Docket #1101 Date Filed: 05/14/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
OREXIGEN THERAPEUTICS, INC.,	Case No. 18-10518 (KG)
Debtor.[1]	

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTOR'S MODIFIED AMENDED PLAN OF LIQUIDATION

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[1] The last four digits of the Debtor's federal tax identification number are 8822. The Debtor's mailing address for purposes of this Chapter 11 Case is Orexigen Therapeutics, Inc. c/o Hogan Lovells US LLP, 390 Madison Avenue New York, NY 10017, Attn: Chris Bryant and John Beck.

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Orexigen Therapeutics, Inc. (the "Debtor") hereby submits this memorandum of law in support of confirmation of the *Debtor's Modified Amended Plan of Liquidation* [D.I. 1099] (as may be altered, modified, amended, or supplemented from time to time in accordance with its terms, including by entry of the Confirmation Order, the "Plan").[2] The facts and circumstances supporting confirmation of the Plan are set forth more fully in, among other things, the (i) *Declaration of Thomas P. Lynch in Support of Confirmation of the Debtor's Modified Amended Chapter 11 Plan* (the "Lynch Declaration"), which was filed concurrently herewith, and (ii) *Declaration of Michael A. Narachi in Support of First Day Relief* [D.I. 3] (the "First Day Declaration"). In support of confirmation of the Plan, the Debtor respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. The Debtor filed this case (this "Chapter 11 Case") with the goal of finding a buyer for substantially all of its assets, including its sole drug product, Contrave®. The Debtor ran a robust marketing process to maximize the value of its assets for all stakeholders that yielded $73.5 million in cash proceeds from a sale transaction closing on July 27, 2018. The Debtor also negotiated a Plan Settlement with its major creditor constituencies that provided an agreed upon structure for distributing the asset sale proceeds and the Debtor's remaining assets. The terms of that Plan Settlement have been implemented in the Plan currently before the Court.

2. The road to this successful result was not easy. The Debtor and its advisors have worked hand-in-hand with the Prepetition Secured Noteholders, Creditors' Committee, the United States Trustee, and other stakeholders, to negotiate a consensual resolution of this Chapter 11 Case. All of these key parties have consented to the Plan, and each voting Class has

[2] Capitalized terms used but not otherwise defined in this Memorandum have the meanings set forth in the Disclosure Statement or Plan, as applicable.

voted to approve it. Only Holders of Interests and Holders of Section 510(b) Claims are deemed to reject the Plan (as they are receiving no recovery), and in the latter case, such Holders have acknowledged that their claims are subordinated pursuant to section 510(b) of the Bankruptcy Code. *See* D.I. 977.

3. The Debtor submits this Memorandum, as well as relevant evidence, to establish the Plan is in the best interests of the Debtor's estate and meets the requirements for confirmation under section 1129 of the Bankruptcy Code. For the reasons detailed herein, the Debtor respectfully submits that the Court should confirm the Plan.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

III. BACKGROUND

5. On March 12, 2018 ("Petition Date"), the Debtor commenced this Chapter 11 Case by filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§101-1532 (as amended, the "Bankruptcy Code"). The Debtor is administering this Chapter 11 Case as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this Chapter 11 Case. On March 27, 2018, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Creditors' Committee") pursuant to Bankruptcy Code section 1102 [D.I. 91].

(a) The Debtor and its Business

6. The Debtor was a biopharmaceutical company focused on the treatment of obesity and the commercialization of a single pharmaceutical drug for chronic weight management. The Debtor successfully closed a sale of substantially all of its assets on July 27, 2018, to Nalpropion

Pharmaceuticals, Inc. Additional details regarding the Debtor's history and business are set forth in the First Day Declaration, which is incorporated by reference in all respects.

(b) **The Bankruptcy and Plan Settlement**

7. For additional information concerning the Chapter 11 Case and the Plan Settlement, please refer to Article 2 of the Disclosure Statement and Section 2.15 of the Plan, respectively.

(c) **The Plan and Disclosure Statement**

8. On March 27, 2019, the Court entered the *Order (A) Approving the Disclosure Statement on an Interim Basis, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, (C) Approving the Forms of Ballots and Solicitation Materials, (D) Establishing the Voting Record Date, (E) Scheduling the Confirmation Hearing and Deadline for Filing Objections to Final Approval of the Disclosure Statement and Confirmation of the Plan, and (F) Approving the Related Form of Notice* [D.I. 999] (the "Joint Procedures Order"), which approved, among other things, (i) the *Disclosure Statement for Debtor's Amended Plan of Liquidation* [D.I. 1007] (as amended, the "Disclosure Statement"), on an interim basis, pursuant to sections 105(d) and 1125 of the Bankruptcy Code, Rule 3017 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Rule 3017-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") and (ii) certain procedures related to solicitation of the Plan and tabulation of votes.

9. The Plan provides full recoveries to holders of Allowed Priority Claims and Allowed Other Secured Claims, which classes are unimpaired and deemed to accept the Plan. Additionally, the Plan provides meaningful recoveries for Holders of Allowed Prepetition Secured Noteholder Claims, while also providing a recovery to Holders of Allowed General

Unsecured Claims as a result of and pursuant to the Plan Settlement, which may increase based on positive results from Causes of Action pursued by the Wind Down Entity.

10. The Plan provides for the following reserves to be funded on or after the Effective Date, the amount and bases for which have been disclosed in the Plan Supplement:

(a) the 401(k) Administrator Expense Reserve, which includes Cash in an amount to be determined by the Required Prepetition Secured Noteholders, to be transferred to the Debtor on the Effective Date and used by the 401(k) Administrator in accordance with the 401(k) Administrator Budget;

(b) the Lender Litigation Expense Reserve, which includes Cash in an amount to be determined by the Required Prepetition Secured Noteholders, to be transferred to the Wind Down Entity on the Effective Date and used by the Wind Down Administrator solely for the payment of Lender Litigation Expenses;

(c) the Priority Claim Reserve, which includes Cash to be transferred to the Wind Down Entity on the Effective Date, in an amount determined by the Debtor with the consent of the Required Prepetition Secured Noteholders, for the purpose of making distributions on account of Allowed Administrative Claims, Allowed Professional Fee Claims, Allowed Priority Tax Claims, and Allowed Claims in Classes 1 and 2;

(d) the Class 4 Disputed Claim Reserve, which shall be funded out of the Plan Settlement Initial Funding Amount and which, with respect to each Disputed Claim, shall include an amount of Cash, equal to the *pro rata* distributions that would have been made on such Disputed Claim if it were an Allowed Claim, other than Disputed Claims that the Debtor or Wind Down Administrator, as applicable, determines in its reasonable discretion are covered by sufficient insurance and/or are subject to subordination under the Bankruptcy Code, in an amount equal to the lesser of (i) the amount of the Disputed Claim, (ii) the amount in which the Disputed Claim shall be estimated by the Bankruptcy Court pursuant to section 502 of the Bankruptcy Code for purposes of allowance, which amount, unless otherwise ordered by the Bankruptcy Court, shall constitute and represent the maximum amount in which such Claim ultimately may become an Allowed Claim, or (iii) such other amount as may be agreed upon by the Holder of such Disputed Claim and the Debtor or Wind Down Administrator, as the case may be;

(e) the Plan Settlement Litigation Reserve, which includes Cash in an amount to be determined by the Wind Down Administrator, to be transferred to the Wind Down Entity on the Effective Date (or reserved thereafter from

time to time from Plan Settlement Net Proceeds) and used by the Wind Down Administrator solely for the payment of Plan Settlement Litigation Expenses, in accordance with the Wind Down Entity Documents;

(f) the Wind Down Operating Expense Reserve, which includes Cash in an amount to be determined reasonably by the Required Prepetition Secured Noteholders, to be transferred to the Wind Down Entity on the Effective Date and used by the Wind Down Administrator solely for the payment of Wind Down Operating Expenses, in accordance with the Wind Down Entity Documents;

(g) the McKesson Disputed Funds totaling $6,932,816.40, which the Debtor agreed that it would segregate pending the entry of a Final Order resolving the McKesson Dispute; and

(h) the Professional Fee Escrow, which includes an amount equal to the Professional Fee Claim Estimate to be funded by the Wind Down Administrator from Distributable Cash on the Effective Date and held, maintained, and distributed by the Debtor, acting through the 401(k) Administrator, pursuant to Section 7.2 of the Plan.

(c) **Solicitation and Voting**

11. On April 12, 2019, the Balloting Agent served the Solicitation Packages (as defined in the Joint Procedures Motion) in accordance with the Joint Procedures Order as evidenced by the *Affidavit of Service* filed on April 18, 2019 [D.I. 1059] (the "Solicitation Affidavit").

12. On April 11, 2019, the Balloting Agent published notice in *USA Today*, National Edition, as evidenced by the *Affidavit of Publication*, which was filed on April 18, 2019 [D.I. 1060] (the "Publication Affidavit").

13. The Debtor solicited votes on the Plan from Holders of Claims in Impaired Classes receiving or retaining property on account of such Claims. The Voting Deadline was May 13, 2019 at 4:00 p.m. (ET).

14. The voting results are compiled and reported in the *Declaration of Angela Nguyen on Behalf of Kurtzman Carson Consultants LLC Regarding Voting and Tabulation of Ballots*

Accepting and Rejecting the Amended Plan of Liquidation of Orexigen Therapeutics, Inc. [D.I. 1098] (the "KCC Declaration") and the attached tabulation of the ballots to accept or reject the Plan (the "Voting Report"), which are incorporated herein by reference. The voting results, as reflected in the Voting Report, are as follows:

Total Ballots Received			
Accept		**Reject**	
Number	**Amount**	**Number**	**Amount**
Class 3 – Prepetition Secured Noteholder Claims			
14 (100%)	$113,615,385.00 (100%)	0 (0%)	$0.00 (0.00%)
Class 4 – General Unsecured Claims			
33 (94.29%)	$45,644,541.35 (96.54%)	2 (5.71%)	$1,634,301.86 (3.46%)
Class 5 – Prepetition Secured Noteholder Subordinated Deficiency Claims			
13 (100%)	$109,240,385.00 (100%)	0 (0%)	$0.00 (0.00%)

15. Classes 3, 4 and 5 are Impaired and eligible to vote on the Plan. As set forth above and in the Voting Report, Classes 3, 4 and 5 voted to accept the Plan. KCC Decl., Exh. A.

IV. ARGUMENT

16. The Plan satisfies the Bankruptcy Code requirements for confirmation, particularly those found in each of sections 1122, 1123 and 1129 of the Bankruptcy Code. Therefore, the Court should confirm the Plan. To confirm the Plan, the Court must find that the Debtor has satisfied the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616 n.23 (Bankr. D. Del. 2001).

17. Through the record in this Chapter 11 Case, including the Lynch Declaration, testimonial evidence that may be adduced at or before the Confirmation Hearing, arguments of counsel at the Confirmation Hearing, and the First Day Declaration, the Debtor will demonstrate,

by a preponderance of the evidence, that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan.

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

18. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code. A principal objective of section 1129(a)(1) is to ensure compliance with requirements regarding classification of claims and interests and the contents of a plan of liquidation, as set forth in sections 1122 and 1123 of the Bankruptcy Code. *See In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008) (suggesting that Congress intended that the phrase "'applicable provisions of this title' requires that the plan comply with the applicable provisions of Chapter 11, such as Section 1122 and 1123"). As explained below, the Plan complies with sections 1122 and 1123 in all respects.

1. Compliance with the Applicable Requirements of Section 1122

19. Section 1122(a) provides that claims that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." *See* 11 U.S.C. § 1122(a). By its terms, this section does not prohibit placing "substantially similar" claims in separate classes. *See id.* The United States Court of Appeal for the Third Circuit has held that similar claims may be placed in separate classes if it is reasonable to do so. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs. (In re Route 37 Bus. Park Assocs.)*, 987 F.2d 154, 158 (3d Cir. 1993) ("[T]he classification of the claims or interests must be reasonable."). The Plan complies with section 1122(a), as each Class contains substantially similar Claims. *See id.* at 158-59.

20. The Debtor exercised its reasonable business judgment in creating the classification scheme. *See* Lynch Decl., ¶ 22. The classification system in the Plan follows the

Debtor's capital structure—debt and equity are classified separately, secured claims are classified separately from general unsecured claims, and subordinated claims are also classified separately. *See* Plan, Art. I. These Classes take into account the differing nature and priority of Claims against, and Interests in, the Debtor. Administrative Expense Claims, Professional Fee Claims and Priority Tax Claims are not classified for purposes of voting or receiving distributions under the Plan, but are treated separately as Unclassified Claims. Accordingly, the Plan satisfies section 1122 of the Bankruptcy Code.

2. The Plan Complies with the Requirements of Section 1123(a)

21. The Plan meets the seven mandatory requirements of section 1123(a).

(a) **The Plan Satisfies Sections 1123(a)(1)-(4)**

22. The Plan's satisfaction of 1123(a)(1)-(4) is readily apparent from the face of the Plan. *See* Plan, Art. I. Those subsections require the Plan to designate classes of claims other than certain priority claims, specify the treatment of those claims and provide the same treatment for each holder in a class, respectively. The Plan here satisfies each requirement.

23. First, the Plan designates seven different classes of Claims and Interests, complying with section 1123(a)(1). Article I of the Plan specifies that Classes 1 and 2 are unimpaired under the Plan, thereby satisfying 11 U.S.C. § 1123(a)(2). Article I of the Plan also specifies that Classes 3, 4, 5, 6 and 7 are impaired under the Plan and specifies the treatment of Claims or Interests in those Classes, thereby satisfying 11 U.S.C. § 1123(a)(3). Lastly, the Plan provides for the same treatment by the Debtor for each Claim or Interest in each respective Class unless the Holder of a particular Claim or Interest has agreed to a less favorable treatment of such Claim or Interest, thereby satisfying 11 U.S.C. § 1123(a)(4).

(b) **The Plan Provides for Adequate Means of Implementation and Satisfies Section 1123(a)(5)**

24. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means for the plan's implementation."

25. Here, Articles I and II of the Plan and the various related documents and agreements set forth therein provide the means for the Plan's implementation, thus satisfying section 1123(a)(5). This includes, but is not limited to: (i) the instructions for distribution of Claims Allowed; (ii) the adoption of the Wind Down Entity Documents and appointment of the Wind Down Administrator and Wind Down Committee; and (iii) the transfer and vesting of the Wind Down Assets and other property, pursuant to the provisions of Bankruptcy Code sections 1141(b) and (c), with the Wind Down Entity free and clear of all Claims, Liens, encumbrances and other interests (other than claims of creditors against the Wind Down Entity and claims of McKesson to the Disputed Funds). *See* Plan, Art. I and II.

(c) **Section 1123(a)(6) Does Not Apply**

26. Section 1123(a)(6) does not apply to the Plan because the Debtor is not issuing any equity securities under the Plan.

(d) **Plan Selects Successor As Required Under Section 1123(a)(7)**

27. Section 1123(a)(7) requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Here, the Plan Supplement (and Wind Down Entity Documents) disclose the identity of the Wind Down Administrator. *See* Plan Supplement, Art. I. Province, Inc., a professional restructuring advisory firm, was selected in a manner consistent with the interests of creditors and with public policy and will oversee the

wind down of the Debtor's estate. No officers or directors of the Debtor will continue after the Effective Date of the Plan, except that Mr. Lynch will continue as a consultant as the 401(k) Administrator, with additional oversight over the Professional Fee Escrow. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

3. Compliance with the Requirements of Section 1123(b)

28. Section 1123(b) sets forth certain provisions that may be incorporated into a Chapter 11 plan, although they are not required. *See* 11 U.S.C. § 1123(b). Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

(a) **The Plan Complies with Section 1123(b)(1)**

29. Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). Claims and Interests in Classes 3, 4, 5, 6 and 7 are impaired. Claims in Classes 1 and 2 are not impaired by the Plan. *See* Plan, Art. I. Accordingly, the Plan is consistent with section 1123(b)(l) of the Bankruptcy Code.

(b) **Assumption and Rejection of Executory Contracts and Unexpired Leases Under the Plan is Appropriate Under Section 1123(b)(2)**

30. Section 1123(b)(2) allows a plan to provide for the assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. The Debtor believes that all executory contracts and unexpired leases of the Debtor were assumed and assigned to the Purchaser, or rejected, during the pendency of the Chapter 11 Case. *See* Lynch Decl., ¶ 19. Out of an abundance of caution, however, Article III of the Plan provides that all executory contracts and unexpired leases of the Debtor which have not been assumed and assigned, or rejected, prior to the Confirmation Date shall be deemed rejected as of the Confirmation Date; *provided, however,* that to the extent any insurance policies of the Debtor,

including but not limited to any directors' and officers' liability insurance policies, are considered to be executory contracts, no such insurance policies shall be rejected or otherwise impacted pursuant to this Plan and all such insurance policies shall be deemed assumed on the Effective Date. *See* Plan, Art. III. Accordingly, the Plan is consistent with section 1123(b)(2) of the Bankruptcy Code

(c) **Retention of Claims and Modification of Rights of Holders of Secured Claims Under the Plan is Appropriate Under Section 1123(b)(3), (5)**

31. Section 1123(b)(3)(B) provides that a plan may "provide for the retention and enforcement by the debtor" of claims or interests belonging to the Debtor. 11 U.S.C. § 1123(b)(3)(B). The Plan preserves for the Wind Down Entity the exclusive right, standing and authority to prosecute, compromise, settle and/or otherwise deal with the Causes of Action and any and all causes of action included among the Wind Down Assets, except as otherwise provided by the Plan. *See* Plan, Art. V. Accordingly, the Plan is consistent with section 1123(b)(3) of the Bankruptcy Code.

32. Section 1123(b)(5) of the Bankruptcy Code provides that a plan may "modify the rights of holders of secured claims." 11 U.S.C. § 1123(b)(5). The Plan modifies the rights of the Holders of the Prepetition Secured Noteholder Claims based on the agreed-upon terms of the Plan and Plan Settlement. The Prepetition Secured Noteholders participated in the negotiations of the Plan and Plan Settlement and agreed to the terms and treatment provided therein. Under the Plan Settlement, the Prepetition Secured Noteholders have agreed to provide the Plan Settlement Initial Funding Amount and subordinate the Prepetition Secured Noteholder Subordinated Deficiency Claim in full to Allowed General Unsecured Claims. This modification complies with section 1123(b)(5) of the Bankruptcy Code.

(d) **The Debtor Releases Under the Plan Are Appropriate Under Section 1123(b)(6)**

33. Section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." The Plan contains at least four types of provisions permitted by section 1123(b)(6): the Debtor release, third-party release, exculpation and injunction provisions in Article VI of the Plan. All of these provisions in the Plan are consistent with applicable provisions of the Bankruptcy Code and case law in the Third Circuit as described in more detail herein. The Debtor received and incorporated informal comments to the Plan's release and exculpation provisions from the U.S. Trustee, and the U.S. Trustee has advised the Debtor that its concerns with respect to these matters have been resolved.

34. The Plan provides for Debtor releases that both satisfy the applicable standard in this circuit and align with similar releases approved in this jurisdiction and by this Court.

35. "Courts in this district have held that a plan may provide for releases by a debtor of non-debtor third parties after considering the specific facts and equities of each case." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 142 (Bankr. D. Del. 2010). In this jurisdiction, courts typically assess the propriety of a "debtor release" in light of five "*Zenith* factors" in the context of a Chapter 11 plan:

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

(2) substantial contribution by the non-debtor of assets to the reorganization;

(3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;

(4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes 'overwhelmingly' votes to accept the plan;

(5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999); s*ee also In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013). No factor is dispositive, nor is a proponent required to establish each factor for the release to be approved; rather, the factors are intended to provide guidance to the court in determining the fairness of the releases. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011); *see also In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that factors are not exclusive or conjunctive requirements, but instead are helpful in weighing the equities of the particular case after a fact-specific review); *Indianapolis Downs*, 486 B.R. at 304 (approving the debtors' releases despite not meeting the third and fifth *Zenith* factors).

36. The Debtor submits that each *Zenith* factor supports the proposed Debtor releases in Article VI of the Plan.

(i) Identity of Interest

37. As to the first factor, there is identity of interest of the Released Parties with the Debtor insofar as such releases include persons or entities whose cooperation and support was necessary to allow the Debtor to liquidate and make distributions through support for the Plan (*i.e.*, the DIP Lenders, the Required Prepetition Secured Noteholders, the Prepetition Secured Notes Indenture Trustee, the Creditors' Committee and its members (in their capacity as members of the Creditors' Committee), and the Prepetition Unsecured Notes Indenture Trustees). *See In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (approving releases where released parties and debtors shared "common goal of achieving a reorganization of the Debtors"). Each of the Released Parties, as stakeholders and critical participants in the Plan process, sought to ensure the success of the Plan and the maximization of distributions to creditors in an

expeditious manner. *See* Lynch Decl., ¶ 10. *See also Indianapolis Downs*, 486 B.R. at 303 ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the nondebtor receiving the release."). Thus, litigation undertaken against the parties otherwise benefitting from the release would negatively impact the Debtor, with little to no benefit accruing to any of the Debtor's stakeholders.

(ii) Substantial Contribution By the Non-Debtor to the Liquidation.

38. As to the second factor, the Debtor releases are predicated on substantial contributions by each of the parties benefitting from those releases. In the first instance, the Debtor releases include parties that have provided direct benefits to the Estate, including (i) Lota Zoth, in her capacity as a director, who served as the Sole Continuing Director following the closing of the Sale on July 27, 2018, and (ii) Thomas Lynch, in his capacity as an officer, who coordinated nearly all aspects of the Debtor's restructuring, and also served as Sole Continuing Officer following the closing of the Sale on July 27, 2018. Both Ms. Zoth and Mr. Lynch's efforts were indispensable to administering this Chapter 11 Case, operating the Debtor's business under difficult circumstances, and formulating and negotiating the Plan. *See Zenith*, 241 B.R. at 111 (officers and directors provided substantial contribution "by designing and implementing the operational restructuring and negotiating the financial restructuring"). The DIP Lenders, Prepetition Secured Noteholders, Creditors' Committee and Prepetition Unsecured Notes Indenture Trustees also made significant contributions to this Chapter 11 Case by, as may be applicable, ensuring the Debtor had the proper financing and use of cash collateral necessary to fund the Sale and its orderly wind down, and through helping the Debtor navigate the Sale and Plan processes to maximize recoveries for creditors and resolve disputes. *See* Lynch Decl., ¶ 11. All the Released Parties have been involved with negotiations and compromises that have

positioned the Debtor to provide meaningful recoveries to holders of Claims, none of which would have been possible to the same extent in a Chapter 7 liquidation. *See id*. The cooperation and work of the Released Parties enabled the Debtor to resolve crucial motions (specifically, those motions relating to DIP financing, cash collateral and the Sale) and reach a global settlement reflected in a consensual Plan and the Plan Settlement, which provides for, among other things, (i) waiver by the Creditors' Committee of its reserved right to commence a Challenge (as defined in the DIP Order) against the DIP Lenders and/or the Prepetition Secured Noteholders; and (ii) the Prepetition Secured Noteholders' agreement to (a) fund the Plan Settlement Initial Funding Amount and many of the reserves required to be funded under the Plan and Wind Down Entity Documents; and (b) subordination of the Prepetition Secured Noteholder Subordinated Deficiency Claim to Allowed General Unsecured Claims, which given the expected recoveries in this Chapter 11 Case is equivalent to a waiver of such claims, for the benefit of unsecured creditors. *See* Lynch Decl., ¶ 11. *See also Wash. Mut.*, 442 B.R. at 347 (released non-debtors made a substantial contribution to the Plan by waiving claims they had asserted against numerous assets of the Debtors).

(iii) Essential Nature of the Releases to the Liquidation

39. The Debtor releases are essential to the Plan itself, satisfying the third factor. Without the Debtor releases, the Debtor does not believe that the compromises forming the basis of the Plan, Plan Settlement and Sabby Settlement, and the related benefits arising therefrom, would be possible. *See* Lynch Decl., ¶ 12. Such releases were required by the Creditors' Committee, the DIP Lenders, Prepetition Secured Noteholders, Prepetition Unsecured Notes Indenture Trustees, and Sabby (with respect to resolving the Sabby Litigation Related Claims) to be included in the Plan as a condition to their support of the Plan and the settlements to which they were parties. *See id.*; *see also Coram Healthcare Corp.*, 315 B.R. at 335 ("The releases given

to the Noteholders are an essential part of the Plan, since they would not provide the funding without the releases."). This factor therefore supports approval with respect to the Debtor releases here.

(iv) Agreement By a Substantial Majority of Creditors

40. The fourth factor examines whether there is agreement by a substantial majority of creditors to support the releases. Importantly, each Class entitled to vote on the Plan voted to accept the Plan by an overwhelming majority. KCC Decl., Exh. A.

(v) Payment of All or Substantially All of the Claims of the Class or Classes Affected by the Releases

41. Finally, the fifth factor – that the Plan provides for payment of all or substantially all of the Classes affected by the releases – also weighs in favor of the Debtor releases. Here, all Classes receive (or are entitled to receive) recoveries other than Holders of Claims in Class 6 and Holders of Interests in Class 7, Holders of the Prepetition Secured Noteholder Deficiency Claim, who agreed as part of the Plan Settlement that such Claims would be subordinated in full to Allowed General Unsecured Claims, are not expected to receive a distribution under the Plan but the possibility exists if unsecured creditors are paid in full. *See* Plan, Art. I. Therefore all Classes granting releases will also receive, or are entitled to receive, recoveries.

(vi) All *Zenith* Factors Are Satisfied and the Releases Should be Approved

42. In addition to satisfying the *Zenith* factors, the releases represent a valid exercise of the Debtor's business judgment and should be approved. *See Aleris*, 2010 WL 3492664, at *20 ("Where . . . releases are an active part of the plan negotiation and formulation process, it is a valid exercise of the debtor's business judgment to include a settlement of any claims a debtor might own against third parties as a discretionary provision of a plan.") (internal citations omitted); *In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *10

(Bankr. D. Del. Apr. 29, 2010) (noting the debtor releases fully complied with the *Zenith* standard and "[a]ccordingly, the Court finds that the Debtor Releases represent a valid exercise of the Debtors' business judgment.").

43. As discussed above, the Plan provides for distributions to creditors that otherwise may have no source of recovery if the case liquidated under Chapter 7. The Debtor's liquidation analysis in Article V of the Disclosure Statement makes it clear that under a Chapter 7 liquidation, the *only* Classes to receive any distribution at all would be Classes 2 and 3 – Other Secured Claims, if any, and Prepetition Secured Noteholder Claims. *See* Lynch Decl., ¶ 14. As a result of arm's-length negotiations with the Prepetition Secured Noteholders, Creditors' Committee, Prepetition Unsecured Notes Indenture Trustees and other constituencies, the Plan provides for distributions to Holders in Classes of lower priority, including the Holders of General Unsecured Claims. *See id.* Absent these negotiations and compromises with such parties, including the Plan Settlement and Sabby Settlement, the Debtor may have been forced to engage and defend protracted and expensive litigation resolving the disputes resolved and embodied in the Plan. *See id.* The Debtor avoided hardships and decreased recoveries for its creditors by negotiating the Plan Settlement and Sabby Settlement and granting releases.

(e) **The Third Party Releases and Exculpation Under the Plan Are Appropriate Under Section 1123(b)(6)**

44. The Plan also includes third-party release and exculpation provisions. *See* Plan, Art. VI. The Plan provides that the following third parties will grant a release under the Plan: (i) parties that vote to accept the Plan; (ii) parties that are deemed to accept the Plan; (iii) parties that abstain from voting on the Plan; and (iv) parties that vote to reject the Plan and do not opt out of the releases. *See* Plan, Art. VI, § 6.2(b). Third-party releases are consensual as applied to holders of claims deemed to accept a plan. *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). Moreover, where parties receive sufficient notice of a plan's release provisions and have an opportunity to object to or opt out of the release and fail to do so, the releases are consensual. *See id.* 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."). Finally, the Plan does not contemplate a release by Holders of Claims in Class 6 or Holders of Interests in Class 7, who are deemed to reject the Plan. Courts in the Third Circuit consistently have approved consensual third-party releases of similar scope. *See Gillman v. Cont'l Airlines (In re Cont'l Airlines Inc.)*, 203 F.3d 203, 214 n.11 (3d Cir. 2000) ("Several of the Bankruptcy Courts in our Circuit have stated that non-debtor releases are permissible only if consensual.") (citing *Zenith Elecs.*, 241 B.R. at 111)); *Spansion*, 426 B.R. at 144.

45. Precedent in this Court and other courts makes clear that third party releases remain consensual so long as the opportunity to opt out was given – even if a creditor abstains from voting. *See Indianapolis Downs*, 486 B.R. at 306 ("[T]he record reflects these [impaired creditors who abstained from voting or voted against and did not opt out of the releases] 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."); *see also Spansion, Inc.* 426 B.R. at 144 (finding that returning a ballot is not essential to demonstrating consent to a release by unimpaired class); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009), *aff'd,* No. 09 CIV. 10156 (LAK),

2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part on other grounds,* 627 F.3d 496 (2d Cir. 2010) (determining that adequate notice of the proposed release was given to impaired creditors, and the ballots set forth the effect of abstaining without opting out of the release).

46. In the case of the third party releases here, the Plan and Ballots clearly indicated to creditors that they could opt out of the third party releases. Creditors were free to consider the possible value of any cause of action being released under the Plan as compared to the value of the distribution to which they would be entitled and to decide whether or not to opt out of the third party releases. Interested parties have received sufficient notice of the releases and (with the exception detailed below) did not object.

47. The exculpation in section 6.1 of Article VI of the Plan should also be approved under the standards established by the Third Circuit.

48. Courts evaluate the appropriateness of exculpation provisions based on a number of factors, including whether the plan was proposed in good faith, whether liability is limited, and whether the exculpation provision was necessary for plan negotiations. *See, e.g.*, *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (evaluating the exculpation clause based on the manner in which the clause was made a part of the agreement, the necessity of the limited liability to the plan negotiations, and that those who participated in proposing the plan did so in good faith).

49. Here, the exculpation is appropriate under applicable law because it is part of a Plan proposed in good faith, is appropriately limited in scope,[3] and is being granted only to (i) the

[3] As noted, the U.S. Trustee provided informal comments to the Plan, which included a limited informal objection to the parties included in the initial definition of "Exculpated Parties." The Debtor agreed to limit the Exculpated Parties to those listed in paragraph 49. The U.S. Trustee has advised the Debtor that it has no objection to the current formulation of the Plan's exculpation provision, which is set forth in the Plan as modified and Confirmation Order.

Debtor and its Estate, (ii) the Creditors' Committee, (iii) the members of the Creditors' Committee (in such capacity), (iv) the Wind Down Administrator (in such capacity), (v) the Wind Down Committee, (vi) the members of the Wind Down Committee (in such capacity), (vii) the Sole Continuing Director (in such capacity), (viii) the Sole Continuing Officer (in such capacity), (ix) the 401(k) Administrator (in such capacity), and (x) KCC (in its capacity as Claims Agent, Noticing Agent, Balloting Agent and Plan distribution agent), including any and all Related Persons of each of the foregoing in such capacities.

50. Exculpation provisions similar to those proposed in Article VI of the Plan are appropriate where, as here, such provisions do not extend to gross negligence or willful misconduct and where the Exculpated Parties have acted in good faith in negotiating and implementing the Plan. *See In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *Indianapolis Downs*, 486 B.R. at 306 (same). The exculpation provision here contains an express carve-out for fraud, willful misconduct, gross negligence or criminal conduct as determined by an Order.

51. Moreover, the third-party release and exculpation provisions are proper because, among other things, they are the product of arm's-length negotiations, have been critical to obtaining the support of the various constituencies for the Plan, and, as part of the Plan, have received substantial support from the creditors who voted for the Plan.

52. Here, the release and exculpation provisions are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtor and its Estate. *See* Lynch Decl., ¶ 17. The provisions are also consistent with the Bankruptcy Code and, thus, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

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

B. Section 1129(a)(2): The Debtor Has Complied with the Applicable Provisions of the Bankruptcy Code

54. The Debtor has satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan comply with the applicable provisions of the Bankruptcy Code—here, sections 1125, 1126 and 1127.

1. The Debtor Has Complied with Section 1125, and Disclosure Statement Should be Approved on a Final Basis

55. The cases and legislative history discussing section 1129(a)(2) indicate that this section principally embodies the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code. *See Aleris*, 2010 WL 3492664 at *20. Section 1125 prohibits the solicitation of acceptances or rejections of a plan "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). Section 1125 ensures that parties in interest are fully informed regarding the debtor's condition so that they may make an informed decision whether to approve or reject the plan. *See Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.),* 25 F.3d 1132, 1136 (2d Cir. 1994); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003).

56. Section 1125 is satisfied here. On March 27, 2019, the Court approved the Disclosure Statement on an interim basis in accordance with section 1125(a)(1). *See* D.I. 999. There were no objections to final approval of the Disclosure Statement.

57. The Court also approved the contents of the Solicitation Packages provided to Holders of Claims entitled to vote on the Plan, the non-voting materials provided to creditors and equity holders not entitled to vote on the Plan, and the relevant dates for voting and objecting to the Plan. *See* Joint Procedures Order. The Debtor, through its Balloting Agent, complied with the content and delivery requirements of the Joint Procedures Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code. *See* Solicitation Affidavit; *see also* Voting Report; Publication Affidavit.

58. The Debtor has also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular Class. The Debtor transmitted the Disclosure Statement to all parties entitled to vote on the Plan. *See* Solicitation Affidavit.

59. The Debtor believes the Disclosure Statement contains adequate information to approve the Disclosure Statement on a final basis. The Debtor has received no objections to the approval of the Disclosure Statement on a final basis.

60. Moreover, the Court previously found in the Joint Procedures Order, on an interim basis, that the Disclosure Statement contained adequate information to satisfy section 1125(b). The Debtor submits that, for the reasons set forth herein, the Debtor has complied with Section 1125 and the Court should approve the Disclosure Statement on a final basis.

61. The Debtor has met the requirements of Local Rule 3017-2. At the time the Joint Procedures Order was entered, the Debtor had approximately $25.2 million in cash on hand. However, the Debtor has since made payments in the course of its Chapter 11 Case. Accordingly, as of the date of this Memorandum, the Debtor has assets for distribution under the Plan of about $24.3 million, which is under the $25 million limit imposed by Local Rule 3017-2.

2. Solicitation Complies with Section 1126

62. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan. 11 U.S.C. § 1126. Specifically, only holders 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. Classes that are unimpaired under the Plan are conclusively deemed to accept. *See* 11 U.S.C. § 1126(f). Conversely, Classes that are entitled to nothing under the Plan are conclusively deemed to reject. *See* 11 U.S.C. § 1126(g).

63. In accordance with section 1126 of the Bankruptcy Code, the Debtor solicited acceptances or rejections of the Plan from the holders of Allowed Claims in each Class of Impaired Claims that is to receive a distribution under the Plan—Classes 3, 4 and 5.[4] *See* Solicitation Affidavit. As provided in the Voting Report, Classes 3, 4 and 5 voted to accept the Plan. *See* Voting Report.

3. The Plan Will Comply With Section 1127

64. Section 1127(a) of the Bankruptcy Code provides a plan proponent with the right to modify the plan "at any time" before confirmation, and section 1127(d) provides that all stakeholders that previously have accepted a plan also should be deemed to have accepted the modified plan. *See* 11 U.S.C. § 1127. The Debtor reserves its rights, under section 1127 of the Bankruptcy Code, to modify the Plan further prior to the entry of the Confirmation Order.

C. Section 1129(a)(3): The Plan Was Proposed in Good Faith

65. Section 1129(a)(3) of the Bankruptcy Code requires that a plan of liquidation be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3).

[4] Classes 6 and 7 will receive no distribution under the Plan and are conclusively presumed to have rejected the Plan.

66. The Debtor acted in good faith in the negotiation and formulation of the Plan. The Plan is based upon extensive arm's-length negotiations between and among the Debtor, the Prepetition Secured Noteholders, the Creditors' Committee, and other constituencies. *See* Lynch Decl., ¶ 5. The Debtor proposed the Plan with the legitimate and good faith purpose of liquidating and maximizing the value of the Debtor's remaining assets and making distributions in a manner that is (a) timely, orderly and efficient, (b) in the best interests of the Debtor's Estate and Holders of Allowed Claims, and (c) in accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and the orders of this Court. *See id.*, ¶ 8. Additionally, the Plan promotes the Debtor's goals for this Chapter 11 Case (*see id.*, ¶ 7) and purposes of the Bankruptcy Code (*see id.*) and has garnered the support of each Class of Claims entitled to vote on the Plan (*see* KCC Decl., Exh. A).

67. Based on the foregoing, the facts and record of this Chapter 11 Case, the Disclosure Statement, the record made at the Joint Procedures Hearing, and the record to be made at the Confirmation Hearing, the Plan and related documents have been proposed in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code.

D. Section 1129(a)(4): The Plan Provides For Court Approval of Certain Administrative Payments

68. Section 1129(a)(4) of the Bankruptcy Code requires that all payments of a debtor's professional fees be subject to review and approval by the Court as to their reasonableness. *See* 11 U.S.C. § 1129(a)(4); *see also In re Fairfield Residential LLC*, 2010 WL 2904990 at *9 (Bankr. D. Del. July 6, 2010). Here, all payments made or to be made by the Debtor for services, costs, or expenses in connection with the Chapter 11 Case prior to confirmation, including all Professional Fee Claims, have been approved by, or are subject to the

approval of the Court as reasonable. The Plan provides that all final requests for payment of Professional Fee Claims shall be filed and served no later than 60 days after the Effective Date for approval by the Court. *See* Plan, Art. VII., § 7.2. After the Effective Date, this Court will retain jurisdiction with respect to applications for allowance of Fee Claims incurred up to and through the Effective Date. Accordingly, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. Section 1129(a)(5): The Plan Discloses Post-Effective Date Management

69. Section 1129(a)(5) of the Bankruptcy Code requires: (i) that the proponent of a plan disclose the identity of any individual proposed to serve after confirmation as a director, officer, or voting trustee of the debtor; (ii) that the appointment of such individuals be consistent with the interests of creditors and shareholders and with public policy; and (iii) that the proponent disclose the identity of any insider that will be employed by the reorganized debtor and the nature of the compensation to be provided to such insider. 11 U.S.C. § 1129(a)(5).

70. The Debtor has satisfied the foregoing requirements. The Debtor has disclosed the identity and affiliation of the Wind Down Administrator proposed to serve after the Effective Date in the Plan Supplement and Wind Down Entity Documents. The appointment of Province, Inc. to this role is consistent with the interests of creditors. *See* Lynch Decl., ¶ 23. Other than Mr. Lynch serving in the limited capacity as 401(k) Administrator, the Debtor is not employing or retaining any insider, with additional oversight over the Professional Fee Escrow. The Wind Down Administrator's compensation, including fees and expenses of the Wind Down Advisors, will be paid as set forth in the Plan and Wind Down Entity Documents.

F. Section 1129(a)(6): The Plan Does Not Effect Any Change in Publicly Regulated Rates

71. The Plan does not provide for any rate changes subject to the jurisdiction of any governmental regulatory commission. Accordingly, the Plan does not implicate this section of the Bankruptcy Code.

G. Section 1129(a)(7): The Plan is in the "Best Interests" of Creditors

72. Section 1129(a)(7) of the Bankruptcy Code—the "best interest of creditors test"—requires that, with respect to each impaired class of claims or interests, either (a) each holder of a claim or interest of such class has accepted the plan, or (b) will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor liquidated under Chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7)(A). The best interests test applies if a class of claims or interests entitled to vote does not vote unanimously to accept a plan, even if the class as a whole votes to accept the plan. *See Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999). The best interests test is generally satisfied by a liquidation analysis demonstrating that an impaired class will receive no less under the plan than in a Chapter 7 liquidation. *See In re Lason*, 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") (citations omitted).

73. The best interests test applies to Holders of Claims in Class 4, which Class did not vote unanimously to accept the Plan, and Holders of Claims in Class 6 and Interests in Class 7, which Classes are Impaired under the Plan, receiving no distribution, and are deemed to reject it. Consequently, each of the Holders in such Classes must either vote to accept the Plan or else receive the requisite level of recovery.

74. The Plan satisfies section 1129(a)(7) of the Bankruptcy Code. As noted above, the Debtor, whose only remaining asset of any value is cash, has determined that the recoveries expected to be available to Holders of Allowed Claims under the Plan would be greater than the recoveries expected to be available in Chapter 7 liquidation. In this Chapter 11 Case, substantially all of the Debtor's assets already have been liquidated through the Sale and pursuant to the Sale Order, and the Debtor's only significant remaining asset is cash, which was generated primarily from the proceeds of the Sale. The Debtor has few, if any, other assets that could be liquidated for value by a Chapter 7 trustee, and the appointment and activities of a Chapter 7 trustee for the benefit of Creditors would likely lead to significantly reduced recoveries given the time and expense the Chapter 7 trustee's new professionals would need to expend familiarizing themselves with the Debtor and the applicable claims and actions. Therefore, the Debtor has determined that conversion to Chapter 7 would bring no benefit to the creditors, while imposing significant additional and unnecessary expenses and delays on the Debtor's Estate—thereby negatively affecting the Creditors' recoveries. *See* Disclosure Statement, Art. V, § 5.1. Therefore, in a hypothetical Chapter 7, there would be no recovery for any creditors other than the Prepetition Secured Noteholders and holders of Other Secured Claims, if any. Further, the Plan effectuates the Plan Settlement and the Sabby Settlement, and provides that the Asset Purchase Agreement Claims, the Takeda Reconciliation Claim, the Holdback Amounts, and the Causes of Action, will be pursued and liquidated by the Wind Down Administrator for the benefit of Holders of Allowed Prepetition Secured Noteholder Claims and/or Holders of Allowed General Unsecured Claims, as applicable.

75. If the Plan is not confirmed, creditor recoveries would be speculative, and subject to significant delays and the material uncertainties of complex litigation. *See* Disclosure

Statement, Art. V, § 5.1. Holders of General Unsecured Claims in Class 4, who are only receiving a distribution under the plan as a result of the Plan Settlement, and Holders of Claims in Class 6, whose Claims are subordinated pursuant to section 510(b) of the Bankruptcy Code, would receive no distribution in a hypothetical Chapter 7. Similarly, Holders of Interests, classified in Class 7 under the Plan and slated to have their Interests cancelled with no distribution on account of such Interests, would also receive no recovery. Section 1129(a)(7) is therefore satisfied as each Holder has either accepted the Plan or will receive under the Plan on account of its respective Claim or Interest property of a value, as of the Effective Date, that is not less than the amount that each such Holder would have received if the Debtor was to have liquidated on the Effective Date under Chapter 7 of the Bankruptcy Code. *See* Plan, Art. III; *see also* Lynch Decl., ¶ 24. The recoveries available under the Plan are a function of the terms set forth therein, including, without limitation, the Plan Settlement. Accordingly, because creditors have supported the Plan or the recoveries provided under the Plan far exceed the recoveries available in a Chapter 7 liquidation, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code. *See id.*

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

76. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either vote to accept a plan or be unimpaired under that plan. 11 U.S.C. § 1129(a)(8). As evidenced by the Voting Report, Classes 3, 4 and 5 each voted to accept the Plan. As discussed above, Classes 1 and 2 are deemed to have accepted the Plan. Holders of Claims in Class 6 and Holders of Interest in Class 7 are deemed to reject the Plan; however, the Plan may still be confirmed over the dissent of Classes 6 or 7 because, as set forth below, the Debtor has satisfied the requirements for cramdown under section 1129(b) of the Bankruptcy Code.

I. Section 1129(a)(9): The Plan Complies with Statutorily Mandated Treatment of Administrative Claims and Priority Tax Claims

77. Section 1129(a)(9) of the Bankruptcy Code requires that holders of claims for administrative expenses allowed under section 503(b) of the Bankruptcy Code must receive on the effective date cash equal to the allowed amount of such claims. The treatment of Administrative Claims and Priority Tax Claims, as set forth in Article I of the Plan, is in accordance with the requirements of section 1129(a)(9) of the Bankruptcy Code. Accordingly, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

J. Section 1129(a)(10): The Plan has been Accepted by at Least One Impaired Class of Claims

78. Section 1129(a)(10) of the Bankruptcy Code requires that at least one class of impaired claims vote to accept the Chapter 11 plan, without including any acceptance by an insider. As evidenced by the Voting Report, Classes 3, 4 and 5 are impaired and have voted to accept the Plan. Classes 3 and 5 do not include any insiders of the Debtor. As such, at least one Impaired Class of Claims has accepted the Plan, determined without including any acceptance of the Plan by any insider (as defined by the Bankruptcy Code). Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

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

79. Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the Bankruptcy Court determine that a plan is feasible. Specifically, the Bankruptcy Court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11). As described below, the Plan is feasible within the meaning of this provision.

80. The feasibility test set forth in section 1129(a)(11) requires the Bankruptcy Court to determine whether a plan is workable and has a reasonable likelihood of success. *See Armstrong World Indus.*, 348 B.R. at 167; *In re NII Holdings, Inc.*, 288 B.R. 356, 364 (Bankr. D. Del. 2002); *In re The Leslie Fay Cos.*, 207 B.R. 764, 788–89 (Bankr. S.D.N.Y. 1997); *In re Woodmere Investors Ltd. P'ship*, 178 B.R. 346, 361 (Bankr. S.D.N.Y. 1995).

81. Moreover, "the feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed." *Kane v. Johns-Manville Corp*., 843 F.2d 636, 649 (2d Cir. 1988).

82. The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed, so as to protect against a visionary or speculative plan. *See Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (*quoting* 5 Collier on Bankruptcy ¶ 1129.02[11], at 1129-34 (15th ed. 1984)). However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. *See In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992) ("The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required.") (*citing In re U.S. Truck Co., Inc.*, 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986)). Having to refinance years into the future cannot defeat feasibility. *In re Sagamore Ps., Ltd.*, 512 B.R. 296, 320–321 (S.D. Fla. 2014); *Bank of Am. v. 203 N. LaSalle St. P'ship*, 195 B.R. 692, 711 (N.D. Ill. 1996), *rev'd on other grounds*, 526 U.S. 434 (1999); *In re Am. Consol. Transp. Cos.*,

Inc., 470 B.R. 478 (Bankr N.D. Ill. 2012); *In re Eddington Thread Mfg. Co*., 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995).

83. Applying the foregoing legal standards, the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. The Plan provides for the liquidation of the Debtor and the distribution of its remaining property in accordance with the priority scheme set forth in the Bankruptcy Code and the terms of the Plan. Therefore, confirmation of the Plan will not be followed by the need for further financial reorganization of the Debtor, thereby satisfying (or eliminating the need to consider) section 1129(a)(11) of the Bankruptcy Code. The ability for the Debtor to make distributions as described in the Plan does not depend on future earnings or operations—only the orderly liquidation of the Debtor's assets.

84. In addition, for purposes of determining whether the Plan satisfies the feasibility standards, the Debtor has analyzed its ability to fulfill its obligations under the Plan. *See* Disclosure Statement, §§ 3.7 and 4. Based on the Debtor's analysis, the Wind Down Entity, which will be administered by the Wind Down Administrator, will have sufficient assets to accomplish its tasks under the Plan. *See* Lynch Decl., ¶ 25.

85. Furthermore, the Debtor has already taken significant steps to wind down in an orderly fashion during the Chapter 11 Case, including, without limitation, selling substantially all of the Debtor's assets in a Court-approved sale. *See id.*, ¶ 27. Through the Plan and the compromises embodied therein, the Debtor has been able to effectuate a fair and reasonable distribution scheme that maximizes recoveries for Holders of Claims. *See id.* Based upon the foregoing, the Plan has more than a reasonable likelihood of success and satisfies the feasibility standard of section 1129(a)(11).

L. Section 1129(a)(12): The Plan Provides for the Payment of All Statutory Fees

86. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under [28 U.S.C. § 1930], as determined by the court at the hearing on confirmation of the plan." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, the Plan provides that all statutory fees owing to the U.S. Trustee that are due and owing as of the Effective Date or that have accrues, but are not yet due, as of the Effective Date shall be paid or fully reserved for by the Debtor and paid in full when such fees are due. After the Effective Date, the Wind Down Entity shall pay any and all such fees when due and payable from the reserve created by the Debtor for such purpose. *See* Plan, Art. V, § 5.10.

M. Sections 1129(a)(13)-(16): Inapplicable to the Plan

87. Section 1129(a)(13) of the Bankruptcy Code requires Chapter 11 plans to continue all retiree benefits (as defined in section 1114 of the Bankruptcy Code). The Debtor does not have any retiree benefit obligations, therefore section 1129(a)(13) does not apply to the Plan. Sections 1129(a)(14) and (15) of the Bankruptcy Code apply only to debtors that are individuals and thus do not apply here. Section 1129(a)(16) of the Bankruptcy Code applies only to debtors that are nonprofit entities or trusts and thus does not apply here.

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

88. 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), a plan may be confirmed so long as the requirements set forth by section 1129(b) of the Bankruptcy

Code are satisfied. *See* 11 U.S.C. § 1129(b). 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. *See* 11 U.S.C. § 1129(b)(1); *Zenith Elecs.*, 241 B.R. at 105.

89. Because Classes 6 and 7 are deemed to have rejected the Plan, the requirements of Bankruptcy Code section 1129(a)(8) are not satisfied. The Debtor therefore requests confirmation of the Plan under section 1129(b) of the Bankruptcy Code, the "cramdown" provision, with respect to Classes 6 and 7.

90. The Plan does not discriminate unfairly with respect to the non-accepting Classes. Here, the Plan's treatment of the non-accepting Classes is proper because all similarly-situated Holders of Claims and Interests in such Classes will receive the same treatment and the Plan's classification scheme rests on a legally acceptable rationale. Class 6 consists of claims that are subordinated pursuant to section 510(b) of the Bankruptcy Code. Class 7 constitutes Interests, which are not similarly situated—legally or otherwise—to any other Class. Accordingly, the Plan does not discriminate unfairly with respect to impaired dissenting Interests and satisfies the requirements of section 1129(b).

91. The Plan is also "fair and equitable" with respect to the non-accepting Classes because the Plan complies with the "absolute priority" rule. The impaired interest test requires that any class junior to the impaired class not receive any distribution under a plan on account of its junior interest. The Plan satisfies section 1129(b)(2)(C) for Class 6 Claims and Class 7 Interests, because no Class junior to these Classes will receive or retain property under the Plan on account of such junior interest. *See* Plan, Art. I.

O. Section 1129(c): Only One Plan

92. Only one Plan is before the Court, therefore, section 1129(c) of the Bankruptcy Code is satisfied.

P. Section 1129(d): The Principal Purpose of the Plan is Not Avoidance of Taxes

93. 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." *See* 11 U.S.C. § 1129(d). The principal purpose of the Plan is not the avoidance of taxes or the application of section 5 of the Securities Act. *See* Lynch Decl., ¶ 26. Accordingly, section 1129(d) is satisfied.

Q. Modifications to Plan

94. Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation as long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications made after acceptance but prior to confirmation, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Fed. R. Bankr. P. 3019(a). The Debtor will be filing contemporaneously with this Memorandum, alongside the Plan, a redline reflecting non-material modifications to the plan as solicited to address certain formal and informal objections, among other ministerial changes. Such

modifications do not adversely change the treatment of any Claim or Interest. Upon modification of a plan, re-solicitation is appropriate only if "the modification adversely affects the interests of a creditor who has previously accepted the plan, in more than a purely ministerial de minimis manner . . . ." *In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023 (Bankr. D. Colo. 1988). Here, the modifications do not have any adverse effects on the treatment of any Holder of Claims or Interests. Thus, re-solicitation is unnecessary and acceptances of the plan as solicited should be deemed acceptances of the Plan, as modified.

R. Continuation of Automatic Stay

95. The Debtor seeks the continuation of all injunctions and stays provided for in the Chapter 11 Case under sections 105 or 362 of the Bankruptcy Code (or otherwise) in existence on the Confirmation Date until the Court enters a final decree closing the Chapter 11 Case. Section 362(c)(2) of the Bankruptcy Code provides, in relevant part, that the stay imposed under section 362(a) continues as to any act enumerated in section 362(a) (except an act against property of the estate) until the earliest of (A) the time the case is closed; or (B) the time the case is dismissed. *See* 11 U.S.C. § 362(c)(2). Thus, the automatic stay shall continue to stay all acts under 362(a) other than with respect to property that is no longer property of the Debtor's Estate following the Effective Date until the Chapter 11 Case is closed or dismissed, whichever is earlier. *See, e.g.*, *In re Houlik*, 481 B.R. 661, 669–70 (B.A.P. 10th Cir. 2012); *In re Stuart*, 402 B.R. 111, 122 (Bankr. E.D. Pa. 2009).

S. Cause Exists to Waive a Stay of the Confirmation Order

96. 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." *See* Fed. R. Bankr. P. 3020(e). 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.

97. The Debtor respectfully submits that cause exists for waiving the stay of the entry of the Confirmation Order such that the Confirmation Order will be effective immediately upon its entry. *See, e.g.*, *In re Seventy Seven Finance Inc.*, No. 16-11409 (LSS) (Bankr. D. Del. July 14, 2016) [D.I. 192] (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re Venoco, Inc.*, No. 16-10655 (KG) (Bankr. D. Del. July 14, 2016) [D.I. 370] (same); *In re Hercules Offshore, Inc.*, No. 15-11685 (KJC) (Bankr. D. Del. Sept. 24, 2015) [D.I. 181] (same); *In re Ablest Inc.*, No. 14-10717 (KJC) (Bankr. D. Del. May 8, 2014) [D.I. 238] (same); *In re AES Eastern Energy, L.P.*, No. 11-14138 (KJC) (Bankr. D. Del. Dec. 27, 2012) [D.I. 951] (same).

98. As noted above, the Debtor has undertaken great efforts to facilitate an orderly liquidation of its assets. The Debtor believes that implementing the Plan expeditiously will reduce costs and enable the Wind Down Entity to start making distributions on Allowed Claims and pursuing further recoveries in accordance with the terms of the Wind Down Entity Documents. Based on the foregoing, the Debtor respectfully requests a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

V. CONCLUSION

99. For the reasons set forth in this Memorandum, the Debtor requests that the Court enter an order, in a form substantially similar to the proposed Confirmation Order, (i) confirming the Plan; (ii) waiving the 14-day stay of the Confirmation Order; and (iii) granting such other and further relief as it deems appropriate.

[*Signature Page Follows*]

Dated: May 14, 2019
Wilmington, Delaware

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