IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
CLOVER TECHNOLOGIES GROUP, LLC, *et al.*,[1]	)	Case No. 19-12680 (KBO)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF AN ORDER APPROVING THE DEBTORS' DISCLOSURE STATEMENT FOR, AND CONFIRMING, THE FIRST AMENDED JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF CLOVER TECHNOLOGIES GROUP, LLC AND ITS DEBTOR AFFILIATES

Joshua A. Sussberg, P.C. (*pro hac vice* pending)
Matthew C. Fagen (*pro hac vice* pending)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

Domenic E. Pacitti (DE Bar No. 3989
Michael W. Yurkewicz (DE Bar No. 4165)
KLEHR HARRISON HARVEY BRANZBURG LLP
919 N. Market Street, Suite 1000
Wilmington, Delaware 19801
Telephone: (302) 426-1189
Facsimile: (302) 426-9193

-and-

Morton R. Branzburg (*pro hac vice* pending)
KLEHR HARRISON HARVEY BRANZBURG LLP
1835 Market Street, Suite 1400
Philadelphia, Pennsylvania 19103
Telephone: (215) 569-3007
Facsimile: (215) 568-6603

Proposed Co-Counsel to the Debtors and Debtors in Possession

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Clover Technologies Group, LLC (9236); 4L Holdings Corporation (0292); 4L Technologies Inc. (5035); Refurb Holdings, LLC (1230); Clover Wireless, LLC (0313); and Valu Tech Outsourcing, LLC (3563). The location of the Debtors' service address in these Chapter 11 Cases is: 5850 Granite Parkway, Suite 720, Plano, Texas 75024.

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RELIEF REQUESTED

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully submit this memorandum of law in support of approval of the *Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of Clover Technologies Group, LLC and its Debtor Affiliates* [Docket No. 5] (the "Disclosure Statement") and confirmation of the *First Amended Joint Prepackaged Chapter 11 Plan of Reorganization of Clover Technologies Group, LLC and its Debtor Affiliates*, filed contemporaneously herewith (as modified, amended, or supplemented from time to time, the "Plan"),[2] pursuant to sections 1125, 1126, and 1129, respectively, of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"). In support of the Plan, the Debtors have filed the declarations of Marc Liebman, Managing Director of the North American Commercial Restructuring practice of Alvarez & Marsal North America, LLC, the Debtors' restructuring advisor (the "Liebman Declaration"), and Richard Morgner, Managing Director and Joint Global Head of Debt Advisory & Restructuring at Jefferies, the Debtors' investment banker (the "Morgner Declaration"), filed contemporaneously herewith, and the certification of votes with respect to the Plan (collectively, the "Voting Reports"). In further support of confirmation of the Plan and approval of the Disclosure Statement, the Debtors respectfully state as follows.

PRELIMINARY STATEMENT

1. The Plan is the product of months of good-faith, arm's-length negotiations among the Debtors, their Term Loan Lenders, and other key constituents, who all worked towards a consensual, value-maximizing restructuring. The Plan is the final step of the Debtors' three-part process to deleverage their balance sheet and create a stronger go-forward business. In late 2019,

2 Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan.

the Debtors completed the first two steps: (1) a $50 million acquisition of Teleplan International N.V. ("Teleplan"); and (2) a $215 million sale of their Imaging Business.[3] These value-maximizing transactions and hard-fought negotiations resulted in the execution of a restructuring support agreement (together with all exhibits thereto, and as amended, restated, and supplemented from time to time, the "Restructuring Support Agreement"), which contemplated the commencement of these Chapter 11 Cases, which had the support of an overwhelming majority of the Debtors' Term Loan Lenders and holders of Existing Equity Interests. This support is unequivocal based on the Voting Report: the Plan has been unanimously accepted by voting creditors and equityholders, and, to date, not a single party has objected to the Plan.

2. The Plan provides for a significant balance sheet restructuring that will substantially reduce the Debtors' debt burden by more than $360 million, ensures the Debtors have enough capital to fund their exit and post-emergence liquidity needs through a new Take-Back Term Loan Facility and by reducing go-forward interest payments, and sends a strong message to the Debtors' employees, vendors, and other business partners that they are well positioned for future success. The Plan provides value to classes of claims and interests that may not have otherwise been available, including payment in full to all general unsecured creditors. The Plan also contains beneficial release provisions for lenders and equityholders, which have garnered consensus from all classes. In addition, the Plan provides mutual releases to the Debtors and certain stakeholders in order to ensure a new chapter in the Reorganized Debtors' business without the overhang of unresolved claims and litigation. These provisions and the restructuring transactions contemplated

[3] "Imaging Business" means the Debtors' former business that provided a comprehensive and diverse portfolio of reverse supply chain, after-market solutions for printer supplies. On December 16, 2019, the Debtors closed the $215 million sale of their Imaging Business to Norwest Equity Partners (the "Imaging Sale").

under the Plan are fair and equitable, maximize stakeholder value, and represent the best path forward for a successful emergence from chapter 11.

3. To limit any disruption to their operations, the Debtors pursued these prepackaged cases with a goal to expeditiously emerge from chapter 11. The Debtors now stand poised to emerge on schedule and without impairing general unsecured claims.

4. As set forth herein and in the Liebman Declaration and Morgner Declaration, the Plan satisfies the required elements of the Bankruptcy Code. For these reasons, and as set forth more fully in this memorandum, the Plan should be confirmed.

BACKGROUND[4]

I. Restructuring Transactions.

5. The Debtors are a privately-owned aftermarket device servicing and manufacturing company that provides provides trade-in and buyback programs, repair and reclamation services, and remarketing and resale programs for consumer and technology devices. As of the Petition Date, and immediately after the $192.6 million paydown with proceeds from the Imaging Sale, the Debtors had approximately $447.9 million outstanding in aggregate funded-debt obligations.

6. In July of 2019, the Debtors engaged with their Term Loan Lenders to begin negotiating a consensual restructuring. Over the next several months, the Debtors, Term Loan Lenders, and other key constituents evaluated and discussed numerous transactions to determine

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4 A detailed description of the Debtors and their businesses, and the facts and circumstances surrounding the Debtors' Chapter 11 Cases, are set forth in greater detail in the *Affidavit/Declaration of Andrew Buck, Chief Financial Officer of Clover Wireless, LLC, in Support of the Chapter 11 Petitions and First Day Motions* [Docket No. 18] (the "First Day Declaration"). On December 18, 2019, the United States Bankruptcy Court for the District of Delaware (the "Court") entered its *Order (I) Directing Joint Administration of the Chapter 11 Cases* [Docket No. 56]. The Debtors are operating their businesses as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code. No committees have been appointed or designated pursuant to section 1102 of the Bankruptcy Code.

their optimal go-forward capital and organizational structure. Ultimately, these discussions culminated with the execution of the Restructuring Support Agreement, which serves as the foundation of the Plan and supports the the Debtors' acquisition of Teleplan and the Imaging Sale, all of which provide the Debtors with the best go-forward opportunity to maximize value for all stakeholders. All parties worked extensively towards achieving an outcome that maximizes the value of the Debtors' estates for the benefit of all stakeholders.

7. The Plan substantially reduces the Debtors' debt burden, increases liquidity, and sends a strong message to their employees, vendors, and other business partners that they are well-positioned for future success. The Debtors now stand poised to consummate restructuring transactions that will position their businesses for success and profitability in the future.

8. The Plan facilitates the Debtors' reorganization on terms that provide a meaningful recovery for all stakeholders. More specifically, the Plan provides, among other things, that:

- Holders of Other Secured Claims shall receive either: (i) payment in full in Cash; (ii) delivery of the collateral securing any such Claim and payment of any interest required under section 506(b) of the Bankruptcy Code; (iii) Reinstatement of such Other Secured Claim under section 1124 of the Bankruptcy Code; (iv) such other treatment rendering its Other Secured Claim Unimpaired in accordance with section 1124 of the Bankruptcy Code; or (v) the indubitable equivalent of such Other Secured Claim.

- Holders of Other Priority Claims shall receive either: (i) payment in full in cash; or (ii) other treatment consistent with the provisions of 1129(a)(9) of the Bankruptcy Code.

- Each Holder of Term Loan Secured Claims shall receive such Holder's Pro Rata share of and interest in: (i) the New Common Stock (subject to dilution from the Management Incentive Plan and the New Warrants); (ii) the Take-Back Term Loans; and (iii) the Excess Cash (to the extent not already distributed) and the payment of interest on the Term Loans that is accrued and unpaid as of the Effective Date.

- Holders of General Unsecured Claims shall, on the Effective Date unless otherwise agreed, be paid in full in advance or fully reinstated.

- Each Holder of Existing Equity Interests will receive such Holder's Pro Rata share of and interest in the New Warrants.

9. The terms of the Restructuring Support Agreement and the Plan set forth a clear pathway to emergence, and the transactions embodied in the Plan will leave the reorganized enterprise substantially deleveraged, while streamlining their business operations. This will position the Debtors well for post-emergence success.

II. The Solicitation Process and Voting Results.

10. As more fully described in the Scheduling Motion,[5] on December 13, 2019, the Debtors caused their solicitation agent, Stretto[6] ("Stretto"), to distribute solicitation packages containing the Disclosure Statement, Plan, and Ballots[7] to Holders of Claims and Interests in Classes 3 and 7, the only Holder entitled to vote to accept or reject the Plan (the "Voting Classes") as of December 13, 2019 (the "Voting Record Date") in accordance with sections 1125 and 1126 of the Bankruptcy Code. Stretto transmitted the solicitation materials to Holders in the Voting Classes by overnight and electronic mail, and such Holders were directed in the Disclosure Statement and Ballots to follow the instructions contained in the Ballots (and described in the Disclosure Statement) to complete and submit their respective Ballots to cast a vote to accept or reject the Plan.

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5 *See Debtors' Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Approving the Solicitation Procedures and Dates, Deadlines, and Notices Related Thereto, (III) Directing That A Meeting of Creditors Not Be Convened, and (IV) Waiving the Requirements to File Statements of Financial Affairs and Schedules of Assets and Liabilities* [Docket No. 6] (the "Scheduling Motion").

6 Stretto is the trade name of Bankruptcy Management Solutions, Inc., and its subsidiaries.

7 The forms of ballot used in solicitation were included as Exhibits 3-A and 3-B attached to the Scheduling Motion (the "Ballots").

11. Each Holder was explicitly informed in the Disclosure Statement and Ballot to submit its Ballot so that it was actually received by Stretto by 11:59 p.m. (prevailing Eastern Time) on January 15, 2020 (the "Voting Deadline") to be counted. Holders of Claims and Interests were not provided a solicitation package if such Holders are either (a) Unimpaired under and conclusively presumed to accept the Plan under section 1126(f) of the Bankruptcy Code, or (b) Impaired, entitled to receive no distribution on account of such Claims or Interests under the Plan and, therefore, deemed to have rejected the Plan under section 1126(g) of the Bankruptcy Code.

12. On December 16, 2019 (the "Petition Date"), the Debtors filed, among other things, their chapter 11 petitions, the Plan, the Disclosure Statement, and the Scheduling Motion seeking a combined hearing to approve the Disclosure Statement and confirm the Plan. On December 19, 2019, the Court entered the Scheduling Order[8] that, in relevant part, (a) established January 15, 2020, at 5:00 p.m. (prevailing Eastern Time) as the objection deadline for the Disclosure Statement and the Plan, (b) approved the solicitation procedures set forth in the Disclosure Statement (the "Solicitation Procedures"), and (c) approved the form and manner of the confirmation hearing notice (the "Combined Hearing Notice"). On December 20, 2020, the Debtors caused Stretto to serve the Combined Hearing Notice in accordance with the terms of the Scheduling Order.[9] On December 24, 2019, the Debtors published the Combined Hearing Notice in *The Wall Street Journal (National Edition)* and the *Chicago Tribune* (the "Publication Notice"). Concurrently

8 *See Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Approving the Solicitation Procedures and Dates, Deadlines, and Notices Related Thereto, (III) Directing That A Meeting of Creditors Not Be Convened, and (IV) Waiving the Requirements to File Statements of Financial Affairs and Schedules of Assets and Liabilities* [Docket No. 62] (the "Scheduling Order").

9 *See Affidavit of Service* [Docket No. 78].

with the filing of this memorandum, the Debtors submitted a proposed version of the order confirming the Plan (the "Confirmation Order").

13. The Debtors completed their final tabulation of the ballots after the Voting Deadline, following a complete review and audit of all Ballots received.[10] As set forth below and in the Voting Report, the Voting Classes voted unanimously in favor of the Debtors' restructuring:[11]

Class	Amount Voted	Amount Voted to Accept (%)	Total Number of Holders Voted	Number Voted to Accept (%)
Class 3: Term Loan Secured Claims	$ 597,851,048.28	$597,851,048.28 (100%)	173	173 (100%)
Class 7: Existing Equity Interests	1,362,327 Shares	1,362,327 Shares (100%)	11	11 (100%)

14. On January 8, 2020, the Debtors filed the Plan Supplement.[12] Also on January 8, 2020, the Debtors caused a notice of the Plan Supplement to be transmitted to all parties listed on the Debtors' master service list.[13] On January 14, 2020, the Debtors filed the First Amended Plan Supplement,[14] and caused a notice of the First Amended Plan Supplement to be transmitted to all parties listed on the Debtors' master service list.[15]

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10 For additional discussion about, and certification of, the solicitation and vote tabulation processes, *see* the Voting Report.

11 Voting Report, Ex. A.

12 *See Notice of Filing of Plan Supplement for the Joint Prepackaged Chapter 11 Plan of Reorganization of Clover Technologies Group, LLC and its Debtor Affiliates* [Docket No. 92] (the "Plan Supplement").

13 *See Affidavit of Service* Docket No. [94].

14 *See Notice of Filing of First Amended Plan Supplement for the Joint Prepackaged Chapter 11 Plan of Reorganization of Clover Technologies Group, LLC and its Debtor Affiliates* [Docket No. 97] (the "First Amended Plan Supplement").

15 *See Affidavit of Service* [Docket No. 99]

ARGUMENT

15. This memorandum is organized into two sections. The first section requests final approval of the Disclosure Statement and a finding that the Debtors complied with the Scheduling Order. The second section contains the Debtors' case in chief that the Plan satisfies section 1129 of the Bankruptcy Code and, accordingly, requests that the Court confirm the Plan. Additionally, the Debtors submit the Liebman Declaration and Morgner Declaration in support of the Plan.

I. Approval of the Disclosure Statement Is Warranted and the Debtors Complied with the Scheduling Order.

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

16. Pursuant to section 1126(b) of the Bankruptcy Code, a disclosure statement employed in a prepetition solicitation of votes to accept or reject a chapter 11 plan must be in compliance with "any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation," or, if such laws and regulations do not apply, provide "adequate information" as defined in section 1125(a) of the Bankruptcy Code.[16] For the reasons discussed below, the Disclosure Statement fully complies with section 1126(b) of the Bankruptcy Code.[17]

1. The Debtors Complied with Applicable Nonbankruptcy Law.

17. In accordance with section 1126(b)(1) of the Bankruptcy Code, the Debtors' solicitation of Holders of Claims and Interests receiving securities under the Plan was subject to

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16 Section 1126(b) of the Bankruptcy Code provides that "a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if (1) the solicitation of such acceptance or rejection was in compliance with any applicable 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)." 11 U.S.C. § 1126(b).

17 The Debtors are not seeking separate approval of the Disclosure Statement under section 1125(b) of the Bankruptcy Code. Such approval is not required because the Disclosure Statement was transmitted prepetition.

the United States Securities Act of 1933 (as amended, the "Securities Act") and the regulatory authority of various states under state securities laws ("Blue Sky Laws"). The Securities Act requires an issuer of securities to file a registration statement with the U.S. Securities and Exchange Commission prior to commencing a public offering.[18] The Debtors, however, were not required to file a registration statement under one or more of the exceptions to the registration requirements of the Securities Act, Blue Sky Laws, and similar statutes, rules, and regulations. In particular, section 4(a)(2) of the Securities Act exempts transactions not involving a public offering, and section 506 of Regulation D of the Securities Act ("Regulation D") provides a safe harbor under section 4(a)(2) for transactions that meet certain requirements, including that the investors participating therein qualify as "accredited investors" as defined in section 501 of Regulation D.[19] The Debtors' prepetition solicitation was exempt from registration requirements.[20]

18. Additionally, the Securities Act and regulations promulgated thereunder contain additional disclosure requirements that apply whether or not a registration statement is required.[21] Under those generally applicable requirements, a party offering or selling securities may not make "any untrue statement of a material fact or any omission to state a material fact necessary in order

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18 15 U.S.C. § 77e(c).

19 *See* Definitions and Terms Used in Regulation D, 17 C.F.R. § 230.501 (2017).

20 The Debtors here took steps to ensure that the parties entitled to vote on the Plan were Accredited Investors, as that term is defined in Rule 501 of Regulation D. For instance, each lender that executed the Restructuring Support Agreement represented that it was an Accredited Investor. Moreover, pursuant to the First Lien Term Loan Agreement and the Second Lien Term Loan Agreement, only Accredited Investors are permitted as eligible transferees of the bank debt. As a result of the foregoing, there was no general solicitation in connection with the sale of securities under the Plan. As such, the Debtors' prepetition solicitation did not constitute a public offering because it falls within the exemption set out in section 4(a)(2) of the Securities Act.

21 *See, e.g.*, 15 U.S.C. § 77q(a)(2); 17 C.F.R. § 240.10b-5(b); *see also* 7 *Collier on Bankruptcy* ¶ 1126.03[d] (16th ed.) (recognizing that the securities laws contain provisions regarding the accuracy of disclosure).

to make the statements made, in light of the circumstances in which they were made, not misleading."[22] "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[23]

19. As described in detail below, the Disclosure Statement contains extensive disclosures regarding all of the facts material to voting to accept or reject the Plan. Accordingly, the Debtors respectfully submit that the Disclosure Statement satisfies the disclosure requirements of applicable nonbankruptcy law under the terms of section 1126(b)(1) of the Bankruptcy Code.

2. The Disclosure Statement Contains Adequate Information.

20. The primary purpose of a disclosure statement is to provide material information, or "adequate information," that allows parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[24] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[25] Courts within the Third Circuit and elsewhere acknowledge that determining what constitutes

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22 15 U.S.C. § 77q(a)(2); *see also* 17 C.F.R. § 240.10b-5(b) (same).

23 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (internal quotations omitted).

24 *See, e.g.*, *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) ("Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing adequate information to enable a creditor to make an informed judgment about the Plan.") (internal quotations omitted); *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote.").

25 11 U.S.C. § 1125(a)(1) ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case."); *First Am. Bank of N.Y. v. Century Glove, Inc.*, 81 B.R. 274, 279 (D. Del. 1988) (noting that adequacy of disclosure for a particular debtor will be determined based on how much information is available from outside sources).

"adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code resides within the broad discretion of the court.[26]

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

a. the events which led to the filing of a bankruptcy petition and the relationship of a debtor with the affiliates;

b. a description of the available assets and the value of the present condition of a debtor while in chapter 11;

c. the anticipated future of the company and the claims asserted against a debtor;

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

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

f. the future management of a debtor;

g. the chapter 11 plan or a summary thereof;

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

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

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

k. the litigation likely to arise in a nonbankruptcy context; and

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26 *See, e.g.*, *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court."); *In re River Village Assocs.*, 181 B.R. 795, 804 (E.D. Pa. 1995) (same); *In re Phx. Petrol. Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) (same); *see also In re PC Liquidation Corp.*, 383 B.R. 856, 865 (E.D.N.Y. 2008) ("The standard for disclosure is, thus, flexible and 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.") (internal citations omitted); *In re Lisanti Foods, Inc.*, 329 B.R. 491, 507 (D.N.J. 2005) (same).

l. the tax attributes of a debtor.[27]

22. The Disclosure Statement contains, among other things, descriptions and summaries of: (a) classification and treatment of Claims and Interests under the Plan, including who is entitled to vote and how to vote on the Plan;[28] (b) the Debtors' corporate history and corporate structure, business operations, and prepetition capital structure and indebtedness;[29] (c) events leading to these Chapter 11 Cases, including the Debtors' prepetition restructuring negotiations and entry into the Restructuring Support Agreement;[30] (d) certain important effects of confirmation of the Plan; (e) the releases and exculpations contemplated by the Plan;[31] (f) certain financial information about the Debtors, including financial projections and liquidation and valuation analyses;[32] (g) the statutory requirements for confirming the Plan;[33] (h) certain risk factors Holders of Claims and Interests should consider before voting to accept or reject and the Plan and information regarding alternatives to confirmation of the Plan;[34] (i) certain important

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27 *In re U.S. Brass Corp.*, 194 B.R. 420, 424–25 (Bankr. E.D. Tex. 1996); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (listing the factors courts have considered in determining the adequacy of information provided in a disclosure statement); *In re Metrocraft Publ'g. Servs., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same). Disclosure regarding all topics is not necessary in every case. *Phx. Petrol.*, 278 B.R. at 393; *U.S. Brass*, 194 B.R. at 425.

28 *See* Disclosure Statement, Art. V.B.

29 *See id.* at Art. II.

30 *See id.* at Art. III; Art. IV.A.

31 *See id.* at Art. V.G.

32 *See id.* at Ex. E; Ex. F.

33 *See id.* at VI. D.

34 *See* Disclosure Statement, Art. VIII.

disclosures regarding securities laws;[35] and (j) certain U.S. federal income tax consequences of the Plan.[36]

23. In addition, and as noted above, the Disclosure Statement and the Plan were subject to review and comment by the Consenting Term Loan Lenders, the U.S. Trustee, certain other key stakeholders, and their respective advisors. As of the date hereof, no parties filed an objection to approval of the Disclosure Statement or confirmation of the Plan. For the reasons set forth above, the Debtors submit that the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code in satisfaction of section 1126(b)(2) and should be approved.

B. The Debtors Complied with the Scheduling Order.

24. On December 19, 2019, the Court entered the Scheduling Order[37] and approved the form and manner of the Publication Notice, Voting Record Date, Voting Deadline, Solicitation Procedures, form of Ballots, and voting tabulation procedures.[38] The Debtors complied with the procedures approved by the Scheduling Order.

1. The Debtors Complied with the Notice Requirements Set Forth in the Scheduling Order.

25. The Debtors satisfied the notice requirements set forth in the Scheduling Order, Bankruptcy Rule 3017, and Local Rule 3017-1. ***First***, on December 13, 2019, the Debtors caused their solicitation agent, Stretto, to distribute the solicitation materials, which included the Plan and

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35 *See id.* at Art. IX.

36 *See id.* at Art. X.

37 For the avoidance of doubt, the factual and legal arguments set forth in the Scheduling Motion are incorporated herein by reference in their entirety.

38 *See* Scheduling Order ¶¶ 11–16.

the Disclosure Statement, to Holders of Claims and Interests in the Voting Classes as of the Voting Record Date.[39] ***Second***, on December 23, 2019, the Debtors mailed the Combined Hearing Notice to all parties on the Debtors' creditor matrix and all interest Holders of record informing the recipients of, among other things: (a) the commencement of these Chapter 11 Cases; (b) the date and time set for the hearing to consider approval of the Disclosure Statement and confirmation of the Plan; and (c) the deadline for filing objections to the Plan and the Disclosure Statement.[40] ***Third***, the Debtors caused the Publication Notice to be published in *The Wall Street Journal* and the *Chicago Tribune* on December 24, 2019.[41] ***Fourth***, the Combined Hearing Notice included instructions on how to obtain the Plan and the Disclosure Statement without a fee through the Debtors' restructuring website or for a fee at the Court's PACER website.

2. The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Scheduling Order.

26. The form of Ballots used comply with the Bankruptcy Rules and were approved by the Court pursuant to the Scheduling Order.[42] No party has objected to the sufficiency of the Ballots. Based on the foregoing, the Debtors submit that they complied with the Scheduling Order and satisfied the requirements of Bankruptcy Rule 3018(c).

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39 As previously noted, under the Scheduling Order, the Debtors were not required to mail a copy of the Plan or the Disclosure Statement to Holders of Claims or Interests that are: (a) Unimpaired under, and conclusively presumed to accept, the Plan; or (b) Impaired under, and deemed to reject, the Plan. *See id.* ¶ 16.

40 *See Affidavit of Service* [Docket No. 77].

41 *See id*.

42 *See* Scheduling Order ¶ 14.

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

27. The Debtors' solicitation period complied with the Scheduling Order and Bankruptcy Rule 3018(b). ***First***, as demonstrated above and in the Scheduling Motion, the Plan and Disclosure Statement were transmitted to all Holders of Claims and Interests in the Voting Classes. ***Second***, the solicitation period, which lasted from December 13, 2019, through January 15, 2020, complied with the Scheduling Order[43] and was adequate under the particular facts and circumstances of these Chapter 11 Cases. Accordingly, the Debtors submit that they complied with the Scheduling Order and satisfied the requirements of Bankruptcy Rule 3018(b), and no party has asserted otherwise.

4. The Debtors' Vote Tabulation Procedures Complied with the Scheduling Order.

28. The Debtors request that the Court find that the Debtors' tabulation of votes complied with the Scheduling Order. Stretto reviewed all Ballots received in accordance with the procedures described in the Scheduling Motion and the Disclosure Statement[44] and subsequently approved in the Scheduling Order.[45] Because Stretto complied with all of the Solicitation Procedures, the Debtors respectfully submit that the Court should approve the Debtors' tabulation of votes confirming that in Classes 3 and 7 the requisite majorities in amount and number of Claims voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code.

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43 *See id.* ¶¶ 8, 12.

44 *See generally* Voting Report.

45 *See* Scheduling Order ¶ 15.

5. Solicitation of the Plan Complied with the Bankruptcy Code and Was in Good Faith.

29. 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.

30. As set forth in the First Day Declaration and the Scheduling Motion, and as demonstrated by the Debtors' compliance with the Scheduling Order, the Debtors at all times engaged in arm's-length, good-faith negotiations and took appropriate actions in connection with the solicitation of the Plan in compliance with section 1125 of the Bankruptcy Code.[46] Therefore, the Debtors respectfully request that the Court grant the parties the protections provided under section 1125(e) of the Bankruptcy Code.

II. The Plan Satisfies the Requirements of Section 1129 of the Bankruptcy Code and Should Be Confirmed.[47]

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

31. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision also encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the

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46 *See* First Day Declaration ¶ 26-31.

47 *See In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *4 (Bankr. D. Del. Apr. 29, 2010) (holding that the plan proponent must prove each element of section 1129(a) and 1129(b) of the Bankruptcy Code by a preponderance of the evidence); *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 148 (Bankr. D.N.J. 2010) ("The plan proponent bears the burden to show by a preponderance of the evidence that the proposed Chapter 11 plan has a reasonable probability of success, and is more than a visionary scheme") (citing *In re Wiersma*, 227 Fed. Appx. 603, 606 (9th Cir. 2007)) (internal citations omitted).

content of a plan of reorganization, respectively.[48] As explained below, the Plan complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code, as well as other applicable provisions.

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

32. The classification requirement of section 1122(a) of the Bankruptcy Code provides, in pertinent part, that "[e]xcept as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[49] For a classification structure to satisfy section 1122 of the Bankruptcy Code, substantially similar claims or interests need not be grouped in the same class.[50] Instead, claims or interests placed in a particular class must be substantially similar to each other.[51] Courts in this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[52]

33. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Interests into separate

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48 S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re S&W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was most directly aimed at were [s]ections 1122 and 1123.").

49 11 U.S.C. § 1122(a).

50 *See, e.g.*, *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (D. Del. 2006).

51 *Id.*

52 Courts have identified grounds justifying separate classification, including where members of a class possess different legal rights or there are good business reasons for separate classification. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *In re Jersey City Med. Ctr.*, 817 F.2d 1055,

classes, with Claims and Interests in each class differing from the Claims and Interests in each other class in a legal or factual way or based on other relevant criteria.[53] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

a. Class 1: Other Secured Claims;

b. Class 2: Other Priority Claims;

c. Class 3: Term Loan Secured Claims;

d. Class 4: General Unsecured Claims;

e. Class 5: Intercompany Claims;

f. Class 6: Intercompany Interests; and

g. Class 7: Existing Equity Interests.

34. Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class.[54] In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests.[55] Namely, the Plan separately classifies the Claims and Interests

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1061 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes); *see also Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because the classification scheme had a rational basis on account of the bankruptcy court-approved settlement); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan."); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (although discretion is not unlimited, "the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case" (internal quotation marks omitted)); *In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("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 . . . .").

53 *See* Plan, Art. III.

54 *See* Liebman Declaration ¶ 19.

55 *See id*.

because each Holder of such Claims or Interests may hold (or may have held) rights in the Debtors' estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification.

35. For example, the classification scheme distinguishes Holders of the Term Loan Secured Claims (Class 3) from Holders of the General Unsecured Claims (Class 4) because of the different circumstances of each Class and the relative priority of their Claims against the Debtors. Other Priority Claims (Class 2) are classified separately due to their required treatment under the Bankruptcy Code. In addition, the Plan classifies Existing Equity Interests separately from interests that a Debtor holds in another Debtor because the Debtors' ownership structure is dependent upon maintaining the intercompany interests and, therefore, the intercompany interests may be preserved under the Plan for the administrative convenience of ensuring the preservation of the Debtors' corporate structure after the Effective Date.[56]

36. Accordingly, the Claims or Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests in each such Class and the distinctions among Classes are based on valid business, factual, and legal distinctions. The Debtors submit that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code.

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

37. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. The Plan satisfies each of these requirements.

56 *See id*.

a. Designation of Classes of Claims and Equity Interests and Specification of Unimpaired Classes (§ 1123(a)(1)–(2)).

38. For the reasons set forth above, Article III of the Plan properly designates Classes of Claims and Interests and identifies each Class of Claims or Interests that are not Impaired under the Plan.

b. Treatment of Impaired Classes (§ 1123(a)(3)).

39. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan meets this requirement by setting forth the treatment of each Class that is Impaired in Article III.

c. Equal Treatment within Classes (§ 1123(a)(4)).

40. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." The Plan meets this requirement because Holders of Allowed Claims or Interests will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such Holders' respective Class.

d. Means for Implementation (§ 1123(a)(5)).

41. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. The Plan satisfies this requirement because Article IV of the Plan, as well as other provisions thereof, provides for the means by which the Plan will be implemented, providing for, among other things:

a. the execution and delivery of appropriate agreements or other documents of merger, amalgamation, consolidation, restructuring, reorganization, conversion, disposition, transfer, arrangement, continuance, dissolution, sale, purchase, or liquidation containing terms that are consistent with the terms of the Plan;

b. the execution and delivery of appropriate instruments of transfer, assignment, assumption, or delegation of any asset, property, right, liability,

debt, or obligation on terms consistent with the terms of the Plan and having other terms to which the applicable parties agree;

c. the filing of appropriate certificates or articles of incorporation, reincorporation, formation, merger, consolidation, conversion, amalgamation, arrangement, continuance, or dissolution or other certificates or documentation for other transactions as described in clause (a), pursuant to applicable state law;

d. the execution and delivery of the New Shareholders Agreement and the New Organizational Documents and any certificates or articles of incorporation, bylaws, or such other applicable formation, organizational, governance, or constitutive documents (if any) of each Reorganized Debtor (including all actions to be taken, undertakings to be made, and obligations to be incurred and fees and expenses to be paid by the Debtors and/or the Reorganized Debtors, as applicable), and the issuance, distribution, reservation, or dilution, as applicable, of the New Common Stock, as set forth herein;

e. the execution and delivery of the Exit Facility Documents and the Take-Back Term Loan Credit Agreement (in both cases, including all actions to be taken, undertakings to be made, and obligations to be incurred and fees and expenses to be paid by the Debtors and/or the Reorganized Debtors, as applicable);

f. the execution and delivery of the New Warrant Agreement, and the issuance and distribution of the New Warrants;

g. the adoption of the Management Incentive Plan and the issuance and reservation of equity thereunder to the participants in the Management Incentive Plan on the terms and conditions set by the Reorganized Clover Board after the Effective Date; and

h. all other actions that the applicable Entities determine to be necessary or appropriate, including making filings or recordings that may be required by applicable law in connection with the Restructuring Transactions.

42. The precise terms governing the execution of these transactions are set forth in the applicable definitive documents or forms of agreements included in the Plan Supplement. The Debtors submit that the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

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

43. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. Article IV.L of

the Plan provides that the New Organizational Documents will prohibit the issuance of non-voting equity Securities. The certificate of incorporation for Reorganized Clover similarly will reflect such prohibition.[57]

f. Directors and Officers (§ 1123(a)(7)).

44. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." Pursuant to Article IV.M of the Plan, the Reorganized Clover Board and new officers of the Reorganized Debtors shall be appointed in accordance with the New Organizational Documents and other constituent documents of each Reorganized Debtor. Pursuant to section 1129(a)(5) of the Bankruptcy Code, to the extent known and determined, on or prior to the Effective Date, the number and identity of the members of the Reorganized Clover Board shall be determined in accordance with the Plan, Restructuring Support Agreement, and/or the applicable New Organizational Documents. The selection process and composition of the Reorganized Clover Board accords with applicable state law, the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. Accordingly, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

57 *See First Amended Plan Supplement*, Ex. A(ii) [Docket No. 97] (amended and restated certificate of incorporation containing such prohibition).

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

a. Overview of the Plan's Compliance with Section 1123(b) of the Bankruptcy Code.

45. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases; (c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[58]

46. The Plan is consistent with section 1123(b) of the Bankruptcy Code. Specifically, under Article III of the Plan, Classes 1, 2, 4, and, potentially, 5, and 6 are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of the Holders of Claims and Interests within such Classes.[59] On the other hand, Classes 3, 7, and, potentially, 5, and 6 are Impaired since the Plan modifies the rights of the Holders of Claims and Interests within such Classes as contemplated in section 1123(b)(1) of the Bankruptcy Code.[60]

47. In addition, and under section 1123(b)(2) of the Bankruptcy Code, Article V of the Plan provides for the assumption of all Executory Contracts and Unexpired Leases under section 365 of the Bankruptcy Code, except to the extent set forth in the Plan.[61]

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

59 *See* Plan, Art. III.

60 *See id.*

61 *See id.* at Art. V.A.

b. The Plan's Release, Exculpation, and Injunction Provisions Satisfy Section 1123(b) of the Bankruptcy Code.

48. The Plan also includes certain releases, an exculpation, and an injunction provision. These discretionary provisions are proper because, among other things, they are the product of extensive good-faith, arm's-length negotiations, were a material inducement for parties to enter into the Restructuring Support Agreement and support the Plan, are supported by the Debtors and their key constituents, and are consistent with applicable precedent. Further, these provisions were fully and conspicuously disclosed to all parties in interest through the Combined Hearing Notice, which excerpted the full text of the releases, exculpation, and injunction provision as set forth in the Plan.

(i) The Debtor Release Is Appropriate.

49. 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 the estate."[62] Further, a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[63] In determining whether a debtor release is proper, courts in Delaware and elsewhere generally may consider the following five factors:

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62 *See In re Coram Healthcare Corp.*, 315 B.R. 321, 334–35 (Bankr. D. Del. 2004) (holding that standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019). Generally, courts in the Third Circuit approve a settlement by the debtors if the settlement "exceed[s] the lowest point in the range of reasonableness." *See, e.g.*, *In re Exaeris, Inc.*, 380 B.R. 741, 746–47 (Bankr. D. Del. 2008) (citation omitted); *see Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (examining whether settlement "fall[s] below the lowest point in the range of reasonableness") (alteration in original) (citation omitted); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (stating that settlement must be within reasonable range of litigation possibilities).

63 *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether the compromise is fair, reasonable, and in the best interest of the estate.") (internal citations omitted).

a. whether the non-debtor has made a substantial contribution to the debtor's reorganization;

b. whether the release is essential to the debtor's reorganization;

c. agreement by a substantial majority of creditors to support the release;

d. identity of interest between the debtor and the third party; and

e. whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release.[64]

Not all of the above factors need to be satisfied for a court to approve a debtor release.[65]

50. Article VIII.D of the Plan provides for releases by the Debtors, as of the Effective Date, of, among other things, certain claims, rights, and causes of action that the Debtors and the Reorganized Debtors may have against the Released Parties (the "Debtor Release").[66] The Debtors have satisfied the business judgment standard in granting the Debtor Release under the Plan. The Debtor Release meets the applicable standard because it is fair, reasonable, the

64 *See, e.g.*, *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.,* 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)); *In re Spansion, Inc.*, 426 B.R. at 143 n.47 (citing the *Zenith* factors).

65 *See, e.g.*, *Wash. Mut.*, 442 B.R. at 346 ("These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the [c]ourt's determination of fairness."); *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that *Zenith* factors are not exclusive or conjunctive requirements).

66 Article I.A.85 of the Amended Plan defines "Released Party" as, collectively, and in each case in its capacity as such: (a) the Debtors and the Reorganized Debtors; (b) the Secured Parties; (c) the Term Loan Agent; (d) the Sponsors; (e) the Consenting Stakeholders; (f) with respect to each of the foregoing Entities in clauses (a) through (e), each such Entity's current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equity holders, and funds; and (g) with respect to each of the foregoing Entities in clauses (a) through (f), each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (with respect to clause (f), each solely in their capacity as such); *provided*, *however*, that any Holder of a Claim or Interest in a voting Class that (a) objects to the Plan and votes to reject the Plan or (b) abstains from voting shall not be a "Released Party" for purposes of the Plan.

product of arm's-length negotiations, was critical to obtaining support for the Plan and Restructuring Support Agreement from various constituencies, and in the best interests of the Debtors' estates. Indeed, the Debtor Release was negotiated in connection with the other terms of the Plan and Restructuring Support Agreement and is an indispensable component to achieving final resolution of potential disputes that would otherwise negatively affect these Chapter 11 Cases and the available recoveries under the Plan.

51. ***First***, each Released Party has made a substantial contribution to the Debtors' estates. The Released Parties played an integral role in the formulation of the Plan and contributed to the Plan not only by expending significant time and resources analyzing and negotiating the issues facing the Debtors, but also in giving up material economic interests to ensure the success of the Plan. For instance, in exchange for the Debtor Release, the Consenting Term Loan Lenders not only agreed to support the Plan pursuant to the Restructuring Support Agreement, but also agreed to equitize all but $80 million of their Term Loan Secured Claims. Certain of the Consenting Term Lenders also consented to the Debtors' use of Cash Collateral, which was instrumental to the uninterrupted operation of the Debtors' business during the pendency of these Chapter 11 Cases. Finally, the Debtors' directors, officers, and other agents, as well as the creditors' professionals and other agents, have been instrumental in negotiating, formulating, and implementing the restructuring transactions contemplated under the Restructuring Support Agreement and the Plan.

52. ***Second***, the Debtor Release is essential to the Debtors' reorganization because it constitutes an integral term of the Restructuring Support Agreement, the agreement underpinning the entirety of these Chapter 11 Cases. Indeed, absent the Debtor Release, it is highly unlikely the Released Parties would have agreed to support the Plan and the restructuring transactions

contemplated therein. Moreover and as described above, each Released Party contributed substantial value to these Chapter 11 Cases, and did so with the understanding that they would receive releases from the Debtors. In the absence of these parties' support, the Debtors would not be in a position to confirm the Plan and emerge from chapter 11. The Debtor Release, therefore, is essential to the Debtors' reorganization.

53. ***Third***, no stakeholders have objected to the Debtor Release contained in the Plan. All voting creditors and equityholders voted to accept the Plan (including the Debtor Release).

54. ***Fourth***, an identity of interest exists between the Debtors and the parties to be released. Each Released Party, as a stakeholder and critical participant in the Plan process, shares a common goal with the Debtors in seeing the Plan succeed. Like the Debtors, these parties seek to confirm the Plan and implement the transactions contemplated thereunder. Moreover, with respect to certain of the releases—*e.g.*, those releasing the Debtors' current and former directors, officers, and principals—there is a clear identity of interest supporting the release because the Debtors will assume certain indemnification obligations under the Plan that will be honored by the Reorganized Debtors (and such claims would "ride through" these Chapter 11 Cases and would be paid in full similarly to all other general unsecured claims, even assuming that the indemnification obligations were not being assumed). Thus, a lawsuit commenced by the Debtors (or derivatively on behalf of the Debtors) against certain individuals would effectively be a lawsuit against the Reorganized Debtors themselves.

55. ***Fifth***, the Debtors' Plan provides for meaningful recoveries for all Classes affected by the Debtor Release. Furthermore, as noted above, the Debtor Releases are supported by all parties entitled to vote on the Plan on a unanimous basis.

56. For these reasons, the Debtor Release is justified, is in the best interests of creditors, is an integral part of the Plan, and satisfies key factors considered by courts in determining whether a debtor release is proper.

(ii) The Third-Party Release Is Consensual and Appropriate.

57. The Plan also provides for the Releasing Parties'[67] release to the extent set forth in the Plan (the "Third-Party Release").[68] Courts in this jurisdiction routinely approve such release provisions if, as here, they are consensual.[69] The Releasing Parties include, among others, the Consenting Sponsors, and the Consenting Term Loan Lenders, all Holders of Claims or Interests that vote to accept or are deemed to accept the Plan. Notably, the Plan only provides for the Releasing Parties to be released if those parties vote in favor of the Plan, while nonvoting or rejecting Impaired Class parties are not included as Releasing Parties. Additionally, the Plan garnered unanimous consensus from Classes 3 and 7. The Third-Party Releases are consensual, consistent with established Third Circuit law, and integral to the Plan, and therefore should be approved.

58. Numerous courts have recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual.[70] Consensual releases are

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67 Article I.A.86 of the Plan defines "Releasing Parties" as, collectively, and in each case in its capacity as such: (a) the Debtors and the Reorganized Debtors; (b) the Consenting Term Loan Lenders; (c) the Term Loan Agent; (d) the Sponsors; (e) with respect to each of the foregoing Entities in clauses (a) through (d), each such Entity's current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equity holders, and funds; (f) with respect to each of the foregoing Entities in clauses (a) through (e), each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (with respect to clause (e), each solely in their capacity as such); and (k) all Holders of Claims and Interests not described in the foregoing clauses (a) through (f); provided, however, that any Holder of a Claim or Interest in a voting Class that (a) objects to the Plan and votes to reject the Plan or (b) abstains from voting shall not be a "Releasing Party" for purposes of the Plan.

68 *See* Plan, Art. VIII.E.

permissible on the basis of general principles of contract law.[71] The law is clear that a release is consensual where parties have received sufficient notice of a plan's release provisions and have had an opportunity to object to or opt out of the release and failed to do so (including where such holder abstains from voting altogether).[72] Here, all parties in interest had ample opportunity to evaluate and opt out of the Third-Party Releases by either (a) abstaining from voting on the Plan or (b) objecting to the Plan. Importantly the ballots distributed to Holders of Claims and Interests entitled to vote on the Plan quoted the entirety of the Third-Party Release in bold, conspicuous font, clearly informing such Holders of the steps they should take if they disagreed with the scope of the release. Thus, affected parties were on notice of Third-Party Release, including the option to opt out of the Third-Party Release. As such, the Third-Party Release is consensual as to all creditors and interest holders who did not object.

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69 *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party release that applied to unimpaired holders of claims deemed to accept the plan as consensual); *Spansion*, 426 B.R. at 144 (same); *Wash. Mut.*, 442 B.R. at 352 (observing that consensual third-party releases are permissible); *Zenith Elecs.,* 241 B.R. at 111 (approving non-debtor releases for creditors that voted in favor of the plan); *see also In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Apr. 2, 2018).

70 *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 305 (collecting cases); *Spansion*, 426 B.R. at 144 (stating that "a third party release may be included in a plan if the release is consensual").

71 *In Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004).

72 *See, e.g.*, *In re Indianapolis Downs*, *LLC,* 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved."); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009) ("Except for those who voted against the Plan, or who abstained and then opted out, I find the Third Party Release provision consensual and within the scope of releases permitted in the Second Circuit."); *aff'd* 2010 WL 1223109 (S.D.N.Y. March 24, 2010), *modified on other grounds*, 634 F.3d 79 (2d Cir. 2011); *In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) ("The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that *Specialty Equipment* permits.") (citing *In re Specialty Equip. Corp.*, 3 F.3d 1043 (7th Cir. 1993).

59. Based on the foregoing, the Debtors have established that the Third-Party Release is consensual, and there is no need to consider the factors governing non-consensual third-party releases under *Continental*[73] and its progeny. Nonetheless, even if the court determines that such releases are non-consensual, the Debtors submit the Third-Party Release is appropriate and should be approved.

60. Courts in the Third Circuit have held that a non-consensual release may be approved if such release is fair and necessary to the reorganization, and the court makes specific factual findings to support such conclusions.[74] In addition, the Third Circuit has found that, for such releases to be permissible, fair consideration must be given in exchange for the release.[75]

61. The Third Party Release is warranted under the circumstances of these Chapter 11 Cases because it is critical to the success of the Plan and it is fair and appropriate. Without the efforts of the Released Parties, both in negotiating and navigating the Teleplan acquisition and Imaging Sale, the Restructuring Support Agreement, and Plan negotiations, the Debtors would not be poised to confirm the Plan with the unanimous support of the Voting Classes. In addition, many of the Released Parties have been instrumental in supporting these Chapter 11 Cases and

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73 *See*, *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 213-14 (3d Cir. 2000).

74 *See*, *Id* (noting that the "hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, specific factual findings to support these conclusions"); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (evaluating certain factors to determine whether the "hallmarks" of permissible non-consensual releases are met, including "(i) the non-consensual release is necessary to the success of the reorganization, (ii) releases have provided a critical financial contribution to the Debtors' plan; (iii) the releasee's financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release"); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001) (evaluating similar factors to determine whether non-consensual third party releases were permissible); *cf. Washington Mutual*, 442 B.R. at 355 ("[T]he Court concludes that any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of third party releases.").

75 *See United Artists Theatre Co. v. Walton*, 315 F.3d 217, 227 (3d Cir. 2000) (citing *In re Continental Airlines*, 203 F.3d at 215).

facilitating a smooth and expeditious administration thereof. Finally, throughout these Chapter 11 Cases and the related negotiations, the Debtors' directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours both pre- and postpetition.[76]

62. Moreover, the third parties bound by the Releases have received sufficient consideration in exchange for the release of their Claims against the Released Parties to justify the Third-Party Release, which was a critically negotiated provision of the Plan. For example, without the concession by the Consenting Term Loan Lenders to equitize the overwhelming majority of their Term Loan Secured Claims, Holders of General Unsecured Claims would have received little to no recovery in these Chapter 11 Cases. Without the Third-Party Release, the Debtors' key stakeholders would not have been willing to fund and otherwise support the consensual restructuring transactions contemplated by the Restructuring Support Agreement, support confirmation of the Plan, and enable the Debtors to emerge from bankruptcy as a viable company while paying their trade and known general unsecured creditors in full.

63. Each of the Released Parties, as stakeholders and critical participants in the Debtors' reorganization process, share a common goal with the Debtors in seeing the Plan succeed. Further, the Debtors and the Reorganized Debtors are required to indemnify certain of the Released Parties under, among other agreements, their credit facilities and, with respect to officers and members of the boards of directors of the Debtors, certain indemnification agreements. Thus, causes of action against one of the Debtors' indemnitees could create an obligation on behalf of the Debtors and could effectively amount to litigation against the Debtors, depleting assets of

[76] *See* Liebman Declaration ¶ 43.

the Debtors' estates. Accordingly, there is an identity of interests between the Debtors and the entities that will benefit from the Third-Party Releases.

64. The Released Parties, including the Consenting Stakeholders, such parties' professionals and agents, certain of Clover's other key stakeholders, and the Debtors' officers and members of their board of directors, played an integral role in the formulation and negotiation of the Plan and the transactions contemplated thereby. As discussed above, the Released Parties have been active and important participants in the development of the Plan and have expended significant time and resources analyzing and negotiating the issues presented by the Debtors' capital structure and the material barriers to the resolution thereof. These parties have each provided material concessions or contributions to ensure that the Debtors have a consensual and expeditious reorganization. The Debtors' restructuring would not have been possible without the Released Parties' support and contributions. In addition to concessions under the Plan, the Released Parties made the contributions as discussed above, each in exchange for, among other things, the Third-Party Releases.

65. The Debtors submit that the Third-Party Releases are consensual or otherwise appropriate under *Continental* and its progeny. Accordingly, the Third-Party Releases should be approved.

(iii) The Exculpation Provision Is Appropriate.

66. Exculpation provisions that apply only to estate fiduciaries, and are limited to claims not involving actual fraud, willful misconduct, or gross negligence, are customary and generally approved in this district under appropriate circumstances.[77] Unlike third-party releases,

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77 *See Wash. Mut.*, 442 B.R. at 350–51 (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate).

exculpation provisions do not affect the liability of third parties *per se*, but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtors' restructuring.[78]

67. Here, the Plan's definition of exculpated parties includes the following estate fiduciaries:

> (a) the Debtors and the Reorganized Debtors; and (b) with respect to each of the foregoing entities, each such Entity's current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equity holders, and advisors.[79]

68. The Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtors, and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties.

69. Moreover, the exculpation provision and the liability standard it sets represents a conclusion of law that flows logically from certain findings of fact that the Court must reach in confirming the Plan as it relates to the Debtors. As discussed above, this Court must find, under section 1129(a)(2), that the Debtors have complied with the applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3), that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors and, by extension, to the Debtors' officers, directors, employees, and professionals. Further, these findings imply that the Plan was negotiated at arm's length and in good faith. Where

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78 *See In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (finding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code"); *see also In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *10 (approving a similar exculpation provision as that provided for under the Plan); *Spansion*, 2010 WL 2905001, at *16 (same).

79 *See* Plan, Art. I.A.41 (defining "Exculpated Party").

such findings are made, parties who have been actively involved in such negotiations should be protected from collateral attack.

70. Here, the Debtors and their officers, directors, and professionals actively negotiated with Holders of Claims and Interests across the Debtors' capital structure in connection with the Plan and these Chapter 11 Cases. Such negotiations were extensive and the resulting agreements were implemented in good faith with a high degree of transparency, and as a result, the Plan enjoys unanimous support from Holders of Claims and Interests entitled to vote.[80] The Exculpated Parties played a critical role in negotiating, formulating, and implementing the Restructuring Support Agreement, the Disclosure Statement, the Plan, and related documents in furtherance of the restructuring transactions.[81] Accordingly, the Court's findings of good faith vis-à-vis the Debtors' Chapter 11 Cases should also extend to the Exculpated Parties.

71. Additionally, the promise of exculpation played a significant role in facilitating Plan negotiations. All of the Exculpated Parties played a key role in developing the Plan that paved the way for a successful reorganization, and likely would not have been so inclined to participate in the plan process without the promise of exculpation. Exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability.[82]

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80 *See, e.g.*, Voting Report, Ex. A.

81 *See* Hr'g Tr. 58:18–19, *In re Verso Corp.*, No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016) ("[T]he debtors did not do this alone; they did it with the help of many others.").

82 *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (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").

72. Accordingly, under the circumstances, it is appropriate for the Court to approve the exculpation provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[83]

(iv) The Injunction Provision Is Appropriate.

73. The injunction provision set forth in Article VIII.G of the Plan implements the Plan's release, discharge, and exculpation provisions, in part, by permanently enjoining all entities from commencing or maintaining any action against the Debtors, the Reorganized Debtors, the Released Parties, or the Exculpated Parties on account of or in connection with or with respect to any such claims or interests released, discharged, or subject to exculpation pursuant to Article VIII.F of the Plan. Thus, the injunction provision is a key provision of the Plan because it enforces the release, discharge, and exculpation provisions that are centrally important to the Plan. As such, to the extent the Court finds that the exculpation and release provisions are appropriate, the Debtors respectfully submit that the injunction provision must also be appropriate. Moreover, this injunction provision is narrowly tailored to achieve its purpose.

4. The Plan Complies with Section 1123(d) of the Bankruptcy Code.

74. 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 nonbankruptcy law."

75. The Plan complies with section 1123(d) of the Bankruptcy Code because it provides for the satisfaction of monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan by payment of the default amount, if any, on

83 *See PWS Holding Corp.*, 228 F.3d at 246–47 (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *In re Indianapolis Downs, LLC*, 486 B.R. at 306 (same).

the Effective Date or in the ordinary course of business, subject to the limitations described in Article V of the Plan or the proposed Confirmation Order. In accordance with Article V of the Plan and section 365 of the Bankruptcy Code, the Debtors will satisfy any monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan on the Effective Date or in the ordinary course of business.

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

76. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The legislative history to section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[84] As discussed below, the Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code regarding disclosure and solicitation of the Plan.

1. The Debtors Complied with Section 1125 of the Bankruptcy Code.

77. As discussed in Part I of this memorandum, the Debtors complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code.

2. The Debtors Complied with Section 1126 of the Bankruptcy Code.

78. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Specifically, under section 1126 of the Bankruptcy Code, only holders

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84 *See, e.g.*, *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.*, No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) 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").

of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.[85]

79. As set forth above, in accordance with section 1125 of the Bankruptcy Code, the Debtors solicited acceptances or rejections of the Plan from the Holders of Allowed Claims and Interests in Classes 3 and 7. The Debtors did not solicit votes from Holders of Claims and Interests in Classes 1, 2, or 4, because Holders of Claims and Interests in these classes are Unimpaired and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have accepted the Plan. Depending on their ultimate treatment by the Debtors, Holders of Claims in Class 5 (Intercompany Claims) and Interests in Class 6 (Intercompany Interests) will either be conclusively deemed to accept or conclusively deemed to reject the Plan, and in either scenario are not entitled to vote on the Plan. Thus, pursuant to section 1126(a) of the Bankruptcy Code, only Holders of Claims and Interests in Classes 3 and 7 were entitled to vote to accept or reject the Plan.[86]

80. With respect to the Voting Classes, (a) section 1126(c) of the Bankruptcy Code provides that a class accepts a plan where holders of claims holding at least two-thirds in amount

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85 11 U.S.C. § 1126(a), (f).

86 *See* Plan, Art. III.

and more than one-half in number of allowed claims in such class vote to accept such plan, and (b) section 1126(d) of the Bankruptcy Code provides that a class accepts a plan where holders of at least two-thirds in amount of allowed interests vote to accept such plan.

81. As described above, the Voting Classes voted to accept the Plan did so in sufficient number and by sufficient amounts as required by the Bankruptcy Code.[87] Based upon the foregoing, the Debtors submit that they satisfy the requirements of section 1129(a)(2) of the Bankruptcy Code.

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

82. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[88] To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[89]

83. The Debtors negotiated, developed, and proposed the Plan in good faith, and the Plan satisfies section 1129(a)(3) of the Bankruptcy Code. The Plan was negotiated with, and is supported by, the Debtors, the Consenting Term Loan Lenders, and other key constituents.[90] These

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87 *See* Voting Report, Ex. A.

88 *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d at 242 (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997) (quoting *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.*), 764 F.2d 406, 408 (5th Cir. 1985)); *In re Century Glove*, *Inc*., Civ. A. Nos. 90-400 and 90-401, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

89 *See, e.g.*, *T-H New Orleans*, 116 F.3d at 802 (quoting *In re Sun Country Dev., Inc.*, 764 F.2d at 408); *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012); *Century Glove*, 1993 WL 239489, at *4.

90 *See* Liebman Declaration ¶¶ 35, 38.

parties came to consensus after many months of restructuring efforts, which involved significant arm's length negotiations. As provided in the Liebman Declaration, the Plan delivers significant value to creditors and interest holders alike, and preserves the Reorganized Debtors as a going concern.[91] Additionally, the Plan received unanimous support from Classes 3 and 7 as illustrated by the Voting Results from Classes 3 and 7. The Plan was proposed in good faith and not by any means forbidden by law, has a high likelihood of success, and will achieve a result consistent with the objectives of the Bankruptcy Code.[92]

84. 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.[93] Here, the Plan will enable the Debtors to right-size their balance sheet, improve liquidity, and strengthen go-forward operations, positioning them for long-term success. The Plan's unanimous acceptance by Classes 3 and 7 supports this view.

85. Throughout the negotiation of the Plan and these Chapter 11 Cases, the Debtors have upheld their fiduciary duties to stakeholders and protected the interests of all constituents with an even hand. Accordingly, the Plan and the Debtors' conduct satisfy section 1129(a)(3) of the Bankruptcy Code.

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91 *See id.* ¶ ¶ 29, 35.

92 *See id.* ¶ 53–55.

93 *See NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528 (1984); *B.D. Int'l Disc. Corp. v. Chase Manhattan Bank, N.A. (In re B.D. Int'l Disc. 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").

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

86. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent or by the debtor be subject to approval by the Court as reasonable. Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the court as to their reasonableness.[94]

87. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code. The Debtors submit that payment of their professional claims is the only category of payments that falls within the ambit of section 1129(a)(4) of the Bankruptcy Code in these Chapter 11 Cases, and the Debtors may not pay their professional claims absent Court approval. Further, all such professional claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 and 330 of the Bankruptcy Code.[95] Article II.B.2 of the Plan, moreover, provides that the Debtors' professionals shall file all final requests for payment of the professional claims no later than 45 days after the Effective Date, thereby providing adequate time for interested parties to review such professional claims.

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

88. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the

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94 *See In re Lisanti Foods, Inc.*, 329 B.R. at 503 ("Pursuant to § 1129(a)(4), a [p]lan should not be confirmed unless fees and expenses related to the [p]lan have been approved, or are subject to the approval, of the Bankruptcy Court."), *aff'd*, 241 F. App'x 1 (3d Cir. 2007); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

95 11 U.S.C. §§ 328(a), 330(a)(1)(A).

identity of an "insider" (as defined by section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider. Additionally, 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.[96] Section 1129(a)(5)(A)(ii) directs the Court to ensure that the post-confirmation governance of the Reorganized Debtors is in "good hands," which courts have interpreted to mean: (a) experience in the reorganized debtors' business and industry;[97] (b) experience in financial and management matters;[98] (c) that the debtors and creditors believe control of the entity by the proposed individuals will be beneficial;[99] and (d) does not "perpetuate[] incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor."[100] The "public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[101]

89. The Plan satisfies section 1129(a)(5) of the Bankruptcy Code. As described above, in accordance with Article IV.M of the Plan, on or prior to the Effective Date, the number and identity of the members of the Reorganized Clover Board shall be determined by the

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96 11 U.S.C. § 1129(a)(5)(A)(ii).

97 *See In re Rusty Jones, Inc.,* 110 B.R. 362, 372, 375 (Bankr. N.D. Ill. 1990) (stating that 1129(a)(5) not satisfied where management had no experience in the debtor's line of business); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149–50 (Bankr. S.D.N.Y. 1984) (continuation of debtors' president and founder, who had many years of experience in the debtors' businesses, satisfied section 1129(a)(5)); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 760 (citing *Toy & Sports*, 37 B.R. at 149–50).

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

99 *See In re Apex Oil Co.*, 118 B.R. 683, 704–05 (Bankr. E.D. Mo. 1990).

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

101 7 Collier on Bankruptcy ¶ 1129.02[5][b] (16th ed. 2018).

Required Consenting Term Loan Lenders in accordance with the Plan, the Restructuring Support Agreement and/or the applicable New Organizational Documents. On the Effective Date, the officers of the Reorganized Debtors shall be appointed in accordance with the New Organizational Documents and other constituent documents of each Reorganized Debtor.[102] The Debtors will make all known disclosures in advance of the Effective Date regarding the identity and affiliations of any members of the Reorganized Clover Board in the Plan Supplement.[103] In instances where specific individuals are not yet known, the Debtors have disclosed which creditor constituency has the right to appoint the applicable director. The Debtors and their creditors believe control of the Reorganized Debtors by the proposed individuals or individuals to be appointed in accordance with the Plan and New Organizational Documents will be beneficial, and no party in interest has objected to the Plan on these grounds. Therefore, the requirements under section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied. Finally, the Debtors satisfied section 1129(a)(5)(B) of the Bankruptcy Code because the Debtors have or will publicly disclose the identity of all insiders that the Reorganized Debtors will employ or retain in compliance with the Bankruptcy Code in the Plan Supplement.

F. The Plan Does Not Require Governmental Regulatory Approval (§ 1129(a)(6)).

90. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has

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102 *See* Plan, Art. IV.M; First Amended Plan Supplement, Exhibit A(i).

103 *See In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).; *see also In re Armstrong World Indus.*, 348 B.R. 111, 165 (D. Del. 2006) (finding disclosure of identities and nature of compensation of persons to serve as directors and officers on the effective date sufficient for section 1129(a)(5) of the Bankruptcy Code).

approved any rate change provided for in the plan. Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases.

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

91. Section 1129(a)(7) of the Bankruptcy Code, commonly known as the "best interests test," requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a value of not less than the value such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. The best interests test applies to individual dissenting holders of impaired claims and interests rather than classes,[104] and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[105]

92. The Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the best interests test. As set forth in the Disclosure Statement[106] and the Liebman Declaration,[107] the Debtors, with the assistance of their financial advisors, prepared a liquidation analysis that estimates recoveries for members of each of the Classes. The projected recoveries for these Classes under the Plan are

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104 *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 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."); *Century Glove*, 1993 WL 239489, at *7; *In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (stating that section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

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

106 *See* Disclosure Statement, Ex. F.

107 *See* Liebman Declaration ¶¶ 54–55.

equal to or in excess of the recoveries estimated in a hypothetical chapter 7 liquidation.[108] Under the Debtors' liquidation analysis, the Holders of Intercompany Claims and Intercompany Interests are expected to receive *no* recovery in a liquidation. Such recoveries are significantly less than the proposed Plan treatments for Intercompany Claims (which will be reinstated, converted to equity, or extinguished) and Intercompany Interests (which will be reinstated or extinguished).

93. Significantly, in a chapter 7 liquidation, the Holders of Other Secured Claims would be required to be paid in full before any distributions were made to junior claim holders and then to equityholders. Because the Debtors' liquidation analysis shows that the Holders of General Unsecured Claims would not be paid in full in a liquidation scenario, the Holders of General Unsecured Claims, who are Unimpaired in the Chapter 11 Cases, would receive ***no*** recovery in a chapter 7 liquidation. Accordingly, the Plan complies with section 1129(a)(7), and no party has asserted otherwise.

H. The Plan Is Confirmable Despite Potentially Not Meeting the Requirements of Section 1129(a)(8) of the Bankruptcy Code.

94. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. However, the Holders of Claims and Interests in the Classes that may reject are deemed to have rejected the Plan and, thus, were not entitled to vote. While the Plan potentially may not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to the Deemed Rejecting Classes, the Plan is nonetheless confirmable because it satisfies sections 1129(a)(10) and 1129(b) of the Bankruptcy Code, as discussed below.

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108 *See id*.

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

95. 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. 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—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. 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 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). Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—i.e., priority tax claims—must receive cash payments over a period not to exceed five years from the Petition Date, the present value of which equals the allowed amount of the claim.

96. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. ***First***, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each Holder of an Allowed Administrative Claim will receive cash equal to the amount of such Allowed Claim. ***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 and such Claims have been paid in the ordinary course. ***Third***, Article II.C of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it provides that Holders of Allowed Priority

Tax Claims shall be treated in accordance with the terms of Section 1129(a)(9)(C) of the Bankruptcy Code. The Plan thus satisfies each of the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Class of Impaired, Non-Insider Claims Accepted the Plan (§ 1129(a)(10)).

97. 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, "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan.

98. Here, Classes 3 and 7, which are Impaired, voted to accept the Plan independent of any insiders' votes. Thus, the Plan has been accepted by the only two voting classes holding impaired, non-insider claims with respect to each Debtor. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

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

99. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that a plan is feasible as a condition precedent to confirmation. Specifically, the Court must determine that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[109] To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[110] Rather, a debtor must provide only a reasonable assurance of success.[111] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[112] As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

100. In determining standards of feasibility, courts have identified the following probative factors:

a. the adequacy of the capital structure;

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109 11 U.S.C. § 1129(a)(11).

110 *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *W.R. Grace & Co.*, 475 B.R. at 115; *In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd,* 800 F.2d 581 (6th Cir. 1986).

111 *Kane*, 843 F.2d at 649; *Flintkote Co.*, 486 B.R. at 139; *W.R. Grace & Co.*, 475 B.R. at 115; *see also Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted) (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation"); *accord In re Capmark Fin. Grp. Inc.*, No. 09-13684 (CSS), 2011 WL 6013718, at *61 (Bankr. D. Del. Oct. 5, 2011) (same).

112 *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility"); *In re Sea Garden Motel & Apartments*, 195 B.R. 294, 305 (D. N.J. 1996); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *on reconsideration,* 464 B.R. 208 (Bankr. D. Del. 2011).

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.[113]

101. The Plan is feasible. As set forth in the Liebman Declaration,[114] the Debtors and their advisors have 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. The Debtors' management team has designed and has made progress in implementing a business plan that will better position the Debtors to succeed given current industry trends. To properly execute on this business plan, the Plan will deleverage the Debtors' balance sheet by reducing funded debt by $360 million.

102. Moreover, as set forth in the Disclosure Statement, the Debtors prepared projections of the Debtors' financial performance through 2023. These financial projections reflect a series of realistic assumptions regarding the Debtors and their industry. The detailed projections demonstrate the Debtors' ability to generate sufficient cash to service their debt, comply with the financial covenants under their funded debt documents, and meet their obligations under the Plan. On the basis of these projections, which were prepared by the Debtors and their advisors working

113 *See, e.g.*, *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *28 (Bankr. D. Del. May 13, 2010).

114 *See* Liebman Declaration ¶ 35.

closely together over several months, the Debtors believe their financial future, taking into account the provisions of the Plan, is sound.

103. In addition, upon the Effective Date, the Debtors expect to have sufficient funds to make all payments contemplated by the Plan. The Debtors, along with their professionals, have closely monitored their cash situation to ensure that they will be able to make all Plan payments required on the Effective Date as well as in the months to come.[115] In fact, pursuant to the All Claims Order, the Debtors generally have been paying obligations in the ordinary course during the pendency of these Chapter 11 Cases.[116] The Debtors therefore submit that the Plan is feasible and confirmation will not be followed by liquidation. Accordingly, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

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

104. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because Article II.A of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid (a) if an Administrative Claim is Allowed as of the Effective Date, on the Effective Date (or, if not then due, when such Allowed Administrative Claim is due or as soon as reasonably practicable thereafter); or (b) if such Administrative Claim is not

115 *Id.* ¶ 35.

116 *See Order Authorizing Payment of Certain Prepetition Claims in the Ordinary Course of Business* [Docket No. 64] (the "All Claims Order").

Allowed as of the Effective Date, no later than the date on which an order Allowing such Administrative Claim becomes a Final Order, or as soon as reasonably practicable thereafter.

M. All Retiree Benefits Will Continue Post-Confirmation (§ 1129(a)(13)).

105. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.

106. The Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code because Article V.G of the Plan provides that from and after the Effective Date, all retiree benefits, as defined in section 1114 of the Bankruptcy Code, will continue in accordance with applicable law.

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

107. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. Since the Debtors are not subject to any domestic support obligations, the requirements of section 1129(a)(14) of the Bankruptcy Code do not apply. Likewise, section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code. Because none of the Debtors is an "individual," the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply. Finally, none of the Debtors is a nonprofit corporation, and, therefore, section 1129(a)(16) of the Bankruptcy Code, which relates only to nonprofit corporations, is not applicable in these Chapter 11 Cases.

O. The Plan Satisfies the "Cram Down" Requirements of Section 1129(b) of the Bankruptcy Code.

108. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in

section 1129(b) of the Bankruptcy Code are satisfied. To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[117]

109. The Plan satisfies section 1129(b) of the Bankruptcy Code. As noted above, both Impaired Classes of Claims and Interests, the Term Loan Secured Claims and Existing Equity Interest (Classes 3 and 7), unanimously voted to accept the Plan. Additionally, Classes 5 and 6 may be deemed to reject the Plan based on the Debtors' ultimate determination to maintain or cancel these intercompany claims and interests.

1. The Plan Does Not Unfairly Discriminate with Respect to the Impaired Classes that Have Not Voted to Accept the Plan (§ 1129(b)(1)).

110. Although the Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to make the determination.[118] In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling

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117 *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d at 157 n.5; *In re Ambanc La Mesa L.P.*, 115 F.3d 650, 653 (9th Cir. 1997) ("the [p]lan satisfies the 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b), which requires that the [p]lan 'does not discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the [p]lan.").

118 *See In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *Bank of Am. Nat. Trust & Sav. Assoc. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established."); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"); *In re Aztec Co.*, 107 B.R. 585, 589–91 (Bankr. M.D. Tenn. 1989) ("Courts interpreting language elsewhere in the Code, similar in words and function to § 1129(b)(1), have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination.").

justifications for doing so.[119] A threshold inquiry to assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.[120]

111. Here, the Plan's treatment of Class 5 (Intercompany Claims) and Class 6 (Intercompany Interests) is proper because all similarly situated Holders of Claims and Interests will receive substantially similar treatment, and the Plan's classification scheme rests on a legally acceptable rationale. These intercompany claims and intercompany interests, which exist to support the Debtors' corporate structure, ultimately may be reinstated because reinstatement of intercompany claims and interests advances an efficient reorganization by avoiding the need to unwind and recreate the corporate structure and relationships of the reorganized Debtors. Such Intercompany Claims shall be resolved or compromised and such Intercompany Interests shall be Reinstated or cancelled and released consistent with the Restructuring Transactions after the Effective Date by the Reorganized Debtors, and importantly, this reinstatement does not affect the economic substance of the Plan for the Debtors' stakeholders.

112. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code and the Plan may be confirmed notwithstanding the deemed rejection by the Deemed Rejecting Classes.

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119 *See In re Coram Healthcare Corp.*, 315 B.R. at 349 (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination); *Ambanc La Mesa*, 115 F.3d at 656–57 (same); *Aztec Co.*, 107 B.R. at 589–91 (stating that plan which preserved assets for insiders at the expense of other creditors unfairly discriminated); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (stating that interests of objecting class were not similar or comparable to those of any other class and thus there was no unfair discrimination).

120 *See In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *31 (citing *In re Armstrong World Indus.*, 348 B.R. at 121).

2. The Plan Is Fair and Equitable (§ 1129(b)(2)(B)(ii)).

113. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule.[121] This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired accepting class not receive any distribution under a plan on account of its junior claim or interest.[122] Under the Plan, no Holder of a Claim or Interest junior to an Impaired Class of Claims or Interests will receive any recovery under the Plan on account of such Claim or Interest.

114. Although Intercompany Claims and Intercompany Interests may be reinstated under the Plan and, therefore, would be Unimpaired, such treatment is for the purposes of preserving the Debtors' corporate structure and will have no economic substance.[123] Accordingly, the Plan is "fair and equitable" with respect to all Impaired Classes of Claims and Interests and satisfies section 1129(b) of the Bankruptcy Code.

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121 *See 203 N. LaSalle St. P'ship*, 526 U.S. at 441–42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

122 *See id.*

123 *See In re ION Media Networks, Inc.*, No. 09-13125 (JMP) 419 B.R. 585, 601 (Bankr. S.D.N.Y. Nov. 24, 2009) ("This technical preservation of equity is a means to preserve the corporate structure that does not have any economic substance and that does not enable any junior creditor or interest holder to retain or recover any value under the Plan. The Plan's retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure.").

P. The Plan Complies with the Other Provisions of Section 1129 of the Bankruptcy Code (Sections 1129(c)–(e)).

115. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. Section 1129(c), prohibiting confirmation of multiple plans, is not implicated because there is only one proposed plan of reorganization.

116. Section 1129(d) of the Bankruptcy Code provides that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[124] The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. 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.

117. Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' Chapter 11 Cases is a "small business case."[125] Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements.

Q. Modifications to the Plan.

118. 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. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be

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124 *See* 11 U.S.C. § 1129(d).

125 *See* 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,490,925[] (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101(51D)(B).

deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[126]

119. Contemporaneously with the filing of this memorandum, the Debtors filed an amended version of the Plan, which makes technical clarifications and resolves certain formal and informal comments to the Plan by parties in interest. The modifications are immaterial and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. The Consenting Stakeholders support these modifications. Accordingly, the Debtors submit that no 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 Plan.]

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

120. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

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126 *See, e.g.*, *In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation); *In re Burns & Roe Enters., Inc.*, No. 08-4191 (GEB), 2009 WL 438694, at *23 (D.N.J. Feb. 23, 2009) (confirming plan as modified without additional solicitation or disclosure because modifications did "not adversely affect creditors").

121. The Debtors submit that good cause exists for waiving and eliminating any stay of the proposed Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the proposed Confirmation Order will be effective immediately upon its entry.[127] As noted above, these Chapter 11 Cases and the related Plan transactions have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information. Additionally, each day the Debtors remain in chapter 11 they incur significant administrative and professional costs, which will be significantly reduced if the Debtors emerge expeditiously.

122. For these reasons, the Debtors, their advisors, and other key constituents are working to expedite the Debtors' entry into and consummation of the documents and transactions related to the restructuring transactions so that the Effective Date of the Plan may occur as soon as possible after the Confirmation Date. Based on the foregoing, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry.

CONCLUSION

123. For all of the reasons set forth herein and in the Liebman Declaration and Morgner Declaration, and as will be further shown at the Combined Hearing, the Debtors respectfully request that the Court approve the Disclosure Statement and confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the proposed Confirmation Order and granting such other and further relief as is just and proper.

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127 *See, e.g.*, *In re Source Home Entm't, LLC*, No. 14-11553 (KG) (Bankr. D. Del, Feb. 20, 2015) (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re GSE Envtl., Inc.*, No. 13-11126 (MFW) (Bankr. D. Del. July 25, 2014) (same); *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Dec. 23, 2013) (same); *In re Gatehouse Media, Inc.*, No. 13-12503 (MFW) (Bankr. D. Del. Nov. 6, 2013) (same); *In re Dex One Corp.*, No. 13-10533 (KG) (Bankr. D. Del. Apr. 29, 2013) (same); *In re Geokinetics Inc.*, No. 13-10472 (KJC) (Bankr. D. Del. Apr. 25, 2013) (same).

Dated: January 17, 2020
Wilmington, Delaware

/s/ Domenic E. Pacitti

Domenic E. Pacitti (DE Bar No. 3989)
Michael W. Yurkewicz (DE Bar No. 4165)
KLEHR HARRISON HARVEY BRANZBURG LLP
919 N. Market Street, Suite 1000
Wilmington, Delaware 19801
Telephone: (302) 426-1189
Facsimile: (302) 426-9193
Email: dpacitti@klehr.com
myurkewicz@klehr.com

-and-

Morton R. Branzburg (*pro hac vice* pending)
KLEHR HARRISON HARVEY BRANZBURG LLP
1835 Market Street, Suite 1400
Philadelphia, Pennsylvania 19103
Telephone: (215) 569-3007
Facsimile: (215) 568-6603
Email: mbranzburg@klehr.com

-and-

Joshua A. Sussberg, P.C. (*pro hac vice* pending)
Matthew C. Fagen (*pro hac vice* pending)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: joshua.sussberg@kirkland.com
matthew.fagen@kirkland.com

Proposed Co-Counsel for the Debtors and Debtors in Possession