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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
BCBG MAX AZRIA GLOBAL HOLDINGS, LLC, *et al.*,[1]	)	Case No. 17-10466 (SCC)
Debtors.	)	(Jointly Administered)

DEBTORS' (A) MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE AND (B) OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION OF THE PLAN

Dated: July 21, 2017

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, include: BCBG Max Azria Global Holdings, LLC (6857); BCBG Max Azria Group, LLC (5942); BCBG Max Azria Intermediate Holdings, LLC (3673); Max Rave, LLC (9200); and MLA Multibrand Holdings, LLC (3854). The location of the Debtors' service address is: 2761 Fruitland Avenue, Vernon, California 90058.

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BCBG Max Azria Global Holdings, LLC and its above-captioned debtor affiliates, as debtors and debtors in possession (collectively, the "Debtors"),[2] submit this Memorandum of Law in support of confirmation of the *Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 461] (as may be further amended, the "Plan") pursuant to section 1129 of title 11 of the United States Code (as amended, the "Bankruptcy Code"). The Debtors respectfully state as follows:[3]

Preliminary Statement

1. The Debtors stand poised to consummate a value maximizing transaction that preserves going concern operations in the face of what has been described as a retail apocalypse. Following extensive marketing efforts that kicked off well before the petition date, a relentless effort to develop a going concern transaction, coupled with good-faith negotiations among all of the Debtors' key stakeholders, has culminated in a series of transactions under the Plan. It is not surprising that each class of creditors entitled to vote on the plan voted overwhelmingly to accept the Plan. The Plan, which satisfies all necessary prerequisites to confirmation, should be confirmed.

2. Standing between the Debtors and confirmation of the Plan are objections from the U.S. Trustee,[4] the Azrias,[5] BCBG France (as defined below),[6] and certain landlords, all of

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[2] All capitalized terms used and not otherwise defined herein shall have the meaning ascribed to them in the Plan.

[3] In further support hereof, and of confirmation of the Plan, the *Declaration of Holly Felder Etlin in Support of Confirmation of the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Etlin Declaration") is being filed concurrently herewith.

[4] *See Objection of United States Trustee to Debtors' Disclosure Statement Relating to the Joint Plan of Reorganization* (the "UST Objection") [Docket No. 407].

which should be overruled. The U.S. Trustee objects to the scope of the Plan Releases and Exculpation provisions. As described herein, the Releases and Exculpation provisions comply with Second Circuit law and are appropriate in these circumstances. The Azrias raise a number of concerns in an effort to delay confirmation and increase their leverage to extract unwarranted amounts from the Debtors in connection with the ongoing litigation regarding the rejection of Lubov Azria's employment contract. As explained more fully below, all of the Azrias' objections are substantively incorrect and should be overruled. BCBG Max Azria Group SAS ("BCBG France") filed an objection arguing that their claims were improperly classified and such classification results in unfair discrimination under the Plan. BCBG France is a subsidiary of the Debtors and is subject to an ongoing insolvency proceeding in France. BCBG France's assertions are incorrect. Finally, various landlords and contract counterparties filed technical objections with respect to cure amounts and future adequate assurance of payment. Many of these claims have already been resolved and the Debtors are working to resolve the remaining objections prior to the Confirmation Hearing.

Background

I. The Debtors' Plan of Reorganization.

3. On March 1, 2017, the Debtors filed the initial version of the Plan, which has served as a foundation for achieving a value-maximizing resolution of these chapter 11 cases.[7] Before the commencement of these Chapter 11 Cases, the Debtors commenced a marketing

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[5] *See The Azrias' Objection To the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 537] (the "Azria Objection")

[6] *Limited Objection of BCBG MAx Azria Group SAS To Amended Joint Plan of Reorganization BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 553] (the "BCBG France Objection").

[7] *See Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 39] filed on March 1, 2017.

process to sell either the Debtors' assets or reorganized equity interests pursuant to a chapter 11 plan. The Court subsequently approved procedures and a process in connection with this marketing process.[8] As part of this process, the Debtors reached out to more than 130 potentially interested parties and received several non-binding indications of interest in April 2017 and bids in May 2017.[9] Ultimately, the Debtors did not receive bids to acquire their equity interests, but instead received bids from potential acquirers of intellectual property, certain inventory, and certain other operating assets.[10]

4. After reviewing the bids and engaging in further conversations with certain bidders, the Debtors determined to work with two potentially interested parties who were interested in different aspects of the Debtors' business. Specifically, Marquee Brands, LLC (the "IPCo Purchaser") was interested in acquiring the Debtors' intellectual property while GBG USA Inc. (the "OpCo Purchaser" and together with IPCO Purchaser, the "Purchasers") was interested in the Debtors' retail and wholesale operations. The Debtors brought these parties together in an effort to document a series of transactions (collectively, the "Sale Transaction") that could maximize value, preserve the going concern, and be implemented through the Plan.[11]

5. After reaching agreement on the terms of the Sale Transaction with the Purchasers, the Debtors' board of managers unanimously authorized entry into the Asset Purchase Agreements on June 9, 2017.[12] In connection with entry into the Asset Purchase Agreements, the Debtors, the Purchasers, and Allerton Funding, LLC ("Allerton Funding"), the

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[8] *See Order (I) Approving the Bidding Procedures, (II) Scheduling the Bid Deadlines and the Auction, (III) Approving the Form and Manner of Notice Thereof, and (IV) Granting Related Relief* [Docket No. 244].

[9] Etlin Decl. ¶ 4.

[10] *Id.*

[11] *Id.* ¶ 5.

[12] *Id.* ¶ 6.

holder of 100 percent of the Term Loan New Tranche A Claims, entered into the Plan Support Agreement.[13] Designer Apparel Dual Holdings, LLC, on behalf of 100 percent of the Term Loan Tranche B Claims, subsequently joined the Plan Support Agreement on June 23, 2017, as a supporting creditor.[14] Further, the official committee of unsecured creditors appointed in these Chapter 11 Cases (the "Committee") agreed to support the Plan and issued a letter of support that was included in the solicitation materials.[15] The Court approved the Debtors' entry into the Plan Support Agreement on June 23, 2017.[16]

6. The Sale Transaction embodied in the Plan includes three main components: (i) the IPCo Purchaser will purchase the Debtors' intellectual property and certain other assets pursuant to the IPCo Purchase Agreement; (ii) the OpCo Purchaser will purchase certain businesses and related assets, including up to 43 of the Debtors' existing retail store locations,[17] up to all of the Debtors' existing partnershops, including certain Canadian operating locations, the Debtors' existing wholesale business, the Debtors' existing ecommerce business, and inventory and purchase orders corresponding with the foregoing pursuant to the OpCo Purchase Agreement[18]; and (iii) the Debtors or Post-Effective Date Debtors, as applicable, under the supervision of the Plan Administrator, will liquidate and wind down the stores and assets not purchased by the OpCo Purchaser, including pursuant to the Store Closing Sales with the

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See Order (I) Authorizing the Debtors to Enter Into a Plan Agreement; (II) Approving the Expense Reimbursement and Breakup Fee for Marquee; and (III) Granting Related Relief* [Docket No. 460].

[17] Although the original OpCo Purchase Agreement contemplated that the OpCo Purchaser would purchase only up to 22 of the Debtors' existing retail store locations, the Debtors subsequently amended to the OpCo Purchase Agreement to provide to increase the number of existing retail store locations to 43.

[18] The OpCo Purchaser also intends to hire the majority of the Debtors' employees.

assistance of the Store Closing Agent, and distribute the proceeds thereof to creditors in accordance with the terms of the Plan.[19] In addition, the IPCo Purchaser and the OpCo Purchaser have entered into or will enter into separate agreements, which the Debtors are not and will not be a party to, pursuant to which the IPCo Purchaser will license the acquired intellectual property assets to the OpCo Purchaser for use in the operation of the go-forward business, and the IPCo Purchaser will receive a royalty payment in exchange.[20]

7. On June 23, 2017, the Court entered the order approving the Disclosure Statement [Docket No. 459] (the "Disclosure Statement Order"), and the Debtors filed the solicitation versions of the Plan [Docket No. 461] and Disclosure Statement [Docket No. 462]. Thereafter, the Debtors promptly commenced solicitation of votes on the Plan in compliance with the Disclosure Statement Order. The Debtors submit that except as otherwise ordered by the Court, solicitation of the Plan pursuant to the procedures established in the Disclosure Statement Order conformed to the requirements of Bankruptcy Rule 3017(a) and Local Bankruptcy Rule 3017-1(a) and (b) with respect to the contents and transmittal of the Disclosure Statement. On July 12, 2017, the Debtors filed the Plan Supplement.[21]

8. Contemporaneously herewith, the Debtors filed an amended version of the Plan containing certain non-material modifications, along with a redline that highlights the changes compared to the solicitation version of the Plan. The Plan modifications were made in response to comments, informal responses, or objections from creditors and parties in interest. None of

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[19] *See* Etlin Decl. ¶ 7.

[20] *Id.*

[21] *See Plan Supplement for the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 523], which included the Schedule of Assumed Executory Contracts and Unexpired Leases, the Schedule of Retained Causes of Action, the Royalty Sharing Agreement, and a draft Transition Services Agreement.

the Plan modifications adversely affects the treatment of those Classes of Claims that voted to accept the Plan. Therefore, no further solicitation is required in accordance with sections 1126 and 1127(a) of the Bankruptcy Code.[22]

9. Contemporaneously with the filing of this Memorandum of Law, the Debtors filed the proposed *Findings of Fact, Conclusions of Law, and Order Confirming the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Proposed Confirmation Order").

10. The Confirmation Hearing is scheduled for July 25, 2017, at 9:00 a.m., prevailing Eastern Time.

II. Voting Results.

11. The deadline for all holders of Claims entitled to vote on the Plan was July 17, 2017, at 4:00 p.m., prevailing Eastern Time (the "Voting Deadline"). Contemporaneously herewith, the Debtors filed the voting certification of the Court-appointed solicitation agent, Donlin, Recano & Company, Inc. (the "Voting Certification").[23]

12. The Plan is a separate Plan for each of the Debtors, and the classification of Claims and Interests set forth herein applies separately to each of the Debtors. For purposes of administrative convenience, the Plan consolidates the process by which distributions will be made under the Plan, but the Plan does not contemplate substantive consolidation. The

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

[23] *See Declaration of Jung W. Song on Behalf of Donlin, Recano & Company, Inc. Regarding Voting and Tabulation of Ballots Accepting and Rejecting Amended Joint Plan of Reorganization of BCBG Max Azria Global Holding Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*, filed contemporaneously herewith.

following table summarizes the voting rights of each Class under the Plan:

Class	Claim/Interest	Status	Voting Rights
1	Secured Tax Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
2	Other Secured Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
3	Other Priority Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
4	Term Loan New Tranche A Claims	Impaired	Entitled to Vote
5	Term Loan Tranche B Claims	Impaired	Entitled to Vote
6	Unsecured Claims	Impaired	Entitled to Vote
7	Intercompany Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept or Reject)
8	Intercompany Interests	Unimpaired	Not Entitled to Vote (Deemed to Accept or Reject)
9	Interests in Global Holdings	Impaired	Not Entitled to Vote (Deemed to Reject)
10	Section 510(b) Claims	Impaired	Not Entitled to Vote (Deemed to Reject)

13. As evidenced in the Voting Certification, ***each*** creditor Class entitled to vote at ***each*** Debtor entity overwhelming voted to accept the Plan. Specifically, the holders of Claims in Class 4 Term Loan New Tranche A Claims (approximately $56.1 million), Class 5 Term Loan Tranche B Claims (approximately $289.4 million), and Class 6 Unsecured Claims each voted to accept the Plan.

14. Thus, because the Plan meets the requirements of section 1129(b) as described below, the Bankruptcy Court may confirm the Plan over the deemed rejection of Class 9 Interests in Global Holdings and certain other classes Classes.

III. Objections to Confirmation.

15. The deadline to file objections to the Plan was July 17, 2017, at 4:00 p.m., prevailing Eastern Time (the "Plan Objection Deadline"). As of the Plan Objection Deadline (as

extended for certain parties), the Debtors received fifteen formal objections or reservations of rights with respect to confirmation of the Plan and several informal inquiries and/or requests for clarifications. The Debtors have been working with the various parties to address their respective concerns and are optimistic that the majority of the objections have been—or will be—resolved in advance of the Confirmation Hearing as a result of (a) certain amendments to the Plan and/or (b) inclusion of certain language in the Proposed Confirmation Order. Attached hereto as **Exhibit A** is a chart summarizing the objections the Debtors have received to date, the resolutions reached to date by the Debtors and the objecting parties, and the Debtors' position with respect to each objection to the extent an agreement has not been reached. As of the date hereof, the objections of the U.S. Trustee, the Azrias, BCBG France, and certain landlords and contract counterparties raising technical cure and adequate assurance objections remain outstanding and should be overruled for the reasons set forth herein. The Debtors will update the Court regarding the status of all objections prior to or at the Confirmation Hearing. The Debtors' arguments in response to the outstanding objections are set forth below.

Argument

16. This memorandum reflects the Debtors' "case in chief" that the Plan should be confirmed because it satisfies section 1129 of the Bankruptcy Code. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[24] The Debtors respectfully submit that the Plan

[24] *See In re Bally Total Fitness of Greater N.Y., Inc.*, No. 07-12395 (BRL), 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) ("The Debtors, as proponents of the Plan, have the burden of proving the satisfaction of the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence."); *see also Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II* (*In re Briscoe Enters., Ltd., II*), 994 F.2d 1160, 1165 (5th Cir. 1993) ("[t]he combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown") (footnote omitted); *In re El Charro, Inc.*, No. 05-60294 (REN), 2007 WL 2174911, at *4 n.4 (Bankr. D. Kan. July 26, 2007) (preponderance of evidence applies to valuation and every element governing confirmation).

complies with all relevant sections of the Bankruptcy Code, including sections 1122, 1123, 1125, 1126, and 1129 thereof, the Bankruptcy Rules, and applicable non-bankruptcy law and should be confirmed. This memorandum addresses each requirement individually.

I. The Plan Satisfies Each Requirement for Confirmation.

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

17. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code. The legislative history relating to this provision explains that section 1129(a)(1) of the Bankruptcy Code encompasses and incorporates the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and interests and the contents of the plan, respectively.[25]

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

18. The Plan satisfies section 1122 of the Bankruptcy Code, which provides 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."[26] The Second Circuit has recognized that plan proponents have significant flexibility under section 1122 in classifying claims.[27] Moreover, the requirement of substantial similarity does not mean that claims or

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[25] *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 Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986) ("[T]he legislative history of subsection 1129(a)(1) suggests that Congress intended the phrase 'applicable provisions' in this subsection to mean provisions of Chapter 11 that concern the form and content of reorganization plans[,] . . . such as section 1122 and 1123, *governing classification and contents of plan*.") (citations omitted), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (When determining if a plan has met the requirements of section 1129(a)(1), "[r]eference must be made to [Bankruptcy] Code [section] 1123 with respect to the contents of a plan, and particularly to the rules with respect to classification of claims.").

[26] 11 U.S.C. § 1122(a).

[27] *See In re Reader's Digest Ass'n, Inc.*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] Hr'g Tr. 122:25-123:1-4 (approving a plan of reorganization where debtor provided a reasonable basis for differing classification of general unsecured claims); *Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*),

interests within a particular Class must be identical or that all similarly situated claims must receive the same treatment under a plan.[28] Indeed, as one court in this district has stated, "a majority of both cases and commentators have rejected the concept that all creditors of equal rank must receive equal treatment."[29] Courts generally will approve placement of similar claims in different classes, provided there is a "rational basis" or "reasonable basis" to do so.[30]

19. The Plan properly classifies Claims and Interests into Classes based on their legal and/or factual nature or other relevant and objective criteria, establishing that a legitimate basis exists for the classification scheme under the Plan that "does not offend one's sensibility of due process and fair play."[31] The Claims or Interests within each particular Class are substantially similar to each other, and the classification structure is necessary to confirm the Plan. Thus, as

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10 F.3d 944, 956-57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (finding that "the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case . . . ."), *aff'd*, No. 93-cv-844, 1993 WL 316183 (S.D.N.Y. May 21, 1993); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar classes be grouped together . . . .") (citation omitted); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177–78 (Bankr. S.D.N.Y. 1989) ("a debtor may place claimants of the same rank in different classes and thereby provide different treatment for each respective class.").

[28] *See In re DRW Prop. Co.*, 60 B.R. 505, 511 (Bankr. N.D. Tex. 1986).

[29] *See Ionosphere Clubs*, 98 B.R. at 177.

[30] *See, e.g.*, *In re Reader's Digest Ass'n, Inc.*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] Hr'g Tr. 122:25-123:1-4 (approving a plan of reorganization where debtor provided a reasonable basis for differing classification of general unsecured claims); *Chateaugay Corp.*, 10 F.3d at 957 (finding separate classification appropriate because classification scheme and "discriminatory terms of the Plan attacked by [plan opponents] ha[d] a rational basis"); *500 Fifth Ave. Assocs.*, 148 B.R. at 1018 ("[T]he proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case"); *Drexel*, 138 B.R. at 757 ("Courts frequently interpret § 1122 to permit separate classification of different groups of unsecured claims where a reasonable basis existed for the classification. . . . Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar classes be grouped together, but merely that any groups be homogenous or share some attributes.") (citations omitted); *Ionosphere Clubs*, 98 B.R. at 177–78 ("[A] debtor may place claimants of the same rank in different classes and thereby provide different treatment for each respective class.").

[31] *See In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 246-47 (Bankr. S.D.N.Y. 2007) (quoting *In re One Times Square Assocs. Ltd. P'ship*, 159 B.R. 695, 703 (Bankr. S.D.N.Y. 1993)), *appeal dismissed*, 371 B.R. 660 (S.D.N.Y. 2007), *aff'd*, 544 F.3d 420 (2d Cir. 2008).

set forth in more detail below, the classification scheme proposed under the Plan is consistent with the flexible standard of section 1122(a).

20. Dissimilar Claims and Interests are not classified together under the Plan. Generally speaking, the classification scheme follows the Debtors' capital structure. For example, debt and equity are classified separately and secured debt is classified separately from unsecured debt. Other aspects of the classification scheme reasonably recognize the different legal or factual nature of Claims or Interests.

21. Specifically, the Plan separately classifies Claims in Class 1 to reflect the priority of such Claims under section 507(a) of the Bankruptcy Code and separately classifies Other Secured Claims in Class 2 and Other Priority Claims in Class 3 based on their distinct legal nature. The Debtors' prepetition secured Claims are divided into two separate classes according to the relative priority of each class of creditors in the collateral securing such Claims: Class 4 contains all Term Loan New Tranche A Claims and Class 5 contains all Term Loan Tranche B Claims. The Debtors' prepetition unsecured debt is classified into Class 6 Unsecured Claims. Similarly, Class 7 Intercompany Claims are separately classified because they do not involve third-party creditors and Class 8 Intercompany Interests are separately classified from Interests in Global Holdings because they arise from intercompany transactions and do not impact recoveries to third parties. Class 9 Interests in Global Holdings are classified separately from Claims because they are equity interests. Finally, Class 10 Section 510(b) Claims are separately classified to reflect the treatment of such Claims under section 510(b) of the Bankruptcy Code.

22. In its objection, BCBG France argues that the Debtors' Plan improperly classifies its intercompany claims; however, classifying intercompany claims separately from general unsecured claims is appropriate. Similar claims may be classified separately so long as the

debtor has a reasonable basis for doing so.[32] As explained more fully below, the Debtors have a valid business and legal reason to classify the intercompany claimants separately than the general unsecured creditors.

23. The Plan's classification scheme reflects the Debtors' creditor body and capital structure. Valid factual and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan. In each instance, the Plan classifies Claims based upon their different rights and attributes. Additionally, each of the Claims or Interests in each particular Class is substantially similar to the other Claims or Interests in such Class.

24. Accordingly, the Debtors respectfully submit that the Plan satisfies the classification requirements of section 1122 of the Bankruptcy Code.

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

25. Section 1123(a) of the Bankruptcy Code sets forth the mandatory requirements of a corporate debtor's chapter 11 plan.[33] The Plan meets the six applicable mandatory requirements of section 1123(a).[34]

26. ***Specification of Classes, Impairment, and Treatment.*** The first three requirements of section 1123(a) are that the Plan (a) designate classes of Claims and Interests, (b) specify whether such Claims and Interests are impaired or unimpaired, and (c) specify the treatment of each class of Claims or Interests. 11 U.S.C. § 1123(a)(1)–(3). As explained above,

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[32] *See In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *47 (Bankr. S.D.N.Y. Oct. 31, 2003) ("A debtor need not place all substantially similar claims in the same class as long as the debtor has a reasonable basis for the separate classification.").

[33] 11 U.S.C. § 1123(a)(1)-(7).

[34] *See* 11 U.S.C. § 1123(a)(1)-(8). Because the Debtors are selling substantially all of their assets and winding down the remaining assets the confirmation requirements set forth in section 1123(a)(6) of the Bankruptcy Code are inapplicable to these Chapter 11 Cases. In addition, section 1123(a)(9) of the Bankruptcy Code is only applicable to individual debtors.

the Plan properly designates classes of Claims and Interests. Article III of the Plan also identifies Classes 1, 2, 3, 7, and 8 as unimpaired and identifies Classes 4, 5, 6, 9, and 10 as impaired, and specifies the treatment of the impaired classes.

27. The U.S. Trustee argues that the Debtors inappropriately classify claims as unimpaired, because the holders of such claims are providing releases under the Plan and have not consented.[35] Regardless of whether the releases are consensual (addressed below), they do not render the claims impaired because impairment is a claim-specific inquiry—not a creditor-specific inquiry.[36] *See* 11 U.S.C. § 1124(a) (A class of claims is unimpaired when it "leaves unaltered the legal, equitable, and contractual rights ***to which such claim*** or interest ***entitles the holder of such claim*** or interest.") (emphasis added). Here, each unimpaired creditor is having its ***Claim*** paid in full, in cash (or as otherwise required under the Bankruptcy Code), and thus its rights to which the holder's ***Claim*** entitles it remain unchanged. Whether the creditor may also be releasing different claims (whether against the Debtors or third parties) is irrelevant to whether the creditor's specific Claim that is classified as unimpaired is in fact unimpaired.

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[35] *See* UST Objection at § III.B.

[36] The U.S. Trustee relies on *In re Chassix Holdings* for the proposition that unimpaired creditors may not be presumed to accept. *See In re Chassix Holdings, Inc.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015). For the reasons that follow, the Debtors believe that the U.S. Trustee's position and the holding in *In re Chassix Holdings* improperly apply a creditor-specific inquiry rather than a claim-level inquiry to the issue of impairment. The Debtors are unaware of any other decisions holding that an unimpaired class's deemed acceptance of a Plan that includes a third party release renders the claims in such class unimpaired. Indeed such a result would be inconsistent with precedent and case law in this and other Courts. *See, e.g., In re Answers Holdings, Inc.*, No. 17-10496 (SMB) (Bankr. S.D.N.Y. Apr. 10, 2017); *In re Cengage Learning, Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014); *In re Legend Parent Inc.*, No. 14-10701 (RG) (Bankr. S.D.N.Y. 2014) (approving the grant of releases under a plan for holders of claims that (i) are unimpaired by the plan, (ii) have not voted to reject the plan, or (iii) have voted to reject the plan but have not opted out of the releases); *see also In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("In this case, the third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases.").

28. Moreover, each holder of an unimpaired Claim received notice of its non-voting status, which specifically referenced the Third Party Release (as defined below) and that such holder would be deemed to have consented to such release. Notwithstanding such notice, no holder of an unimpaired claim has objected or raised issue with the Plan and its releases, whether formally or informally.

29. ***Equal Treatment.*** Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide the same treatment for each Claim or Interest within a particular Class (unless the holder of a particular Claim or Interest agrees to less favorable treatment on account of its Claim or Interest). The Plan satisfies this requirement because Article III of the Plan provides that each holder of an Allowed Claim or Interest will receive the same rights and treatment as other holders of Allowed Claims or Interests within such holders' respective Class.

30. ***Adequate Means for Implementation.*** Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation. Article IV of the Plan satisfies this requirement, including by providing for consummation of the Sale Transaction and Restructuring Transactions, the undertaking of the Store Closing Sales, and the appointment of the Plan Administrator. In addition, Article VI of the Plan provides provisions governing Distributions under the Plan and Article VII of the Plan provides procedures for resolving contingent, unliquidated, and disputed Claims.

31. ***Selection and Appointment of Directors and Officers.*** Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions regarding the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." Article IV of the Plan satisfies this requirement as it provides that the Plan Administrator—which will be disclosed in the Plan

Supplement prior to the confirmation hearing, to the extent known—shall be appointed as the sole manager and sole officer of the Post-Effective Date Debtors and shall succeed to the powers of the Post-Effective Date Debtors' managers and officers.

32. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1123(a) of the Bankruptcy Code.

3. The Discretionary Contents of the Plan Are Appropriate Under Section 1123(b) of the Bankruptcy Code.

33. For the reasons set forth in Section II below, the discretionary contents of the Plan are appropriate under section 1123(b) of the Bankruptcy Code.

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

34. The principal purpose of section 1129(a)(2) is to ensure that a plan proponent has complied with the requirements of the Bankruptcy Code regarding solicitation of acceptances of the plan.[37] Pursuant to the Disclosure Statement Order, the Court approved, among other things, (a) the Disclosure Statement as containing adequate information within the meaning of section 1125 of the Bankruptcy Code, (b) the other solicitation materials transmitted to creditors entitled to vote on the Plan, (c) the timing and method of delivery of such materials, and (d) the rules for tabulating votes on the Plan.

35. Consistent therewith, the Debtors, with the assistance of the Debtors' Notice, Claims, and Balloting Agent, distributed Solicitation Packages to over 1,600 creditors holding

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[37] *See, e.g.*, *In re Texaco Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988) ("The principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of section 1125 in the solicitation of acceptances to the plan."); *Johns-Manville Corp.*, 68 B.R. at 629-30 ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code . . . which provide for the appropriate manner of disclosure and solicitation of plan votes."); *Toy & Sports Warehouse*, 37 B.R. at 149 (Section 1129(a)(2) requires that "the proponent must comply with the ban on post-petition solicitation of the plan unaccompanied by a written disclosure statement approved by the court in accordance with Code §§ 1125 and 1126.").

Claims in the Voting Classes.[38] A printed copy of the Confirmation Hearing Notice was also mailed to over 38,000 parties in interest.[39] Additionally, the Confirmation Hearing Notice was published in the national edition of the *The New York Times* and the *Los Angeles Times* on June 29, 2017, in accordance with the Disclosure Statement Order.[40]

36. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law (§ 1129(a)(3)).

37. Section 1129(a)(3) of the Bankruptcy Code compels courts to reject those plans not proposed in good faith or by means forbidden by law.[41] The Second Circuit has construed the good-faith standard in the bankruptcy context as "requiring a showing that the plan was proposed with honesty and good intentions and with a basis for expecting that the reorganization can be effected."[42] Good faith should be evaluated "in light of the totality of the circumstances

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[38] *See Affidavit of Donlin, Recano & Company, Inc. Regarding Service of Solicitation Packages with Respect to Disclosure Statement Relating to the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 493].

[39] *Id.*

[40] *See* The Publishers' Affidavits for publication attached to the *Notice of Hearing to Consider Confirmation of the Chapter 11 Plan Filed by the Debtors and Related Voting and Objection Deadlines* in *The New York Times* and the *Los Angeles Times* attached to the *Notice of Filing of Affidavits of Publication* [Docket No. 488] as Exhibit A and Exhibit B, respectively.

[41] *See* 11 U.S.C. § 1129(a)(3); *see also In re Gaston & Snow*, Nos. 93 Civ. 8517 (JGK), 93 Civ. 8628 (JGK), 1996 WL 694421, at *9 (S.D.N.Y. Dec. 4, 1996).

[42] *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir.1988); *see also Manati Sugar Co. v. Mock*, 75 F.2d 284, 285 (2d Cir. 1935); *Texaco*, 84 B.R. at 907 (Generally, a plan is proposed in good faith "if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.") (internal citations omitted); *Drexel*, 138 B.R. at 759; *Gaston & Snow*, 1996 WL 694421, at *9 ("In this context, the failure to propose a plan in good faith occurs when the Plan is not proposed with honesty, good intentions, and to effectuate the reorganization of the enterprise, but rather for some other motive."); *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 497-98 (S.D.N.Y. 1994) (bankruptcy proceeding used as part of litigation strategy).

surrounding confirmation."[43] "[T]he bankruptcy judge is in the best position to assess the good faith of the parties' proposals."[44]

38. The Plan was proposed with honesty, good intentions, and a desire to preserve the Debtors' business as a going concern, while maximizing stakeholder recoveries. Throughout these cases, the Debtors, their board of managers, and their senior management team have upheld their fiduciary duties to stakeholders and protected the interests of all constituents with an even hand. The Plan follows an extensive pre- and post-petition marketing process to solicit interest in the Debtors (through acquisition or plan sponsorship) and extensive arm's-length negotiations among the Debtors, the ABL Lenders, the Term Loan Lenders, the DIP Lenders, the Purchasers, the Committee, and other parties interested in ensuring that stakeholders realize the highest possible recoveries under the circumstances. Indeed, the Debtors' management team and advisors spent many months evaluating and negotiating the Restructuring Transaction to provide the most value for their stakeholders. Importantly, the Plan is supported by each of the Debtors' key economic stakeholders including, among others, the ABL Lenders, each tranche of the Term Loan Lenders, the DIP Lenders, the Purchasers, and the Committee, a fiduciary for, and representative of, all unsecured creditors in the Chapter 11 Cases.

39. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(3) of the Bankruptcy Code.

D. Payments Under the Plan Are Subject to Court Approval (§ 1129(a)(4)).

40. As required by section 1129(a)(4) of the Bankruptcy Code, all payments promised or received, made or to be made, by the Debtors in connection with services provided or for costs

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[43] *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994) (citing cases); *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (good faith has been found to be lacking where a plan is proposed for ulterior purposes) (quotations omitted).

[44] *See Toy & Sports Warehouse*, 37 B.R. at 149.

or expenses incurred in connection with the Chapter 11 Cases, including for professionals, are subject to the review by and approval of the Court.[45] Among other things, the Plan provides that all requests for professional compensation and claims for reimbursement will be allowed, after notice and a hearing, in accordance with and subject to the requirements of the Bankruptcy Code and prior orders of the Court, as applicable. Moreover, the Plan provides that the Court will retain jurisdiction to decide and resolve all matters relating to applications for the allowance of compensation or reimbursement of expenses to professionals authorized pursuant to the Bankruptcy Code or the Plan.[46]

41. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. The Debtors Have Complied with the Governance Disclosure Requirement (§ 1129(a)(5)).

42. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires the proponent of a plan to disclose the identity and affiliation of any individual proposed to serve as a director or officer of the debtor or a successor to the debtor under the plan.[47] Although section 1129(a)(5) requires the plan proponent to disclose the identity of proposed directors and officers, the plan proponent is not required to do so for proposed directors and officers that are unknown at the time.[48]

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[45] *See* 11 U.S.C. § 1129(a)(4); *see also Johns-Manville*, 68 B.R. at 632 (concluding that court must be permitted to review and approve reasonableness of professional fees made from estate assets).

[46] *See* Plan, Art. II.B.

[47] 11 U.S.C. § 1129(a)(5)(A)(i).

[48] *See In re Charter Commc'ns*, 419 B.R. 221, 260 n.30 (Bankr. S.D.N.Y. 2009) ("To the extent the Plan's satisfaction of 11 U.S.C. § 1129(a)(5) remains at issue, the Court concludes that this confirmation standard is satisfied. It is undisputed that two out of the eleven seats on the Debtors' board of directors remain vacant . . . . Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at this time of the identities of the *known* directors.") (internal citations omitted) (citing *In re Am. Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) ("[Section 1129(a)(5)] does not (and cannot) compel the debtor to do the impossible, however. If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i).")), *appeal dismissed*, 449 B.R. 14 (S.D.N.Y. 2011), *aff'd*, 691 F.3d. 476 (2d Cir. 2012).

Section 1129(a)(5)(A)(ii) of the Bankruptcy Code requires that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[49]

43. The Plan satisfies section 1129(a)(5). Article IV.E of the Plan provides for a Plan Administrator.[50] The Plan provides that the identity of the Plan Administrator will be disclosed prior to the confirmation hearing after being selected through the process set forth in Article IV.E.1.[51] The Plan provides that the Plan Administrator will act for the Post-Effective Date Debtors in the same fiduciary capacity as applicable to a board of managers and officers and also provides that on the Effective Date, the authority, power, and incumbency of the persons acting as managers and officers of the Post-Effective Date Debtors shall be deemed to have resigned, solely in their capacities as such. At that time, a representative of the Plan Administrator will be appointed as the sole manager and sole officer of the Post-Effective Date Debtors. At this time, the identity of such representative is unknown. The Debtors will disclose such identity at or prior to the Confirmation Hearing to the extent such representative's identity becomes known prior to the Confirmation Hearing. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. The Plan Does Not Require Regulatory Approval of Rate Changes (§ 1129(a)(6)).

44. Section 1129(a)(6) of the Bankruptcy Code requires, with respect to a debtor whose rates are subject to governmental regulation following confirmation, that appropriate

[49] 11 U.S.C. § 1129(a)(5)(A)(ii). *See In re Sherwood Square Assocs.,* 107 B.R. 872, 878 (Bankr. D. Md. 1989); *see also In re W. E. Parks Lumber Co.*, 19 B.R. 285, 292 (Bankr. W.D. La. 1982) (In determining whether the post-confirmation management of a debtor is consistent with the interests of creditor, equity security holders and public policy, a court must consider proposed management's competence, discretion, experience and affiliation with entities having interests adverse to the debtor).

[50] *See* Plan, Art. IV.E.

[51] *See* Plan, Art. IV.E.1.

governmental approval has been obtained for any rate change provided for in the plan, or that such rate change be expressly conditioned on such approval. The Debtors are not subject to any such regulation and the Plan does not provide for any rate changes. Accordingly, section 1129(a)(6) of the Bankruptcy Code does not apply to these Chapter 11 Cases.

G. The Plan Satisfies the "Best Interests of Creditors" Test (§ 1129(a)(7)).

45. The "best interests of creditors" test of section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a present value, as of the effective date of the plan, of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time.[52] The "best interests of creditors" test is satisfied where the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation are less than or equal to the estimated recoveries for a holder of an impaired claim or interest under the debtor's plan of reorganization that rejects the plan.[53]

46. To determine the value that rejecting creditors and equity holders would receive in a hypothetical liquidation of the Debtors' estates under chapter 7 of the Bankruptcy Code, the Debtors must first determine the "liquidation value" of their assets. This "liquidation value" consists of the potential net proceeds from the liquidation of the Debtors' assets in a hypothetical

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[52] *See In re Leslie Fay Cos.*, 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997) ("The [best interests of creditors] test requires that each holder of a claim or interest either accept the plan or receive or retain property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated in a hypothetical liquidation under chapter 7 of the Bankruptcy Code."); *see also In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 759 (Bankr. S.D.N.Y. 1995) (same).

[53] *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Source Enters. Inc.*, No. 06-11707 (AJG), 2007 WL 2903954, at *7 (Bankr. D. Del. Oct. 1, 2007) (approving plan that provided a superior recovery to creditors relative to conversion of the chapter 11 cases to a chapter 7 liquidation as being in the best interests of creditors), *aff'd*, 392 B.R. 541 (S.D.N.Y. 2008); *Adelphia*, 368 B.R. at 251 (§ 1129(a)(7) is satisfied if the impaired holder would receive no less what would be received in a hypothetical liquidation).

chapter 7 proceeding, plus cash on hand, reduced by the costs and expenses relating to, and claims arising in connection with, among other things, the compensation paid to the chapter 7 trustee, the asset disposition, taxes, litigation related to disposition, chapter 7 operations, and any other unpaid administrative expense claims.

47. A chapter 7 liquidation could also trigger certain additional priority claims or accelerate the payment of certain priority claims (*e.g.*, tax claims), that would otherwise be payable in the ordinary course of business, but which, in a liquidation scenario, would instead be paid from net proceeds (after paying secured claims to the extent of the value of the underlying collateral but before paying unsecured creditors or equity holders). Additionally, a liquidation would likely increase, perhaps significantly, the aggregate amount of unsecured claims arising from additional lease rejections or litigation, among other things.

48. Here, as set forth in the following table and as further described in the Etlin Declaration,[54] all rejecting holders of impaired claims or interests will receive or retain property valued, as of the Effective Date, at an amount that is at least equal to the value of what they would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code.[55]

Class	Claim/Interest	Estimated Plan Recovery	Estimated Chapter 7 Liquidation Recovery
1	Secured Tax Claims	100%	100%
2	Other Secured Claims	100%	100%
3	Other Priority Claims	100%	37 - 78%

[54] *See* Etlin Decl. ¶¶ 30-34.

[55] BCBG France argues that the "best interests of creditors" test is not satisfied. *See* BCBG France Objection at ¶ 30. BCBG France has failed to allege sufficient facts to demonstrate that BCBG France would receive a greater recovery in a theoretical chapter 7 liquidation than under the Plan. *See In re Affiliated Foods, Inc.*, 249 B.R. 770, 788 (Bankr. W.D. Mo. 2000) ("[A]lthough the valuation of a hypothetical Chapter 7, is by nature, inherently speculative, it must be based on evidence."). As demonstrated below through concrete figures, BCBG France currently stands to receive nothing under both the Plan and a theoretical chapter 7 liquidation. Accordingly, the BCBG France Objection should be overruled.

4	Term Loan New Tranche A Claims	[●]%[56]	0%
5	Term Loan Tranche B Claims	0.6%+	0%
6	Unsecured Claims	0% - 0.2%+	0%
7	Intercompany Claims	0%	0%
8	Intercompany Interests	0%	0%
9	Interests in Global Holdings	0%	0%

49. Under a hypothetical chapter 7 liquidation, the estimated proceeds available for allocation (net of required costs and expenses) are estimated to total between approximately $96.5 million and $126.8 million, with a mid-point of $111.7 million, subject to the assumptions set forth in the liquidation analysis. Thus, in a liquidation scenario, only Claims in Classes 1 and 2 would be paid in full—all other Claim holders would be impaired. A liquidation of the Debtors' assets would result in holders of Class 3 Other Priority Claims receiving between approximately 37 percent and 78 percent recovery and holders of Claims or Interests in Classes 4, 5, 6, 7, 8, and 9 would not receive a recovery. This is in direct contrast to the Plan, which provides recoveries to holders of Claims in Classes 3, 5, and 6 of 100%, 0.6%, and between 0%-0.2%, respectively. Although the exact recovery for Class 4 is currently unknown, they will receive the Excess Distributable Cash and accrued interest under the Royalty Sharing Agreement, which the Debtors estimate will be greater than a 0 percent recovery.[57]

50. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(7) of the Bankruptcy Code.

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[56] The Debtors do not have sufficient information to date to accurately estimate the value of the royalty stream or the timing of any payments contemplated under the Royalty Sharing Agreement to the holder of the Term Loan New Tranche A Claims. But the Debtors project that the holder of Term Loan New Tranche A Claims will receive greater than is projected recovery in a hypothetical chapter 7 proceeding (*i.e.*, 0 percent), and the holder of Term Loan New Tranche A Claims has accepted the Plan.

[57] *See* Etlin Decl. ¶ 33.

H. The Plan Can be Confirmed Notwithstanding the Requirements of Section 1129(a)(8) of the Bankruptcy Code (§ 1129(a)(8)).

51. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. Although the Classes of Claims entitled to vote on the Plan voted to accept the Plan, certain Classes of Claims and Interests are deemed to reject the Plan under section 1126(g) of the Bankruptcy Code because holders of Claims and Interests in such Classes are not entitled to receive or retain any property under the Plan. Notwithstanding this deemed rejection, the Plan is confirmable because it satisfies section 1129(b) of the Bankruptcy Code, as discussed in section I.P below.

I. The Plan Provides for the Payment of Priority Claims (§ 1129(a)(9)).

52. Section 1129(a)(9) of the Bankruptcy Code requires that claims entitled to priority under section 507(a) must be paid in full in cash, unless the holder thereof agrees to a different treatment with respect to such claim. In accordance therewith, the Plan generally provides that:

- Allowed Administrative Claims will be paid in full in cash no later than 30 days after the Effective Date (or as soon as reasonably practicable thereafter) or, if not then due or Allowed, on or as soon as reasonably practicable after the date such Claim is due or becomes Allowed, consistent with section 1129(a)(9)(A);

- Allowed Priority Tax Claims will be paid in full in cash on or as soon as reasonably practicable after the Effective Date or paid in installments over a period of no more than five years, consistent with section 1129(a)(9)(C); and

- Allowed Other Priority Claims will be paid in full in cash on or as soon as reasonably practicable after the Effective Date or, if not then due or Allowed, on or as soon as reasonably practicable after the date such Claim is due or becomes Allowed, consistent with section 1129(a)(9)(B).

53. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Has Been Accepted by at Least One Impaired Class (§ 1129(a)(10)).

54. Section 1129(a)(10) of the Bankruptcy Code is an alternative to the requirement that each class of claims or interests must either accept a plan or be unimpaired under the plan as set forth in section 1129(a)(8) of the Bankruptcy Code. Section 1129(a)(10) of the Bankruptcy Code provides that if a class of claims is impaired under a plan, at least one impaired class of claims must accept the plan, excluding acceptance by any insider.[58] As set forth in the Voting Certification, all Classes of Claims against each Debtor entitled to vote on the Plan voted to accept the Plan.[59] Therefore, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(10) of the Bankruptcy Code.

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

55. Section 1129(a)(11) of the Bankruptcy Code requires that the Court determine, in relevant part, that confirmation is not likely to be followed by the liquidation or further financial reorganization of the Debtors (or any successor thereto), unless such liquidation or reorganization is proposed in the Plan. This has been interpreted by courts in this district as requiring a determination that the Plan "has a reasonable likelihood of success."[60] Importantly, "the feasibility inquiry is peculiarly fact intensive and requires a case-by-case analysis, using as a backdrop the relatively low parameters articulated in the statute . . . . There is a relatively low

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[58] 11 U.S.C. § 1129(a)(10).

[59] *See* Voting Certification.

[60] *See In re Adelphia Bus. Sols., Inc.*, 341 B.R. 415, 421-22 (Bankr. S.D.N.Y. 2003) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success." Success need not be guaranteed.) (citing *Kane v. Johns-Manville*, 843 F.2d at 649); *Texaco*, 84 B.R. at 910 (plan is feasible if there is a "reasonable assurance of commercial viability"); *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11).").

threshold of proof necessary to satisfy the feasibility requirement."[61] Section 1129(a)(11) does not require the Debtors to guarantee the Plan's complete success. Instead, and to satisfy the feasibility requirement, the Debtors must show that the Plan has a reasonable chance of success.[62]

56. The Plan satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code by providing for a clear path to emergence from these Chapter 11 Cases and the ability of the Debtors to satisfy all of their obligations under the Plan. The implied value of the transactions contemplated by the Plan is approximately $162.5 million, comprised of approximately:

- $135.6 million of cash proceeds from the Purchasers;
- $7.6 million of liabilities assumed by the Purchasers; and
- $19.3 million of cash proceeds from the Store Closing Sales and collection of accounts receivable.[63]

57. The Debtors project that these funds and assumed liabilities will be sufficient to satisfy all priority and administrative Claims under the Plan, including all DIP Claims, Professional Fee Claims, and other administrative and priority claims. The Debtors have

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[61] *See Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006), *remanded*, No. 04-30511, 2008 WL 687266 (Bankr. D. Conn. Mar. 10, 2008), ("[A] 'relatively low threshold of proof' will satisfy the feasibility requirement.") (*quoting In re Brotby*, 303 B.R. 177, 191–92 (B.A.P. 9th Cir. 2003)); *Berkeley Fed. Bank & Trust v. Sea Garden Motel and Apartments (In re Sea Garden Motel and Apartments)*, 195 B.R. 294, 304–05 (D.N.J. 1996); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995) ("[T]he feasibility inquiry is peculiarly fact intensive and requires a case by case analysis, using as a backdrop the relatively broad parameters articulated in the statute.").

[62] *See In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *27–29 (Bankr. D. Del. May 13, 2010). *Accord Kane*, 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed.").

[63] *See* Etlin Decl. ¶ 40.

therefore established that the Post-Effective Date Debtor will have sufficient funds to satisfy all requirements and obligations under the Plan.[64]

58. Further, the Post-Effective Date Debtors will provide transition services pursuant to the Transition Services Agreement. The OpCo Purchaser requested this transition period, which the Debtors agreed to on the condition that the OpCo Purchaser would be responsible for the costs related to the transition period. After the completion of the transition period, the Plan provides for an orderly wind down and dissolution of the Post-Effective Date Debtors pursuant to the Wind Down Budget, which has been agreed to with Allerton Funding. As such, the Debtors have a demonstrated ability to fund distributions required under the Plan, including to taxing authorities, administrative claimants, and other unimpaired Classes of Claims, paying the Term Loan Tranche B Recovery, funding the Unsecured Creditor Recovery Pool, and funding the orderly wind down and dissolution of the Debtors' remaining operations.[65]

59. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Provides for the Payment of Certain Statutory Fees (§ 1129(a)(12)).

60. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930 must be paid or that provision be made for their payment under a chapter 11 plan. Here, Article XII.C of the Plan provides that the Debtors shall pay all fees and applicable interest under section 1930(a) of the Judicial Code and 31 U.S.C. § 3717, as applicable, as determined by the Bankruptcy Court, for each quarter (including any fraction thereof) until the Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first.[66] Accordingly, the

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[64] *See* Etlin Decl. ¶ 41.

[65] *See* Etlin Decl. ¶ 42.

[66] *See* Etlin Decl. ¶ 44.

Debtors submit that the Plan fully complies with and satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. The Debtors Have No Obligation to Pay Retiree Benefits (§ 1129(a)(13)).

61. Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation, after the plan's effective date, of all retiree benefits at the level established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code at any time prior to confirmation of the plan, for the duration of the period to which the debtor has obligated itself. The Debtors have no obligation to pay retiree benefits within the meaning of section 1129(a)(13) of the Bankruptcy Code.[67] Accordingly, section 1129(a)(13) of the Bankruptcy Code is not implicated by the Plan.[68]

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

62. Section 1129(b) of the Bankruptcy Code allows for confirmation of a plan in cases where all requirements of section 1129(a) are met other than section 1129(a)(8) (*i.e.*, the plan has not been accepted by all impaired classes of claims or interests), by allowing a court to "cram down" the plan notwithstanding objections or deemed rejections as long as the court determines that the plan is "fair and equitable" and does not "discriminate unfairly" with respect to the rejecting classes.[69]

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[67] *See* Etlin Decl. ¶ 45.

[68] The final requirements of section 1129 are inapplicable to these Chapter 11 Cases and confirmation of the Plan. The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases. The Debtors are not an individual, and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases. The Debtors are a moneyed, business, or commercial corporation, and, accordingly, section 1129(a)(16) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

[69] 11 U.S.C. § 1129(b)(1); *see also In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *59-60 (Bankr. S.D.N.Y. Oct. 31, 2003) ("Section 1129 of the Bankruptcy Code provides, in relevant part: Notwithstanding section 510(a) of [the Bankruptcy Code], if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of

63. As discussed below, and as further discussed in the Etlin Declaration,[70] the Debtors meet the "cram down" requirements in section 1129(b) of the Bankruptcy Code to confirm the Plan over the deemed rejection of certain Classes of Claims and Interests as to each of the Debtors.

1. The Plan is Fair and Equitable with Respect to Impaired Classes That Were Deemed to Have Rejected the Plan.

64. A chapter 11 plan is "fair and equitable" pursuant to section 1129(b)(2)(A) of the Bankruptcy Code if, with respect to a class of impaired secured claims, the plan provides (a) that the holders of such claims will retain their liens and be paid in full in Cash, including the payment of any required interest under section 506(b) of the Bankruptcy Code, (b) for the sale, subject to section 363(k) of the Bankruptcy Code, of any property that is subject to the secured creditors' liens free and clear, with such liens attaching to the proceeds of such sale, or (c) be otherwise treated in a manner such that the secured creditors will receive the indubitable equivalent of their claims. In addition, a chapter 11 plan is considered "fair and equitable" pursuant to sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code if, with respect to a class of impaired unsecured claims or interests, the plan provides that no holder of any junior claim or interest will receive or retain any property under the plan on account of such junior claim or interest.[71] This central tenet of bankruptcy law, known as the "absolute priority rule," requires that if the holders of claims in a particular class receive less than full value for their claims, no holders of claims or interests in a junior class may receive any property under the

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the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.").

[70] *See* Etlin Decl. ¶¶ 46-50.

[71] 11 U.S.C. § 1129(b)(2)(B).

plan.[72] The Plan is "fair and equitable" to holders of Claims and Interests in those Classes that were deemed to reject the Plan because the Plan satisfies the absolute priority rule with respect to each of these non-accepting Impaired Classes. Specifically, no holder of any junior claim or interest will receive or retain any property under the Plan on account of such junior claim or interest.[73]

65. Accordingly, the Debtors submit that the Plan fully complies with, and satisfies the "fair and equitable" requirements of, section 1129(b) of the Bankruptcy Code.

2. The Plan Does Not Unfairly Discriminate with Respect to Impaired Classes.

66. Section 1129(b) of the Bankruptcy Code does not prohibit discrimination in treatment between classes, but rather it prohibits only discrimination that is "unfair."[74] Notably, the Bankruptcy Code does not set forth a standard for determining when "unfair discrimination" exists.[75] Rather, courts typically look to the particular facts and circumstances of the case.[76]

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[72] *See Bank of Am. v. 203 N. LaSalle*, 526 U.S. at 441-42.

[73] *See* Etlin Decl. ¶ 48; 11 U.S.C. § 1129(b)(2)(B).

[74] *See In re Reader's Digest Ass'n, Inc.*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] Hr'g Tr. 118:4-7 ("Clearly, one of the areas flexibility that Congress provided in Chapter 11 is the unfair discrimination test of 1129, recognizing implicitly in the plain language that some forms of discrimination are fair."); *Ionosphere Clubs*, 98 B.R. at 177 ("in the context of reorganization, a majority of both cases and commentators have rejected the concept that all creditors of equal rank must receive equal treatment."); *In re Jewish Memorial Hosp.*, 13 B.R. 417, 420 (Bankr. S.D.N.Y. 1981) ("the Bankruptcy Act does not establish inexorable rules for distribution that can never be deviated from in the interest of justice and equity.").

[75] *See In re Reader's Digest Ass'n, Inc.*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] Hr'g Tr. 107:17-20 ("[I]t has long been noted that it is difficult to fix the meaning or the proper standard for whether a plan does not discriminate unfairly with respect to the dissenting class."); *In re 203 N. LaSalle St. P'ship,* 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"); *Johns-Manville*, 68 B.R. at 636 ("The language and legislative history of the statute provides little guidance in applying the 'unfair discrimination' standard.").

[76] *See, e.g.*, *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances.").

67. Generally, courts have found that a plan unfairly discriminates in violation of section 1129(b) only if similarly situated claims are treated differently *without a reasonable basis for the disparate treatment*.[77] There is no unfair discrimination where two or more classes receiving different treatment are comprised of dissimilar claims or interests.[78] Likewise, there is no unfair discrimination if, taking into account the particular facts and circumstances of the case, there is a reasonable basis for the disparate treatment.[79] Courts in the Second Circuit have ruled that "[u]nder section 1129(b) of the Bankruptcy Code, a plan unfairly discriminates where similarly situated classes are treated differently without a reasonable basis for the disparate treatment."[80] In giving effect to the proscription against unfair discrimination (*i.e.*, to prevent the "unfair" preferential payment of one creditor class *to the detriment* of another), courts have also appropriately considered the actual harm (if any) to the dissenting class resulting from the discrimination.[81]

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[77] *See In re Reader's Digest Ass'n, Inc.*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] Hr'g Tr. 112:22-23 (in determining whether plan unfairly discriminates, fact finder must "focus his or her inquiry on the reasonable basis for discriminating.").

[78] *See Worldcom*, 2003 WL 23861928, at *59.

[79] *See In re Reader's Digest Ass'n, Inc.*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 15, 2010) [Docket No. 758] Hr'g Tr. 112:12-15; *In re Charter Commcn's*, No. 09-11435 (JMP) (Bankr. S.D.N.Y. Nov. 17, 2009) [Docket No. 920] ("The hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination") (*citing In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990) *Worldcom*, 2003 WL 23861928, at *59; *Mercury Capital Corp. v. Millford Conn. Assoc., L.P.*, 354 B.R. 1, 10 (D. Conn. 2006) ("A plan unfairly discriminates . . . if similar claims are treated differently without a reasonable basis").

[80] *WorldCom*, 2003 WL 23861928, at *59 (requiring a reasonable basis to justify disparate treatment); *see also Buttonwood Partners*, 111 B.R. at 63 (evaluating whether "(i) there is a reasonably basis for discriminating, (ii) the debtor cannot consummate the plan without discrimination, (iii) the discrimination is proposed in good faith, and (iv) the degree of discrimination is in direct proportion to its rationale," but also noting that the second prong assessing whether the plan cannot be consummated without discrimination is not dispositive of the question of unfair discrimination).

[81] *In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) (noting that courts "have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination."); *see also In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (presumption of unfair discrimination can be rebutted "by showing that, outside of bankruptcy, the dissenting class would similarly receive less than the class receiving a greater recovery, or that the alleged preferred class had infused

68. Here, the Plan's treatment of those Classes that are deemed to reject the Plan is proper and not "unfair" because no similar class of interests exists and all holders of Claims or Interests in such Classes will receive identical treatment.[82] BCBG France contests this because general unsecured creditors are receiving a distribution.[83] As discussed more fully below, the fact that general unsecured creditors are receiving a distribution does not constitute unfair discrimination with regard to intercompany claims. Accordingly, the Plan does not discriminate unfairly with respect to impaired dissenting Classes of Claims and Interests.

O. The Principal Purpose of the Plan Is Not Avoidance of Taxes or Section 5 of the Securities Act (Section 1129(d)).

69. Section 1129(d) of the Bankruptcy Code states 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."[84] The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933.[85] Moreover, no party that is a governmental unit, or any other entity, has requested that the Court decline to confirm the Plan on the grounds that 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. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

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new value into the reorganization which offset its gain.") (citing *In re Dow Corning Corp.,* 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)).

[82] *See* Etlin Decl. ¶ 49.

[83] *See* BCBG France Objection at ¶¶ 20-28.

[84] 11 U.S.C. § 1129(d).

[85] *See* Etlin Decl. ¶ 51.

II. The Discretionary Contents of the Plan Are Appropriate Under Section 1123(b) of the Bankruptcy Code.

70. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a chapter 11 plan. For example, a plan may, among other things: (a) impair or leave unimpaired any class of claims or interests; (b) modify or leave unaffected the rights of holders of secured or unsecured claims; (c) provide for the settlement or adjustment of claims against or interests in a debtor or its estate or the retention and enforcement by a debtor, trustee or other representative of claims or interests; (d) provide for the assumption or rejection of executory contracts and unexpired leases; or (e) provide for the sale of all or substantially all of the property of the Debtors' estates, and the distribution of the proceeds of such sale among holders of Claims or Interests. In addition to the enumerated provisions, section 1123(b) of the Bankruptcy Code also provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[86]

71. Here, the Plan includes various discretionary provisions that are consistent with the discretionary authority vested under section 1123(b) of the Bankruptcy Code. For example, the Plan impairs certain Classes of Claims and Interests and leaves others Unimpaired, proposes treatment for Executory Contracts and Unexpired Leases, provides a structure for Claim allowance and disallowance and establishes a distribution process for the satisfaction of Allowed Claims entitled to distributions under the Plan. In addition, the Plan contains provisions implementing certain releases and exculpations, discharging claims and interests and permanently enjoining certain causes of action. The Plan also provides for the sale of

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[86] *See* 11 U.S.C. § 1123(b)(6).

substantially all of the property of the Debtors' estates pursuant to the IpCo and OpCo Purchase Agreements and the Store Closing Sales.

72. Each of these provisions are appropriate because, among other things, they (a) are the product of arm's-length negotiations, (b) have been critical to obtaining the support of the various constituencies for the Plan, (c) are given for valuable consideration, (d) are fair and equitable and in the best interests of the Debtors, these estates, and the Chapter 11 Cases, and (e) are consistent with the relevant provisions of the Bankruptcy Code and Second Circuit law. Such provisions are discussed in turn below, but, in summary, satisfy the requirements of section 1123(b).[87]

A. The Debtor Release Is Appropriate.

73. Section 1123(b)(3)(A) specifically provides that a plan of reorganization may provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estate. Accordingly, pursuant to section 1123(b)(3)(A), the Debtors may release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[88] Article VIII.C of the Plan provides for releases by the Debtors, the Post-Effective Date Debtors, their estates, and certain Related Parties[89] of any and all Claims and Causes of Action, including any derivative claims, the Debtors could assert against each of the Released Parties (the "Debtor Release").[90]

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[87] *See* Etlin Decl. ¶ 53.

[88] *See, e.g.* ., *Charter*, 419 B.R. at 257 ("Debtors are authorized to settle or release their claims in a chapter 11 plan"); *In re WCI Cable, Inc.*, 282 B.R. 457, 469 (Bankr. D. Or. 2002) ("a chapter 11 plan may provide for the settlement of any claim belonging to the debtor or to the estate").

[89] As used herein, the term "Related Parties" shall refer to various individuals and entities related to the Released Parties, Releasing Parties, and Exculpated Parties, as applicable, including affiliates, predecessors, successors, and current and former equity holders, officers, directors, employees, agents, advisors, and other professionals.

[90] The Released Parties include, in each case in their capacity as such: (a) the Term Loan Lenders; (b) the DIP Lenders; (c) the Term Loan Agent; (d) the DIP Agent; (e) the holders of Global Holdings Non-Series A

74. In considering the appropriateness of debtor releases, courts use the "best interests of the estate" standard for approval of a settlement under Bankruptcy Rule 9019[91] or require a showing that granting such releases is a valid exercise of the debtor's business judgment.[92] In determining whether such a release is within a debtor's business judgment, the court need not conduct a "'mini-trial' of the facts or the merits underlying [each] dispute" and the settlement "need not be the best that the debtor could have obtained."[93] Under this forgiving standard, the "court should instead canvass the [settled] issues [to] see whether the settlement falls below the lowest point in the range of reasonableness."[94] "When courts in [the Second Circuit] consider whether a settlement is within the range of reasonableness, they apply the following factors: (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay; (3) the paramount interests of creditors; (4) whether other parties in interest support

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Interests; (f) the ABL Lenders; (g) the ABL Agent; (h) the ABL Canadian Agent; (i) the Purchasers; (j) the Term Loan Participants; and (k) with respect to each of the Debtors, the Post-Effective Date Debtors, and each of the foregoing entities in clauses (a) through (j), such Entity and its current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals; *provided that* any holder of a Claim or Interest that opts out of the Third-Party Release (as defined below) shall not be a "Released Party"; *provided, further* that none of the Azria Parties shall be a "Released Party."

[91] *See generally Bally Total Fitness*, 2007 WL 2779438, at *12 ("[t]o the extent that a release or other provision in the Plan constitutes a compromise of a controversy, this Confirmation Order shall constitute an order under Bankruptcy Rule 9019 approving such compromise."); *In re Spiegel, Inc.*, No. 03-11540 (BRL), 2005 WL 1278094, at *11 (Bankr. S.D.N.Y. May 25, 2005) (approving releases pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a)).

[92] *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) *aff'd in part*, *rev'd in part on other grounds*, 627 F.3d 496 (2d. Cir. 2010) (approving a debtor release under business judgment standard: "[t]he releases and discharges of claims and causes of action by the Debtors, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of the estate.") (footnote omitted).

[93] *In re NII Holdings, Inc.*, 536 B.R. 61, 99 (Bankr. S.D.N.Y. 2015).

[94] *Id.* at 100.

the settlement; (5) the nature and breadth of releases to be obtained by officers and directors; (6) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement; and (7) the extent to which the settlement is the product of arm's-length bargaining."[95]

75. The Debtor Release is in the best interests of the Debtors' estates and a sound exercise of the Debtors' business judgment. As an initial matter, without the Debtors' agreement to provide releases, the Debtors' stakeholders likely would not have participated in the negotiations and compromises that led to the Plan Support Agreement, the Purchase Agreements, and the Plan. Further, the Debtors satisfy each of the foregoing factors. Moreover, the Debtors have determined that probability of success in litigation with respect to Claims or Causes of Action, if any, against the Released Parties is low and the cost and delay of pursuing any such claims is high.[96]

76. Indeed, at the direction of their three independent directors, the Debtors began an investigation into estate claims and causes of action before the petition date. The focus of this investigation was any claims or causes of action against the Debtors' secured lenders and equity owners. As it relates to the secured lenders, and in connection with entry into the final DIP Order, the Debtors reported to the independent directors (through a lengthy report and presentation) and this Court that there were no colorable claims against the Debtors' secured lenders. Accordingly the final DIP Order contained certain stipulation and release provisions regarding Causes of Action of the Debtors against their prepetition secured lenders. Paragraph 43 of the final DIP Order provides for a challenge period during with the Committee and all

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

[96] *See* Etlin Decl. ¶ 55.

other parties in interest—including, for example, the Azria Parties—were to to have commenced a challenge to such stipulations and releases. Specifically, paragraph 43 of the final DIP Order provides as follows:

> a party in interest with standing and requisite authority . . . has timely filed the appropriate pleadings, and timely commenced the appropriate proceeding required under the Bankruptcy Code and Bankruptcy Rules, including, without limitation, as required pursuant to Part VII of the Bankruptcy Rules . . . challenging the Prepetition Lien and Claim Matters . . . by no later than 60 days from [March 28, 2017].

The challenge period lapsed on May 27, 2017, without any party in interest commencing such a challenge. Thus, the releases and stipulations in favor of the Debtors' secured lenders contained in the final DIP Order and approved by this Court are binding as to all parties in interest in the Chapter 11 Cases. Thus, the release of many of the Causes of Action that would be covered by the Debtor Release has already been approved by this court pursuant to the final DIP Order, which release may not be challenged by parties in interest due to the lapsing of the final DIP Order's challenge period.[97]

77. Further, holders of Claims have overwhelmingly voted in favor of (and otherwise support) the Plan, including the Debtor Release. And no party in interest has objected to the Debtor Release. The Plan, including the Debtor Release, was negotiated at arm's length by sophisticated entities that were represented by able counsel and financial advisors and is an integral piece of the agreement among the various parties. In addition, the Debtors' directors' and officers' active participation both in prepetition negotiations and during the course of these cases merit their inclusion as Released Parties for purposes of the Debtor Release.[98]

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[97] *See* Etlin Decl. ¶ 56.

[98] *See* Etlin Decl. ¶ 57.

78. The Debtor Release reflects the important contributions, concessions, and compromises made by the Released Parties in the process of formulating the Plan. The Debtors submit that the Debtor Release reflects a reasonable balance of the risk and expense of litigation, on the one hand, against the benefits of resolution of disputes and issues, on the other hand, removing what could otherwise be potentially substantial impediments to an expedited successful emergence from these Chapter 11 Cases.[99] Since the Debtor Release underlies a Plan that maximizes the value of the Debtors estates, it ultimately inures to the benefit of all stakeholders.[100]

79. The Debtor Release is in the best interest of the Debtors' estates and well within their business judgment. The Debtors do not believe they have material causes of action against the Released Parties—thus, the Debtors are ultimately giving up very little by way of the Debtor Release. For reasons like the foregoing, many courts have approved similar debtor-release provisions in other chapter 11 cases.[101] The Debtors would not be where they are today, on the verge of confirming a highly consensual and value-maximizing transaction that resolves myriad complex issues, without the participation of the Released Parties. Accordingly, the Debtors submit that the Debtor Release is consistent with applicable law, represents a valid settlement

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[99] *See In re Allegiance Telecom, Inc.*, No. 03-13057 (RDD) (Bankr. S.D.N.Y. June 10, 2004) [Docket No. 1481] Conf. Order, at ¶¶ 60-61 ("avoidance of long and complicated litigation is one of the principal rationales for debtors entering into settlements with creditors") (citing *In re Baldwin United Corp*., 43 B.R. 888 (Bankr. S.D. Ohio 1984); *In re Teltronics Servs., Inc*., 762 F.2d 185, 188-89 (2d Cir. 1985); *In re W.T. Grant Co*., 699 F.2d 599, 608 (2d Cir. 1983)).

[100] *See* Etlin Decl. ¶ 58.

[101] *See, e.g.*, *In re Sabine Oil & Gas Corp.*, Case No. 15-11835 (SCC) (Bankr. S.D.N.Y. July 27, 2016) [Docket No. 1358]; *In re Hawker Beechcraft, Inc.*, No. 12-11873 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2013) [Docket No. 1263]; *In re Residential Capital, LLC*, No. 12-12020 (MG) (Bankr. S.D.N.Y. Dec. 11, 2013) [Docket No. 6065]; *In re Glob. Aviation Holdings Inc.*, No. 12-40783 (CEC) (Bankr. E.D.N.Y. Dec. 10, 2012) [Docket No. 823]; *In re FGIC Corp.*, No. 10-14215 (SMB) (Bankr. S.D.N.Y. Apr. 23, 2012) [Docket No. 314]; *In re Great Atl. & Pac. Tea Co.*, No. 10-245549 (RDD) (Bankr. S.D.N.Y. Feb. 28, 2012) [Docket No. 3477]; *In re Sbarro, Inc.*, No. 11-11527 (SCC) (Bankr. S.D.N.Y. Nov. 17, 2011) [Docket No. 708]; *In re Innkeepers USA Trust*, No. 10-13800 (SCC) (Bankr. S.D.N.Y. June 29, 2011) [Docket No. 1804]; *In re Neff Corp.*, No. 10-12610 (SCC) (Bankr. S.D.N.Y. Sept. 21, 2010) [Docket No. 451].

and release of claims the Debtors may have against the Released Parties pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, is a valid exercise of the Debtors' business judgment, and is in the best interests of their estates.

B. The Release of Non-Debtors by Third Parties.

80. In addition to the Debtor Release, the Plan provides for releases by certain holders of Claims and Interests. Specifically, Article VIII.D of the Plan provides that each Releasing Party shall release any and all Claims and Causes of Action (including a list of specifically enumerated Claims and Causes of Action) such parties could assert against the Debtors, the Reorganized Debtors, and the Released Parties (the "Third-Party Release" and together with the Debtor Release, the "Releases"). The Releasing Parties include, among others, the Term Loan Lenders, the ABL Lenders, and the DIP Lenders, the agents under the Debtors' pre- and postpetition credit facilities, holders of Global Holdings Non-Series A Interests, and all holders of Claims or Interests that: (a) vote to accept or are deemed to accept the Plan; and (b) either abstain from voting on the Plan, vote to reject the Plan, or are deemed to reject the Plan, in each case to the extent they do not affirmatively opt out (the "Opt Out") of the Third-Party Release. In addition, the Releasing Parties include all holders of Claims and Interests, regardless of whether such holders Opt Out, solely with respect to releases of the Term Loan Lenders, the Term Loan Participants, and certain parties affiliated or related thereto (collectively, the "Term Loan Released Parties"). The Third-Party Release is consistent with the requirements of case law in the Second Circuit and is an integral part of the Plan.

81. The U.S. Trustee[102] objected to the scope of the Plan's releases and the Court's subject matter jurisdiction to grant such releases.[103] The U.S. Trustee asserts that the Debtors

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[102] *Objection of United States Trustee to Debtors' Disclosure Statement Relating to the Joint Plan of Reorganization* [Docket No. 407] (the "UST Objection").

have not demonstrated how that Plan's releases are consistent with *In re Johns-Manville Corp.* and *In re Metromedia Fiber Network, Inc*.[104] Similarly, the Azrias assert in their objection that the Third-Party Releases are inappropriate to the extent they are nonconsensual.[105] The Azrias' objection to the Third-Party Release is a thinly veiled attempt to delay confirmation given that the Azrias provided broad releases to the Term Loan Lenders in connection with the Contribution Agreement dated as of January 26, 2015, and Max Azria provided similarly broad releases again to the Term Loan Lenders in connection with the letter agreement, dated July 26, 2016. For the reasons set forth below, the Third-Party Release should be approved in this instance because the Releases as to all parties other than the Term Loan Release Parties are consensual and as to the Term Loan Release Parties are consistent with case law in the Second Circuit.

82. As noted above, the Debtors' secured lenders are already the beneficiaries of releases pursuant to the DIP Order. Any party seeking to challenge the secured claims was required to seek standing and bring such a challenge on or before May 27, 2017.[106] No party brought a challenge. The DIP Order became a final, non-appealable order on April 11, 2017. The releases under the DIP Order, as under the Plan, were in direct return for the considerable value the DIP Lenders provided in these cases. Absent access to capital to fund this process, there would be no going concern. And the only source of capital, as demonstrated at the hearing on March 28, 2017, was the dual DIP financings.[107] Moreover, the Debtors have been in default

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[103] *See* UST Objection, § III.

[104] *Id.* at § III.B.

[105] *See* Azria Objection.

[106] *See* DIP Order at ¶ 43.

[107] *See Declaration of Jeffery Finger in Support of the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash*

of each of their DIP Facilities through much of these chapter 11 cases and have obtained seven waivers and amendments to the DIP Facilities from the DIP Lenders. The Debtors' lenders have stuck by the company in every respect to ensure that today was possible and the jobs of so many are preserved.

83. "Most courts allow consensual [third-party] releases to be included in a plan."[108] Courts in this district have found that parties consent to give releases when they vote in favor of the plan or when they abstain from voting but do not opt out of releases.[109] Third party releases may also be deemed consensual for unimpaired creditors who are deemed to accept the plan.[110] Here, the Third-Party Release is consensual with respect to all of the Released Parties, other than the Term Loan Released Parties. Importantly, the ballots distributed to holders of Claims entitled to vote on the Plan quoted the entirety of the Third-Party Release and related provisions and definitions of the Plan, clearly informing holders of Claims entitled to vote of the steps they

Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection To the Prepetition Lenders, (V) Modifying the Auomatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relef [Docket No. 48]

[108] *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007); *see also Indianapolis Downs*, 486 B.R. at 305 ("Courts in this jurisdiction have consistently held that a plan may provide for a release of third party claims against a non-debtor upon consent of the party affected.").

[109] *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) ("Nondebtor releases may also be tolerated if the affected creditors consent."); *In re Calpine Corp.*, No. 05-60200 BRL, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) ("Such releases by Holders of Claims and Interests provide for the release by Holders of Claims and Interests that vote in favor of the Plan, who abstain from voting and choose not to opt out of the releases, or who have otherwise consented to give a release, and are consensual.");. *DBSD N. Am.*, 419 B.R. at218–19 ("Except for those who voted against the Plan, or who abstained and then opted out, I find the Third Party Release provision consensual and within the scope of releases permitted in the Second Circuit."); *Adelphia*, 368 B.R. at 268 (upholding non-debtor releases for creditors who voted to accept the plan because creditors consented to the releases through their vote to support the plan); *In re Lear Corp.*, No. 09–14326, 2009 WL 6677955, at *7 (Bankr. S.D.N.Y. Nov. 5, 2009) (finding that non-debtor releases for creditors who voted to accept the plan were permissible); *In re Calpine Corp.*, No. 05-60200 (BRL), 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) (same).

[110] *See Indianapolis Downs*, 486 B.R. at 306 (finding that the releases, which included releases of unimpaired creditors who were deemed to accept the plan, "may be properly characterized as consensual").

should take if they disagreed with the scope of the release.[111] Thus, affected parties were on notice of Third-Party Release, including the option to opt out of the Third-Party Release with respect to all entities except Term Loan Released Parties. With respect to the Term Loan Released Parties, the Third Party Release is consensual as it related to creditors who voted to accept the Plan (*i.e.*, the vast majority of voting creditors). As a result, the primary aspects of the Third-Party Release are consensual under the substantial majority of precedent in this jurisdiction, and the Court need not consider the other *Metromedia* factors with respect to such aspects.

84. In addition to being fully consensual, the Third Party Releases are substantively warranted for the Released Parties. For example, beginning in 2016, certain holders of Global Holdings Series A Interests waived payment of management fees that would otherwise have come due under a management services agreement (arguably on an administrative basis). In addition, such Interest holders have been instrumental in supporting these chapter 11 cases and facilitating a smooth administration, despite the fact that they will not receive a recovery under the Plan. In return, the Interest holders seek and deserve closure through the third party release included in the Plan. Finally, throughout the entire case and all these negotiations, the Debtors' directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours both pre- and postpetition.[112]

85. Even though certain aspects of the Third Party Release are non-consensual as it relates to the Term Loan Released Parties, as set forth below, such release satisfies the factors

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[111] *See, e.g.*, *In re Crabtree & Evelyn, Ltd.*, No. 09-14267 (BRL), 2010 WL 3638369, at *8 (Bankr. S.D.N.Y. Jan 14. 2010) (finding that where creditors have accepted the plan and the non-debtor releases were appropriately disclosed by the debtors in both the disclosure statement and the ballot, the creditors have expressly consented to the non-debtor releases and therefore, the non-debtor releases satisfy the standards set forth in *Metromedia* for granting non-debtor releases and are fair to the releasing parties).

[112] *See* Etlin Decl. ¶ 62.

under *Metromedia* and its progeny. As an initial matter, as referenced above, the DIP Order already binds the Debtors and all creditors and parties in interest to the Debtors' stipulations therein, including those relating to the Term Loan Released Parties and causes of action against them. Further, in the Second Circuit, nonconsensual third-party releases are permissible where "truly unusual circumstances" render the release terms integral to the success of the plan.[113] The determination is not a matter of "factors and prongs" but courts have provided some guidance for allowing third party releases. Non-debtor releases have been approved when: (a) the estate received a substantial contribution; (b) the enjoined claims were "channeled" to a settlement fund rather than extinguished; (c) the enjoined claims would indirectly impact the debtors' reorganization by way of indemnity or contribution; (d) the plan otherwise provided for the full payment of the enjoined claims; and (e) the affected creditors consent.[114] No one factor is outcome determinative, and courts should consider the totality of the circumstances to determine whether the releases are important to the success of the plan.[115]

86. Approving nonconsensual third-party releases is appropriate where the release was an "essential component" of the plan, the fruit of "long-term negotiations," and achieved by the exchange of "good and valuable consideration" by the non-debtor that "will enable unsecured creditors to realize distribution in this case."[116] Here, the Term Loan Released Parties (and the

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[113] *Metromedia*, 416 F.3d at 142-43.

[114] *Id.* at 141; *see also In re Drexel Burnham Lambert Grp., Inc.,* 960 F.2d 285, 293 (2d Cir. 1992) (enjoining future prosecution of claims against non-debtors where, as is the case here, the injunction "plays an important part in the debtor's reorganization plan"); *In re XO Commc'ns, Inc.*, 330 B.R. 394, 440 (Bankr. S.D.N.Y. 2005) (approving third-party release where non-debtors provided significant consideration, non-debtors were integral to plan, non-debtors' interests aligned with those of debtors with regard to the claims, and release was necessary to plan process).

[115] *Metromedia*, 416 F.3d at 141.

[116] *In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009); *see also Worldcom*, 2003 WL 23861928, at *28 (finding that "[t]he inclusion of the [release provisions] was an essential element of the [p]lan formulation process and negotiations with respect to each of the settlements contained in the [p]lan [and] . . . [t]he inclusion of the

other Released Parties to the extent the Third-Party Release is deemed nonconsensual with respect to such parties) have provided substantial consideration to the Debtors' estates, and the releases provided for in the Plan are an integral part of and critically important to the success of the Plan.[117] Indeed, against an exceedingly difficult backdrop across the entire apparel industry, the Released Parties have made massive concessions and commitments that will allow the Debtors to maximize the value of their estates and maintain a portion of their business as a going concern through the Sale Transaction. In addition to a number of economic concessions under the Plan, the Term Loan Lenders (as well as the ABL Lenders) made the administration of these Chapter 11 Cases possible by providing debtor-in-possession financing—including $45 million of new-money financing provided by the Term Loan Lenders—and otherwise consenting to a robust marketing process over the course of these Chapter 11 Cases. The DIP Lenders continued to fund the Debtors, even after several defaults under the DIP Credit Agreement Documents. And the Term Loan Lenders (as well as the ABL Lenders) were instrumental in negotiating the initial plan of reorganization that was filed on the first day of these chapter 11 cases, thereby providing a foundation and structure to enable the Debtors to achieve the current value-maximizing Plan. It was this foundation that helped the Debtors to secure the commitment of the Purchasers to purchase the Debtors' intellectual property and a portion of the Debtors' operating assets, the proceeds of which will make the Debtors' emergence from chapter 11 possible. In addition, the New Tranche A Lenders agreed to a Plan that provided for a $900,000

[release provisions] were vital to the successful negotiation of the terms of the [p]lan in that without such provisions, the [released parties] would have been less likely to negotiate the terms of the settlements and the Plan."); *In re Trinsum Grp., Inc.*, No. 08–12547 (MG), 2013 WL 1821592, at *6 (Bankr. S.D.N.Y. Apr. 30, 2013) (approving third party releases that are "integral to the global settlement" where the releases are relied upon by the released parties as a condition for the funding of the settlement).

[117] *In re Union Fin. Servs. Grp., Inc.*, 303 B.R. 390, 428 (Bankr. E.D. Mo. 2003) ("Where the success of the reorganization is premised in substantial part on such releases, and the failure to obtain releases means the loss of a critical financial contribution to the Debtor's plan that is necessary to the plan's feasibility, such releases should be granted.").

Unsecured Creditor Recovery Pool and the Tranche B Lenders agreed, pursuant to the Plan, to waive their more than $287.5 million deficiency claim.[118]

87. The Third-Party Release is an integral part of the Plan and a material inducement to the Released Parties pledging their support and making the value-maximizing transaction contemplated by the Plan possible. Under these circumstances, the Third-Party Release is appropriate with respect to the Term Loan Released Parties even on a non-consensual basis (and, to the extent it should be deemed nonconsensual with respect to any of them, the other Released Parties).

88. The U.S. Trustee further asserts that the Court does not have subject matter jurisdiction to grant the proposed releases.[119] A court has subject matter jurisdiction over claims to be released when the claims might have "any conceivable effect" on the bankruptcy estate. A third party claim has a "conceivable effect"[120] if the "outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate."[121] Specifically, a bankruptcy court has jurisdiction to enjoin third-party, non-debtor claims that directly affect the *res* of the estate.[122]

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[118] *See* Etlin Decl. ¶ 61.

[119] *See* UST Objection, § III.C.

[120] *Quigley Co. v. Law Office of Peter G. Angelos (In re Quigley Co.)*, 676 F.3d 45, 57 (2d Cir. 2012) ("[T]he touchstone for bankruptcy jurisdiction remains 'whether [a third party action] might have any 'conceivable effect' on the bankruptcy estate.'") (citations omitted).

[121] *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 288 (Bankr. S.D.N.Y. 2016) (citations omitted).

[122] *See Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville)*, 517 F.3d 52, 66 (2d Cir. 2008) *("Manville III")* ("[A] bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate."); *see also In re FairPoint Commc'ns, Inc.*, 452 B.R. 21, 29 (S.D.N.Y. 2011) ("[A] bankruptcy court has jurisdiction to enjoin third party non-debtor claims, but only to the extent that those claims 'directly affect' the *res* of the bankruptcy estate.") (citing *Manville III,* 517 F.3d at 66, *reaff'd,* 600 F.3d 135, 153 (2010)).

89. Additionally, a court has subject matter jurisdiction to consider and grant third party releases when the debtor has a contingent indemnification obligation.[123] In *Sabine*, for example, the Court found it had subject matter jurisdiction to approve releases of certain third parties where, under a credit facility, those parties were granted broad indemnification rights against the debtor's estate.[124] The Court found that since the released parties would hold indemnification claims against the estate if held liable on certain claims, it would directly impact the estate.[125]

90. Here, the claims to be released could have an effect on the *res* of the bankruptcy estate. Many of the Released Parties have indemnification rights against the Debtors' estates. For example, certain Released Parties have indemnification rights against the Debtors under the Term Loan Credit Agreement, the DIP Term Loan Credit Agreement, the ABL Credit Agreement, the DIP ABL Credit Agreement, the Plan Support Agreement, and the Debtors' organizational documents. Such contingent indemnification obligations have a conceivable effect on the *res* of the estate, thus the Court has subject matter jurisdiction over the third party releases.

91. Finally, and as noted above, the Plan's release provisions have a "self-correction" feature that limits the releases to the fullest extent permissible under applicable law. The inclusion of such a provision means that the Court need not determine the subject matter

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[123] *See Sabine*, 555 B.R. at290 (Bankr. S.D.N.Y. 2016) ("[A] contingent indemnification obligation can be sufficient to satisfy the 'conceivable effect' test because such obligation 'directly affects the *res* of the bankruptcy estate.'") (quoting *In re FairPoint Commc'ns, Inc.*, 452 B.R. 21, 29 (S.D.N.Y. 2011)); *see also In re Trinsum Grp., Inc.*, No. 08–12547 (MG), 2013 WL 1821592, at *5 (Bankr. S.D.N.Y. Apr. 30, 2013) ("With respect to the Distributing Agent, any suit against the Distributing Agent also affects the *res* of the estate because the Distributing Agent has indemnification rights against the estate.").

[124] *Sabine*, 555 B.R. at 290.

[125] *Id.*

jurisdiction issue at this time, but may instead reserve such issue to be determined if and when a specific claim may be asserted.

92. The Debtors submit that the Third-Party Releases are consensual or otherwise appropriate under *Metromedia* and its progeny. Accordingly, the Third-Party Releases should be approved, and the UST Objection should be overruled.

C. The Exculpation Provision Is Appropriate.

93. Article VIII.E of the Plan provides that each Exculpated Party[126] shall be released and exculpated from any Causes of Action arising out of acts or omissions in connection with these chapter 11 cases and certain related transactions, except for acts or omissions that are found to have been the product of actual fraud or willful misconduct (the "Exculpation"). The Exculpation is an integral part of the Plan and otherwise satisfies the governing standards in the Second Circuit. This provision provides necessary and customary protections to those parties in interest (whether estate fiduciaries or otherwise) whose efforts were and continue to be vital to formulating and implementing the Plan, which has garnered overwhelming support from the Debtors' creditors.

94. The Exculpation provision sets a standard of actual fraud or willful misconduct for any hypothetical future litigation against an Exculpated Party for acts arising out of the

[126] The "Exculpated Parties" include, in each case in their capacity as such: (a) the Debtors; (b) any official committees appointed in the Chapter 11 Cases and each of their respective members; (c) the Term Loan Lenders; (d) the Term Loan Participants (e) the Term Loan Agent; (f) the DIP Lenders; (g) the DIP Agent; (h) the ABL Lenders; (i) the ABL Agent; (j) the Purchasers; and (k) with respect to each of the foregoing entities in clauses (a) though (j), such Entity and its current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

Debtors' restructuring.[127] A bankruptcy court cannot confirm a chapter 11 plan unless it finds that the plan has been proposed in good faith.[128] Once the Court makes this good-faith finding, it is appropriate to provide a standard of care for the parties involved in the negotiation and formulation of that chapter 11 plan.[129] Exculpation provisions, therefore, prevent future collateral attacks against the Court's good-faith finding. Ultimately, the Exculpation provides protection to those parties that worked hand-in-hand with the Debtors and were instrumental in assuring the success of the Debtors' restructuring. Generally speaking, as here, the effect of an appropriate exculpation provision is to set a standard of care of gross negligence or willful misconduct in future litigation for acts arising out of the restructuring.[130]

95. Courts evaluate exculpation provisions based upon a number of factors, including whether the the beneficiaries of the exculpation have participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan.[131] Additionally, courts have specified certain parties that generally are appropriate candidates for exculpation,

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[127] *See, e.g.*, *In re Health Diagnostic Lab., Inc.*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016) ("The practical effect of a proper exculpation provision is . . . to raise the standard of liability of fiduciaries for their conduct during the bankruptcy case."); *see also In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (holding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] . . . states the standard of liability under the Code."); *Worldcom*, 2003 WL 23861928, at *28.

[128] *See* 11 U.S.C. § 1129(a)(3).

[129] *See Health Diagnostic*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016) ("Exculpation provisions in chapter 11 plans are not uncommon and 'generally are permissible, so long as they are properly limited and not overly broad.'"); *PWS*, 228 F.3d at 246-247 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . .").

[130] *See Calpine*, 2007 WL 4565223, at *10 finding that an exculpation provision that did not relieve any party of liability for gross negligence or willful misconduct and was appropriate); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 501 (S.D.N.Y. 2005) (holding that an exculpation provision was appropriate where such provision excluded gross negligence and willful misconduct).

[131] *See Bally*, 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *Worldcom,* , 2003 WL 23861928, at *28 (approving an exculpation provision where it "was an essential element of the Plan formulation process and negotiations"); *Enron*, 326 B.R. at 501 excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

including where the exculpation is consensual and properly noticed or parties to "unique transactions" who "contribute substantial consideration to the reorganization."[132]

96. Here, the Debtors propose to exculpate the Exculpated Parties whose contributions and concessions have made the Plan possible. The Plan provides, however, that no Exculpated Party will be immune from liability that is determined in a Final Order to have constituted gross negligence or actual fraud.[133] Such exculpation provisions are routinely approved in plans of reorganization in cases similar to these Chapter 11 Cases.[134] The Chapter 11 Cases could not have progressed as quickly and as productively absent the significant contributions of the Exculpated Parties, whose efforts were instrumental to the success of the Debtors' efforts to achieve a Plan supported by the vast majority of their stakeholders.[135]

97. The Debtors respectfully submit that this Court has an ample record before it to conclude that the Exculpated Parties are entitled to the Exculpation proposed in the Plan. In light of the record in these Chapter 11 Cases, the protections afforded by the Exculpation are

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[132] *See Adelphia*, 368 B.R. at 268.

[133] *See* Plan, Art. VIII.E.

[134] *See, e.g.*, *Enron* , 326 B.R. at 500 (upholding exculpation provision that precluded liability for, *inter alia*, "any act taken or omitted to be taken in connection with and subsequent to the commencement of the Chapter 11 Cases"); *In re Adelphia Commc'ns Corp.*, No. 02-41729 (REG) (Bankr. S.D.N.Y. Jan. 5, 2007) [Docket No. 12952] (approving exculpation for, *inter alia*, "all prepetition activities leading to the promulgation and confirmation of this Plan," as well as for "any act or omission in connection with, or arising out of the Debtors' restructuring, including, without limitation the negotiation and execution of this Plan, the Reorganization Cases . . . and . . . all documents ancillary thereto"); *In re Ampex Corp.*, No. 08-11094 (AJG) (Bankr. S.D.N.Y. July 31, 2008) [Docket No. 386] (same); *In re Oneida Ltd.*, No. 06-10489 (ALG) (Bankr. S.D.N.Y. Aug. 30, 2006) [Docket No. 387] (approving exculpation provision precluding liability for "any pre-petition or post-petition act or omission in connection with, or arising out of, the Disclosure Statement, the Plan or any Plan Document, including any Bankruptcy Court orders related thereto, the solicitation of votes for and the pursuit of Confirmation of this Plan, the Effective Date of this Plan, or the administration of this Plan or the property to be distributed under this Plan"); *In re Wellman, Inc.*, No. 08-10595 (SMB) (Bankr. S.D.N.Y. Jan. 14, 2009) [Docket No. 774] (approving exculpation provision precluding liability arising from "any Claim related to any act or omission in connection with, relating to, or arising out of the Debtors' in or out of court restructuring efforts . . . or any contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases . . ., including . . . the Plan Sponsorship Agreement . . . or any other agreement").

[135] *See* Etlin Decl. ¶ 65.

reasonable and appropriate. In short, the Exculpation Provision represents an integral piece of the overall settlement embodied in the Plan and is the product of good-faith, arm's-length negotiations, and significant sacrifice by non-Debtor Exculpated Parties. The Exculpation Provision is narrowly tailored to exclude acts of actual fraud or willful misconduct, relates only to acts or omissions in connection with, or arising out of the Debtors' restructuring, and ultimately inures to the benefit of only those parties traditionally considered estate fiduciaries or those that have made similar contributions to the Debtors' restructuring.

98. The U.S. Trustee challenges the Debtors' exculpations for non-estate fiduciaries.[136] But in the Second Circuit, exculpation provisions that extend to prepetition conduct and cover non-estate fiduciaries are regularly approved.[137] This is because courts have recognized the appropriateness of extending exculpation to parties who make a substantial contribution to a debtor's reorganization and, specifically, who play an integral role in building consensus in support of a debtor's restructuring.[138] As discussed above, the non-fiduciary

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[136] *See* UST Objection, § III.C.

[137] *See, e.g.*, *In re Oneida,* 351 B.R. 79, 94, n.22 (Bankr. S.D.N.Y. 2006) (considering an exculpation provision covering a number of prepetition actors with respect to certain prepetition actions, as well as postpetition activity); *In re Granite Broad. Corp.*, 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (providing exculpation of controlling shareholder as well as estate fiduciaries); *see also In re Eastman Kodak Co.*, No. 12-10202 (Bankr. S.D.N.Y. Aug. 23, 2013) (overruling U.S. Trustee objection to exculpation of both estate fiduciaries and non-fiduciaries from liability for "any prepetition or postpetition act taken or omitted to be taken in connection with, or arising from or relating in any way to, the chapter 11 cases"); *In re Neff Corp.*, No. 10-12610 (Bankr. S.D.N.Y. Sept. 20, 2010) (estate and non-estate fiduciaries "shall neither have, nor incur any liability to any Entity for any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating . . . the Plan"); *In re Charter Commc'ns, Inc.*, No. 09-11435 (Bankr. S.D.N.Y. Nov. 17, 2009) (approving exculpation of estate fiduciaries and non-fiduciaries for "any pre-petition or postpetition act taken or omitted to be taken in connection with, or related to . . . the restructuring of the Company"); *In re Cengage Learning, Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014) (approving exculpation provision for estate fiduciaries and non-fiduciaries for "any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating, soliciting, preparing, disseminating, confirming, implementing, or consummating the Plan").

[138] *See In re Residential Capital*, No. 12-12020, Findings of Fact, ¶ 291 [Docket No. 6066] (approving exculpation of certain prepetition lenders who "played a meaningful role. . . in the mediation process, and through the negotiation and implementation of the Global Settlement and Plan"); *WorldCom*, 2003 WL 23861928, at *28 (approving exculpation provisions where "[t]he inclusion of the Exculpation Provision … in the Plan [was] vital

Exculpated Parties provided a substantial contribution to the estates. The Exculpation provision was a critical component of forming a consensual Plan, as the protection it affords was essential to the promotion of good-faith plan negotiations that might not otherwise have occurred had the negotiating parties faced the risk of future collateral attacks from other parties.[139]

99. In light of the foregoing and the record of these chapter 11 cases, the protections afforded by the Exculpation are reasonable and appropriate.[140] Further, in light of the carve-out for gross negligence and actual fraud, the standard of care established by the Exculpation is entirely consistent with, and appropriate under, applicable law and as a matter of public policy.[141] Thus, the UST Objection should be overruled.

D. The Injunction Provision Is Appropriate.

100. The injunction provision set forth in Article VIII.F of the Plan (the "Injunction Provision") merely implements the Plan's discharge, release, and exculpation provisions, in part,

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to the successful negotiation of the terms of the Plan in that without such provisions, the Covered Parties would have been less likely to negotiate the terms of the settlements and the Plan.").

[139] *See Drexel*, 960 F.2d at 293 (protection against legal exposure may be key to settlement negotiations involving complex issues and multiple parties); *Enron*, 326 B.R. at 503 (exculpation necessary to encourage parties to participate in plan negotiation process; lack of exculpation would chill parties' willingness to participate).

[140] The U.S. Trustee also argues that the Plan must include a provision limiting exculpations for attorneys to maintain compliance with the New York Rules of Professional Conduct. *See* N.Y. Comp. Codes R. & Regs. tit. 22 § 1200 Rule 1.8(h)(1). Such a provision is not required—and has no bearing on the standard of care typically established under an exculpation provision. Courts in this district have confirmed plans without such a provision when attorneys are exculpated parties. *See*, *e.g.*, *In re Answers Holdings, Inc.*, No. 17-10496 (SMB) (Bankr. S.D.N.Y. Apr. 10, 2017); *In re Sabine Oil & Gas Corporation*, No. 15-11835 (SCC) (Bankr. July 27, 2016). Accordingly, the Debtors' Plan should be confirmed without the addition of the requested provision.

[141] *See, e.g.*, *Oneida*, 351 B.R. at 94 n.22 (approving exculpation provision that covered prepetition lenders, DIP lenders, creditor committees and their members, and the respective affiliates of each except in cases of gross negligence, willful misconduct, fraud, or criminal conduct over an objection that was raised but "not pursue[d] at the confirmation hearing" and noting that the language "generally follows the text that has become standard in this district, is sufficiently narrow to be unexceptional"); *see In re Cengage Learning, Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014) [Docket No. 1225] (approving exculpation provision the extended to estate fiduciaries and non-fiduciaries that excluded gross negligence and willful misconduct); *In re DJK Residential, LLC*, No. 08-10375 (JMP), (Bankr. S.D.N.Y. May 7, 2008) [Docket No. 497] (approving an exculpation provision that excluded gross negligence and willful misconduct); *Bally*, 2007 WL 2779438, at *8 (same).

by permanently enjoining all Entities from commencing or maintaining any action against the Debtors, the Post-Effective Date Debtors, the Released Parties, or the Exculpated Parties on account of or in connection with or with respect to any such Claims, Causes of Action, or Interests discharged, released, exculpated, or settled under the Plan. The Injunction provision is necessary to preserve and enforce the Debtor Release, the Third-Party Releases, and the Exculpation and is narrowly tailored to achieve that purpose.[142] As such, to the extent the Court finds that the Plan's exculpation and release provisions are appropriate, the Court should approve the Injunction Provision. Thus, the Court should approve the Injunction provision to the same extent it approves the Release, Third-Party Release, Exculpation and discharge provisions.

E. The Sale Transaction Should Be Approved Under 11 U.S.C. §§ 363 and 1123(b)(4) of the Bankruptcy Code.

1. The Sale Transaction Is a Sound Exercise of the Debtors' Business Judgment and Should be Approved.

101. The Court may authorize the Debtors to sell the assets under the Sale Transaction pursuant to sections 363(b) and 1123(b)(4) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."[143] Similarly, section 1123(b)(4) provides that a "plan may provide for the sale of all or substantially all of the property of the estate." To approve a sale under section 363(b)(1) of the Bankruptcy Code, the Second Circuit requires a debtor to show that the decision to sell the property outside of the ordinary course of business was based on a sound exercise of the debtor's business

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[142] *See Drexel*, 960 F.2d at 293 (court may approve injunction provision in settlement contained in plan of reorganization where such provision "plays an important part in the debtor's reorganization plan").

[143] 11 U.S.C. § 363(b)(1).

judgment.[144] Accordingly, for the purpose of selling the assets, the Debtors need only show a legitimate business justification for the proposed action.[145]

102. The business judgment rule shields a debtor's management decisions from judicial second guessing.[146] Once a debtor articulates a valid business justification, the law vests the debtor's decision to use property outside of the ordinary course of business with a strong presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[147] Parties challenging a debtor's decision must make a showing of "bad faith, self-interest or gross negligence."[148] Generally, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

103. The Debtors' sale of the purchased assets under the Sale Transaction represents a sound exercise of the Debtors' business judgment, is essential to the Debtors' Plan, and is justified under section 363(b) of the Bankruptcy Code. The Debtors believe that the sale

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[144] *See In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a judge determining a 363(b) application must find a good business reason to grant such application); *see also In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring "some articulated business justification" to approve the use, sale or lease of property outside the ordinary course of business); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (noting that the standard for determining a section 363(b) motion is "good business reason"); *In re Glob. Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003).

[145] *See, e.g.*, *Lionel*, 722 F.2d at 1070; *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct.").

[146] *Johns-Manville Corp.*, 60 B.R. at 615-16 (a "presumption of reasonableness attaches to a debtor's management decisions" and courts will generally not entertain objections to the debtor's conduct after a reasonable basis is set forth).

[147] *In re GSC, Inc.*, 453 B.R. 132, 174 (Bankr. S.D.N.Y. 2011) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *see also In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993).

[148] *Integrated Res.*, 147 B.R. at 656 (citations omitted).

represents the most efficient and appropriate means of maximizing the value of the Debtors' estate. No other person or entity or group of entities has offered to purchase the assets for greater overall value to the Debtors' estates than the Purchasers.[149] Moreover, the sale is appropriate under 1123(b)(4) as it is provided for by the Plan, which, for the reasons set forth in herein, satisfies all of the requirements to be confirmed. Accordingly, the sale of the purchased assets pursuant to the Asset Purchase Agreements should be approved.

2. The Court Should Approve of the Sale Transaction Free and Clear of all Liens, Encumbrances and Other Interests under Bankruptcy Code Section 363(f).

104. The Debtors request approval to sell the assets subject to the Sale Transaction free and clear of any and all liens, claims, and encumbrances in accordance with sections 363(f) and 1129(b)(2)(A)(ii) of the Bankruptcy Code. Section 1129(b)(2)(A)(ii) allows a debtor to sell property pursuant to a Plan free and clear of liens.[150] Further, a debtor in possession may sell property under sections 363(b) and 363(f) "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (i) applicable non-bankruptcy law permits the sale of such property free and clear of such interest; (ii) such entity consents; (iii) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (iv) such interest is in bona fide dispute; or (v) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[151]

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[149] *See* Etlin Decl. ¶ 66.

[150] 11 U.S.C. § 1129(b)(2)(A)(ii).

[151] 11 U.S.C. § 363(f); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that since section 363(f) is written in the disjunctive, the court may approve a sale free and clear if any one subsection is met).

105. The Debtors anticipate that, to the extent there are liens on the purchased assets, all holders of such liens will consent to the sales because they provide the most effective, and efficient approach to realizing proceeds for, among other things, the repayment of amounts due to such parties.[152] Further, all other holders of such claims, liens, encumbrances, or other interests are adequately protected by having their claims, liens, encumbrances, or other interests, if any, in each instance against the Debtors, their Estates, or any of the assets subject to the Sale Transaction, attach to the net cash proceeds of the Sale Transaction ultimately attributable to the assets in which such creditor alleges a claim, lien, encumbrance, or other interest, in the same order of priority, with the same validity, force, and effect that such claim, lien, encumbrance, or other interest had prior to consummation of the Sale Transaction, subject to any claims and defenses the Debtors and their estates may possess with respect thereto, and with such claims, liens, encumbrances, or other interests being treated in accordance with the Plan. Moreover, all identified lienholders have received notice and have been given sufficient opportunity to object to the Sale Transaction. Any such entity that does not object to the sale should be deemed to have consented.[153]

106. Accordingly, the Debtors submit that the sale of the Store Closure Assets satisfies the statutory requirements of section 363(f) of the Bankruptcy Code and should, therefore, be free and clear of any liens, claims, encumbrances, and other interests.

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[152] *See* Etlin Decl. ¶ 67.

[153] *See Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281, 285-86 (7th Cir. 2002) ("It is true that the Bankruptcy Code limits the conditions under which an interest can be extinguished by a bankruptcy sale, but one of those conditions is the consent of the interest holder, and lack of objection (provided of course there is notice) counts as consent. It could not be otherwise; transaction costs would be prohibitive if everyone who might have an interest in the bankrupt's assets had to execute a formal consent before they could be sold." (internal citations omitted)); *Hargrave v. Twp. of Pemberton* (*In re Tabone, Inc.*), 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (finding failure to object to sale free and clear of liens, claims and encumbrances satisfies section 363(f)(2)); *Elliot*, 94 B.R. at 345 (same); *see also In re Enron Corp.*, No. 01-16034, 2003 WL 21755006, at *2 (Bankr. S.D.N.Y. July 28, 2003) (order deeming all parties who did not object to proposed sale to have consented under section 363(f)(2)).

3. The Purchasers are Good-Faith Purchasers and are Entitled to the Full Protection of Section 363(m) of the Bankruptcy Code.

107. Section 363(m) of the Bankruptcy Code provides that "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith[.]"[154] Although good faith is not specifically defined in the Bankruptcy Code, the Second Circuit has stated that:

> [g]ood faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings . . . . A purchaser's good faith is lost by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.[155]

108. The Sale Transaction, the Asset Purchase Agreements, and their terms are the product of good-faith, arm's-length negotiations. There is no indication of fraud or any improper insider dealing. Further, the consideration provided by the Purchasers pursuant to the Asset Purchase Agreements (i) is fair and reasonable, (ii) is the highest or best offer for the purchased assets, and (iii) constitutes reasonably equivalent value (as those terms are defined in each of the Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, and section 548 of the Bankruptcy Code) and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia. Throughout the Debtors' exhaustive marketing and sale process, no other person or entity or group of entities offered to purchase the assets for greater overall value to the Debtors' estates than the

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[154] 11 U.S.C. § 363(m).

[155] *In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997) (internal quotations omitted).

Purchasers.[156] Accordingly, the Debtors request that the Court enter an order entitling the Purchaser to the full protections of section 363(m) of the Bankruptcy Code.

109. Accordingly, the Debtors submit that the discretionary provisions of the Plan are consistent with and permissible under section 1123(b) of the Bankruptcy Code. In light of the foregoing, because the Plan fully complies with section 1122 and 1123 of the Bankruptcy Code, the Debtors submit that the Plan fully complies with and satisfies the requirements of section 1129(a)(1) of the Bankruptcy Code.

Reply to Objections.

110. As of the date hereof, fourteen of the fifteen objections have not been withdrawn from the docket or otherwise resolved. The objections of the U.S. Trustee, the Azrias, BCBG France, and certain landlords raising technical cure and adequate assurance objections remain outstanding. For the reasons set forth herein, the Debtors respectfully request that the Court overrule each such unresolved objection.

I. The Debtors are Entitled to a Discharge.

111. The Azrias argue that the Debtors are not entitled to a discharge pursuant to section 1141(d)(3) of the Bankruptcy Code.[157]

112. Challenges to a debtor's discharge are very narrowly construed, and courts make every effort to grant the discharge.[158] Section 1141(d)(3) provides that "[t]he confirmation of a plan does not discharge a debtor if—(A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after

[156] *See* Etlin Decl. ¶ 67.

[157] *See* Azria Objection at ¶¶ 26–33.

[158] *See In re Khalil*, 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007), *aff'd*, 578 F.3d 1167 (9th Cir. 2009) ("The bankruptcy court noted that discharge provisions are liberally construed in favor of debtors and strictly against the person objecting to the discharge."); *see also In re Duncan*, No. 2:11-BK-16577 (JMM), 2012 WL 5462917, at *2 (Bankr. D. Ariz. Nov. 6, 2012).

consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title."[159] All three elements of the section 1141(d)(3) must be established before a chapter 11 debtor's discharge may be denied.[160] Here, the Azrias have failed to establish the second element because the Debtors will continue to "engage in business after consummation of the plan."[161]

113. Under the Plan, the Debtors' business will continue to operate following the Effective Date. Indeed, a key element of the OpCo Sale Transaction is the Transition Services Agreement. Moreover, the Debtors are still involved in insolvency proceedings in Japan and France that will be important to conclude. The requirement under section 1141(d)(3)(B) to receive a discharge is simply to engage in business after the consummation of the plan.[162] There is no requirement that the business be equivalent to the debtor's prepetition business, nor any language qualifying what level of business activity is required.[163]

114. Following consummation of the Plan, the Post-Effective Date Debtors will, for a period of time, continue to operate the Debtors' business in coordination with the OpCo Purchaser to continue to operate the Debtors' business, including, initially, under the Transition Services Agreement. This will include managing and coordinating with vendors and customers, running the go-forward retail stores and partnershops, overseeing the Store Closing Sales, and

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[159] 11 U.S.C. § 1141(d)(3).

[160] *See id.*; *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 55 (S.D.N.Y. 1999); *In re Berg*, 423 B.R. 671, 677 (B.A.P. 10th Cir. 2010).

[161] *See* 11 U.S.C. 1141(d)(3).

[162] *See id.*

[163] *See In re Flintkote Co.*, 486 B.R. 99, 132 (Bankr. D. Del. 2012), *aff'd*, 526 B.R. 515 (D. Del. 2014).

operating the ecommerce business.[164] Further, the Debtors' personnel will continue to provide the same services that they currently provide during this period,[165] and will remain employees of the Debtors until they are either terminated by the Debtors or hired by the OpCo Purchaser.[166] The Debtors will maintain insurance policies on all of their facilities and maintain the appropriate amount of workers' compensation insurance for its employees.

115. In short, the Debtors' business will continue to meaningfully operate for a significant period of time, and accordingly, the Azrias have failed to demonstrate that the Debtors are not entitled to a discharge.

II. The Distributions Under the Plan Do Not Require the Debtors to Substantively Consolidate.

116. The Azrias argue that the Debtors' Plan distribution mechanism operates as if the Debtors are substantively consolidated.[167] The Plan, however, expressly states the opposite, and substantive consolidation would serve no purpose to the Debtors' creditors. Thus, this should be overruled.

117. Substantive consolidation is applied to ensure equitable treatment of all creditors.[168] Courts in the Second Circuit have found substantive consolidation to be appropriate when either "creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit" or "the affairs of the debtors are so entangled that

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[164] *See In re Duncan,* No. 2:11-BK-16577 (JMM), 2012 WL 5462917, at *4 (Bankr. D. Ariz. Nov. 6, 2012) (holding that Debtor continued to engage in business after consummation of the plan because it would continue to earn income from various sources).

[165] Transition Services Agreement at Art. 1(e).

[166] Transition Services Agreement at Art. 1(j)

[167] *See* Azria Objection at ¶¶ 37-39.

[168] *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988).

consolidation will benefit all creditors."[169] When applied, it usually results in "pooling the assets of, and claims against, the two entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans."[170]

118. In *In re Sabine Oil & Gas Corp.*,[171] the court faced a similar argument, namely that the plan effected a *de facto* substantive consolidation.[172] There, the Court denied the argument that the plan effectuated a *de facto* substantive consolidation, noting that the plan treated each claim separately against each debtor, which was demonstrated by (i) the ballots and voting tabulation, which were on a debtor-by-debtor-basis, and (ii) the distribution scheme.[173]

119. Here, the Plan explicitly states that it does not provide for substantive consolidation.[174] Instead, the Plan applies separately for each of the Debtors, and the classification of Claims and Interests under the Plan apply separately to each of the Debtors.[175] In addition, voting tabulations for recording acceptances and rejections of the Plan are done on a Debtor-by-Debtor basis.[176] Further, substantive consolidation in this case would not ensure more equitable treatment to the creditors. The Debtors' secured creditors have claims against each of the Debtors and have liens on substantially all of the assets of each Debtor. Accordingly, outside of a chapter 11 plan, including in a hypothetical chapter 7 liquidation, unsecured creditors would

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169 *Id.*

170 *Id.*

171 555 B.R. 180 (Bankr. S.D.N.Y. 2016).

172 *See id.*

173 *Id.* at 318.

174 *See* Plan Art. I.G. ("[T]he Plan does not provide for the substantive consolidation of any of the Debtors.").

175 Plan Art. III.A.

176 *Id.*

not be entitled to any distribution. But under the Plan, certain of the Debtors' secured creditors have agreed to allow holders of Unsecured Claims to receive their pro rata share of the Unsecured Creditor Recovery Pool, notwithstanding that these secured creditors will not be paid in full. In this context, the Debtors determined that such pro rata sharing among all holders of Unsecured Claims across all Debtors was a fair and appropriate means to effectuate this distribution in light of their capital structure, not because the Plan is effectuating a *de facto* substantive consolidation.[177] Thus, there is no basis for holding that the Plan's terms result or should result in a *de facto* substantive consolidation.[178]

III. The Plan Does Not Unlawfully Eliminate Setoff Rights.

120. In their objections, BCBG France, the Azrias, and certain landlords argue that the Debtors' Plan unlawfully abrogates creditors' setoff and recoupment rights.[179] Courts have recognized "that a right of set-off is preserved under § 553 in a bankruptcy proceeding but . . . that the right must be exercised by the creditor in a timely fashion and appropriately asserted in accordance with other provisions of the Bankruptcy Code."[180] In the Second Circuit, courts have adopted this reasoning and have also "held that the right to setoff does not survive plan confirmation when setoff was specifically prohibited in the plan confirmed by the bankruptcy

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[177] With respect to the Azrias assertion that the Plan seemingly does not provide a mechanism for addressing claims against multiple Debtors, the Debtors note that any such claims will be resolved as part of the claims resolution process under the Plan. Indeed, Bankruptcy Rule 3007(d) permits omnibus claims objections with respect to claims that duplicate other claims, have been filed in the wrong case, or that have been satisfied and released during the case.

[178] *See Sabine*, 555 B.R. at 318 (denying that the plan effectuated a *de facto* substantive consolidation).

[179] *See* Azria's Objection at ¶ 35; BCBG France Objection at ¶ 35; *Limited Objection of Acadia Realty Trust, Federal Realty Investment Trust, PGIM Real Estate, Starwood Retail Partners LLC, The Forbes Company, The Macerich Company, and the Related Companies to the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 555] (the "Acadia Objection") at ¶ 5.

[180] *In re Continental Airlines*, 134 F.3d 536, 542 (3d Cir. 1998).

court."[181] Both BCBG France and the Azrias cite *In re BOUSA* for the broad proposition that "confirmation of a debtor's chapter 11 plan does not extinguish prepetition setoff rights."[182] *In re BOUSA*, however, held that confirmation of a debtors plan did not extinguish prepetition setoff rights only where the "plan does not treat setoff rights explicitly and does not prohibit a setoff by any creditor after confirmation."[183] In cases such as this one, where the Plan explicitly addresses post confirmation setoff and recoupment rights,[184] setoff and recoupment rights may be limited to the extent set forth in the plan. If BCBG France, the Azrias, or any landlords wish to preserve any setoff or recoupment rights they may or may not be entitled to, they may do so by filing a motion requesting the right to perform such setoff on or before the Effective Date.[185]

IV. The Court Can Extend the Period to Assume or Reject Unexpired Leases To After Confirmation.

121. In their objection, certain landlords argue that the Debtors ability to assume, assume and assign, or reject leases following the entry of the confirmation order is contrary to section 356(d)(4) of the Bankruptcy Code.[186] As an initial matter, nothing in the plain language of section 356(d)(4) prevents a court from extending the time in which a debtor may assume or reject an unexpired lease—including extending to a time that is after the Effective Date.[187]

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[181] *In re BOUSA Inc.*, No. 89-B-13380 (JMP), 2006 WL 2864964, at *6 (Bankr. S.D.N.Y. Sept. 29, 2006) (citing *Daewoo International (America) Corp. Creditor Trust v. SSTS America Corp.*, No. 02 Civ. 9629 (NRB), 2003 WL 21355214, at *5 (S.D.N.Y. June 11, 2003).

[182] BCBG France Objection at ¶ 33; Azrias' Objection at ¶ 34.

[183] *In re BOUSA Inc.*, 2006 WL 2864964, at *6; *see Daewoo International (America) Corp. Creditor Trust*, 2003 WL 21355214, at *6 (holding that where a debtor's plan specifically prohibited asserting a setoff or recoupment claim the creditor could not raise the claim post confirmation).

[184] *See, e.g.*, Plan Art. VIII.F.

[185] *See* Plan Art. VIII.F(4).

[186] *See* Acadia Objection at ¶ 11.

[187] *See* 11 U.S.C. § 365(d)(4) (expressly providing that "[t]he court may extend the period determined under subparagraph (A)").

Generally courts offer debtors a certain measure of flexibility and have historically allowed debtors to assume or reject executory contracts and unexpired leases after confirmation of a plan as necessitated by the facts of each case.[188] In fact, this Court has recognized that debtors may assume or reject contracts post-confirmation where a plan of reorganization specifically retains the right to do so[189] (as the Plan does in Article V.A). Further, the facts of this case demonstrate a need for similar flexibility with regard to section 365(d)(4). The Debtors are currently performing going out of business sales at the unpurchased stores. These sales are inherently unpredictable because the length of the sales are dictated to a certain degree by the speed at which the merchandise can be sold. Accordingly, the Debtors need flexibility with regard to the effective date of the rejection of these store leases.

V. The Debtors' Plan Properly Classifies BCBG France's Claims and Does Not Unfairly Discriminate Against BCBG France.

122. In its objection, BCBG France argues that the Debtors' Plan improperly classifies its intercompany claims, but classifying intercompany claims separately from general unsecured claims is appropriate. In fact, similar claims may be classified separately so long as the debtor has a reasonable basis for doing so.[190] For example, a Court in this district confirmed a plan where unsecured claims and unsecured intercompany claims were classified separately.[191]

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188 *See DJS Properties v. Simplot*, 397 B.R. 493, 499-501 (Bankr. D. Idaho 2008) (allowing a partnership agreement to be assumed or rejected after confirmation); *In re Greater Southeast Community Hosp. Corp.*, 327 B.R. 26, 33-35 (Bankr. D. D.C. 2005) (allowing for post confirmation rejection of an assumed contract if terms could not be reached); *In re Gunter Hotel Associates*, 96 B.R. 696, 700-701 (Bankr. W.D. Tex. 1988) (allowing a licensing agreement to be rejected after confirmation).

189 *See In re Worldcom, Inc.*, No. 02-13533 (AJG), 2006 WL 898029, at *3 (Bankr. S.D.N.Y. Mar. 9, 2006) ("In the *Greater Southeast* case, the Plan had specifically retained the right for the debtors to reject the contract if the required cure amount was unacceptable.") (citing *Greater Southeast Community Hosp.*, 327 B.R. at 33-34).

190 *See In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *47 (Bankr. S.D.N.Y. Oct. 31, 2003) ("A debtor need not place all substantially similar claims in the same class as long as the debtor has a reasonable basis for the separate classification.").

191 *See In re Advance Watch Co. Ltd.*, No. 15-12690 (MG), 2016 WL 323367, at *3 (Bankr. S.D.N.Y. Jan. 25, 2016) ("Valid business and legal reasons exist for the various Classes of Claims and Interests created under the

Similar to *Advance Watch*, the intercompany claimants in this case are foreign affiliates, the claims may be subject to setoff, and the intercompany claimants are subject to their own insolvency proceeding. Accordingly, the Debtors have a valid business and legal reason to classify the intercompany claimants separately from other unsecured creditors.[192] Indeed, while BCBG France takes issue with the Debtors separately classifying Intercompany Claims, BCBG France acknowledges in its objection that it is actually seeking to subordinate the claims of the Debtors to the claims of third party creditors in their own foreign proceeding.[193]

123. In any event, this is not a confirmation issue. Intercompany Claims are classified as they are under the Plan. BCBG France has appropriately taken advantage of the claims process by filing a proof of claim for an unsecured claim. Under the Plan, the Plan Administrator will take steps to reconcile all outstanding claims and the treatment of those claims will be resolved in connection therewith in due course.

124. BCBG France also argues that the Debtors' Plan unfairly discriminates against its claims because general unsecured creditors are receiving a distribution. This fact alone does not constitute unfair discrimination under the Plan. A plan only unfairly discriminates when "similarly situated classes are treated differently without a reasonable basis for the disparate

Plan, specifically including Class 7 Intercompany Claims, and such classification does not unfairly discriminate among Holders of Claims or Interests."). In *Advance Watch*, the debtors argued that the intercompany claims could be classified differently than the unsecured claims, because (i) the intercompany claimants were foreign affiliates and insiders, (ii) the debtors classified the amounts owing under a loan agreement with an intercompany claimant differently than general unsecured creditors, for accounting purposes, (iii) the intercompany claims may have been subject to recharacterization and setoff, among other things, (iv) the intercompany claimants were subject to international banking rules and regulations, and (v) the intercompany claimants were subject to their own insolvency proceeding in another country. *See* Debtors' Memorandum of Law in Support of Confirmation of the Debtors' First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code and Final Approval of the Related Disclosure Statement at 11-12, *In re Advance Watch Co. Ltd.*, No. 15-12690 (MG) (Bankr. S.D.N.Y. Jan. 14, 2016) [Docket No. 227].

[192] *See In re Advance Watch Co. Ltd.*, No. 15-12690 (MG), 2016 WL 323367, at *3 (Bankr. S.D.N.Y. Jan. 25, 2016).

[193] *See* BCBG France Objection at ¶ 37 (stating that "BCBG France is seeking to subordinate the claims of the Debtors to the claims of third party creditors in BCBG France's proceeding up to 13.2 million Euros.").

treatment."[194] Thus, in some situations, certain unsecured creditors may receive distributions notwithstanding the fact that another class of unsecured claims received no recovery.[195] As explained above, the Debtors have a legitimate basis for classifying the claims separately, and thus the small difference in distribution to the two classes (0% for Intercompany Claims and approximately 0%–0.2% for Unsecured Claims) is appropriate.

125. In addition, BCBG France asserts that the "failure to establish a reserve on account of the BCBG France claims would constitute unfair and unequal treatment vis-à-vis other creditors and would frustrate BCBG France's appellate rights."[196] Contrary to this assertion, the Plan provides for the same treatment of all claims in Class 7, the class in which the BCBG France claims are classified. Unlike in *In re MCorp Fin., Inc.*, the case cited by BCBG France in support of their Objection, the Plan does not treat contested Class 7 Claims differently than uncontested Class 7 Claims.[197] Because the Plan treats all creditors in Class 7 equally, the Debtors submit that the BCBG France Objection should be overruled.

126. Furthermore, the Class 7 claims are not entitled to any distribution under the Plan. Accordingly, a reserve for those claims is not required. The BCBG France does not cite any authority to the contrary, nor does it cite authority suggesting that a plan of reorganization must

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[194] *See In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *59 (Bankr. S.D.N.Y. Oct. 31, 2003). Courts consider whether "(1) there is a reasonable basis for discriminating, (2) the debtor cannot consummate the plan without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of discrimination is in direct proportion to its rationale." *Id.* (citation omitted).

[195] *In re Dallas Stars, L.P.*, No. 11-12935 PJW, 2011 WL 5829885, at *12 (Bankr. D. Del. Nov. 18, 2011) (finding no unfair discrimination when a class of unsecured claims was not receiving a recovery, but other unsecured claims were receiving a recovery "at the election of the Purchaser based upon the Purchaser's determination as to which Claims to pay")

[196] *See* BCBG France Objection at ¶ 19.

[197] *See In re MCorp Fin., Inc.*, 137 B.R. 219, 227–28 (Bankr. S. D. Tex. 1992) ("The plan provisions regarding the estimation process and the capped reserve for contested claims thus limit Debtors' ultimate exposure for payment of a ***contested claim*** to a pro rata amount that may be based on less than the full allowed amount of such claim, while providing holders of ***uncontested claims*** their pro rata distribution based on the full allowed amount of their claims.") (emphasis added).

provide for a reserve if a claimant may appeal the classification of claims therein. Notwithstanding these facts, the Plan provides for appropriate claim resolution procedures that determine the allowance of claims, and distributions will be made according thereto.[198] And further, Article VII.I of the Plan makes clear that "[t]o the extent that a Disputed Claim ultimately becomes an Allowed Claim or Allowed Interest, distributions (if any) shall be made to the holder of such Allowed Claim or Allowed Interest (as applicable) ***in accordance with the provisions of the Plan***" and requires that "the Disbursing Agent provide to the holder of such Claim or Interest the distribution (if any) ***to which such holder is entitled under the Plan***." (emphasis added).

VI. Objections To the Cure Amount Stated in the Assumption Schedule, the Objecting Party's Inability To Identify the Contract To Be Assumed, or Demands for Adequate Assurance Continue to Be Negotiated.

127. Several objecting parties argue that the cure amount set forth in the Schedule of Assumed Executory Contracts and Unexpired Leases (the "Assumption Schedule") for each party's executory contract, the unexpired lease is incorrect or confusing and/or that the party cannot identify the contract to be assumed, or the Debtors must provide adequate assurance of future performance. In each case, the objecting party believes that the proposed cure amount is incorrect and must be corrected before such contract or lease may be assumed. The Debtors have been engaged in discussions with various parties that have objected and will continue to work with them in an effort to consensually resolve any pending disputes. To the extent that the Debtors are unable to consensually resolve the proposed the objections prior to the Confirmation Hearing, the Debtors will determine whether to address the objections at the Confirmation Hearing or continue them to a later date.

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[198] Plan Art. VI; Plan Art. VII.

Conclusion

For all of the reasons set forth herein and in the Supporting Declarations, and as will be further shown at the Confirmation Hearing, the Debtors submit that the Plan fully satisfies all of the applicable requirements of the Bankruptcy Code. Accordingly, the Debtors respectfully request that the Court enter the proposed Confirmation Order confirming the Plan, overrule any remaining objections, and grant such other and further relief as is just and proper.

Dated: July 21, 2017

<u>/s/ Joshua A. Sussberg</u>

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EXHIBIT A

Objection Summary Chart

In re BCBG Max Azria Global Holdings, LLC, et al.,[1] Case No. 17-10466 (SCC)
Summary of Plan Confirmation Objections[2]

No.	Objector & Docket No.	Bases of Objection	Response to Objection	Status
1.	United States Trustee [Docket No. 407]	• The Plan inappropriately classifies certain claims as unimpaired. • The Court does not have subject matter jurisdiction to grant certain non-debtor third party releases and exculpations which would bind other non-consenting third parties. • The releases and exculpations are overbroad and not consistent with Second Circuit law. • The exculpations for attorneys should be limited to comply with the New York Rules for Professional Conduct. • The Plan improperly provides that "Administrative Claim" includes statutory fees and charges.	• Whether holders of claims provide releases does not render their claims impaired. Impairment is a claim-specific inquiry and not a creditor-specific inquiry. • The Court need not reach this issue. Regardless, the Court has jurisdiction over claims to be released when the claims might have "any conceivable effect" on the bankruptcy estate. • The Debtors' releases are largely consensual and include a "self-correction" feature. • Such a provision is not required to confirm the Plan's Exculpation provisions. • The Debtors and the U.S. Trustee have reached a consensual resolution on this issue.	*Pending*
2.	CenturyLink Communications, LLC [Docket No. 532]	• Cure amount should be $484,590.81. • Plan does not provide for cure of amounts that have been billed but are not in default, or that have	• The Debtors disagree with the cure amount set forth in the objection of CenturyLink Communications. Nevertheless, negotiations regarding a consensual resolution remain ongoing.	*Pending*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: BCBG Max Azria Global Holdings, LLC (6857); BCBG Max Azria Group, LLC (5942); BCBG Max Azria Intermediate Holdings, LLC (3673); Max Rave, LLC (9200); and MLA Multibrand Holdings, LLC (3854). The location of the Debtors' service address is: 2761 Fruitland Avenue, Vernon, California 90058.

[2] Capitalized terms used herein but not defined have the meanings given to such terms in the Plan, Disclosure Statement, or relevant Objection, as applicable.

No.	Objector & Docket No.	Bases of Objection	Response to Objection	Status
		accrued but have not been billed, and will come due after the Assumption Date. • Plan does not specify who will be responsible for paying cure costs and accruals.		
3.	Oracle America, Inc. [Docket No. 534]	• The Debtors may not assume and assign the Oracle Agreement without Oracle's consent. • The Debtors have not adequately identified the Oracle Agreement because it does not provide the contract name, date, and identification number. • The Debtors list a cure amount of $225,108, but because it is not properly identified, Oracle cannot assess whether that amount is accurate. • The Debtors have not provided adequate assurance of future performance. • Simultaneous or shared use of any Oracle Agreement is not authorized.	• The Debtors are in negotiations regarding a consensual resolution and believe they will reach such a resolution prior to the confirmation hearing. To the extent such a resolution is not reached, the Debtors disagree with the proposed cure amounts. • Negotiations with regard to the remaining objections remain ongoing.	*Pending*
4.	Bloomindale's, Inc., Macy's Retail Holdings, Inc., and Bloomingdales.com, LLC (collectively, the "Macy's Entities") [Docket No. 535]	• Cure amount should be $520,823.00 combined for the agreements.	• The Debtors are in negotiations regarding a consensual resolution and believe they will reach such a resolution prior to the confirmation hearing. To the extent such a resolution is not reached, the Debtors disagree with the proposed cure amounts.	*Pending*

No.	Objector & Docket No.	Bases of Objection	Response to Objection	Status
5.	Simon Property Group, Inc. [Docket No. 536]	• The Debtors are either (i) in default of its monetary obligations under the Lease(s); (ii) the Notice fails to compensate Landlord for any actual pecuniary loss resulting from the default and/or bankruptcy filing; or (iii) both, thus the cure amount proposed by the Debtors is inaccurate. • The cure amount should include $1,000 per lease as reasonable attorneys' fees.	• The Debtors are in negotiations regarding a consensual resolution and believe they will reach such a resolution prior to the confirmation hearing. To the extent such a resolution is not reached, the Debtors disagree with the proposed cure amounts.	*Pending*
6.	Max Azria Lubov Azria, 2761 Fruitland Avenue L.L.C, and 4701 Santa Fe Avenue, L.L.C. (collectively, the "Azrias") [Docket No. 537]	• The Plan includes compulsory, non-consensual releases and the Debtors have failed to justify such releases. • The Plan provides a discharge in contravention of section 1141(d)(3) of the Bankruptcy Code. • The Plan eliminates creditors' setoff rights while preserving the Debtors' setoff rights in violation of section 553 of the Bankruptcy Code. • The Debtors distribution scheme operates as though the Debtors are substantially consolidated; the Plan, however, does not call for substantive consolidation. • The cure amounts in connection with the assumption of the Fruitland Lease and the Santa Fe Lease are inaccurate and adequate assurances of the assignee's future performance have not been provided.	• The Debtors' releases are largely consensual and include a "self-correction" feature. • The Debtors are entitled to a discharge because the Debtors will continue to operate their business. • Setoff rights can be limited under a chapter 11 plan and such limitations do not violate section 553 of the Bankruptcy Code. • The Plan applies separately to each Debtor and expressly states that it does substantively consolidate the Debtors. The Unsecured Creditor Recovery Pool does not effectuate a *de facto* consolidation. • The Debtors believe that the cure amounts listed in the Plan Supplement are correct with regard to the Fruitland and Santa Fe leases.	*Pending*

No.	Objector & Docket No.	Bases of Objection	Response to Objection	Status
7.	SAP Industries, Inc. f/k/a SAP Retail, Inc. ("SAP") [Docket No. 538]	• Cure amount should be: $1,184,904.18. • SAP's consent is required for the assignment.	• The Debtors disagree with the cure amount set forth in the objection of SAP. Nevertheless, negotiations regarding a consensual resolution remain ongoing.	*Pending*
8.	Tampa Westshore Associate Limited Partnership; Twelve Oaks Mall, LLC; and La Cienega Partners Limited Partnership (collectively, the "Taubman Landlords") [Docket No. 539]	• Cure amounts are inaccurate and should include "pecuniary losses" such as attorneys' fees. • Cure amounts should be: • 761 - $47,141.82 • 762 - $28,851.62 • 764 - $79,565.04	• The Debtors are in negotiations regarding a consensual resolution and believe they will reach such a resolution prior to the confirmation hearing. To the extent such a resolution is not reached, the Debtors disagree with the proposed cure amounts.	*Pending*
9.	GGP Limited Partnership and Turnberry Associates [Docket No. 540]	• Cure amounts are incorrect and should include attorneys' fees. • Cure amounts should be: • 627 (Store) - $13,342.54 • 627 (Storage) - $334 • 707 - $81,820 • Debtors must provide adequate assurance of GBG's future performance. • GGP and Turnberry demand security in form of security deposit, LoC or guaranty under section 365(*l*)	• The Debtors disagree with the cure amounts set forth in the objection of GGP Limited Partnership and Turnberry Associates. Nevertheless, negotiations regarding a consensual resolution remain ongoing. • Negotiations with regard to the remaining objections remain ongoing.	*Pending*
10.	Verizon Communications Inc.	• Cure amounts are incorrect.	• The Debtors and Verizon have reached a consensual resolution.	*Resolved*

No.	Objector & Docket No.	Bases of Objection	Response to Objection	Status
	[Docket No. 550]	• Unclear which Verizon Wireless Contract is being assumed because it is listed on both assumption and rejection schedule.		
11.	Federal Realty Investment Trust and The Forbes Company [Docket No. 551]	• Cure amounts should be: • 617 - $95,157.49 • 667 - $65,214.01 • 715 - cure amount is correct or greater than amount owed. • Cure amount should include attorneys' fees. • Federal lease expired on its own terms and Debtors can only assume and assign their tenant at will occupancy. • Debtors must demonstrate adequate assurance of future payment. • Assignee should provide additional security to the extent they are undercapitalized.	• The Debtors disagree with the cure amounts set forth in the objection of Federal Realty Investment Trust and The Forbes Company. Nevertheless, negotiations regarding a consensual resolution remain ongoing. • Negotiations with regard to the remaining objections remain ongoing.	*Pending*
12.	BCBG Max Azria Group SAS ("BCBG France") [Docket No. 553]	• The Plan unfairly discriminates against BCBG France by failing to provide any recovery or reserve on account of its claims pending resolution. • The Plan improperly classifies BCBG France's claims in Class 7 (Intercompany Claims). • The Plan violates the best interests test by providing no recovery to BCBG France and	• The Debtors have a reasonable basis for separately classifying BCBG France's claims and any resulting disparate treatment. • The Debtors have a reasonable basis for separately classifying BCBG France's claims. • BCBG France is not entitled to a recovery under either the Plan or a hypothetical chapter 7 liquidation. As such, the best interests of the	*Pending*

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No.	Objector & Docket No.	Bases of Objection	Response to Objection	Status
		limiting any right of offset or recoupment that BCBG France may possess. • The Plan eliminates creditors' setoff rights while preserving the Debtors' setoff rights in violation of section 553 of the Bankruptcy Code.	creditors test is satisfied with regards to BCBG France. • Setoff rights can be limited under a chapter 11 plan and such limitations do not violate section 553 of the Bankruptcy Code.	
13.	738 Lincoln Road LLC [Docket No. 554]	• Cure amounts should be - $74,889.21 • Cure amounts should include "pecuniary losses" such as attorneys' fees in the amount of $7,500.	• The Debtors disagree with the cure amounts listed in the cure objection of 738 Lincoln Road LLC. Nevertheless, negotiations regarding a consensual resolution remain ongoing.	*Pending*
14.	Acadia Realty Trust, Federal Realty Investment Trust, PGIM Real Estate, Starwood Retail Partners LLC, The Forbes Company, The Macerich Company and The Related Companies [Docket No. 555]	• The Plan improperly seeks to deprive Landlords of their rights to setoff and recoupment. • The Plan does not adequately address various claims and rights under the Leases that must survive confirmation. • The Plan improperly extends the time to assume or reject leases in violation of section 365(d)(4).	• Setoff rights can be limited under a chapter 11 plan and such limitations do not violate section 553 of the Bankruptcy Code. • The cure amounts for any assumed lease will cover any outstanding liability to the extent there are accrued but unpaid obligations. • The Court has the power to extend to the time for the Debtors to assume or reject leases beyond confirmation.	*Pending*
15.	Westfield, LLC, Sherman Oaks Fashion Associates, LP, and Westfield Topanga Owner LLC [Docket No. 561]	• Cure amounts are incorrect and should include additional amounts such as attorneys' fees. • The Debtors must provide adequate assurance of future performance to the Westfield Landlords regarding the Westfield Leases.	• The Debtors are in negotiations regarding a consensual resolution and believe they will reach such a resolution prior to the confirmation hearing. To the extent such a resolution is not reached, the Debtors disagree with the proposed cure amounts. • Negotiations with regard to the remaining objections remain ongoing.	*Pending*

Informal Objections				
No.	**Objector**	**Bases of Objection**	**Response to Objection**	**Status**
1.	Internal Revenue Service	• Debtors must provide clarification regarding remedies of holders of Allowed Secured Tax Claims in the event of a payment default.	• The Debtors and the IRS have reached a consensual resolution.	*Resolved*
2.	Sherman Oaks Fashion Associates	• Debtors provided for incorrect cure amount.	• The Debtors and the Sherman Oaks Fashion Associates have reached a consensual resolution.	*Resolved*
3.	XL Insurance	• Debtors must provide clarification regarding XL Insurance's ongoing rights under certain legacy workers' compensation insurance policies.	• The Debtors and the XL Insurance have reached a consensual resolution.	*Resolved*
4.	Chubb Insurance	• Debtors must provide clarification regarding Chubb Insurance's ongoing rights under certain active workers' compensation policies and related letters of credit.	• The Debtors and the Chubb Insurance have reached a consensual resolution.	*Resolved*
5.	Mississippi Department of Revenue	• Debtors must provide clarification regarding the payment terms of any priority tax claims claims held by the Mississippi Department of Revenue.	• The Debtors and the Mississippi Department of Revenue have reached a consensual resolution.	*Resolved*
6.	Local Texas Taxing Authorities	• The Debtors must provide clarification regarding the payment terms of certain ad valorem taxes purportedly owed to certain local Texas taxing authorities.	• The Debtors and the Local Texas Taxing Authorities have reached a consensual resolution.	*Resolved*
7.	United States Department of Justice	• The Debtors must provide clarification regarding certain obligations owing to the United States.	• The Debtors and the DOJ have reached a consensual resolution.	*Resolved*