IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Case No. 17-10064 (KG)
Chieftain Sand and Proppant, LLC, *et al*.,	Chapter 11
Debtors.[1]	(Jointly Administered)
	Re: Docket Nos. 263, 286 & 311

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF COMBINED PLAN AND DISCLOSURE STATEMENT FOR CHIEFTAIN SAND AND PROPPANT, LLC AND CHIEFTAIN SAND AND PROPPANT BARRON, LLC

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[1] The Debtors in these chapter 11 cases, and the last four digits of their respective federal tax identification numbers, are Chieftain Sand and Proppant, LLC (1729) and Chieftain Sand and Proppant Barron, LLC (0418). The Debtors' service address is: 331 27th Street, New Auburn, WI 54757.

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The above-captioned debtors and debtors in possession (the "**Debtors**") submit this memorandum of law in support of confirmation of the *Debtors' Combined Plan and Disclosure Statement for Chieftain Sand and Proppant, LLC and Chieftain Sand and Proppant Barron, LLC*, dated July 6, 2017 [Docket No. 263] (as amended, modified and/or supplemented, the "**Plan**").

I. PRELIMINARY STATEMENT

The Plan—which has garnered unanimous support from voting Creditors[2] and has drawn no objections—represents the best available outcome for Creditors in these Chapter 11 Cases. The Plan, in its simplest form, provides for the substantive consolidation of the assets and liabilities of the Debtors for certain purposes and contemplates the appointment of a Plan Administrator to wind-down the Debtors' Estates and make certain distributions. As detailed in the Voting Certification, the Plan was overwhelmingly accepted by the holders of Class 2 (Lender Secured Claims) and Class 4 (Knapp Railroad Claim), the only classes of Claims entitled to vote on the Plan.

As set forth in more detail below, the Plan meets all of the requirements of section 1129 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (as amended, "**Bankruptcy Code**"). The Plan complies, and the Debtors (as the Plan proponents) have complied, with the Bankruptcy Code. Claims and Equity Interests have been properly classified and correctly designated as impaired or unimpaired under sections 1122 and 1123(a)(1) of the Bankruptcy Code. The treatment of both impaired and unimpaired Claims and Equity Interests is clearly specified in the Plan. The Plan does not discriminate and is fair and equitable in the treatment afforded Creditors and Holders of Equity Interests.

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[2] Capitalized terms not specifically defined herein have the meanings ascribed to them in the Plan.

The alternative to the Plan, conversion of these Chapter 11 Cases to cases under Chapter 7, will not produce a better outcome for Creditors. Due to the fact the sale proceeds were insufficient to payoff the Debtors' senior secured debt, absent an agreement by the senior secured lenders to fund the Wind Down Amount and make certain agreed upon distributions under the Plan, there would be no funds available in a hypothetical chapter 7 liquidation to make any distributions to creditors or holders of equity interests.

As evidenced by the terms of the Plan, the Voting Report and the fact that no objections were filed, it is clear that the Plan has been proposed in good faith and should be confirmed.

II. STATEMENT OF FACTS

The facts relevant to confirmation of the Plan are set forth in detail in the Plan, and will not be repeated herein.

III. JURISDICTION

This Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157(b), and the Court has the authority to enter a final order with respect thereto. Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. The Debtors are eligible debtors under section 109 of the Bankruptcy Code. The Debtors are a proper plan proponent under section 1129 of the Bankruptcy Code.

IV. ARGUMENT

A. The Plan Satisfies the Requirements of Section 1129 of the Bankruptcy Code.

As set forth below, the Plan meets all of the requirements of section 1129(a) of the Bankruptcy Code and therefore should be confirmed.

1. The Plan complies with applicable provisions of the Bankruptcy Code.[3]

Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). The determination of whether the Plan complies with Section 1129(a)(1) of the Bankruptcy Code requires an analysis of whether the Plan complies with sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and interests and the contents of a Chapter 11 plan, respectively. *See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988); *In re Century Glove, Inc.*, Case No. 90–400–SLR, 1993 WL 239489, at *6 (D. Del. Feb. 10, 1993).

(a) The Plan properly designates Classes of Claims and Equity Interests.[4]

Section 1123(a)(1) of the Bankruptcy Code requires that a plan classify all claims (with the exception of administrative expense claims and certain tax and other priority claims) and all interests, and that such classifications comply with section 1122 of the Bankruptcy Code. 11 U.S.C. § 1123(a)(1). Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a).

A plan proponent has significant flexibility in classifying claims under section 1122, as long as a reasonable legal or factual basis exists for the classification, and all claims within a particular class are substantially similar. *John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs. (In re Route 37 Business Park Assocs.)*, 987 F.2d 154, 158 (3d Cir. 1993) ("[T]he classification of the claims or interests must be reasonable."(quoting *In re Jersey City*

[3] 11 U.S.C. § 1129(a)(1).

[4] 11 U.S.C. §§ 1123(a)(1) and 1122.

Medical Center, 817 F.2d 1055, 1061 (3d Cir. 1987))); *In re Jersey City Medical Center*, 817 F.2d 1055 at 1060-61 ("Congress intended to afford bankruptcy judges *broad discretion* [pursuant to section 1122] to decide the propriety of plans in light of the facts of each case.") (emphasis added).

The Plan's classification scheme is reasonable and necessary to implement the Plan. The Plan designates Claims and Equity Interests into the following classes: (1) Class 1: Other Priority Claims; (2) Class 2: Lender Secured Claims; (3) Class 3: Other Miscellaneous Secured Claims; (4) Class 4: Knapp Railroad Builders, Inc. – Mechanics Lien/Secured Claim; (5) Class 5: General Unsecured Claims; (6) Class 6: Intercompany Claims; (7) Class 7 – Equity Interests in Chieftain Sand and Proppant, LLC; and (8) Class 8: Equity Interests in Chieftain Sand and Proppant Barron, LLC. *See* Plan, Art. IV.B. Furthermore, in accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Expense Claims, Professional Fee Claims, Statutory Fees and Priority Tax Claims have not been classified and thus are excluded from the Classes of Claims and Equity Interests set forth in Article IV of the Plan. *See* Plan, Art. IV. The Plan's classification of Claims and Equity Interests satisfies section 1122(a) of the Bankruptcy Code because Claims that are substantially similar to each other are classified together, and substantially similar Claims were not classified separately to affect the outcome of voting.

(b) The Plan Specifies the Unimpaired Classes (Section 1123(a)(2)) and the Treatment of Impaired Classes (Section 1123(a)(3)), and Provides for Equal Treatment Within Classes (Section 1123(a)(4)).

Sections 1123(a)(2) and (a)(3) of the Bankruptcy Code require that a plan specify any classes of claims or interests that are not impaired under the plan, and that a plan specify those classes that are impaired. 11 U.S.C. § 1123(a)(2)-(3). The Plan provides that Holders of (i) Claims in Class 1 (Other Priority Claims) and Class 3 (Other Secured Claims Claims) are not impaired under the Plan, are not entitled to vote on the Plan, and are deemed to have accepted the

Plan; (ii) Claims in Class 2 (Lender Secured Claims) and Class 4 (Knapp Railroad Builders, Inc. – Mechanics Lien/Secured Claim) are impaired and are entitled to vote on the Plan; and (iii) Claims or Equity Interests in Class 5 (General Unsecured Claims), Class 6 (Intercompany Claims), Class 7 (Equity Interests in Chieftain Sand and Proppant, LLC) and Class 8 (Equity Interests in Chieftain Sand and Proppant Barron, LLC) will retain no property and will receive no distribution on account of their Claims or Equity Interests and thus are deemed to have rejected the Plan and are not entitled to vote on the Plan. Accordingly, the Plan complies with sections 1123(a)(2) and (3) of the Bankruptcy Code.

Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The Plan provides the same treatment for each Claim and Equity Interests in a particular class and thus complies with section 1123(a)(4).

(c) The Plan provides for adequate means of implementation.[5]

Section 1123(a)(5) of the Bankruptcy Code requires that the plan provide adequate means for its implementation and includes, as examples, the "sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate." 11 U.S.C. § 1123(a)(5)(D). Articles VII and IX of the Plan, among other provisions, provide that implementation of the Plan will include: (a) substantive consolidation of the Debtors' Estates, but solely for the purposes of the Plan, including making any Distributions to Holders of Allowed Claims; (b) continuing existence of the Post-Effective Date Debtors for the purpose of,

[5] 11 U.S.C. § 1123(a)(5).

inter alia, winding up their affairs, liquidating their remaining assets, pursuing Causes of Action, resolving Disputed Claims and filing appropriate tax returns; and (c) funding of the Plan from the fully funded Wind Down Amount. The Plan provides adequate means for implementation and therefore satisfies section 1123(a)(5) of the Bankruptcy Code.

(d) Section 1123(a)(6) of the Bankruptcy Code does not apply.

Section 1123(a)(6) of the Bankruptcy Code requires that a plan provide for the inclusion in a corporate debtor's charter provisions prohibiting the issuance of nonvoting equity securities, and providing for an "appropriate distribution" of voting power among those securities possessing voting power. *See* 11 U.S.C. § 1123(a)(6). The Plan provides for liquidation of the Debtors. All existing Equity Interests will be cancelled, annulled, and extinguished, and any certificates representing such interests shall be null and void. *See* Plan, Arts. VI(B), IX. The requirements of section 1123(a)(6) therefore do not apply.

(e) The manner of selection of officers, directors, and trustees and their successors is consistent with the interests of creditors and public policy.[6]

Section 1123(a)(7) of the Bankruptcy Code requires that a plan's provisions with respect to the manner of selecting any director, officer, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123(a)(7). Under the Plan, the Estates' assets will be administered by the Plan Administrator, who shall serve as the sole officer and director of each Post-Effective Date Debtor. The Plan Administrator will be Victor A. Serri, the Debtors' former Chief Executive Officer and a member of the special restructuring committee of the Debtors' Board of Managers.

[6] 11 U.S.C. § 1123(a)(7).

The appointment of the Plan Administrator is thus consistent with the interests of Creditors and public policy, and fulfills the requirements of section 1123(a)(7) of the Bankruptcy Code.

(f) Section 1123(a)(8) of the Bankruptcy Code is not applicable.

Section 1123(a)(8) of the Bankruptcy Code applies only in cases in which the debtor is an individual. Both Debtors are corporate debtors and therefore, section 1123(a)(8) is not applicable in these Chapter 11 Cases.

(g) The discretionary provisions of the Plan, including the release, exculpation, and injunction provisions, are permissible.[7]

Section 1123(b) of the Bankruptcy Code sets forth various permissive provisions that may be incorporated into a Chapter 11 plan. For example, 1123(b) provides that a plan may (i) impair or leave unimpaired any class of claims or interests, (ii) provide for the assumption or rejection of executory contracts and unexpired leases, (iii) provide for the settlement or retention of claims of the debtor, (iv) provide for the sale of all or substantially all of the assets of a debtor's estate and distribution of proceeds, (v) modify the rights of holders of secured and unsecured claims, and (vi) include any other appropriate provision not inconsistent with the applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(1)-(6). As described below, the discretionary provisions of the Plan are consistent with section 1123(b) of the Bankruptcy Code.

i. Impairment/Unimpairment of Classes of Claims and Interests[8]

The Plan is consistent with section 1123(b)(1) of the Bankruptcy Code. Specifically, pursuant to Article VI of the Plan, Class 1 and Class 3 are designated as unimpaired because the Plan leaves unaltered the legal, equitable and contractual rights of the Holders of

[7] 11 U.S.C. § 1123(b).

[8] 11 U.S.C. § 1123(b)(1).

such Claims. Further, Classes 2, 4, 5, 6, 7 and 8 are designated as impaired, as the Plan modifies the rights of the Holders of such Claims and Interests as permitted in section 1123(b)(1) of the Bankruptcy Code.

ii. Assumption and Rejection[9]

Section 1123(b)(2) of the Bankruptcy Code allows a plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Article XI of the Plan provides that all Executory Contracts and Unexpired Leases that exist between the Debtors and any Person or Entity shall be deemed rejected by the Debtors on the Confirmation Date and effective as of the Confirmation Date, except for any Executory Contract or Unexpired Lease (i) that has been assumed or rejected pursuant to an order of the Bankruptcy Court entered prior to the Confirmation Date, (ii) expired or terminated pursuant to its own terms, or (iii) as to which a motion for approval of the assumption or rejection of such Executory Contract or Unexpired Lease has been filed and served prior to the Confirmation Date. Further, the Confirmation Order will constitute an Order approving such rejection as of the Effective Date. This provision is consistent with section 1123(b)(2) of the Bankruptcy Code.

iii. Retention of Claims or Equity Interests[10]

Section 1123(b)(3) of the Bankruptcy Code provides that a plan may provide for the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose of any claim or interest belonging to the debtor or the debtor's estate. The Plan provides for the retention of Causes of Action and permits the Plan Administrator to

[9] 11 U.S.C. § 1123(b)(2).

[10] 11 U.S.C. § 1123(b)(3).

exercise discretion in connection with the prosecution of such Causes of Action. Accordingly, this provision is consistent with section 1123(b)(3) of the Bankruptcy Code.

iv. Sale of Assets/Distribution of Proceeds[11]

Section 1123(b)(4) of the Bankruptcy Code provides that a plan may provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests. The Plan provides that all of the Debtors' remaining assets, including the Causes of Action, will vest with the Post-Effective Date Debtors. The Plan thus is consistent with section 1123(b)(4) of the Bankruptcy Code.

v. Modification of Rights[12]

Section 1123(b)(5) of the Bankruptcy Code provides that a plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. As further discussed below, the Plan modifies the rights of Holders of Claims and Equity Interests in impaired Classes. The Plan leaves unaffected the rights of Holders of Claims in unimpaired Classes. The Plan thus is consistent with section 1123(b)(5) of the Bankruptcy Code.

vi. *Additional Plan Provisions (Section 1123(b)(6)).*[13]

The Plan further provides for the limited exculpation and release of (and related injunctive relief for) certain parties involved in the administration of these Chapter 11 Cases in a manner that is consistent with section 1123(b) and 1125(e) of the Bankruptcy Code.[14]

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[11] 11 U.S.C. § 1123(b)(4).

[12] 11 U.S.C. § 1123(b)(5).

[13] 11 U.S.C. § 1123(b)(6).

[14] In accordance with Rule 3016(c) of the Federal Rules of Bankruptcy Procedure ("**Bankruptcy Rules**"), the Plan specifically describes in bolded text the parties to be released and acts to be enjoined.

Specifically, Article X of the Plan exculpates and releases certain parties who participated in the Chapter 11 Cases for any act or omissions taken or not taken in connection with, relating to, or arising out of the Debtors' cases, including the negotiation, filing, confirmation, and consummation of the Plan, the filing of the Chapter 11 Cases, and the prosecution and/or settlement of Claims. *See* Plan Art. X. The scope of these provisions are narrowly tailored and do not purport to release any Person for liability that is determined to have arisen from actions that constitute gross negligence or willful misconduct. *See* Plan, Art. X.

The exculpation, release, and injunction provisions contained in Article X of the Plan are substantially similar to the type of limited release that was approved by the Third Circuit in *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) ("*PWS Holding*"). In *PWS Holding*, the plan provided that the debtors, reorganized debtors, the creditor representative under the plan, the creditors' committee, and all of their respective members, officers, directors, employees, advisors, professionals, and agents would have no liability:

> [f]or any act or omission in connection with, related to, or arising out of, the Chapter 11 Cases, the pursuit of confirmation of the Plan, the consummation of the Plan or the Administration of the Plan or the property to be distributed under the Plan, except for willful misconduct or gross negligence.

Id. at 246.

The Third Circuit held that this limited release provision was permissible, because it did not abrogate the liability of third parties for prepetition acts or omission, which would potentially violate section 524(e) of the Bankruptcy Code. *Id*. at 245. Rather, the release provision, which, the court observed, was "apparently a commonplace provision in Chapter 11 plans," simply set forth the applicable standard for liability in connection with the bankruptcy cases. *Id*. Since that standard for release excluded liability for gross negligence or willful misconduct and related only to postpetition conduct in connection with administration of the

bankruptcy cases, it did not purport to abrogate the third parties' liability in a manner that violated section 524(e) of the Bankruptcy Code. *Id.* at 245-46.

Here, the exculpation and release provisions are narrower than the exculpation and release provisions that were approved in *PWS Holding*. In addition, as with the release provision in *PWS Holding*, Article X of the Plan is limited to acts or omissions in connection with the Debtors' Chapter 11 Cases, and excludes releases for acts or omissions that constitute gross negligence and willful misconduct.

Moreover, the exculpation and release provisions in the Plan are narrowly tailored, integral consideration, and critical parts of the Plan, and the Released Parties have relied on the efficacy and conclusive effects of such releases and injunctions when making concessions and exchanging consideration in connection with the Chapter 11 Cases and the Plan. The release and exculpation provisions in Article X of the Plan are (i) in exchange for good, valuable, and reasonably equivalent consideration provided by the Released Parties, (ii) in the best interests of the Debtors, the Estates, and Creditors, and (iii) fair, equitable, reasonable and consistent with section 1125(e) of the Bankruptcy Code.[15]

Accordingly, the release, exculpation, and related injunction[16] provisions are permissible and appropriate.

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[15] Notably, section 1125(e) of the Bankruptcy Code provides that a party that "solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title" is "not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan." The release and exculpation provisions, to the extent that they release and provide exculpation for acts taken or not taken in connection with the Plan merely incorporate the statutory exculpation already provided by the Bankruptcy Code.

[16] The injunction provision in Article X.C of the Plan is necessary to preserve and enforce the release and exculpation provisions and is narrowly tailored to achieve that purpose.

(h) Exempted Property Under Section 522 of the Bankruptcy Code[17]

Section 1123(c) of the Bankruptcy Code is applicable only to individual debtors; accordingly, it is not applicable to these Chapter 11 Cases, which involve only corporate debtors.

(i) Monetary Default Cures under Executory Contracts[18]

Section 1123(d) of the Bankruptcy Code, which requires a plan proponent to provide for the monetary cure of executory contracts being assumed under the Plan, does not apply here, as any Executory Contracts or Unexpired Leases not previously rejected by court order will be rejected under the Plan. Accordingly, there are no monetary defaults that must be cured. The Plan thus complies with section 1123(d) of the Bankruptcy Code.

2. The Debtors have complied with the applicable provisions of the Bankruptcy Code.[19]

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The primary purpose of section 1129(a)(2) is to ensure that the plan proponent has complied with the requirements of sections 1125 and 1126 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018 regarding disclosure and solicitation of plan acceptances. *See* H.R. Rep. No. 95, at 412 (1977); *In re Resorts Int'l,* 145 B.R. 412, 468-69 (Bankr. D.N.J. 1990).

Section 1125 of the Bankruptcy Code provides that acceptances or rejections of a plan may not be solicited until a disclosure statement is approved by the Court, and that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. 11 U.S.C. §§ 1125(a)-(b). The Debtors have complied with section 1125 of the Bankruptcy

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17 11 U.S.C. § 1123(c).

18 11 U.S.C. § 1123(d).

19 11 U.S.C. § 1129(a)(2).

Code. By Order entered on July 25, 2017 ("**Solicitation Procedures Order**"),[20] this Court approved on a preliminary basis the disclosures contained in the Plan as containing "adequate information" under section 1125 of the Bankruptcy Code and approved the Debtors' voting and solicitation procedures. The Debtors did not solicit acceptances or rejections prior to the entry of the Solicitation Procedures Order, and after entry of the Solicitation Procedures Order, the Plan was transmitted to the Holders of Claims and Equity Interests.

Section 1126 of the Bankruptcy Code sets forth the requirements for acceptance of a plan. Only the holders of allowed claims and equity interests that are impaired and that will receive or retain property under a plan on account of such claims are entitled to vote on a plan. 11 U.S.C. § 1126(f)-(g). A class of claims has accepted a plan when the plan has been accepted by creditors holding at least two-thirds in amount and more than one-half in number of the allowed claims in that class held by creditors that submit votes on the plan. 11 U.S.C. § 1126(c). Holders of claims or interests that are not impaired are conclusively presumed to have accepted the plan and are not entitled to vote; holders of claims or interests that are impaired and that will not receive or retain property under a plan are deemed to have rejected the plan and are also are not entitled to vote. 11 U.S.C. § 1126 (f)-(g).

Under the Plan, Class 1 (Other Priority Claims) and Class 3 (Other Secured Claims) are not impaired and are conclusively presumed to have accepted the Plan, and Holders of Class 5 (General Unsecured Claims), Class 6 (Intercompany Claims), Class 7 (Equity Interests in Chieftain Sand and Proppant, LLC), and Class 8 (Equity Interests in Chieftain Sand and Proppant Barron, LLC) will receive nothing on account of their claims or equity interests and are

[20] Docket No. 286.

deemed to have rejected the Plan. The votes of Holders of Claims in these Classes, therefore, were not solicited.

The voting classes under the Plan consist of Class 2 (Lender Secured Claims) and Class 4 (Knapp Railroad Builders, Inc. – Mechanics Lien/Secured Claim). Those classes were solicited in accordance with the requirements of the Solicitation Procedures Order, the Bankruptcy Code, and the Bankruptcy Rules. The Debtors have complied with the requirements of sections 1125 and 1126 and all other applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(2) of the Bankruptcy Code.

3. The Plan was proposed in good faith.[21]

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the term "good faith" is not explicitly defined in the Bankruptcy Code, the good faith standard requires that the plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) (quoting *In re Zenith Elec. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del 1999)). Whether a plan is proposed in good faith must be determined in light of the totality of the circumstances surrounding the plan. *See In re W.R. Grace & Co.*¸ 475 B.R. 34, 87 (D. Del. 2012); *see also In re Century Glove*, 1993 WL 239489, at *4.

The Debtors proposed the Plan in good faith and not by any means forbidden by law. Indeed, this is evidenced by the Plan and the record of these Chapter 11 Cases. The

[21] 11 U.S.C. § 1129(a)(3).

Debtors (with the assistance of the retained professionals) have acted in good faith within the meaning of section 1129(a)(3), and no one has argued to the contrary.

4. Payments for services and expenses are subject to Court approval.[22]

Section 1129(a)(4) of the Bankruptcy Code provides that any payment made "for services or for costs and expenses in or in connection with the case . . . has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). The retained professionals in these cases are already subject to established procedures with respect to the filing and presentation of applications for fees and reimbursement of costs and expenses. The Debtors have paid such fees, costs and expenses in accordance with those procedures and related court orders. The Plan also requires the filing of Final Fee Applications for Professional Fee Claims with the Court no later than sixty (60) days after the Effective Date. Accordingly, the requirements of section 1129(a)(4) have been satisfied.

5. The Debtors have disclosed all required information regarding post-confirmation directors, officers, and insiders.[23]

Section 1129(a)(5) of the Bankruptcy Code requires that: (a) a plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor; (b) the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and (c) there be a disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtors. 11 U.S.C. § 1129(a)(5).

[22] 11 U.S.C. § 1129(a)(4).

[23] 11 U.S.C. § 1129(a)(5).

The Plan is a liquidating plan. The Plan Administrator shall be the sole officer and director of each Post-Effective Date Debtor. The Plan Administrator shall act for the Post-Effective Date Debtors in the same fiduciary capacity as applicable to a board of directors and officers, subject to the provisions of the Plan (and all bylaws, limited liability agreements, operating agreements, articles of incorporation and related corporate documents are deemed amended by the Plan to permit and authorize the same). Those officers and directors who served in such capacity immediately prior to the Effective Date shall be replaced by the Plan Administrator on the Effective Date. As noted above, the Plan discloses that Victor A. Serri will serve as Plan Administrator. The Plan Administrator is experienced and well-qualified, and is being appointed to maximize the value of the recoveries for Creditors; therefore his appointment is consistent with the interests of Creditors and public policy. This disclosure satisfies the requirements of section 1129(a)(5).

6. The Plan does not contain any rate changes subject to the jurisdiction of any governmental regulatory commission.[24]

Section 1129(a)(6) of the Bankruptcy Code requires that, with respect to a debtor whose rates are subject to governmental regulation following confirmation, appropriate governmental approval has been obtained for any rate change provided in the plan, or that such rate change be expressly conditioned on such approval. 11 U.S.C. § 1129(a)(6). Because this is a liquidation case, and because the Debtors never conducted operations in a rate-regulated industry, section 1129(a)(6) of the Bankruptcy Code does not apply.

[24] 11 U.S.C. § 1129(a)(6).

7. The Plan satisfies the "best interest of creditors" requirement.[25]

Section 1129(a)(7) of the Bankruptcy Code provides protection to creditors and interest holders who are impaired under a plan and who have not voted to accept such plan by imposing a "best interest of creditors" requirement. To satisfy this requirement, holders of impaired claims and interests who do not vote to accept the plan must:

> [r]eceive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 [of the Bankruptcy Code] on such date.

11 U.S.C. § 1129(a)(7)(A)(ii). The "best interest" test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan. *See Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 500 (D.N.J. 2005); *In re New Century Holdings, Inc.*, No. 07-10416 (KJC), 2008 WL 2619759, at *16 (Bankr. D. Del. July 2, 2008).

The Plan is in the best interests of Holders of Claims or Equity Interests in these Classes because estimated recoveries are equal to, or in excess of, the recoveries each such Creditor or Equity Interest Holder would be expected to receive in a case under Chapter 7 of the Bankruptcy Code. Due to the fact the sale proceeds were insufficient to payoff the Debtors' senior secured debt, absent an agreement by the senior secured lenders to fund the Wind Down Amount and make certain agreed upon distributions under a Plan, there would be no funds available in a hypothetical chapter 7 liquidation to make any distributions to creditors or holders of equity interests. Thus, the treatment of such Holders under the Plan is no different than the treatment they would receive in a Chapter 7 case.

Accordingly, the Plan satisfies the best interest of creditors test of section 1129(a)(7) of the Bankruptcy Code.

[25] 11 U.S.C. § 1129(a)(7).

8. Acceptance by impaired classes.[26]

Subject to the exceptions contained in section 1129(b) of the Bankruptcy Code, section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either accept the Plan or not be impaired under the Plan. 11 U.S.C. § 1129(a)(8). The Holders of Claims in the two voting Classes have unanimously voted to accept the Plan.[27] As provided in the Plan, Holders of Claims or Equity Interests in Class 5 (General Unsecured Claims), Class 6 (Intercompany Claims), Class 7 (Equity Interests in Chieftain Sand and Proppant, LLC), and Class 8 (Equity Interests in Chieftain Sand and Proppant Barron, LLC) are deemed not to have accepted the Plan. Because such classes are deemed to reject the Plan under section 1126(g) of the Bankruptcy Code, the Plan must satisfy the "fair and equitable" requirements of section 1129(b) of the Bankruptcy Code with respect to such classes. As discussed in Section III.B, below, the Plan is fair and equitable with respect to Classes 5, 6, 7 and 8.

9. The Plan provides for payment of all allowed priority claims.[28]

Section 1129(a)(9) of the Bankruptcy Code generally requires that a plan provide for payment of administrative expense claims, except to the extent that the holders of such claims have agreed to different treatment of such claim. *See* 11 U.S.C. § 1129(a)(9). The Plan meets the requirements of section 1129(a)(9), as all Administrative Expense Claims, Priority Tax Claims, and Priority Non-Tax Claims will be paid in full on the Effective Date or as soon thereafter as is reasonably practicable. The payment of Statutory Fees is likewise provided for under the Plan. The retained professionals have consented to their treatment under the Plan.

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[26] 11 U.S.C. § 1129(a)(8).

[27] *See* Voting Certification.

[28] 11 U.S.C. § 1129(a)(9).

10. At least one Impaired Class has voted to accept the Plan.[29]

If a plan has an impaired class of claims, section 1129(a)(10) of the Bankruptcy Code requires that at least one such impaired class of claims votes to accept the Plan, determined without including the acceptance of a plan by insiders. 11 U.S.C. § 1129(a)(10). The requirements of section 1129(a)(10) have been satisfied since Class 4 voted to accept the Plan.[30]

11. The Plan satisfies the feasibility requirement.[31]

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

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

11 U.S.C. § 1129(a)(11).

Some courts have recognized that the feasibility requirement is not applicable in cases where liquidation is proposed as part of the plan. *See In re Heritage Organization, L.L.C.*, 375 B.R. 230, 311 (Bankr. N.D. Tex. 2007) ("*In re Heritage Organization*") (citing *In re Pero Bros. Farms, Inc.*, 90 B.R. 562, 563 (Bankr. S.D. Fla. 1988); *In re 47th and Belleview Partners*, 95 B.R. 117, 120 (Bankr. W.D. Mo. 1988)). Other courts have examined whether the liquidation proposed as part of the plan is feasible. *See In re Heritage Organization*, 375 B.R. at 311 (citing *In re Holmes*, 301 B.R. 911, 914 (Bankr. M.D. Ga. 2003); *In re Yates Development, Inc.*, 285 B.R. 36, 42-44 (Bankr. M.D. Fla. 2000)).

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29 11 U.S.C. § 1129(a)(10).

30 *See* Voting Certification.

31 11 U.S.C. § 1129(a)(11).

To the extent the feasibility requirement is applicable in these liquidating cases, the Plan satisfies such requirement, because successful performance of its terms is not contingent upon the occurrence of any future uncertain event. *See In re Heritage Organization*, 375 B.R. at 311 (liquidating plan was feasible when debtor's assets were placed in a creditor trust, regardless of the likelihood of success of any future litigation prosecuted by the trustee, because the feasibility requirements looks to whether the trust itself can be created and assets can be transferred into it). As demonstrated in the Plan (and its exhibits) and supported by the Serri Declaration, the Debtors have sufficient Cash to pay the Priority Tax Claims, Priority Non-Tax Claims, and Administrative Expense Claims on the Effective Date or as soon as practicable after such Claims are Allowed, as required by the Plan and the Bankruptcy Code. The Plan also provides that all of the Debtors' remaining assets will vest with each Post-Effective Date Debtor on the Effective Date. The successful performance of the Plan is not contingent on the outcome of any other future events, including but not limited to the litigation of the Causes of Action. Therefore the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

12. The Plan provides for the payment of required statutory fees.[32]

Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930 be paid or that provision be made for their payment. 11 U.S.C. § 1129(a)(12). The Plan provides that all Statutory Fees that come due under 28 U.S.C. § 1930 prior to the Effective Date have been or will be paid and the Statutory Fees that come due after the Effective Date will be paid by the Post-Effective Date Debtors. The Plan thus satisfies section 1129(a)(12).

[32] 11 U.S.C. § 1129(a)(12).

13. The Debtors do not have any retiree benefit obligations to be continued post-confirmation.[33]

Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation of retiree benefits at levels established consistent with section 1114 of the Bankruptcy Code for the duration of the period that the debtor has obligated itself to provide such benefits. The Debtors have no continuing retiree benefit obligations. Therefore, section 1129(a)(13) of the Bankruptcy Code is not applicable here.

B. The Plan Satisfies the "Cram Down" Requirements of Section 1129(b).

Holders of Claims in the two voting Classes have unanimously accepted the Plan. *See* Voting Certification. Nevertheless, the Holders of Claims or Equity Interests in Class 5 (General Unsecured Claims), Class 6 (Intercompany Claims), Class 7 (Equity Interests in Chieftain Sand and Proppant, LLC), and Class 8 (Equity Interests in Chieftain Sand and Proppant Barron, LLC) will not receive or retain property under the Plan and are therefore deemed to have rejected the Plan. *See* 11 U.S.C. § 1126(g). Accordingly, the Plan does not meet the requirement of section 1129(a)(8) with respect to such Classes.[34] The Debors therefore requests that the Court confirm the Plan under section 1129(b) of the Bankruptcy Code.

Section 1129(b) of the Bankruptcy Code provides that if a plan satisfies all of the requirements of section 1129(a) other than section 1129(a)(8) (requiring all impaired classes to accept the plan), a plan may be confirmed without the affirmative acceptance of the plan by a rejecting class so long as "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Other than Classes 5, 6, 7 and 8 (which are deemed to have rejected the

[33] 11 U.S.C. § 1129(a)(13).

[34] Nevertheless, the Plan meets the cram-down requirements for these Classes.

Plan), each Class under the Plan is either unimpaired (Classes 1 and 3) and deemed to have accepted the Plan, 11 U.S.C. § 1126(f), or has voted unanimously in favor of the Plan (Classes 1 and 4).[35] *See* 11 U.S.C. § 1126(c). The Plan does not discriminate unfairly against, and is fair and equitable to, Classes 5, 6, 7 and 8 and thus is confirmable under Section 1129(b).

1. The Plan does not discriminate unfairly against Classes 5, 6, 7 or 8.

The Plan does not discriminate unfairly against Classes 5, 6, 7 and 8. Although Congress did not define the phrase "discriminate unfairly," courts have interpreted this requirement to mean that creditors and interest holders with similar legal rights should not receive materially different treatment under a plan. *See, e.g., In re Johns-Manville Corp. (In re Johns-Manville Corp.),* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp. (In re Johns-Manville Corp),* 843 F.2d 636 (2d Cir. 1988). The test for whether the plan proponent's discrimination is unfair requires a determination of "whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination." *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 660 (Bankr. D. Del. 2003).

The Plan does not discriminate against the Holders of Class 5 (General Unsecured Claims), Class 6 (Intercompany Claims), Class 7 (Equity Interests in Chieftain Sand and Proppant, LLC), and Class 8 (Equity Interests in Chieftain Sand and Proppant Barron, LLC). General Unsecured Claims will not receive any distributions, Intercompany Claims will be extinguished and deemed cancelled in accordance with the limited substantive consolidation of the Debtors and for the reasons discussed below. All Equity Interests will be cancelled on the Effective Date. No Holder of an Equity Interest will receive treatment that is different in any

[35] *See* Voting Certification.

respect from other holders of such Equity Interests. Moreover, the cancellation of the Equity Interests, without any distribution to such Holders, is required by the "absolute priority" rule, as discussed below. Accordingly, the Plan does not discriminate against the Holders of Claims or Equity Interests in Classes 5, 6, 7 or 8.

2. The Plan is fair and equitable with respect to Classes 5, 6, 7 and 8.

In addition to not discriminating unfairly, the Plan must be fair and equitable with respect to the claims or interests that are impaired under, and deemed to have rejected, the Plan. 11 U.S.C. § 1129(b)(1). Section 1129(b)(1) of the Bankruptcy Code provides explicit guidance as to the meaning of the term "fair and equitable." *See, e.g. Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1359 (7th Cir. 1990)("The Code says that a plan treats unsecured creditors fairly and equitably if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.").

Thus, a plan is "fair and equitable" with respect to an impaired class of unsecured claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule. *See* 11 U.S.C. § 1129(b)(2)(B)(ii), (C)(ii); *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999). The absolute priority rule is satisfied with respect to a class of impaired unsecured claims or equity interests so long as the holder of any claim or interest that is junior to the claims or interests in such class will not receive or retain any property under the plan on account of such junior claim or interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii), (C)(ii).

The Plan satisfies the absolute priority rule with respect to all Claims and Equity Interests. No junior holder of a Claim or Equity Interest will receive any distribution unless the Holders of higher priority Claims receive the full value of their Claims or the Holders of such

higher priority Claims have consented to such treatment. No Holders of any Claims or Equity Interests that are junior to any of Classes 5, 6, 7 and 8 will receive or retain any property under the Plan on account of such junior Claims or Interests, and no Holders of Claims or Interests senior to such Classes are receiving more than 100% recovery on account of their Claims or Interests.

As the Plan does not discriminate unfairly against, and is fair and equitable with respect to, Classes 5, 6, 7 and 8, the Plan satisfies, and should be confirmed under, the "cram down" provisions in section 1129(b) of the Bankruptcy Code.

C. Sections 1129(a)(14)-(16), (c)-(e) are Either Inapplicable or Satisfied.

Section 1129(a)(14) and section 1129(a)(15) of the Bankruptcy Code are inapplicable because the Debtors are not individuals. The Debtors were moneyed, business, or commercial entities and, accordingly, section 1129(a)(16) of the Bankruptcy Code also is inapplicable in these Chapter 11 Cases.

The Plan is the only plan before the Court for confirmation, and, accordingly, section 1129(c) is satisfied. Additionally, the principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933, and the Plan therefore satisfies the requirements of section 1129(d) of the Bankruptcy Code. Finally, the Chapter 11 Cases are not "small business case[s]," as that term is defined in the Bankruptcy Code, and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

D. The Plan Modifications Are Permissible Under Section 1127.

Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation as long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code, and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications

made after acceptance but prior to confirmation, Bankruptcy Rule 3019 provides, in relevant part:

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

Fed. R. Bankr. P. 3019(a).

The Debtors have made non-material modifications to the Plan in accordance with the Plan. The modifications were to describe the retained Causes of Action and to clarify the scope of the Plan injunction.

A modification is material if it "so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." 9 COLLIER ON BANKRUPTCY ¶ 3019.01 (16th ed. 2009); *see also In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988). Re-solicitation is appropriate only if "the modification adversely affects the interests of a creditor who has previously accepted the plan, in more than a purely ministerial *de minimis* manner." *In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023 (Bankr. D. Colo. 1988). The modifications made to the Plan do not have a material impact on the treatment of any Claims or Equity Interests, and, thus, re-solicitation is unnecessary and acceptances of the Plan should be deemed acceptances of the Plan, as modified.

E. The Limited Substantive Consolidation Provided for in the Plan is, Under the Circumstances of These Chapter 11 Cases, Permissible and in the Best Interest of Creditors.

The Plan provides for substantive consolidation of the Debtors' Estates, but solely for the purposes of the Plan, including making any Distributions to Holders of Allowed Claims. Specifically, on the Effective Date, (i) all assets and liabilities of the Debtors will, solely for

Distribution purposes, be treated as if they were merged; (ii) all intercompany claims will be eliminated; (iii) each Claim Filed or to be Filed against the Debtors will be deemed a single non-aggregated Claim against, and a single non-aggregated obligation of, the Debtors; (iv) all guarantees of either Debtor of the payment, performance, or collection of obligations of the other Debtor shall be eliminated and canceled; and (v) all transfers, disbursements and Distributions on account of Claims made by or on behalf of any of the Debtors' Estates hereunder will be deemed to be made by or on behalf of all of the Debtors' Estates. Holders of Allowed Claims entitled to Distributions under this Combined Plan and Disclosure Statement shall be entitled to their *Pro Rata* share of assets available for Distribution, if any, on account of such Claim without regard to which Debtor was originally liable for such Claim.[36]

The Third Circuit set forth the standard for substantive consolidation in *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2007) ("*Owens Corning*"). In that case, the Court held that for substantive consolidation to be approved, the proponent of substantive consolidation must show that either "(i) prepetition [the Debtors] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition [the Debtors'] assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Id.* at 211. The test is disjunctive: the proponent of substantive consolidation is required to satisfy one of the two foregoing requirements, "*absent consent*." *Id*. (emphasis added).

No party has objected to the Plan (including substantive consolidation), and all Creditors entitled to vote have voted unanimously in favor of the Plan. Because there is consent

[36] The substantive consolidation of the Debtors under the Plan shall not (other than for purposes of tabulation of votes and Distributions under the Plan) affect the legal and organizational structure of the Debtors, which will be liquidated and dissolved post-confirmation.

to substantive consolidation, the limited substantive consolidation provided for in the Plan should be approved. Even in the absence of consent, however, the Plan meets the *Owens Corning* standard. In particular, the second basis for substantive consolidation is satisfied because the Debtors' assets and liabilities are so scrambled that separating them would be prohibitively expensive and would inure to the detriment of all Creditors.

Specifically, substantive consolidation of the Debtors' Estates is justified because, among other things, the Debtors:

(a) transferred assets and liabilities to each other without proper record keeping;

(b) made intercompany transfers of funds without proper record keeping such that determination of intercompany liabilities is cost prohibitive;

(c) operated as a single business organization, sharing office space, accounting systems, management and governance, employees, and the financial services systems that were offered to their customers in the gaming industry; and

(d) provided consolidated financial statements to its secured creditors and filed consolidated tax returns;

In particular, unscrambling the indiscriminate transfer of assets and liabilities between the Debtors and the intercompany transfers of funds without proper record keeping would be cost-prohibitive, if not impossible. The Debtors engaged in such practices for years preceding the filing of their Chapter 11 Cases, and the Debtors' books and records and accounting and cash management systems are in extremely poor condition and do not properly reflect intercompany transfers. Given the poor and incomplete condition of such records, it would likely be impossible to properly and accurately disentangle the Debtors' assets and liabilities. Even if unscrambling were possible, the expense and time that would be required to attempt to reconcile these intercompany accounts would significantly diminish, if not deplete entirely, the assets available for Distribution to Creditors.

Accordingly, the Court should approve the limited substantive consolidation of the Debtors, as set forth in the Plan, because "postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Owens Corning*, 419 F.3d at 211; *In re Abeinsa*, 562 B.R. at 279 (quoting *Owens Corning*, 419 F.3d at 211).

V. CONCLUSION

For these reasons, and based on the arguments and evidence to be proffered at the hearing on confirmation of the Plan, the Debtors respectfully submit that the Plan complies with and satisfies all of the requirements of section 1129 of Bankruptcy Code and should be confirmed.

Dated: September 11, 2017
Wilmington, DE

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