In re:	Chapter 11
BOOMERANG TUBE, LLC, a Delaware limited liability company, *et al.*,[1]	Case No. 15-11247 (MFW)
	Jointly Administered
Debtors.	

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN DATED DECEMBER 29, 2015 AND REPLY TO LIMITED OBJECTIONS

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[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Boomerang Tube, LLC (9415); BTCSP, LLC (7632); and BT Financing, Inc. (6671). The location of the Debtors' corporate headquarters is 14567 North Outer Forty, Suite 500, Chesterfield, Missouri 63017.

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I. PRELIMINARY STATEMENT[2]

1. The dramatic decline in oil prices and drilling rig counts in the United States resulted in the Debtors' revenues decreasing by 62% in the first quarter of 2015 as compared to the fourth quarter of 2014. The Debtors' financial woes were compounded by an updated inventory valuation performed by the ABL Facility Agent, which significantly reduced the existing valuation of the Debtors' inventory and resulted in a substantial decline in borrowing base and overadvance under the ABL Facility. Defaults under the ABL Facility and Term Loan Facility soon followed.

2. Given the lack of liquidity available to the Debtors, by the end of March, the Debtors were facing the possibility of being unable to pay their workforce and shuttering their plant, and a very real prospect of filing for protection under chapter 7. As this Court is aware, the Debtors, ABL Facility Lenders, Term Loan Lenders, and the Sponsor spent months negotiating a restructuring of the Debtors and their obligations, during which the ABL Facility Lenders continued to fund the Debtors, subject to certain guarantees provided by Access and the priming liens consented to by the Term Loan Lenders. In an effort to maintain the Debtors so negotiations could continue, certain Term Loan Lenders provided a $6.2 million Bridge Facility.

3. These negotiations were hard-fought and ultimately the Debtors again found themselves in a precarious situation, having nearly exhausted the liquidity provided by the Bridge Facility. To avoid a liquidation and further negative impact on the business which subsisted on limited liquidity for months, on June 9, 2015, the Debtors entered into a Plan Support Agreement with the ABL Facility Lenders, Term Loan Lenders, and the Sponsor, as well as other parties, and promptly commenced these Chapter 11 Cases to pursue a restructuring

[2] Capitalized terms not defined in this Preliminary Statement have the meanings ascribed to them elsewhere in this Memorandum.

under the chapter 11 plan outlined in the Plan Support Agreement (as amended, the "**Prior Plan**").

4. On November 9, 2015, the Bankruptcy Court denied confirmation of the Prior Plan, following which the Debtors and their stakeholders immediately engaged in negotiations over an alternative plan that would allow the Debtors to preserve their going concern value and deliver value to creditors within their capital structure consistent with the Court's November 9 ruling. The Debtors, the Term Loan Lenders, the ABL Facility Lenders, the Sponsor, and the Creditors Committee (collectively, the "**Plan Settlement Parties**") commenced settlement negotiations, which were rigorous, hard-fought, arm's-length, and conducted in good faith. Ultimately, on December 7, 2015, the parties reached agreement on the terms of a consensual chapter 11 plan with the goal that such plan would go effective no later than January 31, 2016 (the "**Plan Settlement**"). These terms, with certain agreed upon modifications, are embodied in the Plan presently before the Bankruptcy Court. Among other things, the revised Plan accounts for the valuation range adopted by the Bankruptcy Court and provides general unsecured creditors with a certain, cash recovery that is higher than originally contemplated under the Prior Plan. In exchange, the Creditors Committee has agreed to support the Plan, including the settlement and releases of causes of action the Debtors have, or which might by alleged, against the Released Parties, who are, generally speaking, the ABL Facility Lenders, Term Loan Lenders, the lending facility agents, the Sponsor, the Debtors' directors and officers, the Creditors Committee and certain of the foregoing entities' related parties.

5. The Debtors believe that confirming the Plan is in the best interest of all creditors and interested parties, and this is buttressed by the support for the Plan from the Term Loan Lenders, the ABL Facility Lenders, the Sponsor, and the Creditors Committee, as well as the

overwhelming acceptance of the Plan by parties voting on the Plan. On the other hand, absent confirmation of the Plan, the Debtors' only possible alternatives will be a sale under section 363 of the Bankruptcy Code or conversion to chapter 7, neither of which are likely to yield a recovery to unsecured creditors, regardless of their priority. These undesirable alternatives are especially threatening—and very real—given the lack of any financing available to the Debtors after January 29, 2016.

II. INTRODUCTION

6. On June 9, 2015 (the "**Petition Date**"), Boomerang Tube, LLC ("**Boomerang**") and its affiliates, the debtors and debtors in possession in the above-captioned cases (the "**Debtors**") each filed voluntary petitions (collectively, the "**Chapter 11 Cases**") for relief under chapter 11 of the Bankruptcy Code. Before the Court is the *Debtors' Second Amended Joint Chapter 11 Plan*, dated December 29, 2015 [D.I. 766] (as the same may be further amended, supplemented or modified, the "**Plan**").[3] The Combined Hearing is scheduled for January 27, 2016, at 10:30 a.m. (prevailing Eastern Time). In connection with the Combined Hearing, the Debtors submit this Memorandum of Law (the "**Memorandum**") in support of entry of the Confirmation Order. This Memorandum addresses the requirements set forth in the Bankruptcy Code for confirmation of the Plan and responds to the limited objections of the U.S. Trustee [Docket No. 821] and SB Boomerang Tubular, LLC (referred to as SBI in the Plan) [Docket No. 825]. In support of this Memorandum and confirmation of the Plan, the Debtors incorporate by

[3] Capitalized terms used but not otherwise defined herein shall have the meanings assigned to such terms in the Plan or Disclosure Statement, as applicable. The rules of interpretation set forth in Article I of the Plan are fully incorporated herein. In addition, in accordance with Article I of the Plan, any term used in the Plan that is not defined in the Plan, but that is used in the Bankruptcy Code or the Bankruptcy Rules, has the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable.

reference (i) the *Declaration of Jung W. Song on Behalf of Donlin, Recano & Company, Inc. Regarding Voting and Tabulation of Ballots Accepting and Rejecting Debtors' Second Amended Joint Chapter 11 Plan* [D.I. 837] (the "**Voting Declaration**") and (ii) the *Declaration of Kevin Nystrom In Support of Confirmation of Debtors' Second Amended Joint Chapter 11 Plan* [D.I. 840] (the "**Confirmation Declaration**" and, collectively with the First Day Declaration and the Voting Declaration, the "**Declarations**").

III. OVERVIEW OF THE PLAN[4]

7. Although proposed jointly for administrative purposes, the Plan constitutes a separate Plan for each Debtor for the resolution of outstanding Claims against and Interests in each Debtor pursuant to the Bankruptcy Code. Each Debtor is a proponent of the Plan pursuant to section 1129 of the Bankruptcy Code. The Plan does not contemplate substantive consolidation of any of the Debtors.

8. Article III sets forth the following Classes of Claims which shall be deemed to apply separately with respect to each Plan proposed by each Debtor, as applicable:

- **Class 1 (Other Secured Claims)** consists of any Secured Claim other than (a) an ABL Facility Claim; (b) a Term Loan Facility Claim; (c) a DIP Facility Claim; (d) an SBI Secured Claim; or (e) an SBI Lender Secured Claim.
- **Class 2 (Other Priority Claims)** consists of any Claim entitled to priority in right of payment under section 507(a) of the Bankruptcy Code, other than an Administrative Claim or a Priority Tax Claim.
- **Class 3 (ABL Facility Claims)** consists of any Claim arising under, derived from, or based upon the ABL Facility Documents that has not been repaid on a final and indefeasible basis as of the Effective Date.
- **Class 4 (Term Loan Facility Claims)** consists of any Claim arising under, derived from, or based upon the Term Loan Facility Documents.

[4] The following is a brief overview of the material provisions of the Plan and is qualified in its entirety by reference to the full text of the Plan.

- **Class 5 (Heat Treat Line Secured Claims)** consists of SBI Secured Claims and SBI Lender Secured Claims against Boomerang, and consists of a separate sub-Class with respect to each holder of an Allowed Class 5 Claim.

- **Class 6 (General Unsecured Claims)** consists of any Claim other than an Administrative Claim, a Professional Claim, an Other Secured Claim, a Priority Tax Claim, an ABL Facility Claim, a Term Loan Facility Claim, a DIP Facility Claim, an SBI Lender Secured Claim, an SBI Secured Claim, or a Section 510(b) Claim against any Debtor.

- **Class 7 (Intercompany Claims)** consists of any Claim held by a Debtor against another Debtor.

- **Class 8 (Intercompany Interests)** consists of an Interest held by a Debtor with respect to any other Debtor.

- **Class 9 (Boomerang Preferred Units)** consists of all Boomerang Class A, Class B, and Class C Preferred Units.

- **Class 10 (Boomerang Common Units)** consists of all common units issued by Boomerang.

- **Class 11 (Boomerang Other Equity Securities)** consists of all vested and unvested options, unexercised warrants, or other rights to acquire Common Units or other equity interests issued or granted by Boomerang, whether or not in-the-money, as well as any other outstanding equity interests issued by Boomerang.

- **Class 12 (Section 510(b) Claims)** consists of any Claim against the Debtors arising from rescission of a purchase or sale of a security of the Debtors or an Affiliate of the Debtors, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 of the Bankruptcy Code on account of such a Claim.

9. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, DIP Facility Claims, Professional Claims, and Priority Tax Claims have not been classified and thus are excluded from the Classes of Claims set forth in Article III of the Plan.

10. As more fully described in the Plan, the Plan provides for the discharge of Claims through: (i) the issuance of New Holdco Common Stock; (ii) the issuance of the Subordinated Notes; (iii) the reinstatement of certain Claims and Interests; and (iv) the payment of Cash. The

Debtors will consummate the Transaction, pursuant to which the Debtors will be recapitalized and restructured, on the Effective Date of the Plan.

IV. PLAN SOLICITATION AND VOTING

11. On December 29, 2015, following a preliminary hearing on the adequacy of the *Amended Disclosure Statement for Debtors' Second Amended Joint Chapter 11 Plan*, dated December 29, 2015 [D.I. 767] (the "**Disclosure Statement**"), the Bankruptcy Court entered an Order (the "**Solicitation Procedures Order**") [D.I. 764], pursuant to which the Bankruptcy Court, among other things, (i) approved the Disclosure Statement on a preliminary basis pursuant to section 1125 of the Bankruptcy Code, (ii) established procedures for the solicitation and tabulation of votes to accept or reject the Plan, and (iii) scheduled a combined hearing on confirmation of the Plan and the adequacy of the Disclosure Statement (the "**Combined Hearing**") and established related deadlines. In accordance with the Solicitation Procedures Order, on December 31, 2015 (the "**Solicitation Date**"), the Debtors commenced the solicitation of votes to accept or reject the Plan from the holders of Claims in Classes 3, 4, 5, and 6 (the "**Voting Classes**") who held such Claims or Interests as of December 28, 2015 (the "**Voting Record Date**"). Specifically, the Debtors caused Donlin, Recano & Company, Inc., the claims and noticing agent in these Chapter 11 Cases ("**Donlin Recano**"), to transmit copies of (i) the Disclosure Statement and all exhibits thereto, including the Plan and all exhibits thereto; (ii) the procedures approved by the Bankruptcy Court for soliciting acceptances of the Plan; (iii) a notice detailing certain information regarding the Combined Hearing and deadline to object to the Plan (the "**Combined Hearing Notice**"); (iv) a cover letter from the Debtors (a) describing the contents of the Solicitation Package (as defined below) and (b) urging the holders of Claims in each of the Voting Classes to vote to accept the Plan; (v) the appropriate ballot and applicable

voting instructions; (vi) with respect to Class 6 only, the Creditors Committee Letter; and (vii) any supplemental documents the Debtors filed with the Bankruptcy Court (collectively, the "**Solicitation Packages**"). On January 6, 2016, John Burlacu of Donlin Recano executed an affidavit of service [D.I. 788] (the "**Solicitation Affidavit**") regarding the mailing of the Combined Hearing Notice and the Solicitation Packages in accordance with the terms of the Solicitation Procedures Order.

12. As provided for in the Plan and the Solicitation Procedures Order, the Debtors did not solicit votes on the Plan from the holders of (i) Administrative Claims, DIP Facility Claims, Professional Claims, or Priority Tax Claims (each in their capacity as such), which are Unclassified under the Plan and therefore are not entitled to vote on the Plan; (ii) Claims in Classes 1, 2, 7, or 8, which are Unimpaired and therefore are conclusively presumed to accept the Plan; or (iii) Claims in Classes 9, 10, 11, or 12, which are Impaired under the Plan, are entitled to no recovery under the Plan, and are therefore deemed to reject the Plan.

13. The Plan has received overwhelming support from creditors that have voted. All holders of claims in Class 3—holding approximately $3.7 million of claims against each Debtor—and Class 4—holding approximately $204 million of claims against each Debtor—voted on the Plan, and they voted unanimously to accept the Plan. Creditors in Class 6 holding over $25.8 million in voting amount of General Unsecured Claims voted on the Plan, and of those creditors, holders of 99% in dollar amount of claims (approximately $25.6 Million in voting amount) voted to accept the Plan and, in total, only 5 individual creditors voted to reject the Plan.[5]

[5] Specifically, 71 out of 74 creditors at Boomerang, all 7 creditors of BT Financing, Inc. and 7 of 8 creditors of BTCSP, LLC who timely and properly submitted ballots voted to accept the Plan.

V. THE PLAN SHOULD BE CONFIRMED BECAUSE IT COMPLIES WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE

14. Section 1129 of the Bankruptcy Code governs confirmation of a chapter 11 plan and sets forth the requirements that must be satisfied in order for a plan to be confirmed. The Debtors bear the burden of establishing that all elements necessary for confirmation of the Plan under section 1129(a) of the Bankruptcy Code have been met by a preponderance of the evidence. *See In re Tribune Co.*, 464 B.R. 126, 151-52 (Bankr. D. Del.) *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011) ("The plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a) . . . ." (internal quotation marks omitted)); *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) (stating that the bankruptcy court must find that the debtor has satisfied the provisions of section 1129 by a preponderance of the evidence); *In re Alta+Cast, LLC*, Case No. 02-12082 (MFW), 2004 Bankr. LEXIS 219, *6 (Bankr. D. Del. Mar. 2, 2004) (same). This Memorandum and the Declarations, together with the evidence to be adduced at the Combined Hearing, demonstrate that, by a preponderance of the evidence, the Plan complies with the requirements of section 1129(a) of the Bankruptcy Code with respect to all Classes of Claims or Interests. Accordingly, the Plan should be confirmed.

1) The Plan Complies with All Applicable Provisions of the Bankruptcy Code - 11 U.S.C. § 1129(a)(1)

15. Section 1129(a)(1) of the Bankruptcy Code provides that a court may confirm a chapter 11 plan only if "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1).[6] A principal objective of section 1129(a)(1) is to assure

[6] The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123, which govern the classification of claims under the plan and the contents of the plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S.

compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan. Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of the compliance with sections 1122 and 1123 of the Bankruptcy Code. As set forth below, the Plan complies with these sections of the Bankruptcy Code.

a. The Classification of Claims and Interests in the Plan Satisfies the Requirements of Section 1122 of the Bankruptcy Code

16. Section 1122(a) of the Bankruptcy Code provides that the claims or interests within a given class must be "substantially similar." 11 U.S.C. § 1122(a). Section 1122(a), however, does not mandate that all "substantially similar" claims be classified together. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (noting that section 1122 permits the grouping of similar claims in different classes); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del. 2004) (noting that "section 1122 . . . provides that claims that are not 'substantially similar' may not be placed in the same class; it does not expressly prohibit placing 'substantially similar' claims in separate classes").

17. Courts have generally permitted the separate classification of substantially similar claims so long as the claims were not classified to "gerrymander" an accepting impaired class. *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991) ("Thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."); *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993). While gerrymandering

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Rep. No. 95-989, at 126 (1978); *see also In re Century Glove, Inc.*, Civ. A. No. 90-400-SLR, 1993 WL 239489, at *6 (D. Del. Feb. 10, 1993); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 446-47 (Bankr. D.N.J. 1990); *In re Elsinore Shore Assocs.*, 91 B.R. 238, 256 (Bankr. D.N.J. 1988).

claims in order to create an impaired accepting class is not permissible, section 1122 provides debtors with a great degree of flexibility in classifying claims and interests for legitimate business purposes, and courts have broad discretion in approving a proponent's classification scheme and to properly consider the specific facts of each case before rendering a decision. *See Jersey City Med. Ctr.*, 817 F.2d at 1060-61 ("Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case.").

18. As outlined above, Article III of the Plan separately classifies twelve (12) Classes of Claims against and Interests in each Debtor, as applicable, that are more fully described in the Plan and the Disclosure Statement. In accordance with section 1122(a) of the Bankruptcy Code, each Class of Claims against and Interests in each Debtor contains only Claims or Interests that are substantially similar to the other Claims or Interests within that Class. In addition, valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims against and Interests in each Debtor under the Plan. These reasons include the different status, as secured or unsecured creditors, the different collateral and priority in that collateral for secured creditors, the different statutory priorities under the Bankruptcy Code, as well as the different governance and distribution priorities among the Debtors' various equity Interests. Based upon the foregoing, the Debtors submit that the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

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

19. The Plan also complies with section 1123(a) of the Bankruptcy Code, which sets forth seven requirements with which every plan under chapter 11 of the Bankruptcy Code must

comply. 11 U.S.C. § 1123(a). As demonstrated below, the Plan complies with each such requirement:

- Section 1123(a)(1). As discussed above, Article III of the Plan properly designates all Claims and Interests that require classification, as required by section 1123(a)(1) of the Bankruptcy Code. Pursuant to section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, DIP Facility Claims, Professional Claims, and Priority Tax Claims are not required to be designated into Classes.

- Section 1123(a)(2). In accordance with section 1123(a)(2) of the Bankruptcy Code, Article III of the Plan specifies each Class of Claims or Interests that is Unimpaired under the Plan. In particular, Article III of the Plan provides that Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), Class 7 (Intercompany Claims), and Class 8 (Intercompany Interests) are Unimpaired under the Plan.

- Section 1123(a)(3). In accordance with 1123(a)(3) of the Bankruptcy Code, Article III of the Plan specifies the treatment of each Class of Claims and each Class of Interests that is Impaired under the Plan, which are Class 3 (ABL Facility Claims), Class 4 (Term Loan Facility Claims), Class 5 (Heat Treat Line Secured Claims), Class 6 (General Unsecured Claims), Class 9 (Boomerang Preferred Units), Class 10 (Boomerang Common Units), Class 11 (Boomerang Other Equity Securities), and Class 12 (Section 510(b) Claims).

- Section 1123(a)(4). In accordance with section 1123(a)(4) of the Bankruptcy Code, Article III of the Plan provides the same treatment for each Claim or Interest in a given Class unless the holder of a Claim or Interest agrees to less favorable treatment.

- Section 1123(a)(5). In accordance with section 1123(a)(5) of the Bankruptcy Code, Articles II and IV of the Plan provide adequate means for the Plan's implementation. For example, the Plan provides for the discharge of Claims through (i) the issuance of New Holdco Common Stock and New Opco Common Units; (ii) the issuance of the Subordinated Notes, (iii) the reinstatement of certain Claims and Interests, and (iv) the payment of Cash. Article IV also provides for (i) the execution of the Exit ABL Facility Loan Documents, (ii) the execution of the Exit Term Facility Loan Documents, and (iii) the vesting of all property in each Debtor's Estate (other than the SBI Heat Treat Line Collateral, if abandoned pursuant to Section 3.2(e) of the Plan), all Causes of Action (other than Causes of Action expressly released under the Plan), *provided, however,* that the funds in the GUC Consideration Escrow Account and the Professional Fee Escrow Account shall not be property of the Estates or the Reorganized Debtors. Rather, Article IV provides that, following the occurrence of the Effective Date, the funds in the GUC Consideration Escrow Account shall be distributed to the holders of Allowed General Unsecured Claims and the funds in the Professional Fee Escrow Account shall be distributed to the holders of Professional Claims in accordance with the provisions of the Plan. Accordingly, the Plan satisfies the requirements set forth in section 1123(a)(5) of the Bankruptcy Code.

- Section 1123(a)(6). Under Article IV of the Plan, the New Holdco Certificate of Incorporation, the New Holdco Bylaws, and the New Opco Governance Documents shall be consistent with the provisions of the Plan and the Bankruptcy Code. The New Holdco Documents shall, among other things (i) authorize the issuance of the New Holdco Common Stock, and (ii) pursuant to and only to the extent required by section 1123(a)(6) of the Bankruptcy Code, include a provision prohibiting the issuance of non-voting Equity Securities. The New Opco Governance Documents shall, among other things (i) authorize the issuance of the New Opco Common Units and the Subordinated Notes, and (ii) pursuant to and only to the extent required by section 1123(a)(6) of the Bankruptcy Code, include a provision prohibiting the issuance of non-voting Equity Securities. Therefore, section 1123(a)(6) of the Bankruptcy Code is satisfied.

- Section 1123(a)(7). Section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). The Plan satisfies the requirements set forth in 1123(a)(7) of the Bankruptcy Code as the directors and officers of the Reorganized Debtors will be determined by the Term Loan Lenders, who will be the owners of the Reorganized Debtors following the Effective Date. The Plan provides that the members of the Debtors' boards of directors shall be deemed to have resigned as of the Effective Date. On the Effective Date, the New Board will consist of seven members, (i) one of whom will be New Holdco's chief executive officer (once appointed), (ii) four of whom will be appointed initially by the Majority Holder, (iii) one of whom will be appointed initially by the second largest holder (including any affiliated holder or holders under common control with respect to such holder) of New Holdco Common Stock on the Effective Date, and (iv) one of whom will be appointed initially by the holders of a majority of the New Holdco Common Stock on the Effective Date other than the two largest holders (including, with respect to each such holder, any affiliated holder or holders under common control with respect to such holder) of the New Holdco Common Stock. Article IV of the Plan provides that the members of the board of directors of any subsidiary of the Reorganized Debtors shall be satisfactory to the Majority Term Loan Lenders. On the Effective Date, the existing officers of the Debtors shall serve in their current capacities for the Reorganized Debtors. The members of the New Board have been identified in the Plan Supplement.

c. The Plan Complies With the Requirements of Section 1123(b) of the Bankruptcy Code

20. Section 1123(b)(6) of the Bankruptcy Code provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). To that end, section 1123(b) of the Bankruptcy Code enumerates various discretionary provisions that may be included in a chapter 11 plan.

Here, the Plan employs various provisions in accordance with the discretionary authority under section 1123(b) of the Bankruptcy Code.

(i) The Plan Leaves Certain Classes Impaired and Certain Classes Unimpaired.

21. As set forth in Article III of the Plan, the Plan leaves certain Classes of Claims Unimpaired and Impairs the remaining Classes of Claims and Interests. Specifically, Classes 1, 2, 7, and 8 are Unimpaired, and Classes 3, 4, 5, 6, 9, 10, 11, and 12 are Impaired.

(ii) The Plan Provides for the Assumption or Rejection of Executory Contracts and Unexpired Leases.

22. The Plan provides for the rejection of all of the Debtors' Executory Contracts and Unexpired Leases on the Effective Date ***unless*** such Executory Contract or Unexpired Lease: (i) was assumed or rejected previously by the Debtors; (ii) previously expired or terminated pursuant to its own terms; (iii) is the subject of a motion to assume or reject filed on or before the Effective Date; or (iv) is identified as an Executory Contract or Unexpired Lease to be assumed pursuant to the Plan Supplement before the Effective Date.[7] Specifically, the Plan provides that entry of the Confirmation Order by the Bankruptcy Court shall constitute an order approving the assumptions or rejections of such Executory Contracts or Unexpired Leases as set forth in the Plan, all pursuant to sections 365(a) and 1123 of the Bankruptcy Code. *See* 11 U.S.C. § 365(a); 11 U.S.C. § 1123(b)(2). Section 365(a) provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a).

23. The decision to assume or reject an executory contract is a matter within the business judgment of the debtor. *See In re Pinnacle Brands, Inc.*, 259 B.R. 46, 53 (Bankr. D. Del. 2001) ("The Debtors' decision to assume or reject an executory contract is based upon its

[7] *See* Plan § 5.1 (Assumption of Executory Contracts and Unexpired Leases).

business judgment."). The burden or hardship on the counter-party to a rejected contract is not a factor to be considered. *Borman's Inc. v. Allied Supermarkets,* 706 F.2d 187, 189 (6th Cir. 1983), *cert. denied*, 464 U.S. 908 (1983). If the Debtors determine to assume an executory contract, they must cure defaults and provide adequate assurance of future performance. 11 U.S.C. § 365(b)(1).

24. Here, the Debtors' determination to assume, which may include to assume as amended, or to reject Executory Contracts and Unexpired Leases is a valid exercise of their sound business judgment. In light of the nature and scope of the Debtors' post-emergence business and operations, the Debtors respectfully submit that their determinations as to the assumption or rejection of Executory Contracts and Unexpired Leases embodied in the Plan are appropriate. The Debtors have determined to assume those contracts that will benefit their business on a go forward basis, and they have determined to reject those contracts that are unnecessary or unduly burdensome. Assumption and rejection of Executory Contracts and Unexpired Leases as proposed under the Plan will aid in the implementation of the Plan and is in the best interests of the Debtors, their Estates, and other parties in interest in the Chapter 11 Cases. Finally, the Debtors have and will demonstrate that they will promptly pay Cures and provide adequate assurance of future performance. As a result, the proposed assumptions and rejections provided for in the Plan should be approved in connection with confirmation of the Plan.

(iii) <u>The Plan Contains Procedures for the Allowance and Disallowance of Claims and Interests and Distributions to Holders of Any Such Allowed Claims or Allowed Interests.</u>

25. The provisions of Articles VI and VII of the Plan regarding the Distributions under the Plan and the resolution of Disputed Claims and Interests should be approved in all

respects. Article VI of the Plan contains provisions that will govern the timing and mechanics of distributions under the Plan. Included in those provisions is a mechanism to establish reserves for disputed claims (including a sub-class within the GUC Consideration Escrow Account) that will expedite distributions while protecting parties whose claims may remain subject to dispute. Article VII of the Plan sets forth procedures for resolving Disputed Claims and Interests. From and after the Effective Date, the Reorganized Debtors, subject to Section 7.5 of the Plan, will be permitted to resolve, compromise, or settle the amount of any Claims asserted in these Chapter 11 Cases or to object to any such Claim without the need for further Bankruptcy Court order. In addition, as discussed more fully in Section 7.5 of the Plan, the Ombudsman will have the right and duty to oversee various issues relating to General Unsecured Claims, including, among other things, the right and duty to monitor the prosecution and resolution of Disputed General Unsecured Claims and to resolve any disputes concerning Distributions to holders of Allowed General Unsecured Claims.

(iv) The Plan Provides for the Bankruptcy Court to Retain Jurisdiction Over Certain Matters.

26. Section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the] Bankruptcy Code." 11 U.S.C. § 1123(b)(6). In that regard, Article XI of the Plan provides that, among other things, the Bankruptcy Court shall retain exclusive jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code. This provision is appropriate because the Bankruptcy Court otherwise has jurisdiction over all of these matters during the pendency of the Chapter 11 Cases, and case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation. *See Gruen Mktg. Corp. v. Asia Commercial Co. (In re Jewelcor*

Inc.), 150 B.R. 580, 582 (Bankr. M.D. Pa. 1992) ("There is no doubt that the bankruptcy court's jurisdiction continues post-confirmation to protect its confirmation decree, to prevent interference with the execution of the plan and to aid otherwise in its operation." (internal quotation marks, citation omitted)).

(v) The Plan Contains Certain Releases, Exculpation, and an Injunction That Are Integral Components of the Plan.[8]

27. Article VIII of the Plan contains provisions that provide for the release of claims by the Debtors and their estates of claims against the Released Parties (Section 8.2) (the "**Debtor Release**"), a limited release by certain third-parties of claims against the Released Parties (Section 8.3) (the "**Third Party Release**"), and an exculpation provision in favor of the Exculpated Parties (Section 8.4). As discussed further below, each of these provisions is permissible under section 1123(b) and appropriate in the Chapter 11 Cases.

The Proposed Debtor Release Is Appropriate

28. Background to the Plan and Release Provisions. The Plan is the result of an extensive, almost year-long process geared towards preserving the going-concern value of the Debtors. The process initially commenced several months prior to the Petition Date and was founded upon key contributions and concessions from the Term Loan Lenders, the ABL Facility Lenders, and the Sponsor, that were embodied in the Prior Plan, and these parties' commitment and support for the Debtors as they pursued confirmation of the Prior Plan. As discussed above, confirmation of the Prior Plan was denied. Knowing that the Debtors' only viable alternatives absent confirmation of a chapter 11 plan would be a sale pursuant to section 363 of the Bankruptcy Code or conversion to chapter 7, neither of which would be expected to yield a recovery to unsecured creditors, the Plan Settlement Parties worked together to reach a

[8] *See* Plan §§ 8.2, 8.3, 8.4 & 8.5.

settlement that would avoid these scenarios and thereby preserve and maximize the value of the Debtors' estates, while distributing the value that exists in the Debtors as a going concern. Given the circumstances of the Chapter 11 Cases, the Plan Settlement Parties negotiated the terms of a revised plan on a tight timeline with limited funding.

29. On December 7, 2015, the Plan Settlement Parties reached a global settlement that is incorporated into the Plan. While preserving much of the structure of the proposed reorganization of the Debtors under the Prior Plan, some of the key differences between this Plan and the Prior Plan include: (i) a $500,000.00 cash contribution to the Reorganized Debtors by the Sponsor, conditioned upon the occurrence of the Effective Date and to be used solely for employee-related purposes; (ii) an increased Exit Term Facility being provided by the Term Loan Lenders to the Reorganized Debtors; (iii) an Exit ABL Facility being provided by the Term Loan Lenders; and (iv) critical to the support of the Creditors Committee, providing ***$2.25 million of cash*** to fund the GUC Consideration. Notably, the Sponsor's willingness to provide a cash contribution to the Reorganized Debtors facilitated the decision by the Term Loan Lenders to support the ***amount*** and ***form*** of consideration being provided to General Unsecured Creditors. As a result of these concessions, each holder of an Allowed General Unsecured Claim, who would otherwise have only been entitled to equity in the Reorganized Debtors under a chapter 11 plan, will receive its pro rata share of $2.25 million in cash. Holders of General Unsecured Claims are receiving a further benefit in that the Sponsor and Mr. Kanthamneni, an officer of the Debtors, are expressly waiving claims and the right to participate in distributions of the GUC Consideration. Finally, the Plan Settlement and the cash GUC Consideration allow parties to avoid litigation on what, if any, portion of the equity of the Reorganized Debtors should go to holders of General Unsecured Claims, thereby saving the Debtors and their estates

the expense of further litigation, and providing holders of General Unsecured Claims a sooner and more certain recovery.

30. Based on the Debtors' liquidation analysis attached to the Disclosure Statement as Exhibit E, in a chapter 7 liquidation, only the ABL Facility Lenders and Term Loan Lenders would be expected to receive a recovery, each of which would be paid less than par and the Term Loan Lenders would receive less than 10% on account of their claims. Additionally, the various priority claim holders, critical vendors, customers, contract counterparties and employees who have received (or can expect to receive) a recovery on their claims in these cases would receive nothing. In sharp contrast, due to the collective efforts of the Plan Settlement Parties, pursuant to the Plan Settlement, creditors will receive a significantly higher recovery than they would otherwise receive in the Chapter 11 Cases.

31. ***Notably, and important in light of the Creditors Committee's opposition to the Debtor Release in the Prior Plan, no party is objecting to the Debtor Release in the Plan***.

32. Applicable Legal Standard. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a Plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Such a release is proper if it "is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.),* 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) (finding that court may approve a release after determining that it is fair); *In re Tribune Co.*, 464 B.R. 126, 186 (Bankr. D. Del. 2011) (same). In evaluating the propriety of a debtor's release of the debtor's and estate's causes of action, courts must "[weigh] the equities of the particular case after a fact-specific review." *In re Indianapolis Downs, LLC,* 486

B.R. 286, 303 (Bankr. D. Del. 2013). In conducting their analysis, courts often consider the following five factors (referred to herein as the *Master Mortgage* factors):

> 1. An identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
>
> 2. Substantial contribution by the non-debtor of assets to the reorganization;
>
> 3. The essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;
>
> 4. An agreement by a substantial majority of creditors to support the injunction, specifically if the impaired class of classes "overwhelmingly" votes to accept the plan; and
>
> 5. A provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

Indianapolis Downs, 486 B.R. at 303; *see also Wash. Mut.*, 442 B.R. at 346. "These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness." *Tribune*, 464 B.R. at 186; *Wash. Mut.*, 442 B.R. at 346. As discussed below, the equities of this case, including the *Master Mortgage* factors, weigh in favor of granting the Debtor Release.

33. There is an identity of interest with the Released Parties. The "identity of interest" factor is satisfied where the Debtors have an obligation to indemnify the party receiving the release. *See Indianapolis Downs*, 486 B.R. at 303. Many of the Released Parties are entitled to indemnification from the Debtors either under the Debtors' governance documents, an applicable loan agreement, or the Management Agreement

34. In addition, courts in this district have found that a common goal of confirming a plan and implementing a restructuring of a debtor establishes an identity of interest. *See, e.g.*,

Tribune, 464 B.R. at 187; *In re Zenith Elecs Corp.*, 241 B.R. 92, 110-11 (Bankr. D. Del. 1999). Given the extensive efforts of the Plan Settlement Parties and their related parties (who comprise the Released Parties under the Plan) to restructure the Debtors, as detailed above, the Released Parties have an identity of interest with the Debtors for purposes of the *Master Mortgage* factors.

35. Substantial Contribution. Here, the Released Parties' consideration includes the following tangible economic benefits: (i) pre-petition, DIP, and exit funding provided by the lender-Released Parties, including Access Tubular Lender, LLC, a Sponsor entity, (ii) the pre-petition Limited Sponsor Guarantee provided by Access Tubulars, LLC, a Sponsor entity, in the amount of $500,000, (iii) the approximately $2.3 million prepetition priming lien that the Term Loan Agent extended to the ABL Facility Lender, (iv) the $2.25 million cash GUC Consideration being paid by the Debtors to holders of General Unsecured Claims, which has been consented to by the Term Loan Lenders (who will be the owners of the Debtors under the Plan following the Effective Date) as part of the Plan Settlement, (v) the $500,000 the Sponsor has agreed to contribute to the Reorganized Debtors for employee-related benefits, which facilitated the amount and form of the GUC Consideration, and (vi) the waiver of General Unsecured Claims by the Sponsor and Mr. Kanthamneni. Moreover, the Debtors and their estates have also received intangible benefits from the Released Parties, including the stewardship over the Debtors by the D&Os in the period spanning the restructuring negotiations and chapter 11 cases, the two Access Tubulars, LLC-proposed recapitalizations that served as a platform from which the Debtors were able to negotiate their ultimate restructuring, an overall willingness to work together by the Released Parties to preserve the value of the Debtors and avoid a liquidation, including by continuing to negotiate for a chapter 11 plan of ***reorganization***

after denial of confirmation of the Prior Plan, and the Creditors Committee's efforts to ensure a recovery to holders of General Unsecured Claims.

36. As a result of the collective efforts of the Plan Settlement Parties, holders of Allowed General Unsecured Claims, who otherwise would have only been entitled to equity (with an uncertain value and the risks attendant to being an equityholder in any enterprise), will now, collectively, receive a certain, cash recovery in the amount of $2.25 million. The contributions and concessions that lead to this result were made as part of a unitary settlement negotiated by the Plan Settlement Parties. The release of the Released Parties pursuant to the Plan is an integral component of this resolution, is critical to its success, and cannot be parsed out party by party. For instance, the Term Loan Lenders were willing to agree to the form and amount of the GUC Consideration only after the Sponsor committed to fund $500,000 to satisfy employee-related obligations of the Debtors; absent that, the consideration to holders of General Unsecured Claims that the Term Loan Lenders were willing to support may not have been sufficient to reach a settlement. Further, following the November 9, 2015 ruling on confirmation of the Prior Plan, the DIP ABL Facility Lenders and DIP Term Facility Lenders entered into a number of forbearance agreements and consented to the usage of cash collateral in during those forbearance periods, which allowed the Debtors to continue operations and allowed the Debtors and Creditors Committee to negotiate the Plan Settlement with the other Plan Settlement Parties and pursue its implementation. Also, while not all directors and officers are directly contributing value or releasing claims, the lender-Released Parties and the Sponsor have made it clear in negotiations that the inclusion of those parties in the Debtor Release was tied to their willingness to participate and that the consideration offered by the lender-Released Parties and the Sponsor was, in part, to secure the release of the director and officer parties, many of which will continue

with the Debtors post-Effective Date and all of which could assert indemnity claims against the Debtors.

37. Notably, with the cash GUC Consideration that has been made possible by the Sponsor's and the lender-Released Parties' contributions and concessions, the Creditors Committee now supports the Plan. This support is especially important in this case because the Plan represents the Debtors' best, and likely last and only, chance to effectuate a restructuring under a chapter 11 plan and thereby maximize value for creditors. Absent the efforts, contributions, and concessions of the Released Parties, this result would have been simply impossible.

38. Finally, in *Spansion*, Judge Carey noted that "active[e] involve[ment] in negotiating and formulating the Plan" serves as a basis for providing a release from the debtor. *Spansion*, 426 B.R. at 143. Here the Released Parties have all been actively involved in and integral to the result that is the Plan Settlement and the Plan.

39. Necessary to the Restructuring. The Debtor Release is a central component of the Plan, pursuant to which the Debtors will be restructured. The Plan is a heavily-negotiated "package deal," and the various provisions are interdependent on each other. Importantly, the Plan is also the only viable proposal for a restructuring of the Debtors. The Debtor Release is a key component of the Plan and, therefore, necessary to and an integral part of the restructuring proposed under the Plan. *See Zenith Elecs.*, 241 B.R. at 111.

40. Moreover, many of the Released Parties will have key roles in the Reorganized Debtor, including as lenders under the Exit Term Facility and Exit ABL Facility, shareholders of New Holdco, and officers of the Debtors. This Court has recognized that elimination of post-emergence distractions of such stakeholders demonstrates a necessity to the restructuring. *Zenith*

Elecs., 241 B.R. at 111. Further, many of the Released Parties are entitled to indemnification from the Debtors, and indemnifying them for (even baseless) litigation will frustrate the Reorganized Debtors' efforts to emerge from the Chapter 11 Cases. Eliminating these disruptions and financial burdens are key reasons for implementing the Debtor Release. Finally, if the Debtor Release is not approved, the Plan Settlement will not be implemented and the Debtors will likely either sell their assets under section 363 of the Bankruptcy Code or convert to the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code—likely resulting in no recovery to unsecured creditors, regardless of priority.

41. Creditor Support for Plan with Releases. Perhaps the most objective factor considered by courts when assessing the fairness of a release is "the overwhelming acceptance of the plan and release by creditors and interest holders." *Wash. Mut.*, 442 B.R. at 346 (citing *Zenith Elecs.*, 241 B.R. at 110). This factor strongly supports the Debtor Release under the current Plan. All impaired Classes of claims were entitled to vote on the Plan. The ABL Facility Lender and Term Loan Lenders all voted and unanimously accepted the Plan. With respect to General Unsecured Claims, holders who voted also overwhelmingly supported the Plan. Indeed, 99% in dollar amount of claims, representing over $25.6 million of claims, voted to accept the Plan. Only 5 holders voted to reject the Plan (none of which filed objections to the Debtor Release). Finally, the only other class of claims that is impaired under the Plan is Class 5. While no holders of claims in Class 5 voted (and the Debtors have requested that Class 5 be deemed to accept the Plan), SBI filed an objection to the Plan that ***did not*** contain an objection to the Debtor Release.

42. Substantial Payments to Affected Creditors. Admittedly, the Plan provides for General Unsecured Creditors to receive substantially less than what they are owed. However,

the Court should weigh this factor in light of anticipated recoveries in alternative scenarios. First, the Plan is the only likely result for a chapter 11 reorganization of the Debtors. Assuming a hypothetical alternative reorganization plan did exist, the Debtors submit that the best unsecured creditors would do is to receive equity under that plan. This would be of speculative and uncertain value and would likely be difficult to monetize; for some unsecured creditors, this would be viewed as no recovery at all. Second, if the Debtors pursued either a sale under section 363 or converted the Chapter 11 Cases to cases under chapter 7, recoveries to unsecured creditors would be zero. Faced with a recovery of zero, the recoveries to unsecured creditors under the Plan are, therefore, substantial.

43. Each of the foregoing *Master Mortgage* factors demonstrates that the Debtor Release negotiated for under the Plan is necessary to implement the restructuring thereunder.

44. The "related persons" release is fair and appropriate. The final clause of the definition of Released Person includes a list of parties related to the other Released Parties (the "**Related Persons**"), such as officers, directors and agents, that will be released "in their capacity as such." In *Tribune*, the court found that such a provision was permissible to the extent that the primary parties to whom they were related were entitled to a release. *See Tribune*, 464 B.R. at 188. Here, the Debtors submit that inclusion of Related Persons is appropriate. The Debtors are not proposing to release Related Persons in their individual capacity but only in the capacity in which they are related to the other Released Parties. The failure to provide Related Persons the releases set forth in the Plan would frustrate the goals of the Debtor Release. For example, if the ABL Facility Lenders are granted a release, but the officers of the ABL Facility Lenders are not, a party may bring an action against one or more officers, directors, or other agents of an ABL Facility Lender which would, in effect, force that ABL Facility Lender to defend against the

claim. To prevent such a result, the Debtors submit that the Related Persons are appropriate parties to include in the Debtor Release.

45. For all of the foregoing reasons, the Debtor Release is fair, reasonable, and appropriate, in the best interest of the Debtors and the Estates, and should be approved.

The Proposed Third-Party Releases Are Appropriate

46. In addition to releases by debtors, courts in this jurisdiction have held that a chapter 11 plan can contain releases by third parties that are the result of the affirmative consent of the party granting the release. *See, e.g.*, *Zenith Elecs.*, 241 B.R. at 111. First, the following parties have agreed to support (and, where entitled to vote, have accepted) the Plan, which includes the Third Party Releases: the Term Loan Agent; holders of Term Loan Facility Claims; the ABL Facility Agent; holders of ABL Facility Claims; the DIP ABL Facility Agent; holders of DIP ABL Facility Claims; the DIP Term Facility Agent; holders of DIP Term Facility Claims; the Sponsor; and the ABL Facility Guarantor. Therefore, the Third-Party Release is consensual with respect to these parties and should be approved.

47. Second, the Plan also provides that parties who are unimpaired and are deemed to accept the Plan (without an opportunity to vote) are also deemed to grant the Third-Party Release. Courts in this jurisdiction have found that such a release is permissible, holding that payment in full to a releasing creditor serves as sufficient consideration for the release. *See Indianapolis Downs*, 486 B.R. at 306; *Spansion*, 426 B.R. at 144. Specifically, in *Indianapolis Downs*, the court noted that it can take a "more flexible approach" in evaluating whether a release was consensual. 486 B.R. at 306. In the context of a party who is deemed to accept (*i.e.*, consent to) the Plan, the Debtors submit that the Third-Party Release—which is, itself, limited to a release by entities solely in their capacity as creditors of the Debtors—is permissible where the creditor in question is being paid in full. Moreover, no party in the Chapter 11 Cases has

objected to the Third Party Release. *See Spansion*, 426 B.R. at 144 (finding "the silence of the unimpaired classes on this issue is persuasive" and overruling U.S. Trustee's objection the releases as to unimpaired creditors who were deemed to accept the plan).

48. Third, the last category of creditors that are deemed to grant the Third-Party Release are the current officers and directors of the Debtors. First, these parties are the beneficiaries of the Debtor Release and the Third Party Release, as well as the assumption of indemnity obligations under Section 5.3 of the Plan. Second, many of the Debtors' officers were involved in the negotiation and formulation of the Plan, and the Debtors' board directed management and was fully informed of, and approved, the terms of the Plan. Third, a number of the releasing officers and directors have also affirmatively voted to accept the Plan. In the absence of an objection by any current director or officer (of which there are none), the Debtors submit that the Third Party Release should be approved as to the current directors and officers, in light of the consideration they are receiving in the form of mutual releases from the Debtors and the other Releasing Parties, and the role they played in the overall Plan process.

The Proposed Exculpation is Appropriate

49. Among the permissive provisions customarily included in chapter 11 plans in this Circuit (and elsewhere) under section 1123(b)(6) are exculpation provisions. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 245-47 (3d Cir. 2000).

50. Section 8.4 of the Plan contains an exculpation provision as permitted by section 1123(b)(6) of the Bankruptcy Code which is consistent with this Court's prior ruling in the Chapter 11 Cases regarding the identity of exculpated parties and the scope of exculpation.[9] The

[9] Tr. of Hr'g Before Hon. Mary F. Walrath, U.S. Bankr. Judge (Nov. 9, 2015) [D.I. 689] (hereinafter "**11/9 Tr.**") 14:17 – 15:7; *see also Wash. Mut., Inc.*, 442 B.R. at 350-51 (holding that an "exculpation clause must be limited to the fiduciaries who have served during the

Exculpated Parties only include estate fiduciaries. Namely, the Plan defines Exculpated Parties to include each of the following parties, in its capacity as such: (a) each Debtor and Reorganized Debtor; (b) the Debtors' current and former officers and directors; (c) the Creditors Committee and each of its members; and (d) each of the foregoing entities' respective current and former predecessors, successors, and assigns, and members, limited partners, general partners, principals, partners, members employees, agents, officers, directors, managers, trustees, professionals, representatives, advisors, attorneys, financial advisors, accountants, investment bankers, and consultants, in each case solely in their capacity as such.[10] Further, the acts for which parties may be exculpated are limited to post-Petition Date acts.[11] Finally, the exculpation provision specifically provides that it "shall have no effect on the liability of any Entity solely to the extent resulting from any such act or omission that is determined in a final ordered to have constituted gross negligence or willful misconduct."[12] Accordingly, the exculpation provision should be approved.

(vi) The Plan Properly Treats the SBI Financing Agreement as a Financing Transaction and Provides for Treatment of the SBI Heat Treat Line Collateral.

51. In accordance with this Court's oral ruling issued on November 9, 2015, the Plan properly treats the SBI Financing Agreement with SBI as a disguised financing transaction for the SBI Heat Treat Line Collateral.[13] Consistent with the Court's ruling, the Plan also values the

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chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers").

[10] Plan § 1.1.73.

[11] Plan § 8.4.

[12] *Id.*

[13] 11/9 Tr. at 18:18-21.

SBI Heat Treat Line Collateral at $9.75 million.[14] The Plan initially proposed three treatments to satisfy the SBI Secured Claim and SBI Lender Secured Claim. The first was the issuance of one of two forms of notes (determined based on SBI's election under section 1111(b) of the Bankruptcy Code), secured by a lien on the SBI Heat Treat Line Collateral, to repay the SBI Secured Claim and SBI Lender Secured Claim. The second was the abandonment of the SBI Heat Treat Line Collateral in satisfaction of those two claims. The third was an option for the parties to agree on an alternative treatment for their specific claims.

52. With respect to SBI, the Debtors have elected to abandon the SBI Heat Treat Line Collateral, unless the Debtors and SBI come to a consensual agreement on the treatment of the SBI Secured Claim, as contemplated by Section 3.2(e)(2)(D) of the Plan. Section 554 of the Bankruptcy Code states, in relevant part, as follows:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 554(a). A debtor's power to abandon property is discretionary, *In re Slack*, 290 B.R. 282, 284 (Bankr. D.N.J. 2003), and abandonment is only prohibited where there is a threat to the public health or safety[15]—a circumstance not present here. Courts defer to the debtor's judgment and place the burden on the party opposing abandonment to prove a benefit to the

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[14] 11/9 Tr. at 25:6-12.

[15] "[T]he majority of courts have read the exception to abandonment narrowly by disallowing abandonment only where there is an imminent and identifiable harm to the public health or safety" in situations where the debtor is "attempting to abandon property in contravention of state or local laws or regulations designed to protect the public." *In re Unidigital, Inc.*, 262 B.R. 283, 286 (Bankr. D. Del. 2001); *see also Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 502 (1986) (holding that the Bankruptcy Code does not permit debtors to abandon property in contravention of state or local laws designed to protect the public health or safety).

estate and an abuse of the debtor's discretion. *Id.* (citing *In re Interpictures, Inc.*, 168 B.R. 526 (Bankr. E.D.N.Y. 1994)). The right to abandon exists so that "burdensome property" can be removed and "the best interests of the estate" will be furthered. *South Chicago Disposal, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 130 B.R. 162, 166 (S.D.N.Y. 1991). The court only needs to find the debtor made (a) a business judgment, (b) in good faith, (c) upon some reasonable basis and (d) within the debtor's scope of authority. *Slack*, 290 B.R. at 284 (citing *In re Fulton*, 162 B.R. 539, 540 (Bankr. W.D. Mo. 1993)); *see also In re Wilson*, 94 B.R. 886, 888-90 (Bankr. E.D. Va. 1989). Moreover, "[g]ood faith, reasonable basis, and statutory authority will be presumed unless there is evidence suggesting otherwise." *In re Dilley*, 378 B.R. 1, 7 (Bankr. D. Maine 2007). Once the SBI Heat Treat Line Collateral is abandoned, it will no longer be property of the Debtors' estates. *In re Lyn*, 483 B.R. 440, 451 (Bankr. D. Del. 2012) ("By operation of law, abandoned property is no longer property of the estate." (citing *Fields v. Bleiman*, 267 F. App'x 144, 146 (3d Cir.2008))).

53. The Debtors submit that the costs of retaining the SBI Heat Treat Line Collateral, which would include satisfaction of the SBI Lender Secured Claim and SBI Secured Claim through the issuance of $9.75 million of Class 5 Notes, outweigh the value and benefit to the Debtors' estates that would inure if they were to retain the SBI Heat Treat Line Collateral. Moreover, the Debtors are not aware of (a) any environmental condition that would pose an imminent and identifiable threat to the public health or safety or (b) any current violations of applicable laws and regulations protecting the public.

54. ***Response to SBI's limited objection***. In its limited objection, SBI argues that the plan must provide SBI relief from the injunction under the Plan to exercise its "Recovery Remedies" (as defined in the objection). Through the Confirmation Order, the Debtors have

proposed that the parties meet and confer to establish a protocol for SBI and SBI Lender to recover the SBI Heat Treat Line Collateral and, if the parties cannot reach agreement, for the court to decide any disputed issues. The Debtors believe that this proposal appropriately addresses SBI's objection to the Plan with respect to Recovery Remedies. Additionally, the Debtors have provided in the Confirmation Order that to the extent that SBI has an Allowed Claim arising under the SBI Financing Agreement that exceeds $9.75 million (the value of the SBI Heat Treat Line Collateral), SBI will have an Allowed General Unsecured Claim for such deficiency.

55. If the Debtors and SBI do reach agreement on a consensual alternative treatment of the SBI Secured Claim, the Debtors will not abandon the SBI Heat Treat Line Collateral, and SBI Lender will receive the Class 5 Note contemplated under Section 3.2(e)(2)(A)(i) of the Plan (or such other alternative treatment agreed to between the Debtors and SBI Lender). Retention of the SBI Heat Treat Lien Collateral and the proposed "cram-up" of the claims secured by the SBI Heat Treat Line Collateral is permissible under sections 1123(b)(5) and (6) of the Bankruptcy Code and as discussed below, such treatment satisfies the requirements of section 1129(b) of the Bankruptcy Code.

2) The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code — 11 U.S.C. § 1129(a)(2)

56. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent. *See Collier on Bankruptcy* ¶ 1129.03 (Alan N. Resnick & Henry J. Sommers eds., 16th ed.). The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure

and solicitation requirements under sections 1125 and 1126. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Resorts Int'l, Inc.*, 145 B.R. at 468-69; *Elsinore Shore Assocs.*, 91 B.R. at 258. In determining whether a plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of sections 1125 and 1126. *See PWS Holding*, 228 F.3d at 248.

57. The Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Procedures Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. Among other things, as evidenced by the Solicitation Affidavit, the Debtors have complied with all previous orders of the Bankruptcy Court regarding solicitation of votes, including the Solicitation Procedures Order, and that the Debtors have complied with the Bankruptcy Code, the Bankruptcy Rules, and other applicable law with respect to the foregoing. Accordingly, the requirements of section 1129(a)(2) have been satisfied. *See In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (section 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to the plan).

3) The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law — 11 U.S.C. § 1129(a)(3)

58. Section 1129(a)(3) of the Bankruptcy Code requires a plan to have been "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the Bankruptcy Code does not define "good faith" as that term is used in this section, the Third Circuit has indicated that "for purposes of determining good faith under section

1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *PWS Holding*, 228 F.3d at 242 (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004); *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 164 (Bankr. D. Del. 2006).

59. Courts generally view the good faith requirement in light of the totality of the circumstances surrounding the establishment of the chapter 11 plan. *See Zenith Elecs.*, 241 B.R. at 107-08. In assessing good faith, the Court may look to whether a plan has been proposed with a legitimate purpose and with a basis for expecting that reorganization consistent with the Bankruptcy Code's objectives can be effectuated. *See, e.g., id.* (holding that the plan was proposed in good faith where such plan was "proposed with the legitimate purpose of restructuring [debtor's] finances to permit [debtor] to reorganize successfully," which was "exactly what chapter 11 of the Bankruptcy Code was designed to accomplish" (internal quotation marks, citation omitted)); *In re Surfango, Inc.*, No. 09-30972 (RTL), 2009 WL 5184221, at *8-9 (Bankr. D.N.J. Dec. 18, 2009) (stating that the court should focus on "whether the plan serves a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing value" and "whether the plan is proposed to obtain a tactical litigation advantage").

60. Good faith is not lacking simply because a plan "may not be one which the creditors would themselves design and indeed may not be confirmable." *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 803 (5th Cir. 1997) (affirming finding of good faith against allegations that the debtor did not effectively market the property so as to produce a bidder who would compete against lender at confirmation hearing); *In re Montgomery Court Apartments, Ltd.*, 141 B.R. 324, 330 (Bankr.

S.D. Ohio 1992) ("The Court fails to see how [the creditor's] unhappiness with the Plan's terms can give rise to a finding of bad faith on the part of the Debtor under 11 U.S.C. § 1129(a)(3). Chapter 11 plans routinely alter the contractual rights of parties."); *Zenith Elecs.*, 241 B.R. at 107 (noting that one creditor receiving better treatment than another under plan does not preclude a finding of good faith). Simply put, the good faith standard does not demand that a debtor offer more to its creditors than the Bankruptcy Code requires. *See In re G-I Holdings Inc.*, 420 B.R. 216, 262 (D.N.J. 2009); *see also Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1075 (9th Cir. 2002) ("In enacting the Bankruptcy Code, Congress made a determination that an eligible debtor should have the opportunity to avail itself of a number of Code provisions which adversely alter creditors' contractual and nonbankruptcy rights . . . . [T]he fact that a debtor proposes a plan in which it avails itself of an applicable Code provision does not constitute evidence of bad faith." (internal quotation marks omitted, citing *In re PPI Enter., Inc.*, 228 B.R. 339, 344-45, 347 (Bankr. D. Del. 1998))).

61. The Debtors submit that the record in these Chapter 11 Cases and the Declarations establish that the Debtors, as plan proponents, have proposed the Plan in good faith, with the legitimate purpose of maximizing stakeholder value, and not by any means forbidden by law, in satisfaction of section 1129(a)(3). The Plan provides for the distribution of significant value to creditors and ensures for payment in full of Administrative Claims, DIP Facility Claims, Professional Claims (subject to the agreed upon Professional Fee Payment Amount), Priority Tax Claims, Other Secured Claims, Other Priority Claims, and statutory fees due and owing to the U.S. Trustee, and further provides for the establishment of the GUC Consideration Escrow Account to be maintained exclusively for the benefit of holders of Allowed Class 6 General Unsecured Claims that are entitled to a distribution under the Plan. Additionally, the record of

the Chapter 11 Cases demonstrates that the Debtors and their directors, officers, employees, agents, affiliates, and professionals (acting in such capacity) have acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code. The treatment of the holders of Claims and Interests under the Plan was proposed in good faith, is fair and equitable, and is supported by the valuation range adopted by the Bankruptcy Court. Importantly, the Plan is the result of a settlement of the outcome of these cases that was the result of hard-fought negotiations between the key stakeholders, and the Debtors secured creditors and the Creditors Committee's support for confirmation of the Plan is evidence of the good faith present in the process from which the Plan resulted.

62. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(3) of the Bankruptcy Code.

4) The Plan Provides that Payments Made by the Debtors for Services or Costs and Expenses are Subject to Approval — 11 U.S.C. § 1129(a)(4)

63. Section 1129(a)(4) of the Bankruptcy Code provides that the Bankruptcy Court shall confirm a plan only if "[a]ny payment made or to be made by the proponent, [or] by the debtor . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). In other words, the Debtors must disclose to the Bankruptcy Court all professional fees and expenses, and such professional fees and expenses must be subject to Bankruptcy Court approval. *See New York Life Ins. Co. v. Chase Manhattan Bank, N.A. (In re Texaco, Inc.)*, 85 B.R. 934, 939 (Bankr. S.D.N.Y. 1988).

64. In accordance with section 1129(a)(4) of the Bankruptcy Code, no payment for services or costs and expenses in connection with the Chapter 11 Cases, or in connection with the Plan and incidental to the Chapter 11 Cases, including Professional Claims, has been or will

be made by the Debtors other than payments that have been authorized by order of the Bankruptcy Court. Article II of the Plan provides for the payment of various Professional Claims, which are subject to Bankruptcy Court approval and the standards of the Bankruptcy Code. Accordingly, the provisions of the Plan comply with section 1129(a)(4) of the Bankruptcy Code.

65. ***Resolution of US Trustee's limited objection***. The Office of the United States Trustee for the District of Delaware (the "**U.S. Trustee**") has objected to the Plan to the extent that it permits Professionals for the Creditors Committee to recover fees and expenses for defending the Allowance of their Professional Claims, which the U.S. Trustee contends are prohibited under the Supreme Court's decision in *Baker Botts LLP v. ASARCO LLC*, a question that is *sub judice* in the Chapter 11 Cases. The Allowance of any and all Professional Claims is subject to review and approval by the Bankruptcy Court outside of the Plan. The Plan merely furthers and facilitates the process for submitting Professional Claims to the Bankruptcy Court for Allowance and payment, to the extent Allowed. The Debtors understand that the U.S. Trustee and Creditors Committee have agreed upon language that resolves this issue that will be included in the Confirmation Order.

5) The Debtors Will Have Disclosed the Identity of Directors and Officers and the Nature of Compensation of Insiders — 11 U.S.C. § 1129(a)(5)

66. Section 1129(a)(5)(A) requires the proponent of any plan to disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan," and requires a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests

of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(i)-(ii). Additionally, section 1129(a)(5)(B) requires the proponent of a plan to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B). The Debtors have filed at Exhibit 14 to the Plan Supplement the identity of the Directors and Officers of the Debtors that have been selected to serve after the Effective Date, as required under section 1129(a)(5) of the Bankruptcy Code.

6) The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission — 11 U.S.C. § 1129(a)(6)

67. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the rates charged by the reorganized debtor in the operation of its business approve any rate change under the plan. The Plan does not provide for any rate changes subject to the jurisdiction of any governmental regulatory commission. Accordingly, the Debtors submit that section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Plan.

7) The Plan is in the Best Interests of Creditors — 11 U.S.C. § 1129(a)(7)

68. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity holders. This "best interests" test focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999). The best interests test requires that each holder of a claim or equity interest either accept the plan or receive or retain under the plan 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 was liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7). If a class of claims or equity interests unanimously approves the

plan, the best interests test is deemed satisfied for all members of that class. *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 761. Under the Plan, Classes 3, 4, 5, 6, 9, 10, 11, and 12 are Impaired. The test, therefore, requires that each Holder of a Claim or Interest in those Classes either accept the Plan or receive or retain under the Plan property having a present value, as of the effective date of the Plan, not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code.

69. The Debtors have satisfied section 1129(a)(7) with respect to Classes 3, 4, 5, 6, 9, 10, 11, and 12 and believe that the Plan provides the same or a greater recovery for holders of Allowed Claims and Interests as would be achieved in a liquidation under chapter 7 of the Bankruptcy Code. This belief is based on a number of considerations, including: (i) the Debtors' assets include intangibles, such as goodwill and customer relationships, which would have little to no value in a chapter 7 liquidation; and (ii) the absence of a robust market for the sale of the Debtors' assets, including as a result of the prolonged downturn in the oil and gas industry.

70. In addition, conversion to a chapter 7 would generate additional Administrative Claims and costs connected to the chapter 7 liquidation. The chapter 7 trustee's professionals, including legal counsel and accountants, would add administrative expenses that would be entitled to be paid ahead of Allowed Claims against, or Allowed Interests in, the Debtors. The Estates would also be obligated to pay all unpaid expenses incurred by the Debtors and the Creditors Committee during these Chapter 11 Cases (such as compensation for professionals) before payments could be made to holders of unsecured claims. In addition, the Cash to be distributed to Creditors and Interest holders would be reduced by the chapter 7 trustee's statutory fee, which is calculated on a sliding scale from which the maximum compensation is determined based on the total amount of monies disbursed or turned over by the chapter 7 trustee.

Additionally, it is likely that distributions from a chapter 7 estate would be significantly deferred. As a result, the present value of such distributions is likely to be lower than if made under the Plan. Therefore, under a chapter 7 liquidation, holders of Allowed Claims would receive significantly less than they would receive under the Plan.

71. The Debtors provided all parties in interest with an unaudited liquidation analysis (the "**Liquidation Analysis**"), attached as Exhibit E to the Disclosure Statement, which has been supplemented by the Nystrom Declaration. The Liquidation Analysis includes a discussion of the effects that a chapter 7 liquidation would have on the recoveries of holders of claims and interests and was distributed to all parties in interest.

72. For the reasons set forth above and as set forth in the Liquidation Analysis and Nystrom Declaration, the Debtors believe that the Plan provides a recovery at least equal to, if not better than, the recovery in a chapter 7 case for holders of Claims, and the Plan meets the requirements of the "best interests" test.

8) The Plan Has Been Accepted by Certain Impaired Voting Classes — 11 U.S.C. § 1129(a)(8)

73. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either has either accepted or is not impaired under a chapter 11 plan. 11 U.S.C. § 1129(a)(8). As indicated in Article III of the Plan, Classes 1, 2, 7, and 8 are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. As evidenced in the Voting Report, Classes 3, 4, and 6 voted to accept the Plan with respect to each Debtor. There are no claims in Class 5 with respect to Debtors BTCSP, LLC and BT Financing, Inc.

74. With respect to Debtor Boomerang, Classes 5A and 5B each contain a single claim (SBI Lender Secured Claim and SBI Secured Claim, respectively), but the holders of those

claims did not vote on the Plan. In accordance with Section 3.5 of the Plan, the Debtors are requesting that the Bankruptcy Court deem the Plan accepted by Class 5. Acceptance of a plan may be properly presumed where a creditor fails to vote or object to a plan. *See In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1266-67 (10th Cir. 1988) (holding that a creditor's inaction constituted an acceptance of the plan because "[t]o hold otherwise would be to endorse the proposition that a creditor may sit idly by . . . and thereafter, subsequent to the adoption of the plan, raise a challenge to the plan for the first time" which would "effectively place all reorganization plans at risk in terms of reliance and finality."); *Tribune*, 464 B.R. at 183 (concluding that deemed acceptance by a non-voting impaired class, in the absence of objection, may "constitute the necessary 'consent' to a proposed 'per plan' scheme."). Notably, the ballots received by SBI and the SBI Lender explicitly stated that "[i]f no Holders of Class 5 Heat Treat Line Secured Claims against Debtor Boomerang Tube, LLC eligible to vote to accept or reject the Plan vote on the Plan, the Plan shall be deemed accepted by Class 5 as to Debtor Boomerang Tube, LLC." This provision was also explicitly set forth in the Plan in its own section titled "**Voting Classes; Presumed Acceptance by Non-Voting Classes.**" Finally, while SBI has filed a limited objection to the Plan, its objection is not with respect to its treatment under the Plan, but instead, regarding the procedure by which it may exercise its Recovery Remedies. As a result, the Debtors submit that Classes 5A and 5B should be deemed to accept the Plan.

75. Nonetheless, Class 9 through 12, which are impaired under the Plan, have been deemed to reject the Plan. However, as discussed below, pursuant to section 1129(b) of the Bankruptcy Code, the Plan may be confirmed despite the deemed rejection of those classes as long as the Plan does not discriminate unfairly and is fair and equitable with respect to such class of claims and interests.

9) The Plan Provides for Payment in Full of All Allowed Priority Claims — 11 U.S.C. § 1129(a)(9)

76. Under section 1129(a)(9) of the Bankruptcy Code, unless otherwise agreed, a plan must provide that:

- the holder of a claim entitled to priority under section 507(a)(2) or (3) will receive cash for the allowed amount of the claims on the effective date of the plan;
- the holder of a claim entitled to priority under section 507(a)(1), (4), (5), (6) or (7) will receive either deferred cash payments for the allowed amount, or cash for the allowed amount of the claim on the effective date of the plan;
- the holder of a tax claim entitled to priority under section 507(a)(8) will receive regular installment payments in cash (i) of the total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and, (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and
- the holder of a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, will receive cash payments on account of that claim in the same manner and over the same period as a tax claim entitled to priority under section 507(a)(8).

11 U.S.C. § 1129(a)(9).

77. As required by section 1129(a)(9) of the Bankruptcy Code, Article II of the Plan provides for full payment of all Allowed Administrative Claims, Allowed Priority Tax Claims, and Professional Claims, other than as may have been otherwise agreed with a party, and Article XII provides for the payment in full of all statutory fees due and owing to the U.S. Trustee. Therefore, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

10) At Least One Impaired, Non-Insider Class Has Accepted the Plan — 11 U.S.C. § 1129(a)(10)

78. Section 1129(a)(10) of the Bankruptcy Code requires that at least one impaired class of claims must accept the plan, excluding the votes of insiders. 11 U.S.C. § 1129(a)(10). Classes 3, 4, and 6 have affirmatively voted to accept the Plan with respect to each Debtor. The Debtors have also requested that the Court deem Classes 5A and 5B to have accepted the Plan pursuant to Section 3.5 thereof. Accordingly, the Debtors believe that the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

11) The Plan is Feasible — 11 U.S.C. § 1129(a)(11)

79. Pursuant to section 1129(a)(11) of the Bankruptcy Code, a chapter 11 plan may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Pursuant to section 1129(a)(11) of the Bankruptcy Code, the Bankruptcy Court must determine, among other things, that confirmation of the Plan is not likely to be followed by the liquidation or need for further financial reorganization of the Debtors or any successors to the Debtors under the Plan (unless such liquidation or reorganization is proposed in the Plan). These conditions are referred to as the "feasibility" of the Plan.

80. The Plan is feasible. First, as set forth in Section 8.4 of the Disclosure Statement, the Debtors thoroughly analyzed their post-confirmation ability to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring. Indeed, as the Bankruptcy Court has already ruled, the Debtors have a viable business with a

total enterprise value that is over $300 million.[16] As a result, the Debtors submit that confirmation is not likely to be followed by liquidation.

81. Second, as set forth in the Disclosure Statement and the Nystrom Declaration, the Debtors prepared projections of the Debtors' financial performance through fiscal year 2018 (the "**Projections**"). These Projections demonstrate the Debtors' ability to meet their obligations under the Plan. Based on the Projections, the Debtors will have emergence costs under the Plan of $17 million and cash available to pay such amounts. The Projections also show that the Debtors will have positive EBITDA after 2016, reaching EBITDA of just under $60 million in 2018. Finally, the Exit ABL Facility and Exit Term Facility (to the extent the Debtors are provided access to the $15 million accordion feature, which is currently uncommitted) will provide the Debtors with the ability to access additional funds following the Effective Date.

82. Accordingly, the Debtors believe that the Plan satisfies the requirements of feasibility under section 1129(a)(11) of the Bankruptcy Code,

12) All Statutory Fees Have Been or Will Be Paid — 11 U.S.C. § 1129(a)(12)

83. Section 1129(a)(12) of the Bankruptcy Code provides that a court may confirm a chapter 11 plan only if "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). Section 13.2 of the Plan provides for the payment, on or before the Effective Date, of any fees due pursuant to section 1930 of title 28 of the United States Code or other statutory requirement. Therefore, the Plan meets the requirements of section 1129(a)(12) of the Bankruptcy Code.

[16] 11/9 Tr. at 7:10 (concluding that the Debtors' enterprise value "is between $312 and $361 million").

13) The Plan Appropriately Treats Retiree Benefits — 11 U.S.C. § 1129(a)(13)

84. Section 1129(a)(13) of the Bankruptcy Code requires that a chapter 11 plan provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). The Debtors do not believe that they have any Retiree Benefits within the meaning of Sections 1114 and 1129(a)(13) of the Bankruptcy Code. However, Section 4.15 of the Plan provides that "pursuant to section 1129(a)(13) of the Bankruptcy Code, from and after the Effective Date, all retiree benefits (as such term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid in accordance with applicable law." Accordingly, to the extent it is applicable, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

14) Sections 1129(a)(14)-(16) of the Bankruptcy Code are Inapplicable

85. None of the Debtors are (a) required to pay any domestic support obligations, (b) individuals, or (c) nonprofit corporations or trusts. Accordingly, the Debtors submit that sections 1129(a)(14) through (16) of the Bankruptcy Code are not applicable.

15) The Plan Is Not an Attempt to Avoid Tax Obligations — 11 U.S.C. 1129(d)

86. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of section 5 of the Securities Act of 1933 (the "**Securities Act**"). 11 U.S.C. § 1129(d). The Plan meets these requirements because the principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of the Securities Act, and no party in interest has filed an objection alleging otherwise. The principal purpose of the Plan is to effectuate the Debtors'

recapitalization and restructuring through the Transaction. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

VI. THE PLAN SATISFIES THE "CRAMDOWN" REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129(b) OF THE BANKRUPTCY CODE

87. The Plan has been accepted by Classes 3, 4, and 6, and the Debtors have requested that the Court deem to have accepted the Plan in accordance with Section 3.5 of the Plan. Section 1129(b) of the Bankruptcy Code is implicated by the Plan with respect to Classes 9 through 12, which are deemed to reject the Plan, and Classes 5A and 5B should the Court not deem those Classes to have accepted the Plan. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either accept a plan or be unimpaired under the plan. Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met—notwithstanding a failure to comply with section 1129(a)(8)—a plan may be confirmed so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan. 11 U.S.C. § 1129(b).

88. Therefore, in order to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" against, and is "fair and equitable" with respect to, the non-accepting impaired classes. *See John Hancock Mut. Life Ins.*, 987 F.2d at 157 n.5; *Zenith Elecs.*, 241 B.R. at 105.

89. As discussed below, the Plan satisfies the "cramdown" requirements in section 1129(b) of the Bankruptcy Code to confirm the Plan.

1) The Plan Does Not Unfairly Discriminate With Respect to Any Class

90. The Plan does not discriminate unfairly with respect to an Impaired Class that has rejected the Plan. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. *See In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds, Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established."). Rather, courts typically examine the facts and circumstances of each particular case to determine whether unfair discrimination exists. *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis . . . ."). At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without sufficient justifications for doing so. *See Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'Ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 655 (9th Cir. 1997); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

91. A threshold inquiry to assessing whether a chapter 11 plan unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment. To determine whether there is unfair discrimination in a chapter 11 plan, the Third Circuit has applied a "rebuttable presumption" test that initially examines whether a proposed plan provides for either a materially lower recovery or a greater allocation of risk for the dissenting creditors or holders of interests. *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121-22 (Bankr. D. Del. 2006) (citing *In re Dow Corning Corp.*, 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)). The Plan does not unfairly discriminate against any

Class because the Claims in each Class are legally and factually distinct from other Claims and Interests in other Classes.

2) The Plan is Fair and Equitable With Respect to the Impaired Classes That Did Not Vote to Accept The Plan

a. The Plan is Fair and Equitable With Respect to Classes 9 Through 12

92. Section 1129(b)(2) sets forth the "fair and equitable" standards for claims and interests. This section sets forth a central tenet of bankruptcy law—the "absolute priority rule"—and provide that a plan is fair and equitable with respect to a particular class of unsecured claims or interests if it provides that the holder of any claim or interest in a class junior to the claims or interests of that particular class will not receive a distribution or retain any rights under the plan on account of such junior claim or interest in property. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) & (C)(ii); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (noting the absolute priority rule "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan"); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999) ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'"). Another condition under the absolute priority rule is that senior classes cannot receive more than a 100% recovery for their claims. *See In re Exide Techs.*, 303 B.R. 48, 61 (Bankr. D. Del. 2003); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Del. 2001).

93. The Plan complies with the "fair and equitable" standards in sections 1129(b)(2)(B) and 1129(b)(2)(C) of the Bankruptcy Code because (i) no Claim or Interest junior to the Claims or Interests in Class 9 through 12 will receive or retain any property on account of such junior Claim or Interests, and (ii) based on the valuation range adopted by the Bankruptcy Court, as well as the Projections, liquidation analysis, and other information contained in the Disclosure Statement, Classes 1 through 6 will not receive more than full payment on account of their Claims.

b. The Plan's Treatment of SBI and SBI Lender Is Fair and Equitable

94. To show that the Plan is fair and equitable, the Debtors must also establish that, with respect to Class 5 (Heat Treat Line Secured Claims), the Plan satisfies the provisions of section 1129(b)(2)(A), which provides that for a class of secured claims:

> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A).

95. As discussed above, consistent with the Bankruptcy Court's November 9, 2015 ruling, the Plan properly treats the SBI Financing Agreement between SBI and Boomerang concerning the SBI Heat Treat Line Collateral as a disguised financing transaction and values the

SBI Heat Treat Line collateral at $9.75 million.[17] In addition, as the Bankruptcy Court ruled, SBI and SBI Lender[18] each have a security interest in the SBI Heat Treat Line Collateral, with SBI Lenders' lien being prior in time (*i.e.*, existing prior to SBI's sale to Boomerang and retention of its purchase money security interest)[19] and, therefore, senior in priority.

96. A party receives the indubitable equivalent of its secured claim when it receives the very collateral securing its claim. *See In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1350 (5th Cir. 1989) ("The current plan provides that LNB will receive Brightside itself, and since common sense tells us that property is the indubitable equivalent of itself, this portion of the current plan satisfies the 'indubitable equivalent' requirement."); *In re Pennave Properties Assocs.*, 165 B.R. 793, 795 (E.D. Pa. 1994) ("Generally, return of collateral to a secured creditor provides that creditor with the indubitable equivalent of the secured claim." citing *Sandy Ridge*, 881 F.2d at 1350). Here, the Debtors have determined to abandon the SBI Heat Treat Line Collateral, thereby allowing SBI and SBI Lender to realize on their liens and receive the indubitable equivalent of their secured claims—the SBI Heat Treat Line Collateral itself.[20]

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[17] 11/9 Tr. at 18:18-21, 25:6-12.

[18] The SBI Financing Agreement between the Debtors and SBI required SBI to purchase the equipment "free and clear of any lien or encumbrance." (SBI Fin. Agmt. § 9(d).) The Debtors fully reserve their rights, and those of the Reorganized Debtors, to pursue claims against SBI, or any of its affiliates, for damages based on the breach of the SBI Financing Agreement.

[19] 11/9 Tr. at 26:3-17.

[20] The Debtors may ultimately arrive at a consensual arrangement with SBI whereby the Debtors and Reorganized Debtors retain the SBI Heat Treat Line Collateral. If that is the case, the Reorganized Debtor will issue SBI Lender a Class 5 Note pursuant to Section 3.2(e)(2)(A) of the Plan or provide SBI Lender with such other treatment as SBI Lender and the Debtors or Reorganized Debtors agree, as contemplated by Section 3.2(e)(2)(D) of the Plan, unless the Court orders otherwise. The Debtors submit that the form and structure of the Class 5 Note satisfy section 1129(b)(2)(A)(i) of the Bankruptcy Code, as it provides for SBI Lender to retain its lien, thereby complying with clause (I) of that subsection and provides SBI Lender with payment of the remaining amounts outstanding under the SBI

VII. CONCLUSION

97. For the reasons set forth in this Memorandum, the Debtors respectfully request that the Court enter an order confirming the Plan, in substantially the form of the proposed Confirmation Order that the Debtors have filed concurrently herewith.

Dated: January 25, 2016
Wilmington, Delaware

/s/ Ryan M. Bartley

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Lender Financing Agreement on substantially the same terms, including as to interest rate and remaining duration, thereby complying with clause (II) of that subsection.