¶¶ 33-34.

181 11 U.S.C. § 1129(a)(6).

XI. Section 1129(a)(7): The Plan Satisfies the Best Interests Test

136. Section 1129(a)(7) of the Bankruptcy Code requires that each individual holder of an impaired claim or equity interest has either accepted the plan or will receive or retain property having, as of the effective date of the plan, a present value of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time.[182] This is commonly known as the "best interests" test. The best interests test is satisfied where the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation are less than or equal to the estimated recoveries for a holder of an impaired claim or interest under the debtor's plan or reorganization that rejects the plan.[183]

137. As section 1129(a)(7) makes clear, the best interests test applies only to non-accepting impaired claims or equity interests. As described more fully in the Kocovski Confirmation Declaration, the Debtors completed their liquidation analysis (the "***Liquidation Analysis***") after extensive due diligence, and it includes a detailed description of the assumptions, analysis, and result of a hypothetical chapter 7 liquidation of the Debtors.[184] The Liquidation Analysis, including a complete description of the process and the results of the Liquidation Analysis, is set forth in Exhibit D to the Disclosure Statement.

138. As stated in the Liquidation Analysis, subject to the assumptions and limitations described therein, the proceeds from a hypothetical chapter 7 liquidation of the Debtors and the Non-Debtor Affiliates would yield in the range of approximately $56.25 million to $106.76 million

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[182] *See id.* § 1129(a)(7).

[183] *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *see also In re Adelphia*, 368 B.R. at 252 ("In determining whether the best interests standard is met, the court must measure what is to be received by rejecting creditors in the impaired classes under the plan against what would be received by them in the event of liquidation under chapter 7.").

[184] *See* Kocovski Confirmation Decl. ¶¶ 30-39.

in aggregate net proceeds (after taking into account liquidation expenses). Thus, as set forth in the Liquidation Analysis, after subtracting liquidation expenses, the proceeds from a hypothetical chapter 7 liquidation would provide each Impaired Class with the estimated recoveries set forth in the table below. As shown therein, none of these estimated chapter 7 recoveries is more than the corresponding estimated recovery set forth in the Plan.

Class	Claim	Low Estimated Chapter 7 Recovery	High Estimated Chapter 7 Recovery	Estimated Plan Recovery
3	First Lien Claims	13.5%	25.7%	100%
4	Unsecured Notes Claims	0%	0%	37.7%
5	General Unsecured Claims	0%	0%	100%
6	Intercompany Claims	N/A	N/A	N/A
7	Intercompany Interests.	N/A	N/A	N/A
8	Existing Equity Interests	0%	0%	0%
9	Subordinated Claims	0%	0%	0%

139. As demonstrated by the Liquidation Analysis, if the Chapter 11 Cases were converted to cases under chapter 7 of the Bankruptcy Code, the value that creditors would recover would significantly diminish (except, of course, for those Classes receiving no distribution under the Plan, who would also receive no recovery in that scenario). Additionally, all of the Holders of Claims entitled to vote on the Plan received the Liquidation Analysis, together with the Disclosure Statement, and were provided ample time to consider the contents thereof. Accordingly, the

Debtors submit that the best interests test established under section 1129(a)(7) of the Bankruptcy Code is satisfied.[185]

XII. Section 1129(a)(8): Acceptance of Impaired Voting Classes

140. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept a plan or not be impaired by a plan.[186] A class of claims or interests that is not impaired under a plan is "conclusively presumed" to have accepted the plan and need not be further examined under section 1129(a)(8) of the Bankruptcy Code.[187] A class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half 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.[188] As further discussed below, if any class of claims or interests rejects a plan, such plan must satisfy the "cramdown" requirements of section 1129(b) of the Bankruptcy Code with respect to such claims or interests.

141. The Holders of Claims in the Voting Classes were eligible to vote and overwhelmingly voted in favor of the Plan. In particular, approximately 96.34% in dollar amount of Class 3 Claims (and 100.00% of Holders of Class 3 Claims that submitted Ballots) in addition to 91.12% in dollar amount of Class 4 Claims (and 94.44% of Holders of Class 4 Claims that submitted Ballots) voted in favor of the Plan.[189] However, Class 8 (Existing Equity Interests) and Class 9 (Subordinated Claims) were deemed to reject the Plan, and Class 6 (Intercompany Claims) and Class 7 (Intercompany Interests) were deemed to accept or reject the Plan. The Plan therefore

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185 *See* Kocovski Confirmation Decl. ¶ 39.

186 *See* 11 U.S.C. § 1126(a)(8).

187 *See id.* § 1126(f).

188 *Id.* § 1126(c).

189 *See* Voting Certification Ex. A.

does not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to Classes 8 and 9, and possibly with respect to Classes 6 and 7. Yet, the Plan is nevertheless confirmable because, as discussed below, it satisfies section 1129(b) of the Bankruptcy Code with respect to these rejecting Classes.

XIII. Section 1129(a)(9): The Plan Provides for Payment in Full of Allowed Administrative and Priority Claims

142. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments unless such holders agree to different treatment for such claim.[190] In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code (*i.e.*, administrative claims allowed under section 503(b) of the Bankruptcy Code) must receive on the effective date cash equal to the allowed amount of such claims.[191] Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—generally domestic support obligations, wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan) or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan).[192] Finally, section 1129(a)(9)(C) of the Bankruptcy Code provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code (*i.e.*, priority tax

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[190] 11 U.S.C. § 1129(a)(9).

[191] *Id.* § 1129(a)(9)(A).

[192] *Id.* § 1129(a)(9)(B).

claims) must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.[193]

143. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. *First*, the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because Article II.A provides that each Holder of an Allowed Administrative Claim will receive payment on the Effective Date. *Second*, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no Holders of the types of Claims specified by 1129(a)(9)(B) are Impaired under the Plan. *Finally*, the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because Articles II.C specifically provides that the Holders of Allowed Priority Tax Claims shall be paid in accordance with the terms set forth in section 1129(a)(9)C) of the Bankruptcy Code. Thus, the Debtors respectfully submit that the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code, and no party has asserted otherwise.[194]

XIV. Section 1129(a)(10): At Least One Impaired Class of Claims or Interests Has Accepted the Plan

144. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, excluding acceptance by any insider.[195] Section 1129(a)(10) of the Bankruptcy Code is an alternative requirement to section 1129(a)(8)'s requirement that each class of claims or interests must either accept the plan or be unimpaired under a plan.

145. The Debtors have met this standard because the Voting Classes overwhelmingly voted to accept the Plan, as determined without including any acceptance of the Plan by any insider

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[193] *Id.* § 1129(a)(9)(C).

[194] *See* Norden Confirmation Decl. ¶ 38.

[195] 11 U.S.C. § 1129(a)(10).

holding a Claim in those Classes.[196] In particular, as set forth above, approximately 96.34% in dollar amount of Class 3 Claims (and 100.00% of Holders of Class 3 Claims that submitted Ballots) in addition to 91.12% in dollar amount of Class 4 Claims (and 94.44% of Holders of Class 4 Claims that submitted Ballots) voted in favor of the Plan.[197] Based upon the foregoing, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code, and no party has asserted otherwise.

XV. Section 1129(a)(11): The Plan Is Feasible

146. Section 1129(a)(11) of the Bankruptcy Code requires that the bankruptcy court find that a plan is feasible as a condition precedent to confirmation. Specifically, the court must determine that:

> Confirmation 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.[198]

147. To demonstrate that a plan is feasible, it is not necessary that success be guaranteed; rather, a debtor must demonstrate a reasonable assurance that consummation of the plan will not likely be followed by a further need for financial reorganization.[199] As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

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196 *See* Voting Certification, Ex. A.

197 *See* Voting Certification.

198 11 U.S.C. § 1129(a)(11).

199 *See In re Johns-Manville*, 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *see also In re Briscoe*, 994 F.2d at 1166 ("Only a reasonable assurance of commercial viability is required." (citation omitted)); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995) (finding plan is feasible "so long as there is a reasonable prospect for success and a reasonable assurance that the proponents can comply with the terms of the plan"); *Mut. Life Ins. Co. v. Patrician St. Joseph Partners Ltd. P'ship (In re Patrician St. Joseph Partners Ltd. P'ship)*, 169 B.R. 669, 674 (Bankr. D. Ariz. 1994) ("A plan meets this feasibility standard if the plan offers a reasonable prospect of success and is workable." (citation omitted)).

148. In determining standards of feasibility, courts in this jurisdiction and others have identified the following probative factors:

(a) the adequacy of the capital structure;

(b) the earning power of the business;

(c) the economic conditions;

(d) the ability of management;

(e) the probability of the continuation of the same management; and

(f) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[200]

149. As set forth in Article VI.C.2 of the Disclosure Statement, the Debtors thoroughly analyzed their ability post-confirmation to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring.[201] To conduct this analysis, the Debtors prepared the Financial Projections attached as Exhibit C to the Disclosure Statement, which covers calendar year 2024 through calendar year 2028 (the "***Projection Period***").[202]

150. The Financial Projections demonstrate that, upon emergence, the Debtors will possess sufficient liquidity to meet the necessary distributions required under the Plan and to sustain viable business operations throughout the Projection Period.[203] This is not surprising given that the Plan provides for a significant reduction in debt and interest expense, including through (a) conversion of the First Lien Claims into the Amended and Restated Loans; (b) conversion of

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200 *See, e.g.*, *In re WorldCom*, 2003 WL 23861928, at *58; *In re Texaco*, 84 B.R. at 910; *In re Prudential Energy Co.*, 58 B.R. 857, 862-63 (Bankr. S.D.N.Y. 1986); *see also Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 589 (6th Cir. 1986); *In re Repurchase Corp.*, 332 B.R. 336, 342 (Bankr. N.D. Ill. 2005).

201 *See* Kocovski Confirmation Decl. ¶ 18.

202 *See id.* ¶ 10.

203 *Id.* ¶ 18.

Unsecured Notes Claims into New Common Interests; and (c) conversion of DIP Claims into the Exit Loans.[204]

151. The Reorganized Debtors are anticipated to have sufficient operating cash to pay interest and scheduled amortization on all of their outstanding indebtedness and to fund capital expenditures relating to ongoing business operations as contemplated through the Projection Period.[205] Accordingly, confirmation of the Plan will not likely be followed by liquidation or the need for further financial reorganization of the Debtors and, therefore, the Debtors respectfully submit that the Plan is feasible and satisfies section 1129(a)(11) of the Bankruptcy Code.

XVI. Section 1129(a)(12): The Plan Provides for Full Payment of Statutory Fees

152. 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."[206] Section 507 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 as administrative expenses.[207] In accordance with these provisions, Article II.D and Article XI.C of the Plan provide that all fees payable pursuant to section 1930 of title 28 of the United States Code shall be paid when due. All such fees payable after the Effective Date shall be paid in the ordinary course of business. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

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[204] *See* Plan Arts. II.B and IV.F-H.

[205] *See* Kocovski Confirmation Decl. ¶ 23.

[206] 11 U.S.C. § 1129(a)(12); *see also* 28 U.S.C. § 1930.

[207] 11 U.S.C. § 507(a)(1).

XVII. Sections 1129(a)(13) Through 1129(a)(16): Inapplicable

153. Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code.[208] To the Debtors' knowledge and belief, they do not have any retiree benefit obligations of the sort described in section 1114 of the Bankruptcy Code. However, out of an abundance of caution, Claims for costs and expenses of administration of the Chapter 11 Cases pursuant to section 1114(e)(2) of the Bankruptcy Code are included in the definition of Administrative Expenses, which are required to be paid under Article II.A.1 of the Plan. Accordingly, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code, to the extent applicable, and no party has asserted otherwise.[209]

154. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations. Accordingly, the Debtors respectfully submit that this section of the Bankruptcy Code does not apply.

155. Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). None of the Debtors is an individual. Accordingly, the Debtors respectfully submit that this section of the Bankruptcy Code does not apply.

156. 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 trust be made in accordance with applicable provisions of nonbankruptcy law. The Debtors are

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[208] *Id.* § 1129(a)(13).

[209] *See* Norden Confirmation Decl. ¶ 43.

moneyed, business, or commercial corporations. Accordingly, the Debtors respectfully submit that this section of the Bankruptcy Code does not apply.

XVIII. Section 1129(b): The Plan Satisfies the "Cramdown" Requirements

157. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where the plan is not accepted by all impaired classes of claims and equity interests. This mechanism is known colloquially as "cram down." Section 1129(b) provides in pertinent part:

> if 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.[210]

158. Thus, under section 1129(b) of the Bankruptcy Code, the Court may "cram down" a plan over rejection by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes.[211]

159. Claims and Interests in Class 8 (Existing Equity Interests) and Class 9 (Subordinated Claims) are Impaired under the Plan, and the Holders of such Claims and Interests have been deemed to reject the Plan. Additionally, Claims and Interests in Class 6 and Class 7 may be Impaired, and the Holders of such Claims and Interests may be deemed to reject the Plan. The Debtors, however, respectfully submit that the Plan may nonetheless be confirmed over the rejection by such Classes pursuant to section 1129(b) of the Bankruptcy Code, because the Plan

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[210] 11 U.S.C. § 1129(b)(1).

[211] *See id.*; *see also In re Zenith Elecs. Corp.*, 241 B.R. at 105 (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'").

does not discriminate unfairly and is fair and equitable with respect to all non-accepting Impaired Classes. Moreover, the Voting Classes voted in favor of the Plan, meaning the unfair discrimination and fair and equitable analysis is inapplicable to such Classes (though the Plan nonetheless would satisfy those requirements as to the Voting Classes if they were applicable).

(a) **The Plan Does Not Discriminate Unfairly**

160. Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes. Rather, it prohibits discrimination that is unfair. Under section 1129(b) of the Bankruptcy Code, a plan unfairly discriminates if it treats similarly situated classes differently without a reasonable basis for the disparate treatment.[212] As between two classes of claims or two classes of equity interests, there is no unfair discrimination if: (a) the classes are comprised of dissimilar claims or interests;[213] or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[214] In this regard, the case law recognizes that, by its terms, section 1129(b) of the Bankruptcy Code makes clear that not all "discrimination" is impermissible.[215]

161. Courts in this Circuit consider four factors in determining whether to permit the disparate treatment of claims: (a) whether there is a reasonable basis for such discrimination; (b) whether the debtor can consummate the plan without the discrimination; (c) whether the

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[212] *See In re WorldCom Inc.*, 2003 WL 23861928, at *59 (citing *In re Buttonwood Partners, Ltd.*, 111 B.R 57, 63 (Bankr. S.D.N.Y. 1990); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1986), *aff'd sub nom, Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988)).

[213] *See, e.g.*, *In re Johns-Manville Corp.*, 68 B.R. at 636; *In re Ambanc La Mesa Ltd.*, 115 F.3d 650, 655 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989).

[214] *See, e.g.*, *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 715 (separate classification and treatment was rational where members of each class "possess[ed] different legal rights"); *In re Aztec Co.*, 107 B.R. at 590.

[215] *See* Confirmation Hr'g Tr. 118:4–7, *In re Reader's Digest Ass'n*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] ("Clearly, one of the areas of flexibility that Congress provided in Chapter 11 is the unfair discrimination test of 1129, recognizing implicitly in the plain language that some forms of discrimination are fair.").

discrimination is proposed in good faith; and (d) whether the degree of discrimination is proportional to its rationale.[216] In construing the test, leading courts and commentators have concluded that the "test boils down to whether the proposed discrimination has a reasonable basis and is necessary for reorganization."[217]

162. Here, the Plan's treatment of the Impaired Classes that have been deemed to reject the Plan is proper because (a) all similarly situated Claims and Interests will receive substantially similar treatment, (b) there is a reasonable basis for those Claims and Interests being classified separately from other Claims and Interests that remain Unimpaired, and (c) the Plan's classification scheme rests on a legally acceptable rationale.

163. Claims and Interests in deemed rejecting Classes are not similarly situated to any other Classes, given their distinctly different legal character from all other Claims and Interests. The Plan does not discriminate unfairly against Class 8 (Existing Equity Interests) because there is no other class of Claims or Interests similarly situated to the Claims or Interests in Class 8. The only other Class of Interests is Class 7 (Intercompany Interests), which Interests are entirely different from those in Class 8, and, therefore, appropriately classified separately.

164. Similarly, Claims in Class 6 (Intercompany Claims) are entirely unique from any other Class of Claims and, therefore, appropriately in their own Class. The Debtors separately classified (a) Intercompany Interests from other Interests and (b) Intercompany Claims from other Claims to preserve the option to (x) Reinstate or (y) set off, settle, distribute, contribute, merge, cancel, or release such Interests and Claims, respectively. Such treatment allows the Debtors

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[216] *In re Genco Shipping*, 513 B.R. at 242–43 (collecting cases); *Buttonwood*, 111 B.R. at 63.

[217] *In re Breitburn Energy Partners LP*, 582 B.R. 321, 351 (Bankr. S.D.N.Y. 2018) (citing 7 COLLIER ON BANKRUPTCY ¶ 1129.03[3][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.); Confirmation Hr'g Tr. at 112:21-23, *In re Reader's Digest Ass'n*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No 758] (interpreting the Buttonwood test as providing a "reminder[] to the fact finder to focus his or her inquiry on the reasonable basis for discriminating").

greater flexibility to determine whether it is more efficient to maintain their organizational structure and certain entity relationships when they are implementing the Restructuring Transactions rather than prior thereto. Significantly, the optionality does not affect any stakeholders' recovery under the Plan and is intended for only administrative convenience in the restructuring process.

165. Finally, Class 9 (Subordinated Claims) consists solely of Claims that may be subordinated pursuant to section 510(b) of the Bankruptcy Code. The Plan's treatment of Class 9 Claims is proper because no similarly situated Class will receive more favorable treatment.

166. A higher recovery for the Holders of Claims in Class 5 (General Unsecured Claims) as compared to the Unsecured Notes Claims is necessary in order for the Debtors to successfully reorganize. The majority of the Holders of General Unsecured Claims are university partners, vendors, and customers that will have an ongoing relationship with the Reorganized Debtors. By leaving General Unsecured Claims Unimpaired, the Debtors are able to ensure payment for creditors that are crucial to the Reorganized Debtors' long-term success. Moreover, the payment in full of the General Unsecured Claims is the result of an agreement by the Debtors and the Consenting Stakeholders to facilitate a prompt exit from chapter 11 and ensure a bright future for the Reorganized Debtors.[218]

167. Accordingly, because the Plan does not discriminate unfairly with respect to Classes that have been or may be deemed to reject the Plan, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code.

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[218] *See In re Ditech Holding Corp.*, No. 19-10412 (JLG) (Bankr. S.D.N.Y. Sept. 26, 2019) [Docket No. 1404]. This Court confirmed a plan that contained a global settlement, implemented in order to avoid protracted litigation, whereby undersecured first lien term loan claimants agreed to a carve-out to fund certain differential distributions to holders of second lien notes claims, general unsecured creditors, and consumer creditor claims.

(b) **The Plan Is Fair and Equitable**

168. Sections 1129(b)(2)(B)(ii) and (b)(2)(C)(ii) of the Bankruptcy Code provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if, under the plan, no holder of any junior claim or interest will receive or retain property under the plan on account of such junior claim or interest.[219] Generally, this requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[220] Additionally, in order for a plan to be "fair and equitable," no creditor may be paid more than what it is owed (*i.e.*, no class of creditors may receive more than 100% of its claims).[221]

169. With respect to the Classes that are deemed to reject the Plan (*i.e.*, Classes 8 and 9, and potentially Classes 6 and 7), no Claim or Interest junior to such Classes will receive a recovery under the Plan on account of such Claim or Interest. Accordingly, the Plan is "fair and equitable" and, therefore, consistent with the requirements of section 1129(b) of the Bankruptcy Code.

XIX. Section 1129(c): The Plan Is the Only Plan Currently on File

170. The Plan is the only plan currently on file in the Chapter 11 Cases and, accordingly, section 1129(c) of the Bankruptcy Code does not apply.

XX. Section 1129(d): The Purpose of the Plan Is Not the Avoidance of Taxes or the Avoidance of Securities Laws

171. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of Section 5 of the Securities Act, and no party has objected on any such grounds. Article II.C of the

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219 *See* 11 U.S.C. § 1129(b)(2)(B)(ii), (C)(ii).

220 *See 203 N. LaSalle P'ship*, 526 U.S. at 459.

221 *See* 7 Collier on Bankruptcy ¶1129.03[4][a]; *see also In re Granite Broad. Corp.*, 369 B.R. at 140 ("There is no dispute that a class of creditors cannot receive more than full consideration for its claims, and that excess value must be allocated to junior classes of debt or equity, as the case may be."); *In re Exide Techs.*, 303 B.R. 48, 61 (Bankr. D. Del. 2003) ("a corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims" (citation omitted)).

Plan contemplates the payment of all Allowed Priority Tax Claims. Moreover, no Governmental Unit or any other party has requested that the Court decline to confirm the Plan on such grounds. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code, and no party has asserted otherwise.[222]

XXI. Section 1129(e): Inapplicable

172. The provisions of section 1129(e) of the Bankruptcy Code apply only to "small business cases" as defined therein. The Chapter 11 Cases are not "small business cases." Accordingly, the Debtors respectfully submit that section 1129(e) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases, and no party has asserted otherwise.

XXII. Good Cause Exists to Waive the Stay of the Combined Order

173. 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."[223] 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 contract or unexpired lease under section 365(f) of the Bankruptcy Code.[224] Each rule also permits modification of the imposed stay upon court order.[225]

174. The Debtors submit that good cause exists for waiving and eliminating any stay of the proposed Combined Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the proposed Combined Order will be effective immediately upon its entry.[226] The restructuring

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222 *See* Norden Confirmation Decl. ¶¶ 51-52.

223 Fed. R. Bankr. P. 3020(e).

224 *Id.* 6004(h), 6006(d).

225 *Id*.

226 *See, e.g.*, *In re Windstream Holdings, Inc.*, No. 19-22312 (RDD) (Bankr. S.D.N.Y. June 26, 2020) [Docket No. 2243] (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re Barneys N.Y. Inc.*, No. 19-36300 (CGM) (Bankr. S.D.N.Y. Feb. 5, 2020) [Docket No.

transactions contemplated by the Plan were vigorously negotiated among sophisticated parties, and the Plan has been accepted by the Voting Classes. Further, each day the Debtors remain in chapter 11, they incur significant administrative and professional costs—expenses that are unnecessary in light of the overwhelming support for the Plan. Importantly, not a single creditor voted to reject the Plan. Accordingly, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the proposed Combined Order may be effective immediately upon its entry.

XXIII. The Modifications to the Plan Do Not Require Resolicitation and Should Be Approved

175. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code.[227] Further, section 1127(a) provides that when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan.[228] Bankruptcy 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.[229] Courts interpreting Bankruptcy Rule 3019 have consistently held that a proposed modification to a

789] (same); *In re Deluxe Ent. Servs. Grp. Inc.*, No. 19-23774 (RDD) (Bankr. S.D.N.Y. Oct. 25, 2019) [Docket No. 96] (same); *In re Hollander Sleep Prods., LLC*, No. 19-11608 (MEW) (Bankr. S.D.N.Y. Sept. 5, 2019) [Docket No. 356] (same); *In re Aegean Marine Petroleum Network, Inc.*, No. 18-13374 (MEW) (Bankr. S.D.N.Y. Mar. 29, 2019) [Docket No. 503] (same); *In re Nine West Holdings, Inc.*, No. 18-10947 (SCC) (Bankr. S.D.N.Y. Feb. 27, 2019) [Docket No. 1308] (same).

227 11 U.S.C. § 1127(a).

228 *Id*.

229 Fed. R. Bankr. P. 3019.

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.[230]

176. The Debtors filed the First Amended Plan on August 2, 2024, to account for comments from the Court and to narrow the scope of the Third-Party Release. In addition, the Debtors filed the Second Amended Plan on August 23, 2024, to incorporate comments that the Debtors received from various governmental agencies, including the United States Trustee and the Securities and Exchange Commission. Both the First Amended Plan and the Second Amended Plan were filed before the Objection Deadline and the modifications therein were not material changes and had no impact whatsoever on stakeholder recoveries under the Plan. Rather, they are either modifications to resolve comments to the Plan or technical modifications to the Plan, each of which either improves or does not reflect material differences to the recoveries of each affected Class—*i.e.*, no Holder of a Claim in the Voting Classes is "likely" to reconsider its acceptance.

177. As indicated above, all modifications to the Solicitation Plan were non-material. Indeed, all of the Holders of Claims in the Voting Classes are receiving the same recovery under the Solicitation Plan and the Second Amended Plan. Moreover, the Consenting Stakeholders had the opportunity to review and comment on each iteration of the Plan before it was filed. Therefore, the modifications are immaterial and have been consented to after negotiations among sophisticated consenting parties, and the modifications comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019.[231] Accordingly, the Debtors submit that no

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[230] *See In re AMR Corp.*, 502 B.R. 23, 46 (Bankr. S.D.N.Y. 2013) (finding that resolicitation was not required where "the settlement does not materially and adversely affect" the holders of interests and claims); *In re Cellular Info. Sys., Inc.*, 171 B.R. at 929 n.6 ("nonmaterial modifications . . . do not require resolicitation of the respective impaired classes of creditors and equity security holders").

[231] *See In re AMR Corp.*, 502 B.R. at 46 (finding that resolicitation was not required where "the settlement does not materially and adversely affect" the holders of interests and claims); *In re Best Prods. Co.*, 177 B.R. 791, 802 (S.D.N.Y. 1995) ("The court cannot adopt any modification that materially alters the plan and adversely affects a claimant's treatment."); *see also In re Sentinel Mgmt. Grp., Inc.*, 398 B.R. 281, 301 (Bankr. N.D. Ill. 2008)

additional solicitation or disclosure is required on account of the modifications, and that such modifications should be deemed accepted by all creditors that previously accepted the Solicitation Plan.

CONCLUSION

178. For all of the reasons set forth herein and in the Confirmation Declarations, the Debtors respectfully submit that the Disclosure Statement and the Plan comply with all of the applicable requirements of the Bankruptcy Code and, therefore, request that this Court approve the Disclosure Statement and confirm the Plan by entering the proposed Combined Order, and granting such other and further relief as the Court may deem just and proper.

[*Remainder of page intentionally left blank.*]

("The Bankruptcy Code is designed to encourage consensual resolution of claims and disputes through the plan negotiation process, which includes pre-confirmation modifications. The rules applicable to such modifications should be read and interpreted consistent to that end." (citations omitted)).

LATHAM & WATKINS LLP

Dated: September 4, 2024
New York, New York

By: */s/ George A. Davis*

George A. Davis
George Klidonas
Anupama Yerramalli
Randall C. Weber-Levine
Scott Yousey
1271 Avenue of the Americas
New York, NY 10020
Telephone: (212) 906-1200
Facsimile: (212) 751-4864
Emails: george.davis@lw.com
george.klidonas@lw.com
anu.yerramalli@lw.com
randall.weber-levine@lw.com
scott.yousey@lw.com

Proposed Counsel to the Debtors and Debtors in Possession

Exhibit A

Objections[1]

The chart contained in this Exhibit summarizes the formal objections to approval of the Disclosure Statement and confirmation of the Plan that were filed, the informal objections the Debtors received with respect to confirmation, and the Debtors' responses to such objections. All but one of the Objections are resolved.

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
1.	The United States Trustee for the Southern District of New York (the "***United States Trustee***") [Docket No. 99]	The United States Trustee objects to the approval of the Disclosure Statement, alleging that the Disclosure Statement did not properly explain or justify the Third-Party Release. United States Trustee Objection at 15.	There is no requirement that the Disclosure Statement explain or justify the Third-Party Release in the Plan, and the United States Trustee cites no support for this proposition. The Disclosure Statement need only provide information of a kind to enable a hypothetical investor to make an informed judgment of the Plan.[2] Further, Bankruptcy Rule 3016(c) only requires that a disclosure statement describe in "specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction." Bankr. R. 3016(c). The Disclosure Statement does that by replicating the exact Third-Party Release language from the Plan in **BOLD AND CAPITALIZED FONT**, as has been consistently approved in other recent prepackaged chapter 11 cases in

[1] Capitalized terms used and not otherwise defined herein shall have the meaning ascribed to such terms in the relevant Objection or the Memorandum, as applicable. For the avoidance of doubt, the Debtors reserve the right to respond to any and all Objections, whether or not argued in the Memorandum or listed in this summary chart.

[2] *See* 11 U.S.C. § 1125(a)(1).

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
			this district.[3] In addition, the Debtors alert creditors about the existence of the Third-Party Release in **BOLD AND CAPITALIZED FONT** on page ix of the Disclosure Statement.[4] Furthermore, the same exact Third-Party Release language was also pasted in **BOLD AND CAPITALIZED FONT** in the Ballots and in each of the notices that were distributed to Holders of Claims and Interests that may be effected by the Third-Party Release, including the Combined Notice and the Supplemental Notices.[5] Further, this Court has already acknowledged that the United States Trustee's argument that an explanation of the Third-Party Release should have been provided in "plain English that would allow a creditor to easily understand the Plan's provisions and how to exercise their rights" goes beyond what the Bankruptcy Code requires.[6]

[3] *See*, *e.g.*, *In re Credivalores – Crediservicios S.A.*, Case No. 24-10837 (DSJ) (Bankr. S.D.N.Y. July 3, 2024) [Docket No. 139] (approving disclosure statement in which the full text of the plan releases were pasted into the disclosure statement); *In re Pacificco Inc.*, Case No. 23-10470 (PB) (Bankr. S.D.N.Y. Apr. 28, 2023) [Docket No. 157] (same); *In re Lumileds Holding B.V.*, Case No. 22-11155 (LGB) (Bankr. S.D.N.Y. Oct. 14, 2022) [Docket No. 204] (same); *In re Vewd Software USA, LLC*, Case No. 21-12065 (MEW) (Feb. 1, 2022) [Docket No. 130] (same); *In re GTT Comm'ns, Inc.*, Case No. 21-11880 (MEW) (Bankr. S.D.N.Y. Dec. 28, 2022) [Docket No. 821] (same).

[4] *See* Disclosure Statement at ix.

[5] *See* Solicitation Procedures Order, Ex. 1 at 10-16; Solicitation Procedures Order, Ex. 2 at 12-17; Solicitation Procedures Order, Ex. 3 at 14-19; Solicitation Procedures Order, Ex. 6 at 5-15; Solicitation Procedures Order, Ex. 8 at 5-10.

[6] Hr'g Tr. 169:9-171:-5 *In re Voyager Digit. Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. Mar. 6, 2023) ("You know, there's a constant push and pull in bankruptcy between, on the one hand people will say it's not simple enough and in plain English I can't understand it, and then on the other hand if you try to do something in simple and plain English you get complaints that you haven't been clear enough as to the full details. We can't do it both ways. And so we try to make sure that the full information is there so that people can see it. If anybody thought that they were doing anything other than granting a release, I'm not sure how they could have been confused unless they simply didn't read because it says, you're granting a release. It says you don't have to. You're doing it voluntarily,

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
			Moreover, the Memorandum and the Norden Confirmation Declaration do explain and justify the Releases.[7]
		The United States Trustee objects to the approval of the Disclosure Statement, arguing that the Disclosure Statement fails to establish that the Third-Party Release is consensual. United States Trustee Objection at 15.	This is fundamentally an objection to confirmation of the Plan, rather than the adequacy of the Disclosure Statement, and should therefore be overruled. Even assuming *arguendo* that this is a proper objection to the Disclosure Statement (which, to be clear, it is not), there is no requirement that the Disclosure Statement establish that a release in the Plan is consensual. The Disclosure Statement need only provide information of a kind to enable a hypothetical investor to make an informed judgment of the Plan.[8] The Disclosure Statement does that by replicating the exact Third-Party Release language from the Plan.[9]
		The United States Trustee objects to the approval of the Disclosure Statement, arguing that the Disclosure Statement fails to explain what consideration the Released Parties have given in exchange for the	This is fundamentally an objection to confirmation of the Plan, rather than the adequacy of the Disclosure Statement, and should therefore be overruled. Even assuming *arguendo* that this is a proper objection to the Disclosure Statement (which, to be clear, it is not),

but you're granting a release. So I'm not going to back and say that this whole process has to stop and is no good because of the way the releases were presented. I think they were presented fairly.").

[7] *See* Memorandum ¶¶ 96-110; Norden Confirmation Declaration ¶¶ 56-59.

[8] *See* 11 U.S.C. § 1125(a)(1).

[9] *See* Disclosure Statement Art. V.B.

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
		Debtor Release. United States Trustee Objection at 16.	there is no requirement that the Disclosure Statement explain what consideration the Released Parties have given in exchange for the Debtor Release. The Disclosure Statement need only provide information of a kind to enable a hypothetical investor to make an informed judgment of the Plan.[10] The Disclosure Statement does that by replicating the exact release language from the Plan. Additionally, to adequately inform creditors of the steps taken to determine the propriety of such releases, the Disclosure Statement describes that Ms. Ivona Smith, in her capacity as independent director of the Board and member of the Transaction Committee, with the assistance of her independent legal counsel, commenced an Independent Investigation into claims and causes of action of the estates against various Released Parties, and explains that the Independent Investigation was ongoing as of the date of the Disclosure Statement.[11] Moreover, the Memorandum, the Smith Declaration, and the Norden Confirmation Declaration do explain the consideration the released parties have given in exchange for the debtor release, including, among other things, (a) providing reciprocal releases for the Debtors, (b) negotiating and participating in the restructuring, (c) providing needed consents through the Chapter 11 Cases, (d) cooperating with the Independent

[10] *See* 11 U.S.C. § 1125(a)(1).

[11] *See* Disclosure Statement at 50-51.

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
			Investigation, (e) with respect to the Holders of First Lien Claims, agreeing to certain covenant modifications and to the extension of the maturity of their Claims for twenty-seven months after the Effective Date, (f) with respect to the Holders of Unsecured Notes, agreeing to the impairment of their Claims, and (g) with respect to certain of the Consenting Stakeholders, agreeing to the cancellation of Existing Equity Interests.[12]
		The United States Trustee objects to the approval of the Disclosure Statement, arguing that the Disclosure Statement provides a "perfunctory and unhelpful" warning that the Court may not approve the release, injunction, or exculpation provisions. United States Trustee Objection at 16-17.	The United States Trustee concedes that the Debtors have provided the relevant information and a warning that parties may object to, and the Court may not approve, the release, injunction, or exculpation provisions, which could impact whether the Released Parties support the Plan.[13] This information is tailored to enable a hypothetical investor to make an informed judgment on the plan.[14] It not only advises the hypothetical investors about their ability to object to the release, injunction, or exculpation provisions, but also the possibility that the Court may not approve such provisions, which could impact support for the Plan.
		The United States Trustee objects to the approval of the Disclosure Statement, arguing that the Disclosure Statement doesn't reflect purported modifications	As a preliminary matter, the United States Trustee's characterization of the Third-Party Release is factually incorrect and misleading. *First*, the Plan has always provided that creditors who vote in favor of the Plan are

[12] *See* Memorandum ¶¶ 93; Smith Declaration ¶¶ 14-17; Norden Confirmation Declaration ¶¶ 54-55.
[13] *See* Disclosure Statement at 115-116.
[14] *See* 11 U.S.C. § 1125(a)(1).

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
		made to the Third-Party Release mechanism in the Plan such that (a) "creditors authorized to vote who vote against the Plan or abstain from casting a vote on the Plan must opt into granting these Third-Party Releases," (b) "a vote in favor of the Plan can deem a creditor who has not opted-in bound by the Releases," and (c) "creditors deemed to reject the Plan may opt-in to the Third-Party Releases rather than required to opt out." United States Trustee Objection at 17-18.	agreeing to grant the Third-Party Release, which was clearly disclosed in **BOLD AND CAPITALIZED FONT** in the Disclosure Statement.[15] *Second*, the United States Trustee also incorrectly asserts that creditors who vote to reject the Plan or abstain from voting "must" opt into the Third-Party Release. The Plan, as modified, provides the exact opposite: such creditors cannot grant the Third-Party Release at all.[16] Moreover, the Debtors clearly disclosed this modification in the Supplemental Notices.[17] The Debtors also clearly disclosed in the Notice of Non-Voting Status that creditors in the Deemed-to-Reject Classes will only be deemed to be bound by the Third-Party Release if they affirmatively opt into such Release.[18]
		The United States Trustee objects to the approval of the Disclosure Statement, arguing that, while the Debtors sent the Supplemental Notices regarding the change to the opt-in structure, such notices did not	These assertions are fundamentally incorrect. As a preliminary matter, no creditors had voted on the Plan and made an election to opt out of the Release as of the date the Supplemental Notices were distributed and so none of the proposed explanations needed to be made as

[15] *See* Disclosure Statement at ix.

[16] *See* definition of "Releasing Parties" in Plan.

[17] *See, e.g.*, Solicitation Procedures Order, Ex. 8 at 2.

[18] *See, e.g.*, Solicitation Procedures Order, Ex. 6 at 5.

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
		properly explain (a) the effect of the change on already-casted votes and release elections, (b) the effect of the change on creditors' rights in connection with the Plan, or (c) the proper mechanism to change or amend already-cast elections. United States Trustee Objection at 17-18.	of the date the Debtors distributed the Supplemental Notices.[19] More importantly, the fact that a vote in favor of the Plan is consent to the Third-Party Release has always been in the Plan and was clearly disclosed in the Disclosure Statement.[20] And, as explained in paragraphs 8 through 12 and 106 through 107 of the Memorandum, the Supplemental Notices and the Notice of Non-Voting Status, as applicable, made clear that a vote in favor of the Plan is consent to the Third-Party Release, creditors who vote to reject, or abstain from voting on, the Plan cannot consent to the Third-Party Release, and the default mechanism for parties in the Deemed-to-Reject Classes is that they do not grant the Third-Party Release unless they affirmatively opt into such Release.[21]
		The United States Trustee objects to the approval of the Disclosure Statement, arguing that the Debtors should have amended or supplemented the Disclosure Statement to clearly explain the Plan changes in plain English to those entitled to vote on the Plan. United States Trustee Objection at 17-18.	As the United States Trustee acknowledged earlier in its objection, the Debtors did supplement the information about the Third-Party Release by distributing the Supplemental Notices (which clearly explained the changes) to all creditors who were solicited prepetition.[22] The Debtors prepared the Supplemental Notices at the request of this Court, and such notices were approved in the Solicitation Procedures Order.[23]

[19] *See* Voting Certification ¶14.
[20] *See* Disclosure Statement at ix.
[21] *See* Solicitation Procedures Order, Ex. 6 at 5-6; Solicitation Procedures Order, Ex. 8 at 2.
[22] *See* Certificate of Postpetition Service.
[23] *See* Solicitation Procedures Order ¶ 2.

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
		The United States Trustee objects to approval of the Disclosure Statement, alleging the Disclosure Statement did not provide a list of pending litigation against the Debtors or initiated by the Debtors and the scope and size of such litigation claims so that they can reasonably assess the risks of the Debtors' potential litigation liability. United States Trustee Objection at 18-19.	It is unsurprising that the United States Trustee cites no support for this proposition as there is no requirement that the Disclosure Statement provide a list of pending litigation or provide a sense of scope and size of the litigation. The Disclosure Statement need only provide information of a kind to enable a hypothetical investor to make an informed judgment of the Plan.[24] Further, the Bankruptcy Code contemplates that such hypothetical investor, among other things, is able to obtain relevant information on the debtor in addition to what the disclosure statement provides.[25] The Disclosure Statement satisfies these requirements by warning of the risks of continuing litigations, all of which are described in the Debtors' public filings with the Securities and Exchange Commission (the "***SEC***"), which are also made available on the Debtors' website, and, accordingly, are easily obtainable by a hypothetical investor.[26] The United States Trustee's assertion that, without more information about the "scope and size" of litigation claims, creditors "cannot reasonably assess the risks of the Debtors' potential litigation liability," overstates what constitutes adequate information. As multiple courts have held, the provision of adequate information does not require the disclosure statement "to speculate as to future uncertainties, such as the consequences of possible

[24] *See* 11 U.S.C. § 1125(a)(1).
[25] *See* 11 U.S.C. § 1125(a)(2)(C).
[26] 2U, Inc., Reports and Filings, https://investor.2u.com/reports-and-filings (last visited Sep. 3, 2024).

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
			outcomes of pending litigation."[27] Moreover, as the United States Trustee acknowledges, the Debtors did disclose the existence of pending litigation involving the Debtors in the Initial Plan Supplement, which was filed prior to both the Voting Deadline and Objection Deadline.[28] Accordingly, creditors in the Voting Classes were alerted to the existence of pending litigation prior to having to cast their votes. Moreover, during the negotiations of the Restructuring Support Agreement, the RSA Parties (holding over 82% of First Lien Claims and 89% of Unsecured Notes Claims) – the only Classes of creditors entitled to vote on Plan – received diligence with respect to all of the Debtors' litigation and investigations.
		The United States Trustee objects to approval of the Disclosure Statement, alleging that no interested parties other than the Debtors were given the chance to weigh in on the adequacy of the Disclosure Statement or propose amendments to the Disclosure Statement before the solicitation materials were sent out. United States Trustee Objection at 19.	These assertions are fundamentally incorrect. The Disclosure Statement was reviewed and commented upon by counsel to the RSA Parties (holding over 82% of First Lien Claims and 89% of Unsecured Notes Claims) in advance of solicitation. Moreover, any party in interest could have provided comments to the Disclosure Statement throughout these Chapter 11 Cases. No parties did so. Not even the United States Trustee, which makes its objection all the more

[27] *In re PC Liquidation Corp*, 383 B.R. 856, 866 (Bankr. E.D.N.Y. 2008) (quoting *In re Stanley Hotel, Inc.,* 13 B.R. 926, 935 (Bankr.D.Colo.1981)); *see also In re CDECO Maritime Const. Inc.,* 101 B.R. 499, 501 (Bankr.N.D.Ohio 1989) (holding that a disclosure statement is not the place to argue various theories of recovery of pending litigation or to speculate as to future uncertainties such as consequences of various possible outcomes of pending litigation).

[28] *See* Initial Plan Supplement, Ex. B.

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
			perplexing: if the United States Trustee were trying to constructively aid the provision of information to creditors, why is it raising these points for the first time in an objection on the eve of a holiday weekend, giving the Debtors just one business day to respond, especially when no creditor or interest holder has objected to the adequacy of information in the Disclosure Statement?
		The United States Trustee argues that the Debtors should re-solicit the Disclosure Statement and Plan to give creditors an opportunity to truly understand the Plan and exercise their rights. United States Trustee Objection at 19.	Re-solicitation of the Disclosure Statement and Plan at the sole request of the United States Trustee, who has no economic stake in the Debtors' restructuring, would jeopardize the entirety of the reorganization for no benefit whatsoever, as the Plan is already overwhelmingly supported by the Voting Creditors and otherwise uncontested. Re-solicitation at this stage and extending the Debtors' stay in chapter 11 would also send a message of instability to the Debtors' employees, customers, vendors, partners, and learners, whose continued support is essential to the Debtors' restructuring efforts, which could have adverse effects on the Debtors prospects going forward. Additionally, the milestones set forth in the Restructuring Support Agreement and the DIP Facility provided by certain Unsecured Noteholders were carefully negotiated amongst the RSA Parties. It is unclear that the RSA Parties would provide additional financing or support any form of restructuring at all if the Debtors were forced to re-solicit and linger in chapter 11 beyond the relevant milestones set forth in the Restructuring Support Agreement and the DIP Facility. Without that financing

Filed Disclosure Statement Objections			
	Party	**Objection**	**Response/Status**
			or the support of the RSA Parties, the Debtors risk a prolonged stay in chapter 11 and, potentially, conversion to chapter 7 liquidation, which would result in zero recovery for nearly all creditors.[29] Even assuming the RSA Parties would continue to support the restructuring and the Restructuring Support Agreement remains in place, re-solicitation would not serve any purpose because the RSA Parties would be bound by the Restructuring Support Agreement to vote in favor of the Plan; accordingly, re-solicitation would only delay these cases further and be value destructive. Moreover, as set forth above, the United States Trustee has not shown that re-solicitation of the Plan and Disclosure Statement is necessary. As stated above, the Disclosure Statement need only provide information of a kind to enable a hypothetical investor to make an informed judgment of the Plan.[30] As set forth above and in the Memorandum, the Debtors submit that the Disclosure Statement contains adequate information with the meaning of section 1125(a) of the Bankruptcy Code.

[29] *See* Disclosure Statement, Ex. D.

[30] *See* 11 U.S.C. § 1125(a)(1).

Filed Plan Confirmation Objections			
	Party	**Objection**	**Response/Status**
1.	Oracle America, Inc. ("***Oracle***") [Docket No. 94]	Oracle objects to the proposed assumption of executory contracts between the Debtors and Oracle, arguing that the Debtors have not cured all outstanding amounts owed under the contracts and have not provided adequate assurance of prompt payment of the cure or future performance under such contracts.	***Resolved*:** The Debtors paid the amounts owed per the invoices attached as **Exhibit A** to Oracle's Objection on August 8, 2024, and August 29, 2024, which was confirmed by Oracle's counsel on September 3, 2024.
2.	Fordham University ("***Fordham***") [Docket No. 95]	Fordham objects to the Debtors' proposed assumption of a Master Services Agreement (the "***MSA***") and associated Program Design and Specification Form for Fordham's Graduate School of Social Service (together with the MSA, the "***Agreement***") dated June 24, 2017, alleging that the Debtors cannot cure alleged material, non-monetary breaches of the Agreement and provide adequate assurance of future performance.	***Resolved*:** This Objection has been resolved with the language in the Combined Order at paragraph 45.
3.	BREP 707 17th Street LLC ("***Denver Landlord***") [Docket No. 96]	Denver Landlord objects to confirmation of the Plan on a limited basis arguing that: 1. The Debtors cannot assume the Denver Lease (as defined in Denver Landlord's Objection) without curing all defaults, which Denver Landlord asserts include	Parts of this Objection are moot or have otherwise been ***resolved*** for the following reasons: 1. On September 4, 2024, the Debtors filed an amended Scheduled of Rejected Executory Contracts and Unexpired Leases [Docket No. 121], which includes the Denver Lease on the list

Filed Plan Confirmation Objections			
	Party	**Objection**	**Response/Status**
		(a) removal of liens on the Debtors' leasehold interest as part of the debtor-in-possession financing; and (b) payment of (i) $205.67 related to August 2024 rent and charges; (ii) September 2024 rent; and (c) attorneys' fees relating to events of default or enforcing the landlord's rights under the Denver Lease;	of unexpired leases being rejected pursuant to the Plan. Given that the Debtors no longer intend to assume (and instead will be rejecting) the Denver Lease, this argument is moot.
		2. Certain provisions of the Plan improperly attempt to reserve the Debtors' right to reject leases post-Confirmation Date in violation of section 365(d)(4)(A) of the Bankruptcy Code;	2. ***Resolved*:** This Objection has been resolved with the language in the Combined Order at paragraph 44 and is also moot as the Denver Lease is being rejected.
		3. To the extent the Exit Facility Documents purport to impose any lien on Debtors' leasehold interests, contrary to the terms of the Denver Lease, such terms of the Exit Facility Documents are contrary to assumption of the Denver Lease because a debtor must assume a contract *cum onere*, without any diminution in its obligations or impairment of the rights of the lessor in the present or the future;	3. Given that the Debtors no longer intend to assume (and instead will be rejecting) the Denver Lease, this argument is moot.

Filed Plan Confirmation Objections			
	Party	**Objection**	**Response/Status**
		4. The discharge and injunction provisions of the Plan are overbroad and improperly seek to bar all post-confirmation exercises of setoff and recoupment.	4. ***Resolved*:** This Objection has been resolved with the language in the Combined Order at paragraph 44.
4.	Olive/Hill Street Partners LLC ("***Los Angeles Landlord***") [Docket No. 97].	Los Angeles Landlord filed a joinder to Denver Landlord's limited objection with respect to the objections asserted to the improper restrictions on the exercise of setoff and recoupment contained in Article IX.G of the Plan.	***Resolved*:** This Objection has been resolved with the language in the Combined Order at paragraph 44.
5.	United States Trustee [Docket No. 99]	The United States Trustee objects to confirmation of the Plan on the basis that the Plan's treatment of votes in favor of the Plan as grants of the Third-Party Release allegedly makes such Release non-consensual in violation of established law. United States Trustee Objection at 19-20. The United States Trustee bases this objection in the view that, even when a creditor votes in favor of a plan, the creditor is still silent on a third-party release therein (like a creditor who fails to opt out of a third-party release with an opt-out mechanism) because the vote "is not a	As set forth in paragraphs 100 through 105 of the Memorandum, the United States Trustee's position is contrary to the case law in the Southern District of New York. It is therefore unsurprising that the only case the United States Trustee cites to in support of its position is a case from outside this District: the Western District of New York. Further, as discussed in paragraph 103 of the Memorandum, that case is entirely distinguishable and inapplicable to these Chapter 11 Cases, and even if it were applicable, the Plan's treatment of votes in favor of the Plan as consent to the Third-Party Release satisfies the requirements stated in that case. Moreover, the United States Trustee's attempt to analogize a creditor who votes in favor of the Plan to a

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	Party	**Objection**	**Response/Status**
		writing expressly agreeing to such a release." United States Trustee Objection at 21. The United Trustee adds "a plan is presented as a package deal—a person votes yes or no on the entire plan, not particular aspects of it—and a person should not be compelled to accept a non-debtor release as a condition of receiving the benefits of a plan. That is not true consent." United States Trustee Objection at 22-23.	creditor who fails to opt out of a release falls flat. A vote in favor of the Plan is the exact opposite of silence. It is explicit and affirmative acquiescence to the Plan and the Third-Party Release. Finally, the United States Trustee's objection contradicts itself: on the one hand, it asserts that creditors who vote in favor of the Plan should be able to reject a provision in the Plan that treats a vote in favor of the Plan as consent to the Third-Party Release; on the other hand, it asserts that "a person votes yes or no on the ***entire*** plan, not particular aspects of it."[31] The latter assertion is correct: a vote to accept the Plan should accept the entirety of the Plan (including the Release construct). And that is exactly how the Plan is designed. The Plan does not compel a creditor to accept the Plan and if a creditor chose not to accept the Plan, it had the ability to reject the Plan (or not opt-in to the Third-Party Release in the case of creditors not entitled to vote) and thereby not grant the Third-Party Release. As such, the Plan's Third-Party Release is entirely consensual and appropriate under applicable law in this district.
		The United States Trustee objects to the confirmation of the Plan, arguing that the Third-Party Release impermissibly includes a release of claims pursuant to federal or	The United States Trustee's position is baseless. Indeed, it fails to cite any authority for this position. To the contrary, it is routine for claims related to securities laws

[31] United States Trustee Objection at 19, 22-23 (emphasis added).

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	Party	**Objection**	**Response/Status**
		state securities laws. United States Trustee Objection at 23-24. The United States Trustee elaborates that "[t]his Court lacks jurisdiction to rewrite securities laws or to bind the current or future actions of an executive branch agency tasked with enforcing the same." United States Trustee Objection at 23-24.	to be included in the definition of "Causes of Action".[32] Tellingly, neither the SEC nor any other entity (other than the United States Trustee) objected to this provision of the Plan. Moreover, the Third-Party Release does not purport to bind actions of an executive branch agency as asserted by the United States Trustee because, as discussed below, the Debtors have already added language to the Combined Order explicitly preserving claims of the United States Government.[33] In addition, the United States and its agencies do not hold Claims in the Voting Classes and therefore cannot grant the Third-Party Release.
		The United States Trustee asserts that the Debtors appear to use rule 9019 of the Bankruptcy Code to justify the Third-Party Release. United States Trustee Objection at 24.	That is incorrect. As set forth in paragraphs 96 through 110 of the Memorandum, the Third-Party Release is justified under section 1123(b)(6) of the Bankruptcy Code because it is consensual, critical for a successful restructuring, and provided in exchange for consideration in the form of reciprocal releases and commitment to support the restructuring.

[32] *See In re SAS AB*, No. 22-10925 (MEW) (Bankr. S.D.N.Y. Mar. 22, 2024) [Docket No. 2347]; *In re Voyager Dig. Holds., Inc.*, Case No. 22-10943 (MEW) (Bankr. S.D.N.Y. Mar. 8, 2023 [Docket No. 1159]; *In re GTT Comm'ns, Inc.*, No. 21-11880 (MEW) (Bankr. S.D.N.Y. Dec. 28, 2022) [Docket No. 821]; *In re Lumileds Holdings B.V.*, Case No. 22-11155 (LGB) (Bankr. S.D.N.Y. Oct. 14, 2022) [Docket No. 166].

[33] *See* Combined Order ¶ 43.

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	Party	**Objection**	**Response/Status**
		The United States Trustee objects to confirmation of the Plan, arguing the following regarding the Injunction Provision in Article IX.G of the Plan: 1. The Injunction Provision violates *Purdue* because it enjoins claims pursuant to a non-consensual Third-Party Release; 2. Even if the Third-Party Release is consensual, there is no need for the Injunction Provision in support of a consensual Third-Party Release; and 3. The Injunction Provision precludes any party deemed to consent to the Third-Party Release from raising issues with respect to the enforceability of the Third-Party Release. United States Trustee Objection at 24.	All three of the United States Trustee's arguments regarding the injunction fail: 1. The Third-Party Release is consensual.[34] 2. The Third-Party Release and the Injunction Provision were critical parts of the Plan that were negotiated amongst the RSA Parties as they provide certainty to the new owners of the Reorganized Debtors that those with released claims cannot seek to relitigate such claims against the Reorganized Debtors. 3. The United States Trustee's position is incorrect. The Injunction Provision does not prohibit a party from asking the Court to decide whether it is actually a Releasing Party under the Plan.
		The United States Trustee objects to the confirmation of the Plan, arguing that the Debtor Release in Article IX.B of the Plan improperly releases claims that belong to the estate without proper consideration. United States Trustee Objection at 25.	The United States Trustee's position is incorrect. The Debtors will receive consideration in the form of mutual releases in addition to all of the support from the Released Parties (including the RSA Parties) to make this reorganization feasible (including, but not limited to, agreeing to the Restructuring Support Agreement, providing the DIP Facility, participating in (and

[34] *See* Memorandum ¶¶ 96-110.

Filed Plan Confirmation Objections			
	Party	**Objection**	**Response/Status**
			backstopping) the Equity Rights Offering, and providing the Amended and Restated Loans and the Exit Loans).[35]
		The United States Trustee objects to the confirmation of the Plan, arguing the following regarding the Exculpation provision in Article IX.D of the Plan: 1. The Exculpation provision is overly broad in that it extends to individuals or entities that are not estate fiduciaries; and 2. The Exculpation provision does not carve out claims for bad faith, breach of fiduciary duty, and legal malpractice, which is prohibited by the New York Rules of Professional Conduct. United States Trustee Objection at 26-27.	The Debtors respectfully respond to each argument as follows: 1. The United States Trustee's position is in contradiction with the law of this District.[36] 2. This argument is moot. The Combined Order includes the following language: "For the avoidance of doubt, nothing in the Plan shall limit or otherwise release the attorneys for any party in these cases from liability to their respective clients pursuant to rule 1.8(h) of the New York Rules of Professional Conduct."[37]
		The United States Trustee objects to the confirmation of the Plan, arguing the following with respect to the Plan Supplement:	The United States Trustee's two arguments fail for the following reasons: 1. No parties were prejudiced by filing such documents on August 23, 2024. The documents were negotiated by the RSA Parties, who hold over 82% of First Lien Claims

[35] *See* Memorandum ¶¶ 93; Smith Declaration ¶¶ 14-17; Norden Confirmation Declaration ¶¶ 54-55.

[36] *See* Memorandum ¶¶ 111-118.

[37] *See* Combined Order ¶ 41.

Filed Plan Confirmation Objections			
	Party	**Objection**	**Response/Status**
		1. The Restructuring Transactions Memorandum, members of the New Board, Exit Facility Documents, and new corporate governance documents were not filed until August 23, 2024, when the Voting Deadline was August 26, 2024; and 2. The creditors whose proofs of claims are deemed disallowed and expunged should have the opportunity to object to the treatment of their Claims. United States Trustee Objection at 27-28.	and 89% of Unsecured Notes Claim, and who all voted to accept the Plan notwithstanding the fact that these documents were filed after the Voting Deadline. Importantly, no parties (other than the United States Trustee) objected to the timing of the filing of such documents. Lastly, only the Revolving Lenders asked for an extension of the Voting Deadline, which the Debtors granted through September 3, 2024, at 4:00 pm (prevailing Eastern Time). The Revolving Lenders ultimately voted in favor of the Plan. 2. The creditors did have such opportunity. General Unsecured Creditors could have objected to the treatment of their Claims under the Plan, but none did. Moreover, Article V.B of the Plan provides a dispute resolution process for anyone who objects to their Cure Claim. Indeed, several parties did just that and the Debtors resolved such objections.

Informal Comments			
	Party	**Objection**	**Response/Status**
1.	United States Trustee	The United States Trustee requested that the definition of "Causes of Action" be amended to remove certain terms which it viewed as overly broad and outside the scope of causes of action.	***Resolved***: The Debtors and the United States Trustee resolved the comment by removing certain agreed-upon terms from the definition of "Causes of Action" in the Second Amended Plan.
		The United States Trustee requested that the definition of "D&O Policy" be amended to include more specific information about the policy.	***Resolved***: The Debtors and the United States Trustee resolved the comment by amending the definition of "D&O Policy" in the Second Amended Plan to cross reference Exhibit C of the Insurance Motion, which provides more specific information.
		The United States Trustee requested that the definition of "DIP Agent" be amended to include language that successors, assigns, or replacement agents are DIP Agents "solely in their capacities as administrative agent and collateral agent under the DIP Credit Agreement" to conform with requirements imposed on original agents.	***Resolved***: The Debtors and the United States Trustee resolved the comment by including the requested language in the Second Amended Plan.
		The United States Trustee requested that the definition of "Related Parties" be amended to clarify that entities are Related Parties "solely" in their capacities as certain enumerated roles to that entity.	***Resolved***: The Debtors and the United States Trustee resolved the comment by including the word "solely" in the definition of "Related Parties" in the Second Amended Plan as requested by the United States Trustee.

Informal Comments			
	Party	**Objection**	**Response/Status**
		The United States Trustee requested that Article IV.B of the Plan include language about settlements being above the lowest point of reasonableness.	***Resolved*:** The Debtors and the United States Trustee resolved the comment by including language that the Court must find settlements "within the range of reasonableness."[38]
		The United States Trustee requested clarification that language in Article II.A.2.d. of the Plan did not allow for fees incurred prior to the Effective Date to avoid United States Trustee scrutiny.	***Resolved:*** The Debtors and the United States Trustee resolved the comment by including language clarifying that the relevant provision applies to post-Effective Date fees.[39]
		The United States Trustee requested clarifying language affirming that the Debtors and the United States Trustee have the right to review Restructuring Fees and Expenses for reasonableness and that the Court has jurisdiction over the reasonableness of such fees and expense in Article II.E of the Plan.	***Resolved:*** The Debtors and the United States Trustee resolved the comment by including language that estimates of Restructuring Fees and Expenses will be delivered to the United States Trustee and that if the Debtors, Reorganized Debtors, or the United States Trustee dispute the reasonableness of any such Restructuring Fees and Expenses, they shall notify the relevant Professional in writing prior to the Effective Date and such disputed Restructuring Fees and Expenses will not be paid until the dispute is resolved.[40]

[38] *See* Second Amended Plan Article IV.B.
[39] *See* Second Amended Plan Article II.A.2.d.
[40] *See* Second Amended Plan Article II.E.

Informal Comments			
	Party	**Objection**	**Response/Status**
2.	The Federal Trade Commission (the "***FTC***") and the Office of the Attorney General of California (the "***CA AG***")	The FTC and the CA AG requested inclusion of language in the Combined Order that explicitly preserves governmental claims.	***Resolved*****:** The Debtors, the FTC, and the CA AG resolved this comment through inclusion of the agreed upon language in the Combined Order.[41]
3.	The SEC	The SEC requested revision of language in the Plan that stated that certain offerings and sales "shall be" exempt from the registration requirements of Section 5 of the Securities act to "may be" exempt from the same.	***Resolved*****:** The Debtors and the SEC resolved this comment through inclusion of the SEC's requested language in the Second Amended Plan.[42]
		The SEC requested the removal of certain language in Article IV.L purporting to direct DTC in certain ways.	***Resolved***: The Debtors and the SEC resolve this comment through removal of the requested language in Article IV.L purporting to direct DTC.[43]

[41] *See* Combined Order ¶ 43.
[42] *See* Article IV.L.
[43] *See* Article IV.L.