IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
THE NEWS-GAZETTE, INC., *et al.*,[1]	Case No. 19-11901 (KBO)
Debtors.	(Jointly Administered)
	Related Docket No. 394

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF DEBTORS' AMENDED PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

Dated: September 18, 2020

CHIPMAN BROWN CICERO & COLE LLP

William E. Chipman, Jr. (No. 3818)
Mark D. Olivere (No. 4291)
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801
Telephone: (302) 295-0191
Facsimile: (302) 295-0199
chipman@chipmanbrown.com
olivere@chipmanbrown.com

- and -

MCDONALD HOPKINS LLC
Nicholas M. Miller (Admitted *Pro Hac Vice*)
Michael J. Kaczka (Admitted *Pro Hac Vice*)
300 North LaSalle Street, Suite 1400
Chicago, Illinois 60654
Telephone: (312) 280-0111
nmiller@mcdonaldhopkins.com
mkaczka@mcdonaldhopkins.com

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 as follows: The News-Gazette, Inc. (0894) and D.W.S., Inc. (7985). The Debtors' headquarters are located at 15 East Main Street, Champaign, Illinois 61820.

TABLE OF CONTENTS

Cases

Statutes

Other Authorities

Rules

I. PRELIMINARY STATEMENT

1. This Memorandum is submitted on behalf of the above-captioned debtors and debtors in possession, The News-Gazette, Inc. ("News-Gazette") and D.W.S., Inc. ("D.W.S." and together with News-Gazette, the "Debtors") in support of confirmation of the Debtors' Amended Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, dated August 3, 2020, Docket No. 394 (the "Plan"), pursuant to section 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). The Plan is the culmination of a remarkably successful chapter 11 process: no party in interest filed a substantive objection throughout the entirety of the cases; the Debtors consensually resolved every potentially contested issue that arose during the cases; no party in interest opposed the Plan; and the parties who voted on the Plan unanimously favored the Plan. In other words, the Plan should be confirmed.

2. The factual predicates for confirmation of the Plan can be found in the Plan, the Affidavit of Service Regarding the Solicitation Materials, Docket No. 407 (the "Solicitation Certificate of Service"); the Notice of Filing Plan Supplement, Docket No. 434 (the "Plan Supplement"); the Certification of Stretto Regarding Tabulation of Votes in Connection with the Debtors' Amended Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, Docket No. 445 (the "Voting Report"); and the Declaration of John L. Reed in Support of Confirmation of the Debtors' Amended Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, filed contemporaneously with this Memorandum (the "Confirmation Declaration").

3. The Plan represents the culmination of the efforts of the Debtors, in consultation with their advisors, to achieve the best possible outcome for the Debtors' Estates and the Debtors' stakeholders in the Chapter 11 Cases.[1] Following the successful sale of substantially all of the

[1] Capitalized terms used, but not otherwise defined herein, have the meanings given to them in the Plan or the Disclosure Statement (defined herein).

Debtors' assets in two separate transactions (the operating business sale and the real estate sales), the Plan has been proposed as the means for the liquidation of the Debtors' remaining assets and for the subsequent distributions to the Holders of all Allowed Administrative Claims, Priority Claims, Secured Claims, General Unsecured Claims, and Pension Claims against the Debtors' Estates. The Plan also establishes a mechanism for completing the liquidation of the Debtors' remaining assets, reconciling and fixing the Claims asserted against the Debtors, and distributing the net liquidation proceeds in conformity with the distribution scheme provided by the Bankruptcy Code and the Plan. To do this, the Plan provides for vesting of all remaining assets in the Reorganized Debtors, with a Plan Administrator appointed to administer the assets. The Plan Administrator will have the authority (subject, in certain instances, to approval of this Court) to distribute assets, settle Claims and Causes of Action, and make other relevant decisions on behalf of the Reorganized Debtors.

4. This Memorandum establishes that the Plan satisfies all applicable provisions of the Bankruptcy Code and the requirements for confirmation contained therein. Specifically, this Memorandum sets forth: (i) the burden of proof that the Debtors are required to meet under section 1129 of the Bankruptcy Code; and (ii) the elements of sections 1122, 1123, and 1129 of the Bankruptcy Code that the Debtors must satisfy to confirm the Plan, including the requirements for confirming the Plan in light of the deemed rejection of the Plan by Class 4 and Class 5.

II. THE DEBTORS AND THE PLAN COMPLY WITH SECTION 1129 OF THE BANKRUPTCY CODE

5. Section 1129 of the Bankruptcy Code sets forth the requirements that must be satisfied for a chapter 11 plan to be confirmed. See 11 U.S.C. § 1129. A plan proponent must demonstrate that the plan satisfies the applicable provisions of that statute by a preponderance of the evidence. See In re Armstrong World Indus., Inc., 348 B.R. 111, 120 (Bankr. D. Del. 2006); In re Nutritional Sourcing Corp., 398 B.R. 816, 824 (Bankr. D. Del. 2008); see also Heartland

Federal Savings & Loan Ass'n v. Briscoe Enterprises, Ltd. II (In re Briscoe Enterprises, Ltd., II) 994 F.2d 1160 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under both § 1129(a) and in a cramdown.").

6. Bankruptcy courts have considerable discretion to approve chapter 11 plans. See, e.g., In re Chateaugay Corp., 177 B.R. 176, 186 (Bankr. S.D.N.Y. 1995) ("[I]t remains clear that Congress intended to afford bankruptcy judges broad discretion to decide the propriety of plans in light of the facts of each case."); see also In re Dow Corning Corp., 280 F.3d 648, 656 (6th Cir. 2002) ("Consistent with section 105(a)'s broad grant of authority, the Code allows bankruptcy courts considerable discretion to approve plans of reorganization.") (citing United States v. Energy Res. Co., Inc. 495 U.S. 545, 549 (1990); 11 U.S.C. § 1123(b)(6)).

7. To confirm the Plan, this Court must find that both the Plan and the Debtors are in compliance with each of the requirements of section 1129(a) of the Bankruptcy Code. See Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.), 800 F.2d 581, 583 (6th Cir. 1986) (noting that section 1129 contains two means by which a plan can be confirmed, one of which is meeting all the requirements of section 1129(a)); see also In re 203 N. LaSalle St. P'ship, 126 F.3d 955, 960 (7th Cir. 1997) (the plan's proponent must show that the plan satisfies all the requirements of section 1129(a)); Kane v. Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988). Further, this Court can confirm the Plan if all of the requirements of subsection 1129(a) are met – with the exception of section 1129(a)(8)[2] – and the requirements of section 1129(b) of the Bankruptcy Code are satisfied. As set forth below, in the Confirmation

[2] This Memorandum will not address section 1123(a)(6) of the Bankruptcy Code, which requires that a reorganized debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. See 11 U.S.C. § 1123(a)(6). As described in the Plan, all Interests will be cancelled. Accordingly, section 1123(a)(6) is inapplicable. This Memorandum will also not address section 1123(a)(8), as it applies only in cases in which the debtor is an individual. Therefore, it is not applicable to the Plan or in the Chapter 11 Cases.

Declaration, and in the Voting Report, the Plan should be confirmed because the Plan and the Debtors have met the requirements of sections 1129(a) and (b) of the Bankruptcy Code.

A. The Plan Satisfies the Requirements of Section 1129(a)(1)

8. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code. See 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and interests and the contents of a plan, respectively. See S. Rep. No. 95-989, at 126 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6368; see also In re S & W Enterprise., 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) (finding that section 1129(a)(1) is most directly aimed at requiring compliance with the Bankruptcy Code provisions regarding classification of claims or interests and plan contents). Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the Bankruptcy Code. The Debtors submit that the Plan complies with these sections in all respects as set forth below.

1. Classification of Claims (Section 1122)

9. Section 1122 of the Bankruptcy Code authorizes multiple classes of claims or interests as long as each claim or interest within a class is substantially similar to other claims or interests in that class. See 11 U.S.C. § 1122. This requirement does not mean, however, that claims or interests within a particular class must be identical. See In re Tribune Co., 476 B.R. 843, 854 (Bankr. D. Del. 2012) (finding that "Section 1122(a) is permissive," in that "it does *not* provide that *all* similar claims must be placed in the same class"); *see* also In re John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 158-59 (3d Cir. 1993). Courts in this Circuit and elsewhere have recognized that, under section 1122 of the Bankruptcy Code, plan proponents

have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so and all claims within a particular class are substantially similar. See, e.g., Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 661 (6th Cir. 2002) ("the bankruptcy court has substantial discretion to place similar claims in different classes"); Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.), 10 F.3d 944, 956-57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis; separate classification based on bankruptcy court-approved settlement); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723 (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."); In re Jersey City Med. Ctr., 817 F.2d 1055, 1060-61 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes).

10. The Plan provides for the separate classification of Claims into five Classes, because each Class differs from every other Class in a legal or factual way. Moreover, each of the Claims in a particular Class is substantially similar to the other Claims in such Class. Administrative Claims and Priority Claims are not classified and are separately treated. The Plan provides for classification as follows:

a. Class 1 consists of Secured Claims;
b. Class 2 consists of General Unsecured Claims;
c. Class 3 consists of Pension Claims;
d. Class 4 consists of Intercompany Claims; and
e. Class 5 consists of Equity Interests.

11. As detailed in the Disclosure Statement and the Plan, the Debtors anticipate that there will be sufficient cash available to pay Allowed Administrative Claims, Allowed Priority Claims, and Allowed Class 1 Secured Claims in full. The Debtors also anticipate there will be material distributions made to Holders of Allowed Class 2 and Class 3 Claims.

12. Class 2 is comprised of General Unsecured Claims, which will be satisfied on a pro rata basis from the $250,000 that will be set aside as the Reorganized Debtor General Unsecured Claims Reserve. The estimated recovery for Holders of these Claims varies depending on the resolution of claims objections to certain General Unsecured Claims. Therefore, the Debtors estimate that recovery for Holders of Allowed Class 2 Claims could range from 60.0% - 81.0%.

13. Class 3 is comprised of Pension Claims, which consist of the Allowed Claims of the Pension Benefit Guaranty Compensation, GCIU Employer Retirement Fund, and CWA/ITU Negotiated Pension Plan. The Holders of Class 3 Pension Claims will be satisfied by the Reorganized Debtor Fund, which comprises all the residual cash left in the Estates after payment of expenses under the Plan, the Reorganized Debtors General Unsecured Fund, and payment to Allowed Administrative, Priority, Professional Compensation and Secured Claims. Therefore, the Debtors estimate a recovery to this Class between 28.0% - 36.0%.

14. Class 4 is comprised of Intercompany Claims, and all Intercompany Claims will be cancelled on the Effective Date. No distributions will be made on account of any Intercompany Claims. Finally, Class 5 is comprised of Interests in the Debtors, which Interests will be cancelled on the Effective Date. No distributions will be made to members of Class 5 on account of their Interests.

2. Contents of the Plan (Section 1123)

15. Section 1123(a) of the Bankruptcy Code identifies seven requirements for the contents of a plan of a commercial entity. Specifically, this section requires that a plan:

a. designate classes of claims and interests;
b. specify unimpaired classes of claims and interests;
c. specify treatment of impaired classes of claims and interests;
d. provide for equality of treatment within each class;
e. provide adequate means for the plan's implementation; and
f. contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the Plan.

See 11 U.S.C. § 1123(a). As more fully set forth below, the Plan fully complies with each requirement of section 1123(a) of the Bankruptcy Code.

a. Designation of Classes (Section 1123(a)(1))

16. Article II of the Plan designates Classes of Claims, as required by section 1123(a)(1) of the Bankruptcy Code. Under the Bankruptcy Code, administrative expense claims and priority tax claims need not be classified and must only be designated. Accordingly, Administrative Claims, Professional Compensation Claims, and Priority Claims are designated in Article II of the Plan. Therefore, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

b. Specification of Unimpaired Classes (Section 1123(a)(2))

17. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan." See 11 U.S.C. § 1123(a)(2). Article III of the Plan specifies that Class 1 is unimpaired. Therefore, the Plan satisfies section 1123(a)(2) of the Bankruptcy Code.

c. Specification of Impaired Classes (Section 1123(a)(3))

18. 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." See 11 U.S.C. § 1123(a)(3). The Plan designates Classes 2, 3, 4, and 5 as Impaired. Article III.B of the Plan specifies the treatment for these impaired classes. Therefore, the Plan satisfies section 1123(a)(3) of the Bankruptcy Code.

d. Equal Treatment within Classes (Section 1123(a)(4))

19. 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." See 11 U.S.C.

§ 1123(a)(4). Article III of the Plan provides that the treatment of each Claim in each particular Class is the same as the treatment of every other Claim in such Class. Therefore, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

e. Means for Implementation (Section 1123(a)(5))

20. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. See 11 U.S.C. § 1123(a)(5). Article V of the Plan, titled "Means for Implementation of This Plan," and the provisions located within other Articles of the Plan provide numerous provisions to facilitate the implementation of the Plan, including, but not limited to, the actions required to effectuate the Plan, the vesting of property of the Debtors' Estates in the Reorganized Debtors, and the allowance of all organizational actions necessary to effectuate the Plan. See also Article VII (Disputed Claims); Article VIII of the Plan (Executory Contracts and Unexpired Leases); Article VI of the Plan (Provisions Governing Distributions). Therefore, the Plan satisfies the requirements of section 1123(a)(5) of the Bankruptcy Code.

f. Section 1123(a)(7)

21. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any officer, director or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." See 11 U.S.C. § 1123(a)(7). The Debtors are liquidating their assets pursuant to the Plan. Therefore, the relevant selections subject to this section are the selection of the Plan Administrator, and the members of the board of Reorganized Debtors. The Plan Supplement designates that John L. Reed will be the initial Plan Administrator due to his experience and familiarity with the Debtors' Estates through his role as Chief Executive Officer and President. See Plan Supplement. Mr. Reed will be authorized to distribute and administer of the Reorganized Debtors' assets in accordance with the provisions of the Plan. Mr. Reed will be authorized to pursue Causes of Action, if any.

22. The member of the board of the Reorganized Debtors – J. Michael Martin – is also appropriately qualified. He previously served on the Debtors' board of directors. Therefore, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

g. Section 1123(b)

23. Section 1123(b) describes the provisions that may be incorporated into a chapter 11 plan. See 11 U.S.C. § 1123(b). Section 1123(b) of the Bankruptcy Code also provides a plan proponent with discretion to include other operative provisions of a plan, including "any appropriate provision not inconsistent with the applicable provisions of [title 11]." 11 U.S.C. § 1123(b)(6). As described herein, each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code. For example, pursuant to Article III of the Plan, Class 1 is unimpaired, while Classes 2, 3, 4, and 5 are impaired, as contemplated by section 1123(b)(1) of the Bankruptcy Code. Article VIII of the Plan provides for the rejection of the executory contracts and unexpired leases of the Debtors not previously assumed, assigned, or rejected (or for which the motions for assumption or rejection are filed prior to the Effective Date) under section 365 of the Bankruptcy Code, as contemplated by section 1123(b)(2) of the Bankruptcy Code. Article VI of the Plan provides for the distribution of any remaining proceeds from the liquidation of the Debtors' assets to Holders of Allowed Claims in accordance with section 1123(b)(4) of the Bankruptcy Code.

24. In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan also includes additional provisions that are appropriate and consistent with applicable provisions of the Bankruptcy Code. They include, but are not limited to: (i) the provisions of Article X of the Plan regarding exculpation and injunction; (ii) the provisions of Article XI of the Plan regarding retention of jurisdiction by the Bankruptcy Court over certain matters; (iii) the provisions of Article V of the Plan regarding the means for implementation of the Plan; and (iv) the provisions of Articles VI and VII of the Plan regarding distributions under the Plan.

25. Based upon the foregoing, the Plan complies fully with the requirements of sections 1122 and 1123, as well as with all other provisions of the Bankruptcy Code, and therefore satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code.

h. Substantive Consolidation

26. Article X.E of the Plan provides for deemed consolidation of the Debtors for purposes of voting, confirmation, and distributions under the Plan. Substantive consolidation of two or more debtors' estates generally results in the consolidation of the assets and liabilities of the debtors, the elimination of intercompany claims, subsidiary equity ownership interests, multiple and duplicative creditor claims, joint and several liability claims and guarantees, and the payment of allowed claims from a common fund. See F.D.I.C. v. Colonial Realty Co., 966 F.2d 57, 58-59 (2d Cir. 1992); Union Savs. Bank v. Augie/Restivo Baking Co. Ltd. (In re Augio/Restivo Baking Co., Ltd.), 860 F.2d 515 (2d Cir. 1988); In re Auto-Train Corp., Inc., 810 F.2d 270, 276 (D.C. Cir. 1987); Simon v. Brentwood Tavern, LLC (In re Brentwood Golf Club, LLC), 329 B.R. 802, 814 (Bankr. E.D. Mich. 2005).

27. Numerous courts have held that section 105(a) of the Bankruptcy Code, which provides, in pertinent part, that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," empowers a bankruptcy court to authorize substantive consolidation. See e.g., Augie/Restivo, 860 F.2d at 518 n.1; In re American HomePatient, Inc., 298 B.R. 152, 155 (Bankr. M.D. Tenn. 2003); In re Deltacorp, Inc., 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995); In re Standard Brands Paint Co., 154 B.R. 563, 567 (Bankr. C.D. Cal. 1993).

28. Substantive consolidation for purposes of voting, confirmation, and distributions under the Plan is appropriate in these Chapter 11 Cases for a number of reasons. The Debtors are related entities: D.W.S. is a wholly-owned subsidiary of News-Gazette. The Debtors operated

primarily on a consolidated basis, often with one Debtor using the assets of the other Debtor in its operations. The Debtors also operated with shared executive, financial and administrative staff, and occupied the same space. Most importantly, the Sale was conducted as the sale of substantially all of the assets of both Debtors, without allocation by any party of the value achieved among the Debtor entities. Accordingly, there is no practical or fair way, other than through after-the-fact estimation without material basis in fact, to allocate the sale proceeds among distinct Estates. The Debtors believe it would be burdensome and expensive to disentangle the Debtors' claim obligations or assets in these Chapter 11 Cases for purposes of the Plan; doing so might require retention of separate counsel for each entity and could result in allocation litigation among the entities. The Debtors also believe that such allocation efforts would be wasteful and not likely to create material value for any constituent, and that such substantive consolidation would otherwise avoid the erosion of cash and other value that would otherwise be made available to Holders of General Unsecured Claims or Pension Claims of a single estate. The impact of substantive consolidation – or of attempting to create two distinct estates – on each Debtor's creditors is also speculative.

29. As set forth in the Plan and Disclosure Statement, the Debtors believe that the consolidation of the Debtors for purposes of voting, confirmation, and distributions under the Plan provides for greater (or, at worst, no materially different) recoveries to creditors of each Debtor within the various Classes of Claims under the Plan. In addition, no party has objected to the substantive consolidation of the Debtors. As such, the Debtors believe that the Court is empowered to authorize, and indeed should authorize, substantive consolidation of the Debtors for purposes of voting, confirmation, and distributions under the Plan.

B. The Debtors Satisfy the Requirements of Section 1129(a)(2)

30. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponents "compl[y] with the applicable provisions of [the Bankruptcy Code]." See 11 U.S.C. §1129(a)(2). This section's primary purpose is to ensure that a plan proponent has complied with the requirements of the Bankruptcy Code regarding solicitation of acceptances of the plan. See In re Multuit Corp., 449 B.R. 323, 339 (Bankr. N.D. Ill. 2011) (stating that "[t]he legislative history of this section indicates that Congress was concerned 'that the proponent of the plan comply with the applicable provisions of Chapter 11, such as section 1125 regarding disclosure.'") (quoting H.R. Rep. No. 95-695, at 412 (1977)); see also In re PWS Holding Co., 228 F.3d 224, 248 (3d Cir. 2000); In re Eagle-Picher Indus. Inc., 203 B.R. 256, 274 (Bankr. S.D. Ohio 1996); In re Revco D.S., Inc., 131 B.R. 615, 621-22 (Bankr. N.D. Ohio 1990); In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992). As set forth below, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including sections 1125 and 1126, and therefore have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

1. Disclosure and Solicitation (Section 1125)

31. On August 4, 2020, this Court entered an order approving the Disclosure Statement, Docket No. 399 (the "Disclosure Statement Order"), which satisfied the standard set forth in section 1125 of the Bankruptcy Code. The Court also approved the solicitation procedures and related solicitation materials outlined in the Disclosure Statement Order. As set forth in the Solicitation Certificate of Service and the Voting Report, the Debtors complied with the solicitation procedures outlined in the Disclosure Statement Order and timely distributed the Disclosure Statement, the Plan, the Disclosure Statement Order, the appropriate ballot, notices, and all other related documents to all relevant parties. See Solicitation Certificate of Service and

the Voting Report. Consequently, the Debtors submit that they have satisfied section 1125 of the Bankruptcy Code.

2. Acceptance of Plan (Section 1126)

32. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of the Plan. See 11 U.S.C. § 1126. Under section 1126, only Holders of Allowed Claims in impaired Classes of Claims that will receive or retain property under the Plan on account of such Claims may vote to accept or reject the Plan. Id. As set forth in the Voting Report, and in accordance with section 1126 of the Bankruptcy Code, the Debtors solicited acceptances of the Plan from Class 2 and Class 3, the only impaired Classes of Claims that were entitled to vote to accept or reject the Plan. Holders of Class 2 Claims and Class 3 Claims voted in favor of the Plan in both numerosity and amount. See Voting Report. Based upon the foregoing, the Plan satisfies the requirements of sections 1125, 1126, and 1129(a)(2) of the Bankruptcy Code.

C. The Plan Has Been Proposed in Good Faith (Section 1129(a)(3))

33. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." See 11 U.S.C. § 1129(a)(3). Good faith "requires a fundamental fairness in dealing with one's creditors [and] that a plan will achieve a result consistent with the objectives and purposes of the Code." Jorgensen v. Fed. Land Bank of Spokane (In re Jorgensen), 66 B.R. 104, 108-09 (B.A.P. 9th Cir. 1986); see also In re Gillette Assocs., Ltd., 101 B.R. 866, 873 (Bankr. N.D. Ohio 1989) ("a plan is considered to be in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code'") (quoting In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)); In re Future Energy Corp., 83 B.R. 470, 486 (Bankr. S.D. Ohio 1988).

34. The Third Circuit has addressed the good faith standard under Bankruptcy Code section 1129(a)(3), stating that "[f]or purposes of determining good faith under section 1129(a)(3) . . . the important point on inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives of the Bankruptcy Code." In re PWS Holding Corp., 228 F.3d 224, 242 (3rd Cir. 2000); In re Lernout & Hauspie Speech Prods. N.V., 308 B.R. 672, 675 (D. Del. 2004) (finding that good faith requires "that (1) the plan be consistent with the objectives of the Bankruptcy Code; (2) the plan be proposed with honesty and good intentions and with a basis for expecting that reorganization can be achieved; or (3) there was fundamental fairness in dealing with the creditors."); *see* also In re NII Holdings, Inc., 288 B.R. 356, 362 (Bankr. D. Del. 2002); In re Zenith Elecs. Corp., 241 B.R. 92, 107 (Bankr. D. Del. 1999); In re PPI Enterprises, Inc., 228 B.R. 339, 347 (Bankr. D. Del. 1998).

35. The evaluation of good faith is based on the totality of the circumstances surrounding confirmation. See, e.g., In re Cellular Info. Sys., Inc., 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); In re Ridgewood Apartments of DeKalb County, Ltd., 183 B.R. 784, 789 (Bankr. S.D. Ohio 1995). The good faith standard applies to chapter 11 plans of liquidation as well as plans of reorganization. See, e.g., In re River Village Assocs., 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993); In re Jandous Elec. Constr. Corp., 115 B.R. 46 (Bankr. S.D.N.Y. 1990).

36. The fundamental purpose of chapter 11 is to enable a company in financial distress to restructure its balance sheet, reorganize its basic operations, and avoid the adverse economic effects associated with disposing of assets at their liquidation value. NLRB v. Bidisco & Bidisco, 465 U.S. 513, 528 (1984); see also B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.), 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) (the two major purposes of bankruptcy are achieving equality among creditors and giving the debtor a fresh start). Courts look to the reorganization or liquidation plan to determine whether the plan seeks relief consistent with the

Bankruptcy Code. See, e.g., In re Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1984); In re Trenton Ridge Investors LLC, 461 B.R. 440, 471 (Bankr. S.D. Ohio 2011). Thus, where the plan proponent proposes a plan with the legitimate and honest purpose to reorganize or liquidate and has a reasonable hope of success, the plan proponent will satisfy the good faith requirement of section 1129(a)(3) of the Bankruptcy Code.

37. Here, the Debtors have proposed a plan in good faith, and the Plan is the result of the efforts of the Debtors to work toward the liquidation of their assets efficiently and in a cost-effective manner. The Plan allows the Debtors to monetize and maximize the value of the Debtors' Estates effectively and expeditiously, and provides a greater recovery for creditors than what could have otherwise been achieved through a chapter 7 liquidation or other alternative process. Therefore, the Plan satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Satisfies the Requirements of Section 1129(a)(4)

38. Section 1129(a)(4) of the Bankruptcy Code requires prior court approval or a process for court approval of professional fees in a case or in connection with a plan. See 11 U.S.C. § 1129(a)(4); In re Eagle-Picher Indus., Inc., 203 B.R. 256, 274 (S.D. Ohio 1996). All agreements by the Debtors to retain professional persons to provide services to the Debtors in, or in connection with, the Chapter 11 Cases have been disclosed to the Court in applications to employ those professionals filed with the Court. Pursuant to the interim fee application procedures established by the Court, certain fees and expenses of retained professionals have been authorized and paid. Pursuant to Article II of the Plan, all such fees and expenses, as well as all other accrued fees and expenses of professionals through the Effective Date, remain subject to final review by the Court. See In re Resorts Int'l, Inc., 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990) (as long as fees, costs and expenses are subject to final approval of court, section 1129(a)(4) is satisfied). Therefore, the Plan satisfies the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. The Plan Satisfies the Requirements of Section 1129(a)(5)

39. Section 1129(a)(5) of the Bankruptcy Code requires that: (a) the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor; (b) the appointment or continuance of such officers and directors is consistent with the interests of creditors and equity security holders and with public policy; and (c) the plan proponent discloses the identity of any "insider" (as defined by 11 U.S.C. § 101(31)) that will be employed or retained by the reorganized debtor and the "nature of compensation for such insider." 11 U.S.C. § 1129(a)(5).

40. This section asks the Court to ensure that the post-confirmation governance of a reorganized or liquidated debtor is in "good hands," which courts have interpreted to include the following: experience in the reorganized debtor's business and industry, experience in financial matters, and that the debtor and creditors believe control of the entity by the proposed individuals will be beneficial. See In re Beyond.com Corp., 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003), In re Rusty Jones, Inc., 110 B.R. 362, 372 (Bankr. N.D. Ill. 1990); In re Apex Oil Co., 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990).

41. Here, the Debtors have disclosed the identity and affiliation of John L. Reed as the proposed Plan Administrator. Mr. Reed served as the Debtors' Chief Executive Officer during the Debtors' Chapter 11 Cases and prior to the Petition Date. While Mr. Reed is an "insider" of the Debtors due to his previous roles during the Debtors' Chapter 11 Cases, Mr. Reed is best qualified to serve as the Plan Administrator because of his familiarity with the Chapter 11 Cases, the Debtors' Estates, the nature of the Debtors' businesses and the creditor body. The appointment of another individual as Plan Administrator would likely involve significant onboarding costs. Mr. Reed will be compensated for his role as Plan Administrator pursuant to the terms of the Plan Supplement. The Debtors submit that the appointment of Mr. Reed will ensure a swift and efficient

implementation of the Plan, and is consistent with the interests of creditors and with public policy. Therefore, the Plan satisfies the requirement of section 1129(a)(5) of the Bankruptcy Code.

F. Rate Changes (Section 1129(a)(6))

42. Section 1129(a)(6) of the Bankruptcy Code requires any governmental regulatory commission having jurisdiction over the rates charged by the post-confirmation debtor in the operation of its business to approve any rate change provided for in the plan. See 11 U.S.C. § 1129(a)(6). This provision is inapplicable in the Debtors' cases.

G. The Plan Satisfies the "Best Interests" Test (Section 1129(a)(7))

43. Section 1129(a)(7) of the Bankruptcy Code — the "best interests of creditors test" — requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class under the proposed plan on account of such claim or interest:

> (1) has accepted the plan; or
>
> (2) will receive or retain under the plan on account of such claim or interest property of a value as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1129(a)(7)(A)(i)-(ii).

44. The best interests test focuses on individual dissenting creditors rather than classes of claims, and requires that each impaired creditor either (i) accept the plan or (ii) receive or retain value that is not less than the amount such creditor would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. See, e.g., 203 N. LaSalle St., 526 U.S. at 440; United States v. Reorganized CF&I Fabricators, Inc., 518 U.S. 213, 228 (1996); Bank of America Nat'l Trust & Savings Assn. v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999); *see* also In re Washington Mut., Inc., 461 B.R. 200, 241 (Bankr. D. Del. 2011); 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."). As section 1129(a)(7) of the Bankruptcy Code makes clear, the best interests test applies only to non-accepting impaired claims or interests. If a class of claims accepts the plan, the best interests test automatically is deemed satisfied for all members of that class. See 11 U.S.C. § 1129(a)(7)(A).

45. For the reasons discussed in Section VI of the Disclosure Statement, the Plan satisfies the best interest test as to all Holders of Claims and Interests in impaired Classes under the Plan. Specifically, as shown in the Liquidation Analysis attached as an exhibit to the Disclosure Statement, Holders of Claims against the Debtors will receive either the same or a better return under the Plan than they would in a hypothetical chapter 7 case. First, Class 1 is not impaired under the Plan, and it is conclusively presumed to have accepted the Plan. The Debtors believe that the cash on hand as of the Effective Date will be sufficient to pay Class 1 Allowed Secured Claims. Second, the Holders of Allowed Claims in Class 2 and Class 3 will receive or retain property under the Plan of a value that is equal to or more than the value of the property that such Holders would receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code, because they will receive distributions of cash in amounts greater than they would in a piecemeal Chapter 7 Liquidation. See Disclosure Statement, Ex B "Liquidation Analysis". Lastly, Holders of Class 4 Intercompany Claims and Class 5 Interests will receive no recovery under the Plan.

46. Ultimately, although the Plan has the same goal of liquidating the Debtors' assets for the benefit of creditors as a chapter 7 liquidation, the Debtors believe that the Plan provides a more efficient vehicle to accomplish this goal. A chapter 7 trustee would be obligated complete the liquidation of the Debtors' assets, resolve disputed claims, and distribute funds to creditors, but he or she would not have the benefit of the historical knowledge of the Debtors' prepetition and postpetition affairs that the Debtors, and the Plan Administrator currently possess. Further, a

chapter 7 trustee would likely have to complete substantial due diligence of the Debtors' affairs (and incur fees and cost to do so) in order to fully apprise himself or herself of the particularities and nuances of the Estates, and be entitled to certain statutory fees under the Bankruptcy Code. Therefore, the Plan satisfies the "best interests" test and the requirements of section 1129(a)(7) of the Bankruptcy Code.

H. Acceptance by Impaired Classes (Section 1129(a)(8))

47. Section 1129(a)(8) of the Bankruptcy Code requires either that each class of claims or interests is not impaired under the plan or that each has accepted the plan. See 11 U.S.C. § 1129(a)(8). Pursuant to section 1126(c) of the Bankruptcy Code, a class of claims or interests has accepted the plan "if such plan has been accepted by creditors. . . that hold at least two-thirds in amount and more than one-half in number of allowed claims of such classes held by creditors. . . that have accepted or rejected such plan." Further, a class that is not impaired under a plan, and each holder of a claim or interest in such a class, is conclusively presumed to have accepted the plan. 11 U.S.C. § 1126(f); see In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 290 (2d Cir. 1992) (noting that an unimpaired class is presumed to have accepted the plan).

48. As noted above, Class 1 is unimpaired under the Plan and is deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. As set forth in the Voting Report, 100% of the voting Holders of Class 2 Claims by number and 100% of Class 2 Claims by amount have voted to accept the Plan. Accordingly, Class 2 voted to accept the Plan by the margins required by section 1126 of the Bankruptcy Code. Similarly, 100% of the voting Holders of Class 3 Claims by number and 100% of Class 3 Claims by amount have voted to accept the Plan. Accordingly, Class 2 and Class 3 each voted to accept the Plan by the margins required by section 1126 of the Bankruptcy Code. However, Class 4 and Class 5 of the Plan are deemed to have rejected the Plan, pursuant to section 1126(g) of the Bankruptcy Code, because Holders of Class

4 Intercompany Claims and Class 5 Interests will not receive distributions under the Plan. As a result, the Debtors will utilize the "cram down" provisions of section 1129(b) of the Bankruptcy Code, as further discussed below.

I. The Plan Satisfies the Requirements of Section 1129(a)(9)

49. Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under section 507(a) of the Bankruptcy Code receive specified cash payments under the plan. See 11 U.S.C. § 1129(a)(9). Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) of the Bankruptcy Code requires the plan to satisfy administrative and priority tax claims in full in cash. Id. Article II of the Plan provides for Holders of these types of Claims to be paid in full and in cash. Generally, pursuant to Article II of the Plan, and except as otherwise may be agreed, Holders of Allowed Administrative Claims and Allowed Priority Claims will be paid in full, in Cash, on the later of: (i) the date on which such Administrative Claim or Priority Claim becomes an Allowed Claim; or (ii) the Effective Date. Therefore, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. Acceptance of At Least One Impaired Class (Section 1129(a)(10))

50. Section 1129(a)(10) of the Bankruptcy Code requires the acceptance of the Plan by at least one Class of impaired Claims, "determined without including any acceptance of the plan by any insider." See 11 U.S.C. § 1129(a)(10). As set forth in the Voting Report, the Plan satisfies this requirement because two Classes of impaired Claims – Class 2 and Class 3 – have accepted the Plan. Therefore, the Plan satisfies the requirement of section 1129(a)(10) of the Bankruptcy Code.

K. The Plan Satisfies the Requirements of Section 1129(a)(11)

51. Section 1129(a)(11) of the Bankruptcy Code requires that this Court determine that the Plan is feasible as a condition precedent to confirmation. Specifically, it requires that this Court find that confirmation is not likely to be followed by liquidation of the Debtors, unless such liquidation is proposed in the Plan. See 11 U.S.C. § 1129(a)(11). To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success. United States v. Energy Res. Co., Inc., 495 U.S. 545, 549 (1990); Internal Revenue Serv. v. Kaplan (In re Kaplan), 104 F.3d 589, 597 (3d. Cir. 1997); see also In re U.S. Truck Co., Inc., 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). Rather, the feasibility test set forth in section 1129(a)(11) of the Bankruptcy Code requires a court to determine whether the proposed plan offers a reasonable assurance of success. See, e.g., DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.), 634 F.3d 79, 106 (2d Cir. 2011); Kane v. Johns-Manville Corp., 843 F.2d, 636, 649 (2d Cir. 1988). Here, the Plan is feasible even though it proposes a liquidation. See In re Credentia Corp., Case No. 10-10926, 2010 WL 3313383, at *9 (Bankr. D. Del. May 26, 2010) ("The Plan provides for a workable scheme of liquidation and, therefore, satisfies section 1129(a)(11) of the Bankruptcy Code."); In re Revco D.S., Inc., 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (holding that "[s]ection 1129(a)(11) is satisfied as the [p]lan provides that the property of the Debtors shall be liquidated"). Here, the Plan itself provides for the ultimate liquidation of the Debtors' Estates. The Debtors believe the Cash available in the Reorganized Debtor Administrative and Priority Claim Reserve will be sufficient to pay Allowed Administrative Claims, Allowed Priority Claims, and Class 1 Allowed Secured Claims in full. Class 2 General Unsecured Claims will also be satisfied on a pro rata basis from the $250,000 set aside in the Reorganized Debtor General Unsecured Claim Reserve. Finally, Class 3 Pension Claims will receive all residual value held by

the Reorganized Debtor Fund. Therefore, the Plan is feasible and meets the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Satisfies the Requirements of Section 1129(a)(12)

52. Section 1129(a)(12) of the Bankruptcy Code requires that all fees payable under 28 U.S.C. § 1930 be paid or that the plan provide for their payment on the effective date of the plan. See 11 U.S.C. § 1129(a)(12). All fees payable under section 1930 of title 29, United States Code, have been paid or will be paid pursuant to Article XII.A of the Plan. Therefore, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. Sections 1129(a)(13) Through Sections 1129(a)(16) of the Bankruptcy Code Do Not Apply to the Plan

53. Section 1129(a)(13) of the Bankruptcy Code relates to the continuation of retiree benefits at the levels established pursuant to section 1114 of the Bankruptcy Code. Section 1129(a)(13) is not applicable in this case. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations; therefore, the requirements of section 1129(a)(14) do not apply. Further, 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. The Debtors are not "individuals," so the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply. Finally, any transfers of property under the Plan will be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a trust that is not a moneyed business or commercial corporation or trust; therefore, the requirements of section 1129(a)(16) are also inapplicable.

N. The Plan Satisfies the Requirements of Section 1129(b) With Respect to Class 4 and Class 5

54. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan when the plan is not accepted by all impaired classes of claims or interests. See 11 U.S.C. § 1129(b)(6). Accordingly, section 1129(b) permits this Court to "cram down" the Plan over such dissenting votes as long as the Plan does not "discriminate unfairly" and is "fair and equitable." The Debtors submit that the requirements of section 1129(b)(1) are satisfied and the Plan should be confirmed, because both requirements for "cramdown" of the Plan with respect to the Claims in Class 4 and Interests in Class 5 are satisfied.

1. The Plan Does Not Discriminate Unfairly

55. The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129 (b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment. See In re Coram Healthcare Corp., 315 B.R. 321, 349 (Bankr. D. Del. 2004) (collecting cases); In re Exide Technologies, 303 B.R. 48, 78 (Bankr. D. Del. 2003); In re Kennedy, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); In re Buttonwood Partners, Ltd., 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990). Here, the Plan does not discriminate unfairly with respect to Class 4 or Class 5. All of the Holders of Class 4 Intercompany Claims and Class 5 Equity Interests are not entitled to receive anything pursuant to the Plan or pursuant to the Bankruptcy Code's priority rules. Accordingly, all Holders of Class 4 Intercompany Claims and Class 5 Equity Interests are treated the same, and the treatment afforded Class 4 and Class 5 is neither "unfair" nor "discriminatory" and is appropriate under the Bankruptcy Code.

2. The Plan Is Fair and Equitable

56. The Plan also satisfies the second part of the "cramdown" test of section 1129 (b) of the Bankruptcy Code, because it is fair and equitable. Section 1129(b)(2)(B) provides that the "fair and equitable" test is satisfied with respect to unsecured claims if either: "(i) the plan provides

that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." See 11 U.S.C. § 1129(b)(2)(B).

57. The Plan is also fair and equitable with respect to equity interests. Section 1129(b)(2)(C) provides that the "fair and equitable" test is met with respect to a class of interests if: "(i)the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or (ii)the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property. See 11 U.S.C. § 1129(b)(2)(C).

58. Here, the Plan is fair and equitable because there is no class junior to either Class 4 or Class 5 that will receive or retain any interest under the Plan. Such treatment is clearly fair and equitable, and satisfies sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code. Therefore, the Debtors submit that they have satisfied the "cramdown" provisions of the Bankruptcy Code and the Plan should be confirmed.

O. The Principal Purpose of the Plan Is Not the Avoidance of Taxes or Securities Registration Requirements (11 U.S.C. § 1129(d))

59. Section 1129(d) of the Bankruptcy Code provides that a chapter 11 plan may not be confirmed "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." 11 U.S.C. § 1129(d).

60. As described above, the Plan has been proposed in good faith and for the legitimate purposes of administering the Debtors' remaining assets, maximizing the value of the Debtors'

Estates and maximizing the recoveries for all Holders of Allowed Claims against the Debtors' Estates. The purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933. Therefore, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

III. THE EXCULPATION AND INJUNCTION PROVISIONS OF THE PLAN ARE APPROPRIATE AND SHOULD BE APPROVED

A. The Injunction and Exculpation Provisions Are Appropriate and Should Be Approved

61. Section 105(a) of the Bankruptcy Code also authorizes the Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). This section "grants the bankruptcy court the power to take appropriate equitable measures needed to implement other sections of the Code." In re Dow Corning Corp., 280 F.3d 648, 656 (6th Cir. 2002) (citing In re Granger Garage, Inc., 921 F.2d 74, 77 (6th Cir.1990)). Bankruptcy courts are "specialized court[s] of equity." In re Connolly North America, LLC, 802 F.3d 810, 814 (6th Cir. 2015).

62. Furthermore, section 11 U.S.C. § 1123(b)(6) of the Bankruptcy Code grants a bankruptcy court residual authority to approve a chapter 11 plan that includes "any . . . appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6); United States v. Energy Res. Co., 495 U.S. 545, 549 (1990); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008) ("[A] bankruptcy court is also able to exercise [its] broad equitable powers within the plans of reorganization themselves.") (citing 11 U.S.C. § 1123(b)(6)); In re Dow Corning, 280 F.3d at 656 (6th Cir. 2002) ("Consistent with section 105(a)'s broad grant of authority, the Code allows bankruptcy courts considerable discretion to approve plans of reorganization." (citing Energy Res. Co., 495 U.S. at 549; 11 U.S.C. §

1123(b)(6)); In re Specialty Equip., Co., 3 F.3d 1043, 1046-47 (7th Cir. 1993) (approving of consensual non-debtor releases).

63. Here, the compromises, settlements, exculpations, and injunctions set forth in Article X of the Plan: (a) are within the jurisdiction of this Court under section 1334(a), (b), and (d) of title 28 of the United States Code; (b) are an essential means of implementing the Plan pursuant to section 1123(a)(5) of the Bankruptcy Code; (c) are an integral element of the transactions incorporated into the Plan; (d) confer material benefits on, and are in the best interests of, the Debtors, their Estates, and their creditors; (e) are important to the overall objectives of the Plan; and (f) are consistent with sections 105, 1123, and 1129 of the Bankruptcy Code, other provisions of the Bankruptcy Code, and other applicable law.

1. Injunction

64. Article X.C of the Plan provides an injunction that generally enjoins the prosecution of any Claim or Cause of Action settled pursuant to the Plan. The injunction is necessary to effectuate the Plan's settlements and exculpations and to protect the Debtors from potential litigation by prepetition creditors as it implements the Plan after the Effective Date. Such litigation could hamper the Debtors' efforts to effectively fulfill their responsibilities as contemplated by the Plan, and may hinder their ability to protect the interests of creditors and maximize value for all Holders of Claims. Therefore, the injunction provision in this Plan should be approved.

2. Exculpation

65. Article X.B of the Plan contains a customary exculpation provision (the "Exculpation Provision") that, with certain limitations, protects the Exculpated Parties[3] from liability that might arise from the administration of the Chapter 11 Cases. Unlike a third party

[3] Under the Plan, "Exculpated Parties" means the Debtors, the Debtors' officers and directors, the Plan Administrator, and the Debtors' professionals retained under sections 327 or 328 of the Bankruptcy Code (each in their capacities as such) that served in such capacities at any time between the Petition Date and the Effective Date. See Plan, Article I.

release, the Exculpation Provision does not affect the liability of third parties *per se*, but sets 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 in connection with the Chapter 11 Cases. See In re PWS Holding Co., 228 F.3d 224, 245 (3d Cir. 2000) (holding that an exculpation provision, "apparently a commonplace provision in Chapter 11 plans, does not affect the liability of [third] parties, but rather states the standard of liability under the Code"); In re Berwick Black Cattle Co., 394 B.R. 448, 459 (Bankr. C.D. Ill. 2008) (discussing the "now customary exculpation [provisions in chapter 11 plans] for acts and omissions in connection with the plan and the bankruptcy case"). As a policy matter, exculpation ensures that capable individuals willingly assist and manage a debtor in the chapter 11 context. See In re Chemtura Corp., 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010) ("[E]xculpation provisions are included frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision makers in the chapter 11 case."). Exculpation provisions in a plan are also appropriate when the protection is necessary and given exchange for fair consideration. Gillman v. Cont'l Airlines (In re Cont'l Airlines), 203 F.3d 203, 211-14 (3d Cir. 2000). Estate fiduciaries, lenders, and other parties participating in the plan process are frequently the subject of exculpation provisions. See, e.g., In re W.R. Grace & Co., 446 B.R. 96, 132-33 (Bankr. D. Del. 2011); In re Wash Mut. Inc., 442 B.R. at 350-51; In re Indianapolis Downs, LLC, 486 B.R. 286, 306 (Bankr. D. Del. 2013). Without protection for these parties, key constituents would not participate in the plan process. Denial of this fundamental protection would jeopardize the ability of the Debtors or their Estates to focus on the chapter 11 process.

66. Based on widely accepted and developed precedent, the Exculpation Provision is wholly justified, properly limited, and should be approved. The Exculpation Provision is

appropriately crafted so as to protect only those parties whose efforts have been instrumental in connection with the formulation and development of Plan and who have made a substantial contribution to the overall Chapter 11 Cases. Courts have approved exculpation provisions similar to those proposed in the Plan as appropriate where such provisions do not extend to gross negligence or willful misconduct, and the Exculpated Parties have acted in good faith in negotiating and implementing a chapter 11 plan. Accordingly, the Exculpation Provision should be approved.

IV. WAIVER OF STAY OF CONFIRMATION ORDER

67. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). Bankruptcy Rule 7062(a) provides that "no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after is entry." Fed. R. Bankr. P. 7062(a).

68. Importantly, no objections to the Plan were timely filed. The Debtors believe that the chance of a party seeking to preserve any rights for an appeal is unlikely. Immediate consummation of the Plan will not prejudice any party in interest and creditors will benefit from an accelerated Effective Date. Therefore, to maximize the value of the Debtors' Estates and the recoveries to creditors, the Debtors respectfully request that, notwithstanding Bankruptcy Rules 3020(e) and 7062(a), any order confirming the Plan is effective immediately.

V. RESERVATION OF RIGHTS

69. The Debtors reserve the right to supplement this Memorandum in response to any objection or for any other appropriate reason.

VI. CONCLUSION

70. For the reasons set forth herein, the Debtors submit that the Plan satisfies all of the applicable requirements of the Bankruptcy Code and the Bankruptcy Rules and should be confirmed.

September 18, 2020

Respectfully submitted,

CHIPMAN BROWN CICERO & COLE LLP

/s/ William E. Chipman, Jr.

William E. Chipman, Jr. (No. 3818)
Mark D. Olivere (No. 4291)
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801
Telephone: (302) 295-0191
Facsimile: (302) 295-0199
chipman@chipmanbrown.com
olivere@chipmanbrown.com

- and -

MCDONALD HOPKINS LLC
Nicholas M. Miller (Admitted *Pro Hac Vice*)
Michael J. Kaczka (Admitted *Pro Hac Vice*)
300 North LaSalle Street, Suite 1400
Chicago, Illinois 60654
Telephone: (312) 280-0111
nmiller@mcdonaldhopkins.com
mkaczka@mcdonaldhopkins.com

Co-Counsel to the Debtors
and Debtors in Possession