IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: OPEN ROAD FILMS, LLC, a Delaware limited liability company, *et al.*[1], Debtors.	Chapter 11 Case No.: 18-12012 (LSS) (Jointly Administered) **Hearing Date:** **October 2, 2019 at 1:30 p.m. ET**

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF JOINT CHAPTER 11 PLAN OF LIQUIDATION PROPOSED BY DEBTORS AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS

[1] The Debtors and the last four digits of their taxpayer identification numbers include: Open Road Films, LLC (4435-Del.); Open Road Releasing, LLC (4736-Del.); OR Productions LLC (5873-Del.); Briarcliff LLC (7304-Del.); Open Road International LLC (4109-Del.); and Empire Productions LLC (9375-Del.). The Debtors' address is 1800 Century Park East, Suite 600, Los Angeles, California 90067.

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Open Road Films, LLC, together with its chapter 11 affiliates, the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned jointly administered chapter 11 cases (the "Cases"), and the Debtors' official committee of unsecured creditors (the "Committee" and, with the Debtors, the "Plan Proponents") submit this memorandum of law (the "Memorandum") in support of confirmation, pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code"), of the *Joint Plan of Liquidation Proposed By Debtors and Official Committee of Unsecured Creditors* attached as Exhibit A to the Disclosure Statement (including all exhibits thereto and as amended, modified or supplemented from time to time, the "Plan") and the related disclosure statement [Docket No. 821] (including all exhibits thereto and as amended, modified or supplemented from time to time, the "Disclosure Statement").[2] In support thereof, the Plan Proponents respectfully represent as follows:

PRELIMINARY STATEMENT

1. Following the sale of substantially all of the Debtors' assets in connection with these Cases, the Plan Proponents, along with the Prepetition Lenders, engaged in good-faith and arm's length negotiations regarding a chapter 11 plan that would provide for distributions to creditors and for the prompt and efficient wind-down of the Debtors' Estates and these Cases. Throughout that process, the Plan Proponents have also devoted time and attention to resolving Claims asserted against the Debtors' Estates with priority over General Unsecured Claims.

2. As described in detail in the Disclosure Statement, the Plan provides for, among other things: (i) the substantive consolidation of the Debtors' Estates; (ii) the liquidation of the Debtors' remaining assets; (iii) the satisfaction of all Allowed Administrative Claims, Professional Fee Claims, Priority Tax Claims, Miscellaneous Secured Claims, and Priority Non-

[2] All capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan and in the Disclosure Statement.

Tax Claims; (iv) the vesting of all of the Debtors' assets in Liquidating Debtor Open Road Films, LLC; (v) to the extent funds are available, distributions to Holders of Allowed General Unsecured Claims; (vi) certain release, exculpation, and injunction provisions; and (vii) the wind-down and dissolution of the Debtors.

3. Following the Bankruptcy Court's entry of the order approving the Disclosure Statement [Dkt. No. 819] (the "Disclosure Statement Order"), the Plan Proponents solicited acceptances of the Plan from all creditors entitled to vote. The deadline to vote has passed and, as is evidenced by the *Declaration of John Burlacu on Behalf of Donlin, Recano & Company, Inc. Regarding Voting and Tabulation of Ballots Accepting and Rejecting the Joint Chapter 11 Plan of Liquidation Proposed By Debtors and Official Committee of Unsecured Creditors* [Dkt. No. 876] (the "Voting Declaration"), there is overwhelming support for the Plan. The following table summarizes the Plan voting results from Classes 3 and 4 (the only voting Classes) on a debtor by debtor basis and on a consolidated basis:

Final Tabulation Debtor-by-Debtor Results

CLASS	**TOTAL BALLOTS RECEIVED**			
	Accept		**Reject**	
	AMOUNT (% of Amount Voted)	**NUMBER (% of Number voted)**	**AMOUNT (% of Amount Voted)**	**NUMBER (% of Number Voted)**
Class 3A –Prepetition Lender Claim against Open Road Films, LLC	$90,750,000 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)
Class 3B –Prepetition Lender Claim against Open Road Releasing, LLC	$90,750,000 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)

CLASS	TOTAL BALLOTS RECEIVED			
	Accept		Reject	
	AMOUNT (% of Amount Voted)	NUMBER (% of Number voted)	AMOUNT (% of Amount Voted)	NUMBER (% of Number Voted)
Class 3C –Prepetition Lender Claim against OR Productions LLC	$90,750,000 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)
Class 3D –Prepetition Lender Claim against Briarcliff LLC	$90,750,000 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)
Class 3E –Prepetition Lender Claim against Open Road International LLC	$90,750,000 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)
Class 3F –Prepetition Lender Claim against Empire Productions LLC	$90,750,000 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)
Class 4A – General Unsecured Claims against Open Road Films, LLC	$14,275,784.87 (99.79%)	26 (96.30%)	$29,440.00 (00.21%)	1 (3.70%)
Class 4B – General Unsecured Claims against Open Road Releasing, LLC	$759,181.78 (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)

Final Tabulation Consolidated Results

CLASS	TOTAL BALLOTS RECEIVED			
	Accept		Reject	
	AMOUNT (% of Amount Voted)	NUMBER (% of Number voted)	AMOUNT (% of Amount Voted)	NUMBER (% of Number Voted)

CLASS	TOTAL BALLOTS RECEIVED			
	Accept		Reject	
	AMOUNT (% of Amount Voted)	NUMBER (% of Number voted)	AMOUNT (% of Amount Voted)	NUMBER (% of Number Voted)
Class 3 –Prepetition Lender Claims	$544,500,000.00[3] (100.00%)	1 (100.00%)	$0 (00.00%)	0 (00.00%)
Class 4 – General Unsecured Claims	$15,034,966.65 (99.80%)	27 (96.43%)	$29,440.00 (00.20%)	1 (3.57%)

4. Moreover, no creditors or other parties in interest filed objections to the Plan. The Office of the United States Trustee (the "U.S. Trustee") had certain comments to discrete issues in the Plan, which comments have been consensually resolved. The U.S. Trustee has confirmed to the Plan Proponents that the U.S. Trustee has no remaining objections to confirmation.

5. In light of this broad support for the Plan, and for the other reasons set forth herein, the Plan Proponents respectfully submit that the Plan should be confirmed.

FACTS

6. The pertinent facts relating to these Cases and the Plan are set forth in the Disclosure Statement, the Plan, the Voting Declaration, and the *Declaration of Amir Agam in Support of Confirmation of the Joint Plan of Liquidation Proposed By Debtors and Official Committee of Unsecured Creditors*, which is being filed concurrently herewith (the "Agam Declaration" and, together with the Voting Declaration, the "Declarations").

[3] This number reflects the aggregate amount of the Class 3 Claim ($90,750,000) at each Debtor.

THE PLAN MEETS THE REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129 OF THE BANKRUPTCY CODE

7. To obtain confirmation of the Plan, the Plan Proponents must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[4] Through this Memorandum, the record of these Cases, the Declarations, and any evidence that may be presented at the Confirmation Hearing, the Plan Proponents will demonstrate, by a preponderance of the evidence, that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan. Accordingly, the Plan should be confirmed.

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

8. Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) of the Bankruptcy Code indicates that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and contents of a chapter 11 plan, respectively.[5] As demonstrated below, the Plan complies with the requirements of sections 1122, 1123, and all other applicable provisions of the Bankruptcy Code.

[4] *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 151–52 (Bankr. D. Del. 2011) (plan proponent bears the burden of establishing the plan's compliance with section 1129 of the Bankruptcy Code) (internal citations omitted); *In re Rubicon US REIT, Inc.*, 434 B.R. 168, 174 (Bankr. D. Del. 2010) (applicable evidentiary standard for establishing a plan's compliance with section 1129 of the Bankruptcy Code is the preponderance of the evidence standard).

[5] H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008).

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

9. Section 1122 of the Bankruptcy Code provides that the claims or interests within a given plan class must be "substantially similar." 11 U.S.C. § 1122(a). Section 1122 of the Bankruptcy Code, however, does not require that all substantially similar claims or equity interests must be classified together. Instead, courts have recognized that similar claims may be classified separately, provided there is a reasonable basis for doing so.[6] Courts also are afforded broad discretion in approving a plan proponent's classification structure and should consider the specific facts of each case when making a determination regarding classification.[7]

10. The Plan provides for separate classification of Claims against and Equity Interests in the Debtors based upon differences in the legal nature and/or priority of such Claims and Equity Interests. The Plan designates the following six Classes: Class 1 (Priority Non-Tax Claims), Class 2 (Miscellaneous Secured Claims), Class 3 (Prepetition Lender Claims), Class 4 (General Unsecured Claims), Class 5 (Subordinated Claims) and Class 6 (Equity Interests). Classes 1 through 5 constitute Classes of Claims and Class 6 constitutes a Class of Equity Interests. *See* Plan §§ 3.1–3.2.

11. The Plan's classification scheme complies with section 1122 of the Bankruptcy Code because each Class of Claims or Equity Interests contains only Claims or Equity Interests that are substantially similar to the other Claims or Equity Interests within such Class. Indeed, the Claims and Equity Interests in each Class differ from the Claims and Equity Interests in each

[6] *See, e.g., Aetna Cas. & Sur. Co. v. Clerk, U.S. Bankr. Court N.Y., N.Y. (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996).

[7] *See, e.g., In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060–61 (3d Cir. 1987) (observing that "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").

other Class based on their differing natures. Accordingly, the classification of Claims and Equity Interests in the Plan satisfies section 1122 of the Bankruptcy Code.

B. The Plan Complies with Section 1123(a) of the Bankruptcy Code

12. Section 1123(a) of the Bankruptcy Code sets forth eight requirements. 11 U.S.C. § 1123(a). As shown below, the Plan complies with each of these requirements, to the extent applicable to confirmation of the Plan.

(a) Section 1123(a)(1): Designation of Classes of Claims and Equity Interests

13. Section 1123(a)(1) of the Bankruptcy Code requires that a chapter 11 plan designate classes of claims and equity interests, subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates five Classes of Claims and one Class of Equity Interests, subject to section 1122 of the Bankruptcy Code. *See* Plan §§ 3.1–3.2. Thus, the Plan satisfies the requirement of section 1123(a)(1) of the Bankruptcy Code.

(b) Section 1123(a)(2): Classes that Are Not Impaired by the Plan

14. Section 1123(a)(2) of the Bankruptcy Code requires that a chapter 11 plan specify which classes of claims or equity interests are unimpaired under such plan. The Plan specifies that Class 1 (Priority Non-Tax Claims) and Class 2 (Miscellaneous Secured Claims) are Unimpaired. *See* Plan § 4.1. Thus, the Plan satisfies the requirement of section 1123(a)(2) of the Bankruptcy Code.

(c) Section 1123(a)(3): Treatment of Classes that Are Impaired by the Plan

15. Section 1123(a)(3) of the Bankruptcy Code requires that a chapter 11 plan specify how the classes of claims or equity interests that are impaired under such plan will be treated. The Plan designates Class 3 (Prepetition Lender Claims), Class 4 (General Unsecured Claims), Class 5 (Subordinated Claims), and Class 6 (Equity Interests) as Impaired and specifies the

treatment of Claims and Equity Interests in such Classes. *See* Plan §§ 3.1 & 3.2. Thus, the Plan satisfies the requirement of section 1123(a)(3) of the Bankruptcy Code.

(d) Section 1123(a)(4): Equal Treatment Within Each Class

16. Section 1123(a)(4) of the Bankruptcy Code requires that a chapter 11 plan provide the same treatment for each claim or interest within a particular class, unless the holder of a claim or interest agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtors in each respective Class is the same as the treatment of each other Claim or Equity Interest in such Class, unless the Holder has agreed to receive less favorable treatment. *See* Plan §§ 3.1–3.2. Thus, the Plan satisfies the requirement of section 1123(a)(4) of the Bankruptcy Code.

(e) Section 1123(a)(5): Adequate Means for Implementation

17. Section 1123(a)(5) of the Bankruptcy Code requires that a chapter 11 plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Article V of the Plan provides a detailed description of the transactions that are contemplated by the Plan. Specifically, the Plan provides adequate means for implementation of the Plan through, among other things: (i) the substantive consolidation of the Debtors' Estates; (ii) the vesting of the Debtors' assets in Liquidating Debtor Open Road Films, LLC; (iii) the appointment of the Plan Administrator to implement the Debtors' liquidation; (iv) the making of Distributions by the Plan Administrator in accordance with the Plan; and (v) the ultimate dissolution and wind-down of the Debtors. *See* Plan Art. V. Thus, the Plan satisfies the requirement of section 1123(a)(5) of the Bankruptcy Code.

(f) Section 1123(a)(6): Prohibitions on Issuance of Non-Voting Securities

18. The Plan does not provide for the issuance of any securities, including non-voting securities, and provides that the Debtors' operating agreements shall be deemed to include a

provision prohibiting the issuance of nonvoting equity securities. *See* Plan § 5.3(a). In light of this, section 1123(a)(6) of the Bankruptcy Code is, to the extent applicable, satisfied.

(g) Section 1123(a)(7): Provisions Regarding Directors and Officers

19. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Here, the Debtors' existing directors and officers are being terminated on the Effective Date without any further action of any party. *See* Plan § 5.4(b). John Roussey was selected by the Plan Proponents as the Plan Administrator. *See* Plan § 1.67. Disclosures concerning Mr. Roussey were included in the Plan Supplement. The successors, if any, to the Plan Administrator shall be selected pursuant to the procedures set forth in the Plan.

20. Accordingly, the Plan's provisions related to the selection of directors, officers, or trustees are consistent with the interests of holders of Claims and Equity Interests and with public policy, thereby satisfying the requirement of section 1123(a)(7) of the Bankruptcy Code.

(h) Section 1123(a)(8): Provisions Regarding Treatment of Earnings and Future Income

21. Section 1123(a)(8) of the Bankruptcy Code applies to cases where the debtor is an individual and, accordingly, is inapplicable to the Debtors and the Plan.

C. The Plan Complies with Section 1123(b) of the Bankruptcy Code

22. Section 1123(b) of the Bankruptcy Code sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. *See* 11 U.S.C. § 1123(b). Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

(a) Impairment/Unimpairment of Claims and Equity Interests

23. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). As discussed above, Claims and Equity Interests in Classes 3 through 6 are Impaired under the Plan, and Claims in Classes 1 and 2 are Unimpaired under the Plan. Thus, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

(b) Assumption/Rejection of Executory Contracts and Leases

24. Section 1123(b)(2) of the Bankruptcy Code allows a chapter 11 plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases. *See* 11 U.S.C. § 1123(b)(2). Section 6.1 of the Plan provides that, with certain exceptions (such as, among others, those contracts specifically identified in the Plan Supplement), on the Effective Date, all executory contracts and unexpired leases of the Debtors not previously assumed, rejected, sold, conveyed, or otherwise assigned shall be deemed rejected, pursuant to the Confirmation Order, as of the Effective Date. *See* Plan § 6.1.

25. Assumption or rejection of an executory contract or unexpired lease of a debtor is subject to judicial review under the business judgment standard.[8] This standard is satisfied when a debtor determines that assumption or rejection will benefit the estate.[9] Here, rejection of nearly all of the Debtors' remaining executory contracts and unexpired leases will benefit the Debtors' Estates because these are liquidating cases, and the Debtors have no further need for their remaining contracts or leases. The Plan Proponents have identified, however, three contracts that are beneficial to assume. These contracts are listed in the Plan Supplement, and constitute (i) two contracts for administrative services (record maintenance and e-mail archiving) that will

[8] *See, e.g.*, *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp*., 872 F.2d 36, 39–40 (3d Cir. 1989).

[9] *See, e.g., id.*

benefit the Liquidating Debtors and (ii) one film distribution contract that was not previously sold that the Plan Proponents believe the Liquidating Debtors will attempt to monetize.

26. With respect to the administrative services contracts, the Debtors, in consultation with the Committee, have determined that such contracts will provide value for the Liquidating Debtors by ensuring continuity of the Debtors' records—both paper and electronic—as the Liquidating Debtors and the Plan Administrator implement the Plan and wind-down the Debtors' affairs. In any event, assumption of these contracts poses little risk for the Debtors, as the amounts necessary to cure such contracts are minimal, and each contract expires by its terms (subject to renewal) within one year—ensuring that the Liquidating Debtors will not be saddled with burdensome obligations.

27. With respect to the film distribution contract (known as "The Tank" contract), such contract represents the lone remaining film distribution contract not already disposed of by the Debtors during these cases. The Debtors have been in contact with at least one party that has expressed interest in purchasing the Debtors' rights in The Tank, and the Debtors, in consultation with the Committee, expect to be able to consummate a transaction post-Effective Date to sell these rights to a third party and thus monetize the Debtors' position in The Tank. Importantly, although the remaining expected revenues from The Tank under the distribution agreement are modest, the Debtors' books and records reflect that the Debtors are "in the money"—in other words, there is more expected revenue from the film to the Debtors than obligations to be paid by the Debtors (incidentally, the Debtors' books and records reflect no cure amount due).

28. The Debtors have thus exercised sound business judgment in their decision to assume or reject, as applicable, their remaining executory contracts and unexpired leases.

Accordingly, the treatment of executory contracts and unexpired leases in the Plan is consistent with section 1123(b)(2) of the Bankruptcy Code.

(c) Compromises and Settlements Under and in Connection with the Plan

29. Section 1123(b)(3) of the Bankruptcy Code allows a Plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement by the debtor, the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest." 11 U.S.C. § 1123(b)(3).

(i) Compromises and Settlements

30. The Plan reflects and incorporates certain settlements and compromises, as permitted by section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019. Compromises are favored in bankruptcy because they minimize the costs of litigation and further the parties' interests in expediting administration of a bankruptcy estate.[10] In deciding whether to approve a compromise under Bankruptcy Rule 9019, the Bankruptcy Court must determine if the settlement is fair, reasonable, and in the interests of the estate.[11] The compromises and settlements pursuant to and in connection with the Plan, including the previously-approved global settlement between the Prepetition Lenders, the Debtors, and the Committee (*see* Docket No. 725), the settlement of Intercompany Claims and the releases given by the Debtors' Estates pursuant to Section 9.3 of the Plan, are each fair, reasonable, and in the best interests of the Debtors, their Estates, and their creditors.

(ii) Retained Rights of Action

31. Section 1123(b)(3)(B) provides that a plan may "provide for the retention and enforcement . . . by a representative of the estate appointed for such purpose, of any . . . claim or

[10] *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996).

[11] *See, e.g., In re Key3Media Grp., Inc.*, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (citation omitted).

interest [belonging to the debtor or to the estate]." 11 U.S.C. § 1123(b)(3)(B). The Plan provides that the Retained Rights of Action will be vested in the Liquidating Debtors on the Effective Date and that the Plan Administrator will have the sole power and authority to prosecute and resolve any Retained Rights of Action. *See* Plan §§ 5.7 & 5.5(b)(vii). These provisions are consistent with, and supported by, section 1123(b)(3)(B) of the Bankruptcy Code.

(d) Release, Exculpation, Limitation of Liability, and Injunction Provisions

32. As is customary, the Plan includes certain release, exculpation, and injunction provisions. *See* Plan §§ 9.1–9.4. These provisions are proper because, among other things, they are the product of arm's-length negotiations, have been important to obtaining the support of the various constituencies for the Plan, have been reviewed by the professionals for the Committee, and importantly, have not been objected to by any party in interest in the Cases. Such release, exculpation, and injunction provisions are an appropriate exercise of the Debtors' business judgment, fair and equitable, given for valuable consideration, and in the best interests of the Debtors and their Estates. These provisions are consistent with the Bankruptcy Code and, thus, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

(i) Releases of Estates' Claims

33. Under the Plan, the Debtors propose to release certain parties – the Released Parties[12] – from claims or causes of action that the Debtors' Estates may have. *See* Plan § 9.3. A plan that proposes to release a claim or a cause of action belonging to a debtor's estate is a "settlement" within the scope of section 1123(b)(3)(A) of the Bankruptcy Code.

[12] The Plan defines the "Released Parties" as, collectively, (i) the Debtors' directors, officers (including, but not limited to, the CRO), and employees who served in such capacities during the Chapter 11 Cases or a portion thereof, (ii) the Debtor Retained Professionals, (iii) the Committee and its members (solely in their respective capacity as members of the Committee), (iv) the Committee Retained Professionals, (v) the Prepetition Lenders and their professionals and representatives, and (vi) the respective successors or assigns of the foregoing parties. Plan § 1.85.

34. Section 9.3 of the Plan represents a valid settlement of any claims the Estates may have against the Released Parties, pursuant to section 1123(b)(3)(A) and Bankruptcy Rule 9019. The Plan Proponents have proposed these releases based on their sound business judgment.[13] Indeed, the Plan Proponents believe that pursuing claims against the Released Parties would not be in the best interest of the Debtors' various stakeholders because the costs involved would likely outweigh any potential benefit to the Debtors' Estates from pursuing such claims. Moreover, these releases and the efforts of the Released Parties were important to the development of the Plan. The Estates' release of claims as provided for in Section 9.3 of the Plan is a key component of the consensual Plan process. Accordingly, as set forth above, the Estates' release of the Released Parties represents a valid exercise of the Debtors' business judgment, and the Plan Proponents respectfully submit that these provisions should be approved.

(ii) Consensual Third-Party Releases

35. Section 9.4 of the Plan also provides for certain third-party releases of the Released Debtor/Committee Parties[14] by the Releasing Creditors.[15] These third-party releases are consensual, as they apply to Holders of Claims that vote to accept, or are deemed to accept, the Plan, and expressly do not apply to any Holder of a General Unsecured Claim who elects to opt-out of the third-party releases, even if such Holder votes to accept the Plan. *See* Plan §§ 1.86

[13] *See In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) ("[A] debtor may release claims in a plan pursuant to Bankruptcy Code § 1123(b)(3)(A), if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate.").

[14] The Plan defines such "Released Debtor/Committee Parties" as, collectively, (i) the Debtors, (ii) the Estates, (iii) the Debtors' directors, officers (including, but not limited to, the CRO), and employees who served in such capacities during the Chapter 11 Cases or a portion thereof, (iv) the Debtor Retained Professionals, (v) the Committee and its members (solely in their respective capacity as members of the Committee), (vi) the Committee Retained Professionals, (vii) the Prepetition Lenders and their professionals and representatives, and (viii) the respective successors or assigns of the foregoing parties. Plan § 1.84.

[15] The Plan defines such "Releasing Creditors" as each Holder of a Claim that votes to accept, or is deemed to accept, the Plan, other than any Holder of a Class 4 Claim that affirmatively elects on its Ballot to opt out of being a Releasing Creditor. Plan § 1.86.

& 9.4. Holders of General Unsecured Claims who voted to reject the Plan and Holders of General Unsecured Claims who voted to accept the Plan but elected to opt-out of the releases are not providing the releases set forth in Section 9.4 of the Plan. Courts in this District have regularly approved consensual third-party releases of similar scope. Furthermore, interested parties received sufficient, clear and conspicuous notice of these third-party releases and of the process for opting out of or objecting to such releases—including, for Class 4 General Unsecured Claims, a large box on each Class 4 ballot highlighting the release and the opt-out. Interested parties had ample time to raise any objections to these third-party releases, and no such objections were filed or asserted. Accordingly, the consensual third-party releases should be approved.

(iii) Exculpation and Limitation of Liability

36. The Plan provides for the exculpation of, and limitation of liability for, the Exculpated Parties, who are (a) the Debtors, (b) the present and former officers (including, but not limited to, the CRO), and directors of the Debtors who served in such capacities at any point from and after the Petition Date, (c) the Debtor Retained Professionals, (d) the Committee and its present and former members (solely in their respective capacity as members of the Committee), and (e) the Committee Retained Professionals. *See* Plan §§ 1.39 & 9.2. The exculpation and limitation of liability is subject to a standard carve out for willful misconduct and actual fraud. *Id.* § 9.2.

37. It is well established that exculpation is appropriate for fiduciaries of a bankruptcy estate, including the debtor, its directors, officers, and professionals, and the creditors' committee, and its members and professionals.[16] In the instant case, the Exculpated Parties have

[16] *In re PWS Holding Corp.*, 228 F.3d 224, 245–47 (3d Cir. 2000).

participated in good faith in formulating and negotiating the Plan, and they are entitled to protection from exposure to claims against them relating to their participation in the Cases, consistent with section 1125(e) of the Bankruptcy Code. *See* 11 U.S.C. § 1125(e). Furthermore, interested parties received sufficient notice of the exculpation provision and had ample time to raise any objections thereto, and no such objections were filed. As a result, the exculpation provision set forth in Section 9.2 of the Plan is appropriate and should be approved.

(iv) Injunction

38. Finally, Section 9.1 of the Plan contains an injunction provision that the Plan Proponents believe is necessary to enforce and preserve the release and exculpation provisions provided for in Article IX and should therefore be approved. Furthermore, in compliance with Bankruptcy Rule 3016, all acts to be enjoined by, and all entities that are to be subject to, such injunction are identified in the Disclosure Statement, the Plan, and the proposed Confirmation Order. The injunction provision is therefore appropriate and should be approved.

(e) Other Appropriate Provisions Not Inconsistent with the Applicable Provisions of the Bankruptcy Code

39. Section 1123(b)(6) of the Bankruptcy Code is a "catchall" provision which permits a chapter 11 plan to include any appropriate provision as long as such provision is not inconsistent with applicable sections of the Bankruptcy Code.

(i) Substantive Consolidation

40. Section 5.2 of the Plan provides for the substantive consolidation of the Debtors. *See* Plan § 5.2. The Plan Proponents believe that such substantive consolidation is fair, equitable and in the best interest of the Estates. Moreover, no party has objected to substantive consolidation. Far from opposing substantive consolidation, which is a cornerstone of the Plan, the voting creditors have overwhelmingly accepted the Plan. Moreover, the consent of the

creditors for the Plan was obtained by wide margins whether the votes are tabulated on a consolidated basis across all Debtors or an Estate-by-Estate basis for each Debtor.

41. "Substantive consolidation . . . emanates from equity. It treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph into claims against the consolidated survivor."[17]

42. It is well established that bankruptcy courts may use their equitable powers under section 105 of the Bankruptcy Code to substantively consolidate.[18] Moreover, section 1123(a)(5)(C) of the Bankruptcy Code expressly contemplates that a plan may merge or consolidate debtors as a means for the implementation of the plan. A species of merger and consolidation of debtors under a plan is substantive consolidation.[19] Finally, as noted above, section 1123(b)(3)(A) of the Bankruptcy Code provides that chapter 11 plans may provide for the settlement or adjustment of claims, which includes the settlement of claims and disputes between estates over allocation of assets and liabilities as resolved by substantive consolidation.

43. Here, substantive consolidation is appropriate and justified. Absent the substantive consolidation proposed under the Plan, the process of disentangling the assets and liabilities of the Debtors and their Estates would be time consuming, counterproductive, and costly in several ways, including as discussed in greater detail below. Given the limited assets of the Estates, that process would not be worthwhile.

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[17] *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (internal quotation marks and citation omitted).

[18] *See, e.g., In re Stone & Webster, Inc.*, 286 B.R. 532, 539 (Bankr. D. Del. 2002); *Bruce Energy Ctr. Ltd. v. Orfa Corp. of Am. (In re Orfa Corp. of Phila.)*, 129 B.R. 404, 413–14 (Bankr. E.D. Pa. 1991) ("[T]he court's power to substantively consolidate cases is derived from its general equitable powers under 11 U.S.C. § 105.").

[19] *See Stone & Webster*, 286 B.R. at 542 ("[S]ubstantive consolidation such as that proposed by the Plan is, by reason of § 1123(a)(5)(C), clearly an allowable provision in a Chapter 11 plan."); *see also In re Lehman Bros. Inc.*, 519 B.R. 434, 452 n.103 (S.D.N.Y. 2014) ("Courts have interpreted [section 1123(a)(5)(C) of the Bankruptcy Code] as permitting substantive consolidation under a plan of reorganization.") (citation omitted).

44. First, the vast majority of all of the assets at all of the Debtors were the collateral of the Prepetition Lenders. The Global Settlement agreed to between the Debtors, the Committee and the Prepetition Lenders specified certain amounts to be paid to the Prepetition Lenders and certain amounts to be left in the Debtors' estates to fund the costs of winding down the Debtors' estates and satisfying claims. The Global Settlement did not specify which cash should be remitted to the Prepetition Lenders and which should stay with the Debtors' estates. Litigating this issue amongst the Debtors would be inefficient and wasteful. The funding for the Plan is a result of amounts agreed to be left at the Debtors' estates under the Global Settlement and the Global Settlement does not differentiate amongst individual Debtors. As of August 31, 2019, the recoverable assets at the Debtors other than Open Road Films primarily consisted only of approximately $268,000 in cash, with three of the Debtors having no assets whatsoever. To date, the Debtors other than Open Road Films have not paid any of the professional fees related to administering these Cases. Similarly, the Debtors other than Open Road Films have not paid any significant amount of the associated operating costs, including any share of personnel costs since the Petition Date. Any litigation or efforts to determine what their fair burden of those costs are and if any assets would remain would be inefficient and wasteful.

45. In addition, although the Debtors are aware that claims have been filed in these Cases specifying certain Debtors other than Open Road Films and such claims are yet to be evaluated, the Debtors' records indicate that no amounts are owed (primarily) by Debtors other than Open Road Films (other than Intercompany Claims, which are being waived under the Plan). However, all of the Debtors, are obligated to the Prepetition Lenders for the amounts due to the Prepetition Lenders and settled under the Global Settlement. Absent substantive consolidation, it is therefore difficult to determine how the Debtors' Estates' remaining Cash

should be allocated among the Estates. Apportioning the value of the Debtors' assets and associated liabilities would thus be a difficult task—with no guarantee of a clear answer.

46. *Second*, the foregoing uncertainty as to the proper allocation of assets and liabilities among the Debtors' Estates could lead to prolonged disputes or litigation among the individual Debtors and their Estates. Without substantive consolidation, reconciliation and treatment of Intercompany Claims would be required, which could be difficult and costly (and possibly disputed). The costs attendant to resolving these disputes would diminish recoveries for creditors and delay resolution of these Cases, to the detriment of all the Debtors' stakeholders.

47. *Third*, as permitted by section 1123(a)(5)(C) of the Bankruptcy Code, one basis for substantive consolidation in these Cases is the vote of the Class of General Unsecured Claims in favor of such treatment. Here, the Plan received overwhelming support from the voting creditors. The Plan does not propose substantive consolidation to deprive a specific creditor or group of creditors of their rights while providing a windfall to other creditors. Rather, given the limited amount projected to be available for distribution to Holders of General Unsecured Claims, and the expense involved in allocating the remaining Cash held by the Debtors among the Estates, the recovery by Holders of General Unsecured Claims will be maximized by consolidating the assets and liabilities of each of the Debtors.

48. Simply put, the process of separating out the assets and liabilities of the Debtors would be expensive and would diminish recoveries for all creditors in these Cases. Put frankly, were the Estates to fight over which Estate should get which cash, there would be little left to fight over. For all of these reasons, the Plan Proponents believe that substantive consolidation of the Debtors in connection with the Plan is fair, equitable, and in the best interest of the Estates and parties in interest. Accordingly, substantive consolidation should be approved.

(ii) Retention of Jurisdiction

49. Article X of the Plan provides that, among other things, the Bankruptcy Court will retain jurisdiction over matters in connection with, arising out of, or related to the Cases and the Plan. The post-confirmation retention of jurisdiction by the Bankruptcy Court is permitted by the Bankruptcy Code.[20] The continuing jurisdiction of the Bankruptcy Court, as set forth in Article X of the Plan, is appropriate and wholly consistent with applicable law.

II. Section 1129(a)(2): The Plan Proponents Have Complied with the Applicable Provisions of the Bankruptcy Code

50. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of [the Bankruptcy Code]." 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 activities of the plan proponent.[21] In determining whether the 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 of the Bankruptcy Code.[22]

51. The Plan Proponents have complied with all disclosure and solicitation requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. The Disclosure Statement, the Plan, the Ballots, the confirmation hearing notice, and all other related documents were distributed to parties in accordance with the

[20] *See, e.g., 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 citations omitted).

[21] *See* 7 *Collier on Bankruptcy* ¶ 1129.02[2] (16th ed. 2018).

[22] *See, e.g., In re PWS Holding Corp.*, 228 F.3d at 248.

Disclosure Statement Order. *See* Dkt. Nos. 829, 860 & 870. The confirmation hearing notice was also timely published in the national edition of *USA Today* on August 28, 2019 and in *Variety* on September 3, 2019. See Docket Nos. 840 and 841. In addition to the foregoing, the Plan Proponents also have complied with all orders of the Bankruptcy Court entered during the pendency of these Cases. Accordingly, the requirement of section 1129(a)(2) of the Bankruptcy Code has been satisfied.

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

52. 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). Good faith is generally interpreted to mean that there exists a reasonable likelihood that the "plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[23] Good faith is to be viewed in light of the particular facts and circumstances of the case.[24]

53. The Plan Proponents have proposed the Plan in good faith. Throughout these Cases, the Debtors worked to build consensus among the various creditor constituencies. The Plan and the process leading up to its formulation are the result of extensive arm's length negotiations among the Debtors, the Committee, the Prepetition Lenders, the Buyer, the Guilds, contract and lease counterparties, and other key stakeholders in these Cases. Accordingly, the requirement of section 1129(a)(3) of the Bankruptcy Code has been satisfied.

[23] *Id.* at 242 (internal quotation marks and citation omitted).

[24] *See, e.g.*, *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002); *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 347 (Bankr. D. Del. 1998).

IV. Section 1129(a)(4): The Plan Provides that Professional Fees and Expenses Are Subject to Court Approval

54. Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a 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," either be approved by the court as reasonable or subject to approval of the court as reasonable. 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) has been construed to require that all payments on account of professional fees and expenses from estate assets be subject to the Bankruptcy Court's review and approval.[25]

55. In accordance with section 1129(a)(4) of the Bankruptcy Code, no payments will be made from assets of the Estates on account of Professional Fee Claims other than payments that are authorized by order of the Bankruptcy Court. Pursuant to Section 11.3 of the Plan, all final requests for payment of Professional Fee Claims must be filed with the Bankruptcy Court and served upon all parties required to receive notice within thirty (30) days after the Effective Date, and such Professional Fee Claims are payable only to the extent approved by the Bankruptcy Court. *See* Plan § 11.3. Accordingly, the requirement of section 1129(a)(4) of the Bankruptcy Code has been satisfied.

V. Section 1129(a)(5): The Plan Proponents Have Disclosed All Necessary Information Regarding Directors, Officers, and Insiders

56. Section 1129(a)(5) of the Bankruptcy Code requires (a) that the proponent of a plan disclose the identity and affiliations of the proposed directors, officers or voting trustees of the debtors, an affiliate of a debtor participating in a joint plan with a debtor, or a successor to the debtor under the plan, (b) that the appointment or continuance of such individuals be consistent with the interests of creditors and equity security holders and with public policy, and

[25] *See*, e.g., *Lisanti Foods, Inc. v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 503 (D.N.J. 2005); *Resorts Int'l, Inc.*, 145 B.R. 412, 476 (Bankr. D.N.J. 1990).

(c) that there be disclosure of the identity and nature of the compensation of any insiders to be retained or employed by the reorganized debtors. *See* 11 U.S.C. § 1129(a)(5).

57. Section 5.5 of the Plan provides that, on the Effective Date, existing directors, managers, and officers of the Debtors will have been deemed to have been terminated. *See* Plan § 5.4(b). As disclosed in Section 5.5 of the Plan, the Plan Proponents have selected John Roussey to serve as Plan Administrator to administer the Liquidating Debtors in accordance with the terms of the Plan. The foregoing is consistent with the interests of the Debtors' creditors and public policy. Accordingly, the requirements of section 1129(a)(5) of the Bankruptcy Code have been satisfied.

VI. Section 1129(a)(6): The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission

58. Section 1129(a)(6) of the Bankruptcy Code requires that any governmental regulatory commission having jurisdiction over the rates charged by the debtor in the operation of its business approve any rate change provided for in a plan of reorganization. *See* 11 U.S.C. § 1129(a)(6). The Plan does not provide for the change of any rate that is within the jurisdiction of any governmental regulatory commission after the occurrence of the Effective Date. Therefore, section 1129(a)(6) is inapplicable.

VII. Section 1129(a)(7): The Plan Is in the Best Interest of All Creditors

59. Section 1129(a)(7) of the Bankruptcy Code requires that holders of impaired claims or interests which do not vote to accept the chapter 11 plan at issue "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date." 11 U.S.C.

§ 1129(a)(7)(A). Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test." This test focuses on individual creditors' claims rather than classes of claims.[26]

60. As attested to in the Agam Declaration, the Plan Proponents believe that the best interests test is satisfied as to each Holder of an Impaired Claim or Equity Interest, and no party in interest has argued otherwise or provided any evidence to the contrary. As an initial matter, the Plan is a plan of liquidation. As such, it is difficult to conceive how creditors in these Cases could do better in a chapter 7, where there would be a negative impact on the ultimate proceeds available for distribution to creditors in these Cases, including, without limitation, as a result of (i) the increased costs of liquidation under chapter 7, which would include, *inter alia*, the fees payable to a chapter 7 trustee and the fees that would be payable to additional attorneys and other professionals that such a trustee may engage, all of whom would need to get up to speed on the Debtors' affairs and the status of these Cases, and (ii) the establishment of a new claims bar date, which could result in new General Unsecured Claims being asserted against the Estates, thereby diluting any potential recoveries of other Holders of Allowed General Unsecured Claims. Moreover, the addition of a chapter 7 trustee at this stage in the Cases would likely provide no benefit, as substantially all of the Debtors' assets have already been liquidated and the Debtors' Plan already contemplates the establishment of a Plan Administrator to wind down the few remaining assets of the Estates in a cost-effective manner.

61. Accordingly, with respect to each Class of Claims and Equity Interests that is Impaired under the Plan, the Plan Proponents submit that each Holder of a Claim or Equity Interest in such Impaired Classes has either accepted the Plan or, to the extent that such a Holder has not accepted the Plan, the Plan Proponents believe each such Holder will receive or retain

[26] *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999).

under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date, that is not less than the amount that such Holder would likely receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code.

62. In sum, conversion of these Cases to chapter 7 would likely prolong these proceedings, delay distributions to creditors, and result in far greater fees, costs, and expenses. Accordingly, the requirements of section 1129(a)(7) of the Bankruptcy Code have been satisfied.

VIII. Section 1129(a)(8): The Plan Complies with Section 1129(a)(8) of the Bankruptcy Code, with the Exception of Classes 5 and 6

63. Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or interests accepts the plan, as follows: "With respect to each class of claims or interests – (A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8).

64. As set forth above, Holders of Claims in Classes 1 and 2 are Unimpaired under the Plan and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have voted to accept the Plan. Thus the requirements of section 1129(a)(8) have been satisfied as to each of Class 1 (Priority Non-Tax Claims) and Class 2 (Miscellaneous Secured Claims).

65. As set forth above, and as reflected in the Voting Declaration, the Plan has been accepted by creditors in Impaired Class 3 (Prepetition Lender Claims) and Class 4 (General Unsecured Claims) holding well in excess of two-thirds in amount and one-half in number. Thus, as to those Impaired and accepting Classes, the requirements of section 1129(a)(8) have been satisfied.

66. Holders of Claims in Class 5 (Subordinated Claims) and Holders of Equity Interests in Class 6 (Equity Interests) are not entitled to receive or retain any property under the Plan on account of their Claims and Equity Interests and, therefore, are deemed not to have

accepted the Plan pursuant to section 1126(g) of the Bankruptcy Code. *See* 11 U.S.C. § 1126(g). The Plan nonetheless may be confirmed under the "cram down" provisions of section 1129(b) of the Bankruptcy Code, as discussed below in Section XIV of this Memorandum.

IX. Section 1129(a)(9): The Plan Provides for Payment in Full of All Allowed Administrative Claims, Priority Claims, Priority Tax Claims, and Professional Fee Claims

67. Section 1129(a)(9) of the Bankruptcy Code requires that entities holding allowed claims entitled to priority under section 507(a)(1)–(8) of the Bankruptcy Code receive specified cash payments under a plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) requires a plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive –
>
> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;
>
> (C) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash –
>
> (i) of a 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
>
> (D) with respect to 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, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

11 U.S.C. § 1129(a)(9).

68. Here, the Plan provides the treatment required by section 1129(a)(9) for each of the various Claims specified in sections 507(a)(1)–(8) of the Bankruptcy Code.

69. Specifically, (a) Section 2.2 of the Plan provides that, unless otherwise agreed, each Holder of an Administrative Expense will receive Cash equal to the unpaid portion of the Claim on, or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) thirty (30) calendar days following the date on which such Claim becomes an Allowed Claim, other than Allowed Administrative Expenses with respect to liabilities incurred by a Debtor in the ordinary course of business, which may be paid in the ordinary course of business in accordance with the terms and conditions of any agreements related thereto; (b) Section 2.4 of the Plan provides that, unless otherwise agreed, each Holder of a Priority Tax Claim will receive, at the Liquidating Debtors' option, either (i) Cash equal to the unpaid portion of such Allowed Priority Tax Claim, plus interest at the rate determined under applicable non-bankruptcy law and to the extent provided by section 511 of the Bankruptcy Code on or before the later of the Effective Date or thirty (30) days following the date on which such Priority Tax Claim becomes

an Allowed Priority Tax Claim; (ii) Cash in an aggregate amount of such Allowed Priority Tax Claim payable in installment payments over a period of time not to exceed five years after the Petition Date, pursuant to section 1129(a)(9)(C) of the Bankruptcy Code, plus interest at the rate determined under applicable non-bankruptcy law and to the extent provided for by section 511 of the Bankruptcy Code; or (iii) such other treatment as may be agreed upon by such Holder and the Debtors or Liquidating Debtors or otherwise determined upon an order of the Bankruptcy Court; (c) Section 3.2.1 provides that, unless otherwise agreed, each Holder of a Priority Non-Tax Claim will receive Cash equal to the unpaid portion of such Priority Claim on, or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) thirty (30) calendar days following the date on which such Priority Claim becomes an Allowed Priority Claim; and (d) Section 11.3 of the Plan provides that all Professional Fee Claims shall be paid to the extent approved by Order of the Bankruptcy Court as promptly as possible on the Effective Date for outstanding amounts due as of the Effective Date, and as soon as practicable thereafter as such obligation to pay becomes due unless otherwise agreed upon by the applicable Professional. Accordingly, the requirements of section 1129(a)(9) of the Bankruptcy Code have been satisfied.

X. Section 1129(a)(10): At Least One Class of Impaired Claims Has Accepted the Plan

70. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). As set forth above and in the Voting Declaration, Class 3 (Prepetition Lender Claims) and Class 4 (General Unsecured Claims) are Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code has been satisfied.

XI. Section 1129(a)(11): The Plan Provides for the Liquidation of the Debtors

71. Section 1129(a)(11) of the Bankruptcy Code requires 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).

72. Here, the Plan provides that the Debtors' assets will be vested in the Liquidating Debtors to be liquidated and distributed by the Plan Administrator. *See* Plan Art. V. The Plan Proponents believe, based on their analysis of the Debtors' cash on hand and of the Claims against the Debtors' estates, that the Debtors' cash on hand as of the Effective Date will be sufficient to allow the Plan Administrator to make all payments required to be made under the Plan—i.e., payment in full of all Allowed Claims with priority over General Unsecured Claims. In addition, the cash on hand may be supplemented by any additional proceeds from the liquidation of the Debtors' remaining assets, including, but not limited to, the Retained Rights of Action. Accordingly, the requirement of section 1129(a)(11) of the Bankruptcy Code has been satisfied.

XII. Section 1129(a)(12): All Statutory Fees Have Been or Will Be Paid

73. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan," or that "the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). In accordance with section 1129(a)(12), Section 2.5 of the Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code shall be paid on or before the Effective Date. All such fees

that arise after the Effective Date shall be paid by the Liquidating Debtors. *See* Plan § 2.5. As a result, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

XIII. Sections 1129(a)(13) Through 1129(a)(16) Do Not Apply to the Plan

74. Sections 1129(a)(13)–(16) of the Bankruptcy Code are inapplicable to the Debtors and the Plan, as the Debtors (i) do not provide "retiree benefits" as defined in section 1114 of the Bankruptcy Code (*see* 11 U.S.C. § 1129(a)(13)), (ii) have no domestic support obligations (*see* 11 U.S.C. § 1129(a)(14)), (iii) are not individuals (*see* 11 U.S.C. § 1129(a)(15)), and (iv) are not nonprofit corporations (*see* 11 U.S.C. § 1129(a)(16)).

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

75. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a chapter 11 plan in circumstances where not all impaired classes of claims and equity interests vote to accept that plan. This mechanism is known colloquially as "cram down."

76. Specifically, section 1129(b)(1) provides, in pertinent part, that:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

77. Thus, under section 1129(b) of the Bankruptcy Code, the Bankruptcy Court may "cram down" a plan as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to impaired classes that did not vote to accept the plan.[27]

78. Here, as noted above, only two Impaired Classes – Class 5 (Subordinated Claims) and Class 6 (Equity Interests) – did not accept the Plan. Accordingly, the Plan Proponents invoke section 1129(b) to "cram down" the Plan with respect to Classes 5 and 6.

A. The Plan Does Not Discriminate Unfairly

79. The unfair discrimination standard of section 1129(b) of the Bankruptcy Code requires that a chapter 11 plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly-situated classes.[28] Generally a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment.[29] Accordingly, as between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests,[30] or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[31]

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[27] *See, e.g., In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005); *In re Dura Auto. Sys., Inc.*, 379 B.R. 257, 271–72 (Bankr. D. Del. 2007); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 660 (D. Del. 2003).

[28] *See, e.g., In re Barney & Carey Co.*, 170 B.R. 17, 25 (Bankr. D. Mass 1994).

[29] *See, e.g., In re Rubicon U.S. REIT, Inc.*, 434 B.R. 168, 175 (Bankr. D. Del. 2010) (noting that courts generally look to whether "[v]alid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan"); *Lernout & Hauspie*, 301 B.R. at 660 ("The hallmarks of the various [unfair discrimination] tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination").

[30] *See, e.g., In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, *In re Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

[31] *See, e.g., In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990).

80. Here, the Plan does not "discriminate unfairly" with respect Class 5 (Subordinated Claims) or Class 6 (Equity Interests) as there are no similarly-situated Classes receiving more favorable treatment. The Plan treatment of Holders of Claims in Class 5 (Subordinated Claims) is based on the statutory mandate of section 510 of the Bankruptcy Code. *See* 11 U.S.C. § 510.[32] Indeed, in order to comply with section 1129(a)(1) of the Bankruptcy Code, which requires that a chapter 11 plan comply with applicable provisions of the Bankruptcy Code, section 510 must be enforced. As there is only one Class of Equity Interests, there is no unfair discrimination as there are no other, similarly-situated Classes of Equity Interests receiving different treatment under the Plan. Thus, the Plan does not "discriminate unfairly" with respect to any Impaired Classes of Claims or Equity Interests under the Plan that did not accept the Plan.

B. The Plan Is Fair and Equitable

81. Section 1129(b)(2)(B)–(C) define the phrase "fair and equitable" as to impaired classes of unsecured creditors and equity interest holders as follows:

> As to unsecured creditors: Either (i) each impaired unsecured creditor receives or retains under the plan property of a value, as of the effective date of the plan, equal to the amount of its allowed claim, or (ii) the holders of claims and interests that are junior will not receive or retain any property under the plan on account of their claims or interests.
>
> As to equity interest holders: Either (i) each holder of an interest will receive or retain under the plan property of a value, as of the effective date of the plan, equal to the greatest of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of the interest, or (ii) the holder of any interest that is junior to the non-accepting class will not receive or retain any property under the plan on account of their its interest.

11 U.S.C. § 1129(b)(2)(B)–(C).[33]

[32] The Plan Proponents are unaware at this time of any Class 5 Claims.

[33] *See also LaSalle*, 526 U.S. at 441–42 ("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.'").

82. In the instant case, the "fair and equitable" requirement is satisfied as to Class 5 (Subordinated Claims) and Class 6 (Equity Interests) because (a) no Claims or Equity Interests junior to either Class 5 (Subordinated Claims) or Class 6 (Equity Interests) will receive or retain any property under the Plan on account of such junior Claims or Equity Interests and (b) no Holder of a Claim senior to Classes 5 and 6 will receive more than payment in full on account of its Claim. Therefore, the Plan is "fair and equitable" with respect to all Impaired Classes of Claims or Equity Interests under the Plan that did not accept the Plan.

XV. The Plan Satisfies the Requirements of Section 1129(c), (d), and (e) of the Bankruptcy Code

83. The Plan is the only pending plan on file in the Cases and, as such, section 1129(c) of the Bankruptcy Code is satisfied. 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 no party in interest has alleged otherwise. In light of this, section 1129(d) of the Bankruptcy Code is inapplicable. Finally, these Cases are not "small business cases" and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

XVI. Waiver of Bankruptcy Rules Regarding Stay of Confirmation Order

84. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). Given that no objections to the Plan were filed and that the voting creditors overwhelmingly accepted the Plan, the Plan Proponents respectfully request that the 14-day stay imposed by operation of Bankruptcy Rule 3020(e) be waived and that the Confirmation Order be effective immediately upon its entry. For the same reason, the Plan Proponents also request that the Confirmation Order be effective immediately upon its entry notwithstanding any other provision of the Bankruptcy Rules, including Bankruptcy Rule 6004(h), or otherwise.

CONCLUSION

85. The Plan complies with and satisfies all applicable requirements of section 1129 of the Bankruptcy Code. The Plan Proponents thus request that the Bankruptcy Court (i) confirm the Plan and (ii) grant the Plan Proponents such other and further relief as is just and proper.

Dated: September 27, 2019
Wilmington, Delaware

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