IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	Chapter 11
Glenwood Caverns Holdings LLC,[1]	Case No. 26-13137-KHT
Debtor.	

DEBTOR'S RESPONSE TO MOTION FOR CLARIFICATION OF THE CONFIRMATION ORDER AND FOR STAY PENDING APPEAL

Glenwood Caverns Holdings LLC (the "Debtor"), hereby responds (the "Response") to the Estifanos Creditors' (the "Estifanos") Motion for Clarification of the Confirmation Order and for a Limited Stay Pending Appeal (Docket No. 529) (the "Motion").

A. Introduction.

The Motion cobbles together two distinct types of requested relief: (a) a purported "clarification" of the Court's findings; and (b) a purported limited stay of the Confirmation Order. These would better have been presented as two separate motions, and this Response will separately address them. Regardless of the manner presented, not one of the requests is justified on the merits. The Court's comprehensive and well-reasoned opinion properly addressed the Estifanos' multiplicity of confirmation objections and is clear as written. Under the guise of "clarification," the Motion seeks without basis to rewrite certain provisions of the Plan and to provide unnecessary, potentially confusing instruction to a hypothetical future court in still other promised litigation. The request for stay, stitched together and unsupported to begin with, is moot at this point with the transactions provided for by the confirmed Plan having already been consummated. Both of the

[1] The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number, is Glenwood Caverns Holdings LLC (6861). The location of the Debtor's headquarters is 51000 Two Rivers Plaza Road, Glenwood Springs, CO 81601.

Motion's core requests—the "stay" and the "clarification"—should be denied, and the Court should instead permit the Estifanos' appeal to run its normal course.

B. <u>In the present procedural status, there is nothing to stay</u>.

As noted, part of the Motion purports to seek a limited stay of the Confirmation Order. The request is unusual in several respects and, as discussed in Section D below, the Motion fails to carry the Estifanos' burden under the well-established factors that determine when a stay pending appeal should be granted. But there is a threshold and dispositive issue: at this procedural juncture, nearly four weeks after entry of the Confirmation Order with no stay in place, there is nothing currently to stay.

Pursuant to Bankruptcy Rule 3020(e), the Confirmation Order was automatically stayed for two weeks. For any stay extending beyond the two weeks, it was incumbent upon the objecting creditors to affirmatively seek *and obtain* a court order extending the stay. Surprisingly, the Estifanos waited until the end of the Rule 3020(e) stay period to file the Motion, then made no attempt to obtain an expedited hearing, instead letting the stay lapse.

The Effective Date of the Plan has occurred, as indicated in the Notice of Effective Date and Related Deadlines separately filed at Docket No. 545. The sale of the amusement park provided for in the Plan has closed. The Estifanos expressly disclaimed seeking a stay of the sale. In addition, the Litigation Trust provided in the Plan has been formed. The Litigation Trust Agreement submitted with the Plan Supplement has been executed and the cause of action specified in the Plan has been transferred to the Trust. *See* Plan § 5.03. The Chief Wind-Down Officer under the Plan is installed. Plan § 5.05. GCAP Holdco has paid virtually all of its cash, approximately $1 million, to the Debtor as provided in Section 5.01 of the Plan.

The Motion did not seek a stay of these events and transactions; none was entered. To the contrary, the Proposed Order submitted with the Motion provides that it "[would] ***not*** stay the Confirmation Order, the closing of the sale, or the occurrence of the Effective Date." Proposed Order ¶ 7, Docket No. 529-1 (emphasis added).

Neither the Motion nor the Proposed Order identifies any specific action of the Debtor to be stayed. Instead, the Proposed Order would provide that the "release and extinguishment" of claims as provided in the Plan "are STAYED." *See* Proposed Order ¶ 6. As noted, however, the Effective Date of the Plan has occurred and the Litigation Trust has been formed and funded. Because the Effective Date of the Plan has occurred, the Plan provisions impacting claims and causes of action, including release and extinguishment of those not assigned to the Litigation Trust, have also taken effect. The Debtor's release under Section 7.03 of the Plan has likewise already taken effect as of the Effective Date. Such effect is not contingent upon any future action or event and is not subject at this juncture to a stay. The Motion expressly disclaimed a request to delay the Effective Date. *See* Proposed Order ¶ 7.

In the (unlikely) event that an appellate court concludes that the Confirmation Order was erroneous, it would be up to the appellate court to fashion an appropriate remedy, if any. A putative "stay" after the fact adds nothing, except possibly confusion. The terms of the Proposed Order in respect of GCAP Holdco exemplify the problem: GCAP Holdco's money has been paid to the Debtor, but the releases or extinguishment of claims in connection therewith would be stayed. The attempt to slice and dice the Plan in such a fashion is impractical and arbitrary to the extreme.

C. <u>The requested "clarification" is unjustified and unnecessary</u>.

For its second core component, the Motion also seeks purported "clarification" of certain aspects of the Confirmation Order. In substance, however, the Estifanos seek not clarification of

any ambiguity, but substantive modification of the terms of the Confirmation Order and the Court's related findings. The Motion seeks unnecessary and potentially misleading language confirming that direct claims, if any exist, are not released pursuant to the Plan. The Motion seeks to artificially limit the Court's findings regarding the broad variety of claims the Estifanos contend were held by the estate. And the Motion also seeks to alter the Plan by inserting a severability provision. None of this is necessary, as the Court's order and findings were careful and clear. Instead, the requested changes could generate confusion and prejudice on appeal. The Court could decline to consider the request in this regard altogether, since the Estifanos have filed a Notice of Appeal. In any case, the requests for "clarification" lack merit.

1. *The legal standard for motions for clarification and reconsideration.*

When a party moves for clarification or reconsideration within 14 days of the relevant order, that party moves under Bankruptcy Rule 9023, which incorporates Federal Rule of Civil Procedure 59. *See In re WorldCom, Inc.*, No. 02–13533, 2007 WL 4179316, at *1 (Bankr. S.D.N.Y. Nov. 27, 2007); *In re Crow*, Nos. WY-18-083, WY-18-086, 2019 WL 6335963, at *3 (10th Cir. B.A.P. Nov. 26, 2019); Fed. R. Bankr. P. 9023(b). Under Federal Rule of Civil Procedure 59, the "motion must demonstrate the 'reason why the court should reconsider its prior decision' and 'set forth facts or law of a strongly convincing nature' to induce the court to reverse its earlier decision." *In re Viera*, No. 23-03750, 2024 WL 448701, at *3 (Bankr. D.P.R. Oct. 8, 2024) (citation omitted).

A Notice of Appeal has been filed (Docket No. 530). Accordingly, the Motion's request for purported clarification is governed by Bankruptcy Rule 8008. *See In re Stewart*, No. 15–12215, 2018 WL 2714595, at *2 (Bankr. W.D. Okla. June 4, 2018); Fed. R. Bankr. P. 8008(a) ("If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant

because an appeal has been docketed and is pending . . . ."). Under Rule 8008(a), the Court has four options: (1) defer considering the motion; (2) deny the motion; (3) state that it would grant the motion if the court where the appeal is pending remands for that purpose; or (4) state that the motion raises a substantial issue.

Contrary to the Estifanos' argument, *see* Motion at 7–9, the Tenth Circuit B.A.P. has been clear: a bankruptcy court has "jurisdiction to act following the filing of a notice of appeal only in limited circumstances, such as when granted permission to do so by the appellate court, when authorized by act by a procedural rule, or when adjudicating a dispute between the parties regarding what documents properly constitute the record on appeal." *Bank of Prairie v. Picht (In re Picht)*, 403 B.R. 707, 712 (10th Cir. B.A.P. 2009).[2] Here, the Motion offers no reason for reconsideration, whether characterized as "clarification" or otherwise. And contrary to the stated premise of the Motion, at least certain of the specific requested "clarifications" could impact the appeal.

2. *The Estifanos' request for "clarification" regarding direct/derivative claims is unnecessary and inappropriately asks that this Court insert itself into outside litigation.*

The Motion requests that this Court state that the Estifanos retain direct claims against non-debtors. *See* Motion at 9–13; Proposed Order ¶ 5. The Plan and Confirmation Order, however, are already clear on this point, and the Motion identifies no ambiguity. Additional verbiage is not

[2] The Estifanos could have asked for clearer relief by separating their Motion into two: (1) a motion for reconsideration and (2) separately, a motion for a stay pending appeal. Had the Estifanos first filed a motion for reconsideration, that motion would have tolled the time for filing an appeal. *See In re Poddar*, 507 F. App'x 773, 775 (10th Cir. 2013) ("If a timely motion for reconsideration is filed within fourteen days of the order appealed from, the time for filing an appeal is tolled. *See* Fed. R. Bankr. P. 8002(b)."). The Court could then have adjudicated a straightforward motion for reconsideration under Rule 9023. Instead, the Estifanos filed a single motion seeking both reconsideration and a stay pending appeal and then immediately filed a notice of appeal, creating unnecessary procedural confusion for this Court and the parties.

always a good thing. Sometimes unnecessary verbiage itself creates confusion, and it easily could here.

The Court's findings were clear:

> Subsection (b)(3)(A) allows a debtor to settle or release its own claims, including derivative claims on its behalf. Subsection (b)(3)(A) does not allow a debtor to release claims belonging to third parties without consent. . . . **The Plan currently before the Court settles, releases, or extinguishes the Debtor's claims only** . . . .

See Findings of Fact and Conclusions of Law (Docket No. 504) (the "Findings") at 42 (emphasis added).

Nothing in the Confirmation Order contradicts the Findings. The Estifanos point to no provision of the Confirmation Order that arguably contradicts the Findings. The Motion refers to paragraphs KK, NN, 9, 28, and 35 of the Confirmation Order. None of these provisions, however, purports to release or impact hypothetical direct claims. The Motion points to no language giving rise to genuine ambiguity. Review shows no ambiguity.

The Motion claims the need to clarify the Confirmation Order without altering it. Motion at 8. At best, the request is unnecessary. At worst, it could distort the Plan and Confirmation Order. Furthermore, the Motion invites this Court to presume what may or may not occur in a hypothetical future remand, stating that the above-cited provisions "do not limit the relief the Estifanos Creditors may seek on appeal or on remand." But determination of what is a valid appeal issue or what remedies might be available on remand is the province of the appellate court, not the Bankruptcy Court.

The Motion's purported request for "clarification" on this point has still another failing. Although the Proposed Order does not specify this, the Motion appears to seek the Court's advance blessing to bring "two categories of claims" that the Estifanos contend are direct claims. *See* Motion at 10–11. For instance, the they suggest (for the first time) that alleged alter ego claims

against Iron Mountain Hot Springs are direct claims, not estate claims. Alter ego is not an independent cause of action in the first place, but an equitable theory for imposing liability on another entity to collect on an existing judgment. The Estifanos' characterization of alter ego theories as claims separate from any direct claims they may have is yet another attempt to manufacture ambiguity where none exists. But the Court made no findings as to whether any specific claim was direct such that the Estifanos could sue in their own right. No party requested such a finding, and there was no evidence or argument that any specific claim is direct or derivative.

A motion for reconsideration (even one incorrectly styled as a motion for "clarification") is not the vehicle to adjudicate what specific claims may or may not belong to the Estifanos. Moreover, the Estifanos have not provided the Court with a filed or draft complaint that specifies the allegedly direct claims. Without that and possibly additional necessary information, a meaningful determination would be impossible regardless of the procedural vehicle by which one is sought.

3. *The Motion's request to limit the Court's Findings regarding asserted derivative claims lacks basis and would be prejudicial.*

In response to arguments made by the Estifanos in connection with confirmation, the Court made very careful and focused findings regarding the Plan's treatment of various causes of action that the Estifanos argue belonged to the bankruptcy estate. *See* Findings at 41–49. The Estifanos now request, however, that the Court say: "The Court's findings concerning the existence, value and viability of the Insider Claims were made only to review the Debtor's exercise of business judgment." Proposed Order ¶ 4. But there was nothing unclear about the Findings, and therefore nothing that requires clarification. Moreover, the Findings are entirely supported by the record—a point the Motion does not challenge.

The Findings were not extraneous. To the contrary, the Findings were necessary and appropriate to address the factual and legal arguments the Estifanos *themselves* advanced in opposition to Plan confirmation. The Estifanos presented substantial arguments to this Court—both written and oral—about the strength of certain claims that they believe the Debtor should pursue against non-debtor entities and individuals. For example, when it came to Mr. Beckley, the Estifanos averred that "[t]wo of the estate's strongest claims against" Mr. Beckley and Glenwood Tramway LLC did "not depend on fiduciary duty at all," while arguing to the Court how certain contracts would support those claims. Docket No. 448 at 7–8.

Estifanos' counsel explicitly and repeatedly referred to the claims' alleged "value." *See* Dan Caplis Opening Statement p. 5, lines 14–22 ("very valuable estate claims") (alleging contract claim against Steven Beckley "may end up being the single most valuable asset this Debtor has"); *id.* p. 6, lines 8–12 ("Yet this may be the single biggest asset the estate has, and the Debtor left it out of the Plan."); *id.* p. 3, lines 10–13 ("the largest assets by far … are its claims and potential claims").

It cannot be a surprise, therefore, that the Court meticulously and methodically went through the substance of each argument raised by the Estifanos in this regard. *See* Findings at 41–49. For instance, on the alleged directors and officers claims, the Court noted that the Debtor was managed by an entity, GCAP Holdco, and therefore the duties "are owed by GCAP Holdco as an entity, not by any individual member…." Findings at 44. The Court further found that GCAP Holdco's operating agreement expressly waives fiduciary duties, consistent with Delaware law. *Id.* The Court observed that GCAP Holdco did not take responsibility for day-to-day operations, instead delegating them to Steven Beckley pursuant to the Services Agreement. *Id*. As for claims specifically alleged to lie against Steven Beckley, the Court found that the Services Agreement

upon which a breach claim would be based "required him to perform services in the same manner as he had performed" and that "it appears highly likely Mr. Beckley performed them in substantially the same manner…" *Id.* at 44–45. As to this set of claims, the Court concluded that the language of the applicable documents and applicable law "combine to reduce the likelihood of success" against the director and officer parties regardless of theory. *Id.* at 45. "And more importantly, even if such a cause of action had a likelihood of success at the time it arose … the applicable statute of limitations expired long before Debtor's bankruptcy petition …." *Id.*

The Court also addressed veil piercing or substantive consolidation claims against Iron Mountain Hot Springs and/or Off Road and noted that "each entity observed corporate formalities and maintained separate books and audited financial statements," that shared resources were limited and defined by contract, and that Hot Springs and the Park "were run separately" with different management, investors and capital structures. *Id.* Accordingly, the Court found that a litigant "would have a particularly difficult time showing Debtor was a sham entity designed to defraud creditors." *Id.*

The Court further addressed alleged fraudulent transfer claims against GCAP Holdco, noting that the Plan already provides for return of substantially all of GCAP Holdco's cash—"the proverbial bird in the hand." *Id.* at 47. "[T]here are no other birds in sight, nor is there a realistic possibility other birds will appear." *Id.* The Court similarly analyzed the alleged equitable subordination claims against the prepetition secured lender, noting: (a) no basis for equitable subordination was actually asserted and (b) any such claim, even if meritorious, was barred by the challenge deadline in the cash collateral order. *Id.* "Any such claim is now barred." *Id.*

The Findings and their reliance on deep precedent cited therein speak for themselves, and, more importantly, the Court made those findings *at the behest of the Estifanos*. There is no need

or basis to instruct a future court on how to interpret the Findings, should the issue ever arise. A court in the future will be entirely capable of sorting through the Findings in the context of the claims and allegations made in such a case.

The Estifanos seek to reduce the Findings to some sort of abstraction supported only by the bare concept of business judgment. The Court, however, made specific findings and observations. The Court noted that the Services Agreement delegated day-to-day management of the park operations to Mr. Beckley and management. Findings at 44. The Court noted that waivers recognized by Delaware law are a feature of the GCAP Holdco operating agreement. *Id.* And the Court noted the critical importance of the statutes of limitations. *Id.* at 45. The Court did in fact afford the Estifanos an opportunity to demonstrate that the claims had value. The Court permitted the Estifanos to present evidence, requiring only that it be brief. Order on Motion to Restrict Use of State Trial Court Order 1, Docket No. 450. And the Court considered the entirety of the record in its careful and extensive Findings. All of the above factors, legal concepts, facts, and circumstances amalgamated to a finding that the extinguished claims had a sufficiently low value that the Plan satisfied the "best interest of creditors" test without them. Findings at 53. These factors inform business judgment, but that is not their only relevance to plan confirmation standards.

To artificially limit or minimize the Findings may prejudice the appellate process itself. The Court's Findings regarding the extinguished claims may impact the requirement of good faith, *see* 11 U.S.C. § 1129(a)(3), or the best interest of creditors test, 11 U.S.C. § 1129(a)(7). The Motion further glosses over the substance of the Court's analysis of the asserted claims, discussed above. Moreover, it should be noted that the Court explicitly found that the Plan's treatment of each of the aforementioned categories of litigation claims was not in bad faith, Findings at 43–47,

and that the alleged claims do not have sufficient weight to alter the outcome under the best interest of creditors test, *id.* at 53.

The Proposed Order submitted with the Motion would distort these explicit findings. In the process, the putative clarification could confuse or even prejudice the appeal. The Estifanos argue that the Court's "business judgment" standard is in error—although they do not submit what the standard should have been and cite no authority supporting a different standard. Motion at 1, 4–5. Moreover, they complain (without specificity) that the Court limited evidence of the alleged claims. Not only did the Estifanos fail to specify or provide support for what they contend is the correct legal standard, they entirely failed to proffer excluded evidence that they contend was relevant to the (unspecified) governing standard. *Id.* Despite having "every reasonable opportunity to discover evidence" supporting their arguments, *see* Findings at 10, they continually offered empty rhetoric.

An appeal is not the place for empty rhetoric. If the Estifanos contend that the governing standard was in error and that the Court failed to consider germane evidence, it was incumbent upon them to make an offer of proof of the evidence supposedly excluded in error. *See* F.R.E. 103(a)(2), discussed in Section D.3.a below. They did not do so. The reasons for this failure are obvious to the Debtor but ultimately do not matter. The failure is not a basis to alter the Court's Findings.

The Findings, carefully made and supported by the record, stand on their own.

4. *The Motion's attempt to insert a severability provision into the Plan should fail.*

The Estifanos request the following order: "The provisions of the Plan and Confirmation Order that release or extinguish the Insider Claims are severable from the sale and the APA." Proposed Order ¶ 3. As the Court is doubtless aware, some chapter 11 plans contain so-called

severability provisions that permit one portion of the plan to remain enforced independently of whether another provision is enforced. This Plan, however, has no severability provision.

Absent one, the statute is clear in operation. The Court may either confirm the plan, or not, in its entirety. *See* 11 U.S.C. § 1129(a); *see also* Findings at 37 (citing legislative history, "The Court is not permitted to alter the terms of the plan."). Once confirmed, "the provisions of a confirmed plan bind the debtor … and any creditor" whether or not the creditor accepted the plan. 11 U.S.C. § 1141(a). And a plan may not be modified at all once substantial consummation has occurred. 11 U.S.C. § 1127(b). Consistent with law, Paragraph 26 of the Court's Confirmation Order states: "The provisions of this Order are nonseverable and mutually dependent." The Estifanos ask this Court to declare the opposite, as noted above, and in the process to insert a severability provision into the Plan itself. This request, like others in the Motion, lacks merit.

Paragraph 26 was correct and did not break new ground; it is instead a recitation of what is known to be true in bankruptcy case law. Any individual "part of an overall plan for reorganization must consider the bankruptcy scheme as an integrated whole in order to evaluate whether Plan confirmation is warranted." *In re Congoleum Corp.*, 362 B.R. 167, 185 (Bankr. D.N.J. 2007) (quotation marks omitted). *See also In re Accuride Corp.*, No. 09–13449, 2010 WL 5093173, at *27 (Bankr. D. Del. Feb. 18, 2010) ("The provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are integrated with each other and are, nonseverable and mutually dependent."); *In re Elcom Hotel & SPA, LLC*, Nos. 13-10029, 13-10031, 2011 WL 13496883, at *13 (Bankr. S.D. Fla. Jan. 3, 2011) ("The provisions of this Confirmation Order are integrated with each other and are nonseverable and mutually dependent unless expressly stated by further order of the Bankruptcy Court.").

Here, the Debtor's decision to assign only the insurance bad faith claim to the Litigation Trust, *see* Findings at 42, was not made in isolation but was part of the overall Plan. For example, when it came to the Estifanos' desire to send alleged claims against GCAP Holdco to the Litigation Trustee, the Court noted that "[t]he settlement provides Debtor an opportunity to obtain approximately $1 million cash, representing substantially all of GCAP Holdco's assets, without further delay and expense – the proverbial bird in the hand." Findings at 47. GCAP Holdco has now returned that $1 million to the Debtor because the Plan has gone effective. The Motion, however, seeks to stay the extinguishment of claims against GCAP Holdco, while leaving in place the payment of $1 million of GCAP Holdco's money that has already been made. The absurdity of severing the release from the payment in settlement is manifest. Not only is the release of claims against GCAP Holdco inseparable from its cash contribution, but that release has already taken effect as of the Effective Date pursuant to Section 7.03 of the Plan. At this stage, the Estifanos seek not a stay of the release, but an order reviving claims that have already been released.

Nor can the scope of claims assigned to the Litigation Trust be severed from the organization of the Trust itself. The Litigation Trust Agreement and related Plan provisions were drafted to reflect the Litigation Trust's current structure and funding, and assigning additional claims to the Litigation Trust would require material revisions to both the Plan and the Litigation Trust Agreement. As the Court heard at the confirmation hearing, a broader mandate to the Litigation Trustee would necessitate more funding. More claims to (re)investigate (after the Estifanos have already obtained an enormous amount of discovery) would cost more money. Indeed, the Estifanos explicitly suggested that the Litigation Trust be funded with $250,000 instead of the $100,000 amount provided in the Plan. The Plan provided for delivery of those extra funds to creditors instead. The focused scope of the Litigation Trustee's authority (and therefore

responsibility) under the Plan also protects the Litigation Trustee if she declines to pursue the indiscriminate litigation strategy demanded by the Estifanos' contingency fee counsel. The Plan was properly considered as a whole. The Motion's attempt to atomize its various components lacks merit.

In this regard and others, the Estifanos cannot meet their substantial burden to "set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision." *In re Viera*, 2024 WL 448701, at *3 (quotation marks omitted). The Court's inclusion of Paragraph 26 as written was not error and does not require reconsideration. Worse, the request to include an affirmative finding of severability requires a rewrite of the Debtor's Plan—something the Estifanos never had the power to do. *See* 11 U.S.C. §§ 1121, 1127(a) (plan may be modified only by plan proponent).

Finally, the Estifanos' request that the Court effectively declare that Paragraph 26 does *not* moot their appeal asks for an advisory opinion. *See* Motion at 14–15. "Equitable mootness is a way for an *appellate* court to avoid deciding the merits of a bankruptcy appeal by dismissing the appeal, even if it has jurisdiction and can grant relief, if implementation of that relief would be inequitable." *In re Riviera Drilling & Exploration Co.*, 502 B.R. 863, 867 n.13 (10th Cir. B.A.P. 2013) (emphasis added). The Court lacks the power to issue an advisory opinion on matters for the appellate court. *See In re Cahill*, 642 B.R. 813, 823-25 (Bankr. N.D. Ill. 2022); *In re Envtl. Wood Prods., Inc.*, 609 B.R. 901, 919-20 (Bankr. S.D. Ga. 2019); *In re NSCO, Inc.*, 427 B.R. 165, 176 (Bankr. D. Mass. 2010). And the exercise of such power, if it existed, would be unwarranted here.

* * *

When it comes to the reconsideration aspects of the Motion, the Court should "deny the motion" under Rule 8008(a)(2). The Motion seeks either this Court's unnecessary involvement in hypothetical future litigation or modification of the Plan without authority. The Motion has not "set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision." *In re Viera*, 2024 WL 448701, at *3 (quotation marks omitted). And for the same reasons, to the extent that the Estifanos argue that their "motion raises a substantial issue" under Rule 8008(a)(4), they have not met their burden. The Estifanos do not point to facts or law of a strongly convincing nature that would raise a substantial issue requiring this Court to interrupt the appellate proceedings already underway. *See* Fed. R. Bankr. P. 8008(c) (permitting remand "[i]f the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue").

The clarification/reconsideration portion of the Motion lacks merit in all respects.

D. Even if the Motion had presented the Court with an actionable request, it failed to support any stay pending appeal.

As noted in Section B above, the Plan has gone effective and there is nothing to stay at this juncture. But even if there were, the Motion entirely fails to support such a request under the well-established factors governing consideration of stay requests. These are discussed below.

1. *The legal standard for a motion for stay pending appeal.*

"'A stay is an intrusion into the ordinary processes of administration and judicial review.'" *In re Stewart*, 604 B.R. 900, 905 (Bankr. W.D. Okla. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). It is for that reason that "[t]he movant bears a 'heavy' burden of showing that a stay is justified." *HRV Santa Fe, LLC v. Wolf*, No. 24-01002, 2024 WL 3770195, at *7 (Bankr. D.N.M. Aug. 12, 2024) (citations and some quotation marks omitted); *see also In re Renfrow*, No. 17-1027, 2021 WL 3722219, at *3 (Bankr. N.D. Okla. Aug. 20, 2021) ("A stay pending appeal is

an extraordinary remedy and requires a substantial showing on the part of the movant." (quotation marks omitted)).

There are four factors required for a stay pending appeal: "(1) a strong likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) that the public interest supports a stay." *In re Schwalb*, No. 25-12666, 2025 WL 3465948, at *2 (Bankr. D. Colo. Dec. 2, 2025).

"The burden is on the Movants to establish each of these factors in their favor." *Renfrow*, 2021 WL 3722219, at *3. A stay is "not a matter of right, *even if irreparable injury might otherwise result to the [movant]*." *In re Gibson*, No. 24-01018, 2025 WL 3056363, at *2 (Bankr. D. Colo. Oct. 30, 2025) (emphasis added). Ultimately, "[t]he decision whether to grant a stay pending appeal is left to the discretion of the bankruptcy court." *In re Lang*, 305 B.R. 905, 911 (10th Cir. B.A.P. 2004).

2. *Reciting the stay factors—with little to no analysis—does not constitute a motion for stay pending appeal.*

Even if the Estifanos were asking for a "stay," they have not even attempted to meet their burden to establish that the factors weigh in favor of granting the extraordinary relief of a stay pending appeal. The "*movant* bears a 'heavy' burden of showing that a stay is justified." *HRV Santa Fe*, 2024 WL 3770195, at *7 (emphasis added). That heavy burden "requires a *substantial* showing on the part of the movant." *Renfrow*, 2021 WL 3722219, at *3 (quotation marks omitted and emphasis added).

When a party makes only "a very meager attempt[ ] to establish" that they will prevail on any one factor—let alone all four—that alone is grounds for denial of a motion for a stay pending appeal. *See In re Sunflower Racing*, 225 B.R. 225, 227 (D. Kan. 1998) (denying a stay where the

movants "summarily argue[d] in a total of two sentences" that they were likely to prevail on the merits because the movants incorrectly "assumed" that "the court [would] independently analyze and research all of the . . . issues without any factual references or legal argument"). Thus, "[t]he failure [of the movant] to address the elements for the relief request is sufficient reason to deny the motion for a stay." *In re Hutchins*, 216 B.R. 1, 6 n.1 (Bankr. E.D. Ark. 1997); *accord In re Marlar*, 248 B.R. 577, 580 (Bankr. W.D. Ark. 2000) ("The failure to even address the elements for obtaining a stay is itself grounds for denial of the motion.").

Here, the Estifanos merely recited the factors for a stay pending appeal and gave little to no substantive analysis for those factors. *See* Motion at 16–18. Recitation of the legal standard with little substantive analysis is insufficient for the Estifanos to meet their heavy burden.

On the first factor—likelihood of success on the merits—the Estifanos merely argue that "[t]he appeal presents a substantial issue on the merits." *Id.* at 17 (citing no precedent). That, however, is not the relevant standard. The Estifanos are required to "mak[e] a 'strong showing' that [they are] likely to succeed on the merits of [their] claim, not just a 'better than negligible' or 'possibility' of success." *In re Green Copper Holdings, LLC*, No. 25-10088, 2026 WL 1459953, at *2 (Bankr. N.D. Okla. Apr. 10, 2026). The Motion makes no such showing.

On the second factor—likelihood of irreparable harm—the Estifanos make no argument at all. They say only that a "stay harms no one." Motion at 18. But again, the question for the second factor is not whether a *stay* causes harm to *others*, but instead whether *not entering a stay* causes irreparable harm *to the movant*. *See In re Abengoa Bioenergy Biomass of Kan., LLC*, No. 16–10446, 2018 WL 1613667, at *3 (Bankr. D. Kan. Mar. 29, 2018) (reciting the second factor as "whether [the movant] will likely be irreparably harmed if the stay is denied"). The Estifanos do

not argue that they will be irreparably harmed if a stay is denied, and thus they do not attempt to meet the burden on the second factor.

On the third factor—the balance of the harms—the Estifanos again do not attempt to meet their burden. Here, the Estifanos must "establish that [the Debtor] will *not* suffer substantial harm if the stay is granted." *Gibson*, 2025 WL 3056363, at *3 (quotation marks omitted). The Estifanos' conclusory argument that a "stay harms no one" includes a single sentence asserting that a stay "costs the Reorganized Debtor nothing beyond refraining from settling or abandoning claims that the Plan would otherwise extinguish." Motion at 18. The Estifanos cite nothing for that statement, and a stay motion with "conclusory statements with[out] facts or references to support in the record" is one that should be denied. *In re Malloy*, No. 23-03043, 2024 WL 169172, at *2 (Bankr. E.D. Va. Jan. 12, 2024). And as shown below, *see infra* Section D.3.c, a stay *does* harm the Debtor.

On the fourth factor—the public interest—the Estifanos write only that "[t]he public interest favors appellate review of a decision to release estate claims." Motion at 18. But the question is not whether *review* by the appellate court is in the public interest, but instead whether *entering a stay* is in the public interest. *See Schwalb*, 2025 WL 3465948, at *2 (reciting the fourth factor as whether "the public interest supports a stay"). And again, the Estifanos cite not a single case or fact in the record to show that the public interest favors a stay. That conclusory one-sentence argument is not enough for the Estifanos to meet their burden. *See Malloy*, 2024 WL 169172, at *2.

In the end, the Motion's conclusory arguments for a stay pending appeal do not come close to meeting the Estifanos' substantial burden on any one, let alone all four, of the relevant factors. The Court can deny the Motion for a stay on that basis alone.

3. *Even if the Court were to consider the Estifanos' stay requests on the merits, they have not met their burden.*

Even if the Court were to excuse the Estifanos' lack of substantive analysis, they have not met (and cannot meet[3]) their burden on any single factor. All four factors weigh against a stay here.

a. The Estifanos have not met their burden on the likelihood of success on the merits.

"The moving party bears the burden of making a 'strong showing' that it is likely to succeed on the merits of its claim, not just a 'better than negligible' or 'possibility' of success." *Green Copper*, 2026 WL 1459953, at *2. In particular, where the party's arguments "have been previously rejected by this Court," the "attempt to re-hash previously rejected arguments does not demonstrate a likelihood of success on the merits." *Id*. "The probability of success is demonstrated when the [party] seeking the stay has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Gibson*, 2025 WL 3056363, at *2 (quotation marks omitted).

In deciding whether the Estifanos have shown a likelihood of success on the merits, the Court reviews their arguments under the same standard of review that the *appellate* court would apply to this Court's holdings. *See In re Winters*, 2019 WL 1399854, at *3 (Bankr. D. Utah Mar. 26, 2019); *see also Stewart*, 604 B.R. at 905 ("In considering the first critical factor, 'likelihood of success on the merits on appeal,' this Court must consider the applicable standard of review that would govern such an appeal."). The Estifanos cannot show that they are likely to prevail on the merits, for at least three reasons.

[3] To the extent that the Estifanos attempt to introduce new arguments in any reply brief filed in support of the Motion, "courts ordinarily do not address legal arguments raised for the first time in a reply brief." *In re Westby*, 486 B.R. 509, 517 (10th Cir. B.A.P. 2013).

First, the Estifanos assert that they should have been permitted to put on evidence supporting the extinguished claims. As noted above, however, the Court permitted evidence, requiring it be brief. The Estifanos chose not to put on evidence as the Court permitted. Moreover, to the extent evidence was excluded, the Estifanos waived the ability to contest the exclusion of any evidence, contrary to their argument that the "Court limited the evidence on the [extinguished] claims' viability." Motion at 17. Federal Rule of Evidence 103(a)(2) provides that, to preserve a claim that a court erred in excluding evidence, the party must "inform[] the court of its substance by an offer of proof, unless the substance was apparent from the context." Rule 103(a)(2) requires that "the proponent must, first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence." *United States v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001) (quotation marks omitted). Bankruptcy courts regularly apply Rule 103(a)(2). *See, e.g.*, *In re Hidden Lake Ltd. P'ship*, 247 B.R. 722, 724 (Bankr. S.D. Ohio 2000).

The Court put some limits on the presentation of evidence at the confirmation hearing in two orders: (1) the Order on Motion to Restrict Use of State Trial Court Order (Docket No. 450), and (2) an oral order during the confirmation hearing. To finish the hearing in a reasonable time, some guardrails were necessary and well within the Court's discretion. *See, e.g.*, F.R.E. 611(a).

The Estifanos, however, at no point described the evidence they claim to have and what it would tend to show. After the Court issued its written order, the Estifanos did not submit any filing describing what evidence they intended to present about the extinguished claims that the order prevented them from presenting. And after the Court issued its oral order, the Estifanos did not tell the Court explicitly what evidence they wanted to present. Having been provided discovery virtually unprecedented in scope for a case of this nature, this should not have been hard to do. Additionally, after the Court's written and oral orders, the Estifanos did not cite any specific

evidentiary rule for disagreeing with the Court and for admitting the proffered evidence. Citation to a specific rule is required. *See, e.g.*, *United States v. Hernandez*, 2026 WL 1146008, at *5 (10th Cir. Apr. 28, 2026) ("We are not persuaded. Mr. Hernandez never cited Rule 106 as '[t]he specific ground' for his objection."). Therefore, the Estifanos have not preserved their argument that any limitation on presenting evidence gives grounds for the district court to reverse this Court's Findings and Confirmation Order.[4] Furthermore, the Court *was informed* of basic facts related to such alleged claims, *e.g.,* the Services Agreement, and those facts informed the Findings. The Estifanos' complaints about the scope of evidence are manufactured, and will not succeed on appeal.

Second, the Estifanos are not likely to prevail on appeal for their argument that the Court erred in approving the Debtor's decision to send only the bad faith insurance claim to the Litigation Trust.

As discussed above, the Court's Findings on the extinguished claims were based on the Debtor having proposed the contours of the Litigation Trust in good faith, which, in part, relied on the Debtor's business judgment.

As this Court has already emphasized, a "debtor's release or abandonment of a claim may be approved if it satisfies the business judgment rule." Findings at 43. A debtor's "business judgment is entitled to deference from the court, as long as the burden of giving sound business reasons is met." *In re Railyard Co., LLC*, 572 B.R. 766, 770 (Bankr. D.N.M. 2017). The Court meticulously analyzed each and every claim that the Estifanos believed should be assigned to the

[4] When a party fails to preserve an evidentiary argument by not meeting the requirements of Rule 103(a)(2), the appellate court applies plain error review. *See Adams*, 271 F.3d at 1241. Plain error reversal requires a "showing that [this Court] committed (1) error (2) that is clear or obvious under current law, and which both (3) affected [the Estifanos'] substantial rights and (4) undermined the fairness, integrity, or public reputation of judicial proceedings." *United States v. Roach*, 896 F.3d 1185, 1192 (10th Cir. 2018). The Estifanos will not be able to meet their burden under plain error review either.

Litigation Trust, concluding that the Debtor had made its required showing under the "good faith" standard of 11 U.S.C. § 1129(a)(3). Findings at 41–52.

The Estifanos' Motion just repeats the arguments that they already presented to the Court. *See, e.g.*, Motion at 17 ("The Estifanos Creditors *argued* that standard and the absence of any showing for Mr. Beckley, Glenwood Tramway, and the other individual insiders." (emphasis added)). The Estifanos' "attempt to re-hash previously rejected arguments does not demonstrate a likelihood of success on the merits." *Green Copper*, 2026 WL 1459953, at *2. And, as discussed above, the Court's conclusions were correct. Based on the record, the Court went through each claim and decided that the Estifanos had not met their substantial burden to show that the Debtor did not propose its plan in good faith. Even if the "Estifanos Creditors would prefer that the Plan contain different provisions," the Court found that the Plan satisfied the Bankruptcy Code. Findings at 51. The Estifanos present nothing in their Motion that shows a strong likelihood of the district court holding that this Court clearly erred in its Findings.

b. The Estifanos have not met their burden on the likelihood of irreparable harm.

Like likelihood of success on the merits, "a showing of irreparable harm must be that the harm is both irreparable and likely, not just a possibility. Case law indicates that an irreparable injury must be both certain and great, and that it must not be merely serious or substantial." *Green Copper*, 2026 WL 1459953, at *2 (quotation marks omitted). "The harm must be concrete, and it must pose such a significant risk that it cannot be undone or corrected by future money damages." *Id.* (quotation marks omitted); *see also Gibson*, 2025 WL 3056363, at *3 ("The 'possibility' standard is too lenient." (citation omitted)); *In re Renewable Energy Dev. Corp.*, No. 11-38145, 2022 WL 4111168, at *4 (Bankr. D. Utah Sept. 8, 2022) ("to constitute irreparable harm, 'an injury must be certain, great, actual and not theoretical'"). And a "majority of courts have held that a

risk of mootness, standing alone, does not constitute irreparable harm." *Green Copper*, 2026 WL 1459953, at *2.

The Estifanos do not articulate what harm they will suffer if a stay is not entered. *See* Motion at 16–18. It is not the burden of the Debtor (or the Court) to make that showing for the Estifanos, and the Debtor will not speculate as to what harm the movants will suffer, though the Debtor notes that, because the sale has closed, the Estifanos are to receive approximately $1 million from GCAP Holdco as a result of approval of the Debtor's business judgment to consensually resolve potential claims against GCAP Holdco. *See* Findings at 46–47.

And to the extent that the Estifanos bring their stay request solely to prevent equitable mootness on appeal, the possible application of the equitable-mootness doctrine does not demonstrate irreparable injury. *See In re Container Store Grp., Inc.*, No. 24-90627, 2025 WL 4226766, at *9 (Bankr. S.D. Tex. Apr. 7, 2025); *In re Nat'l CineMedia, LLC*, No. 4:23-CV-02414, 2023 WL 5030098, at *8 (S.D. Tex. Aug. 4, 2023); *Yucaipa Corp. Initiatives Fund, ILP v. Piccadilly Rests., LLC*, No. 14-0609, 2014 WL 1871889, at *4 (W.D. La. May 6, 2014); *In re Village at Camp Bowie I, L.P.*, No. 10-45097 (DML), 2012 WL 79091, at *2 (Bankr. N.D. Tex. Jan. 11, 2012). If the possibility of mootness alone were enough to show irreparable harm, then "anytime an appeal is mooted, a stay would be required," collapsing the rule into the exception. *In re Container Store Grp.*, 2025 WL 4226766, at *9.

c. The Estifanos have not met their burden that the balance of harms requires a stay.

For the third factor, it is the Estifanos' burden to "establish that [the Debtor] will not suffer substantial harm if the stay is granted. In other words, the moving party must show that the balance of harms tips in favor of granting the stay." *Gibson*, 2025 WL 3056363, at *3 (quotation marks omitted). Again, the Estifanos present a one-sentence argument that a "stay harms no one."

Motion at 18. If that statement were correct, it is only because the "stay" sought is so devoid of substance as to be meaningless. *See supra* Section B. But if the Court were to consider a meaningful stay, the balance of harms would need to be considered more fully. Here, it would weigh strongly against granting a stay.

The requested stay would indefinitely freeze the Reorganized Debtor and erode what remains of the estate. The Plan directs the Reorganized Debtor to wind up and dissolve. Plan § 5.04. The Estifanos' proposed stay would last until the "final resolution of the appeal," including any further appeals beyond the district court. Motion at 6. During that time, the Reorganized Debtor could not settle, dismiss, abandon, or transfer any Insider Claim, or dissolve or seek a final decree, without first giving the Estifanos fourteen days' written notice. *Id.* It would also have to "preserve the Insider Claims and related records." *Id.* That is not merely "refraining" from action. It is an injunction directing the Reorganized Debtor's conduct for an indefinite period, *see Nken*, 556 U.S. at 428, and it would keep this case open, at continuing administrative expense, long after the Plan has been substantially consummated.

Moreover, would "preserv[ing]" the claims require suing on them? The identified claims have long been barred by the statute of limitations, as the Court indicated in its Findings. But the Estifanos obviously disagree with this analysis (without support). Demands backed by threats are entirely foreseeable if the requested stay is granted. The Reorganized Debtor, however, will be in no position to act on those threats or demands.

And there is cost. The Estifanos' insistence that their stay is "not a stay of the Confirmation Order," Motion at 7, confirms its real purpose: to manufacture a favorable equitable-mootness factor on appeal, *see id.* at 15, while shifting all the cost and uncertainty onto everyone else. Finally, the Estifanos ask that the stay issue without any bond, *id.* at 7, on the premise that it

"requires no payment," *id.* at 18. Because the stay would impose real costs on the Reorganized Debtor and its stakeholders, that premise fails, and if the Court were inclined to enter any stay, it should require adequate security. *See* Fed. R. Bankr. P. 8007(a)(1)(B).

d. The Estifanos have not met their burden that the public interest requires a stay.

"The fourth factor courts must consider is where the public interest lies. The notion of the 'public interest' in this context is one that transcends the interest of the parties in the case." *Gibson*, 2025 WL 3056363, at *4.

Ultimately, the "public interest is furthered by the timely conclusion of legal disputes." *Id.* (quotation marks omitted). That "timely conclusion" includes the "prompt and efficient administration of bankruptcy cases." *In re Ayaad*, 2025 WL 3028170, at *10 (Bankr. D. Colo. Oct. 28, 2025); *see also Renewable Energy*, 2022 WL 4111168, at *4 ("[T]he need to expeditiously close cases and continue to administer cases for the betterment of the public is a policy factor of this Court."). And "the public interest favors the expeditious administration of bankruptcy cases, and also recognizes the desirability of implementing the legitimate expectations of creditors to get paid." *Stewart*, 604 B.R. at 909 (citing *In re Metiom, Inc.*, 318 B.R. 263, 272 (S.D.N.Y. 2004)).

Here, the Estifanos have not shown that the public interest favors the continued delay of this case. Any continued delay jeopardizes the "prompt and efficient administration" of this case. *Ayaad*, 2025 WL 3028170, at *10. And the "legitimate expectations of [other] creditors to get paid," *Stewart*, 604 B.R. at 909—including that this bankruptcy is wrapped up in a timely manner—weigh in favor of not further delaying the conclusion of this case.

CONCLUSION

For the foregoing reasons, the Court should deny the Estifanos' Motion.

Date: October 27, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2026, I electronically filed the foregoing **DEBTOR'S RESPONSE TO MOTION FOR CLARIFICATION OF THE CONFIRMATION ORDER AND FOR STAY PENDING APPEAL** via the Court's CM/ECF filing system and notice of the filing was served in accordance with Fed. R. Bankr. P. and L.B.R. on the following:

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