IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
Rural/Metro Corporation, et al.,[1]		Case No. 13-11952 (KJC)
	:	
Debtors.	:	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF DEBTORS' FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR RURAL/METRO CORPORATION AND ITS AFFILIATED DEBTORS

[1] A list of the Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number is attached as Schedule 1 to the Declaration of Stephen Farber in Support of Chapter 11 Petition and First Day Pleadings [Docket No. 2] and at www.donlinrecano.com/rmc. The Debtors' headquarters are located at 9221 E. Via de Ventura, Scottsdale, AZ 85258.

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PRELIMINARY STATEMENT

1. Rural/Metro Corporation and its affiliated debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors" or the "Company") submit this memorandum of law in support of confirmation of the *First Amended Joint Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 581] (as may be amended, the "Plan").[1] The Plan is the result of extensive, arm's length negotiations among the Debtors and their largest creditor constituencies, including the Creditors' Committee, the Consenting Lenders and the Consenting Noteholders, who unanimously support the Plan. Moreover, the Debtors received overwhelming support from all of the Classes of Claims entitled to vote on the Plan with more than 84% of each impaired accepting class voting in favor of the Plan. In light of this support, and because the Plan meets the requirements of section 1129 of the Bankruptcy Code, and the Debtors submit that the Plan should be confirmed.

2. Confirmation of the Plan is the culmination of months of negotiation and compromise—both prepetition and postpetition—achieved by and among the Company, its prepetition secured lenders, prepetition bondholders, trade partners and other significant parties in interest. It embodies the Company's and all of its stakeholders' goal of restructuring the Company's balance sheet quickly and seamlessly with as little disruption as possible to the Debtors' businesses.

3. The Restructuring Support Agreement (the "RSA"), which was executed on the eve of filing these chapter 11 cases by a majority of the Company's institutional debt holders, has served as the roadmap for the Debtors' financial restructuring. As of the commencement of

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[1] Capitalized terms used but not otherwise defined herein shall have those meanings ascribed to them in the Plan or the Disclosure Statement (as defined below), as applicable.

the hearing on confirmation of the Plan, all parties to the RSA and Creditors' Committee have faithfully adhered to every milestone set forth in the RSA and the Company is poised to have a confirmed and effective Plan in hand prior to year end.

4. In fewer than five months time, the Debtors have stabilized their businesses through the transition into chapter 11, negotiated exit financing, and developed the terms of the consensual Plan, which will significantly de-lever the Company. Throughout the entire bankruptcy process, which has paved the way to a successful and necessary financial restructuring, the Debtors have been able to maintain their fundamentally sound underlying business operations through effective communication with their customer base and the uninterrupted provision of vital emergency services to their communities.

5. The voting Classes' support of the Plan has laid the groundwork for its confirmation. Each Class of Claims entitled to vote on the Plan has accepted it by the requisite majorities. Specifically, 100% of the voting holders of Class 2 Claims in number and 100% in amount have voted to accept the Plan. 100% of the voting holders of Class 4 Claims in number and 100% in amount have voted to accept the Plan. 90.20% of the voting holders of Class 5 Claims in number and 84.02% in amount have voted to accept the Plan. The Plan is supported, in writing, by the Debtors' key creditor constituencies and is designed to bring about the prompt and consensual conclusion of these cases.

6. A hearing on confirmation of the Plan is scheduled for December 17, 2013. In connection with that hearing, the Debtors submit this memorandum of law and have filed concurrently herewith the declarations of: (a) Stephen Farber, Executive Vice President and Chief Financial Officer of the Debtors (the "Farber Declaration"); and (b) Brandon Aebersold of Lazard Frères & Company LLC (the "Aebersold Declaration"). The Debtors also have filed the

balloting tabulation prepared by Donlin, Recano & Company, Inc. ("DRC"), the Debtors' balloting agent [Docket No. 798] (the "Voting Certification").

7. As set forth below, the Plan satisfies each of the requirements for confirmation under section 1129 and other applicable provisions of the Bankruptcy Code. In particular, the Plan has been proposed in good faith, is feasible, serves the best interests of the Debtors' creditors, and is fair and equitable. Accordingly, the Plan should be confirmed by this Court.

BACKGROUND

I. INTRODUCTION

8. On August 4, 2013 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases") with the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. These Chapter 11 Cases have been consolidated for procedural purposes only. On August 15, 2013, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an Official Committee of Unsecured Creditors (the "Creditors' Committee"). As of the date hereof, no examiner or trustee has been appointed. The events leading up to the Petition Date are set forth in the *Declaration of Stephen Farber in Support of Chapter 11 Petition and First Day Pleadings* [Docket No. 2].

II. THE PLAN AND THE DISCLOSURE STATEMENT

9. The Debtors have worked diligently to negotiate a plan of reorganization in these Chapter 11 Cases with two primary goals: (a) to rehabilitate the Debtors' untenable capital structure such that the Company will be a viable going concern following emergence; and (b) to

distribute the value of the Debtors' estates in a fair and equitable manner consistent with applicable law.

10. The resulting Plan contemplates a consensual balance sheet restructuring that will reduce the Debtors' funded indebtedness by approximately 50% and cut interest payments nearly in half. Specifically, noteholders and holders of Other Unsecured Claims that elect to receive stock in lieu of cash will have their debt converted to equity, and will share the remainder of the reorganized Company's common stock in exchange for the cancellation of their debt. In addition, approximately $50 million of the Company's estimated $427 million of secured debt will be paid down with a portion of the proceeds of a fully committed $135 million new equity Rights Offering. The Company's pre-bankruptcy noteholders who have subscribed to the Rights Offering will purchase the Company's new preferred stock and approximately 70% of the Company's new common stock on the Effective Date.[2]

11. On September 15, 2013, the Debtors filed the *Joint Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket Nos. 255] and the *Disclosure Statement with Respect to the Debtors' Joint Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 256] (as amended, the "Disclosure Statement"). On October 31, 2013, the Debtors filed the amended Plan and the amended Disclosure Statement [Docket Nos. 581 and 582, respectively].

12. On November 5, 2013, the Court entered an order [Docket No. 597] (the "Disclosure Statement Order") approving the Disclosure Statement. The Disclosure Statement Order, among other things, (i) approved the Disclosure Statement as containing adequate

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[2] Specific descriptions of the material terms, treatment and distributions to each Class of Claims is set forth in Article V of the Plan, and a summary chart is included in Article II of the Disclosure Statement (as defined below).

information within the meaning of section 1125 of the Bankruptcy Code, (ii) approved the form and manner of various notices, ballots and the procedures for tabulating votes and implementing the Rights Offering, and (iii) established various deadlines, including December 9, 2013, at 5:00 p.m. prevailing Eastern Time as the deadline by which all ballots must be received by DRC (the "Voting Deadline"). The Court also scheduled a hearing to consider confirmation of the Plan on December 17, 2013, at 9:30 a.m. prevailing Eastern Time (the "Confirmation Hearing") [Docket No. 680].

13. In anticipation of the Confirmation Hearing and the Debtors' emergence from Chapter 11, the Debtors have undertaken several important steps in furtherance of confirmation and implementation of the Plan, including, the solicitation of votes to accept the Plan from holders of Claims in impaired Classes that were entitled to vote on the Plan.

14. On December 2, 2013 and December 13, 2013, the Debtors filed their Plan Supplement (including all exhibits thereto and as amended, modified, and/or supplemented from time to time, the "Plan Supplement"), which provides information regarding a variety of topics, including: (i) the Reorganized Debtors' amended governance documents, including the certificates of incorporation and bylaws; (ii) the Reorganized Debtors' boards of directors and officers; (iii) the litigation trust agreement; and (iv) the Amended and Restated Secured Credit Agreement and Exit LC Facility.

III. PLAN SOLICITATION AND RESULTS THEREOF

15. On or about November 11, 2013, the Debtors began soliciting votes on the Plan by distributing the Disclosure Statement and related materials to holders of Claims in impaired Classes that were entitled to vote under the Plan. The Classes entitled to vote under the Plan (the "Voting Classes") are Class 2 (Secured Lender Claims), Class 4 (Noteholder Claims) and Class 5

(Other Unsecured Claims). Specifically, the Debtors transmitted a solicitation package (the "Solicitation Package") to known holders of Claims in Classes 2, 4 and 5, as of November 5, 2013, containing (i) notice of the Confirmation Hearing setting forth details regarding the solicitation process and applicable deadlines; (ii) the Disclosure Statement Order; (iii) a CD (or hard copy, in the Debtors' discretion) containing the Disclosure Statement (together with all exhibits thereto, including the Plan); and (iv) the appropriate form of ballot to accept or reject the Plan with instructions for completing the Ballot, and a pre-addressed, pre-paid return envelope. In addition, pursuant to the Disclosure Statement Order, the Debtors published notice of the Confirmation Hearing in the national edition of *The New York Times* on November 7, 2013 [Docket No. 618]. Thus, with the solicitation materials distributed on November 11, 2013 and with the Voting Deadline set for December 9, 2013, the voting parties were given twenty-eight days to vote on the Plan in accordance with Bankruptcy Rule 2002(b).

16. As set forth below, the Debtors received overwhelming acceptances from the Voting Classes. See Voting Certification, Ex. A.

VOTING RESULTS Total Ballots Received			
Accept		**Reject**	
Number	**Amount**	**Number**	**Amount**
Class 2 – Secured Lender Claims			
45 (100%)	$169,199,664.79 (100)%	0 (0%)	$0 (0%)
Class 4 – Noteholder Claims			
70 (100%)	$304,435,000.00 (100%	0 (0%)	$0 (0%)
Class 5 – Other Unsecured Claims			
405 (90.20%)	$38,107,500.38 (84.02%)	44 (9.80%)	$7,247,927.87 (15.98%)

17. Under the Plan, Class 1 (Priority Non-Tax Claims) and Class 3 (Other Secured Claims) are unimpaired, and thus, are deemed to have accepted the Plan and were not entitled to

vote to accept or reject the Plan. See 11 U.S.C. § 1126(f). Moreover, Claims and Interests, as applicable, in Class 6 (Existing Securities Law Claims) and Class 7 (Existing Common Stock Interests and Existing Securities Laws Claims on Account Thereof) will not receive any distribution on account of such Claims and Interests. As a result, the holders of Claims and Interests in those Classes are deemed to have rejected the Plan and were not entitled to vote to accept or reject the Plan. See 11 U.S.C. § 1126(g).

18. The Debtors received seven objections to the Plan (collectively, the "Confirmation Objections") from the following parties: (i) Lisa McCall-Stowers, individually and as guardian of Rhonda McCall, and guardian of D.M., and Roger W. McCall, Sr., Wilma McCall and Roger W. McCall Jr. (the "McCall Objection") [Docket No. 613]; (ii) The United Emergency Medical Professionals of Arizona, International Association of Fire Fighters Local I-60 [Docket No. 738]; (iii) Robert E. Ramsey [Docket No. 741]; (iv) Internal Revenue Service [Docket No. 745]; (v) Stephanie Nelson [Docket No. 747]; (vi) Commonwealth of Pennsylvania, Department of Revenue [Docket No. 763]; and (vii) Brian Cates, Ray Iskander and Danny Sleiman [Docket No. 771]. Three parties also filed joinders to the McCall Objection.[3] The Debtors have attempted to resolve the Confirmation Objections without the need for litigation. The Debtors anticipate that all but one of the Confirmation Objections will be fully addressed prior to the Confirmation Hearing. The McCall Objection, which is addressed below, is the only

[3] See *Joinder of Carol DeWitt and the Estate of Richard DeWitt, Ruth Blevins and the Estate of Teddy Blevins, and Hubert Kelso and Sharyel Graul, Individually and As Personal Representative of Marie Kelso to Preliminary Objection to First Amended Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 721]; *Joinder of Martha Ann Carey, Individually and on Behalf of the Statutory Beneficiaries of David Carey, to Preliminary Objection to First Amended Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 726]; and *Joinder of Aaron and Stephanie Miller, Individually and on Behalf of the Estate of A.M., a Minor, to Preliminary Objection to First Amended Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 746].

Confirmation Objection that remains outstanding. For the reasons set forth in more detail below, the Debtors believe this Objection should be overruled.

19. The Debtors submit that the Plan satisfies all of the confirmation standards under section 1129 of the Bankruptcy Code, is in the best interest of all creditors, and should be confirmed by the Court.

IV. MODIFICATIONS TO THE PLAN DO NOT MATERIALLY OR ADVERSELY AFFECT ANY HOLDERS OF CLAIMS OR REQUIRE RESOLICITATION FOR THE PLAN

20. The Debtors have modified certain provisions of the Plan to make technical, non-material or beneficial changes (the "Plan Modifications"). A blackline reflecting the Plan Modifications has been filed concurrently herewith.

21. Pursuant to section 1127(a) of the Bankruptcy Code, a plan proponent may modify the plan "at any time" prior to entry of a confirmation order so long as the modified plan meets the requirements of sections 1122 and 1223 of the Bankruptcy Code. Section 1127(d) of the Bankruptcy Code provides that all stakeholders that previously accepted the plan should also be deemed to have accepted the modified plan. Courts routinely allow plan proponents to make non-material or beneficial changes to a plan without requiring the proponent to re-solicit the plan for acceptances. See, e.g., Enron Corp. v. New Power Co. (In re New Power Co.), 438 F.3d 1113, 1117-18 (11th Cir. 2006) ("[T]he bankruptcy court may deem a claim or interest holder's vote for or against a plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated."); In re Calpine Corp., No. 05-60200, 2007 WL 4565223, at *6 (Bankr. S.D.N.Y. Dec. 19, 2007) (approving immaterial modification to plan without requiring the debtors to resolicit the plan); In re Kmart Corp., No. 02-02474, 2006 WL 952042, at *27 (Bankr. N.D. Ill. Apr. 11, 2006) (if

modification does not adversely change the treatment of claims, then resolicitation is not required); In re Winn-Dixie Stores, Inc., 356 B.R. 813, 823 (Bankr. M.D. Fla. 2006) (same). The Debtors submit that the Plan Modifications do not materially or adversely affect the treatment of any creditors.[4]

22. The Debtors submit that the Plan can be confirmed without re-solicitation for Plan acceptances, and that all creditors in Voting Classes that previously voted to accept the Plan should be deemed to accept the Plan as modified. See 11 U.S.C. § 1127(d).

ARGUMENT

23. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. See In re Armstrong World Indus., Inc., 348 B.R. 111, 120-22 (D. Del. 2006); In re Genesis Health Ventures, Inc., 266 B.R. 591, 616, n.23 (Bankr. D. Del. 2001), appeal dismissed, 280 B.R. 339 (D. Del. 2002); In re Bally Total Fitness of Greater N.Y., Inc., No. 07-12395, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) ("The Debtors, as proponents of the Plan, have the burden of proving the satisfaction of the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence."). As proponents of the Plan, the Debtors bear the burden of establishing that all elements necessary for confirmation of the Plan under section 1129 of the Bankruptcy Code have been met. See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II), 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that

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[4] Courts have held that a modification is material and adverse "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 acceptance." In re Am. Solar King Corp., 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988); see also In re Boylan Int'l, Ltd., 452 B.R. 43, 51 (Bankr. S.D.N.Y. 2011) (same).

the bankruptcy court must find that the debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence).

24. As discussed in detail below, the Plan satisfies all of the applicable requirements of section 1129(a) of the Bankruptcy Code, other than 1129(a)(8) of the Bankruptcy Code with respect to Classes 6 and 7 (the "Deemed Rejecting Classes"). Pursuant to section 1129(b)(1) of the Bankruptcy Code, the Plan may be confirmed notwithstanding this fact because it is "fair and equitable" with respect to the Deemed Rejecting Classes and does not unfairly discriminate against the Deemed Rejecting Classes. As set forth herein and in the Farber Declaration, the Debtors submit that the Plan satisfies these requirements, complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law, as modified by the Disclosure Statement Order, and should therefore be confirmed.

V. THE PLAN COMPLIES WITH APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE (SECTION 1129(A)(1))

25. Bankruptcy Code section 1129(a)(1) provides that a court may confirm a chapter 11 plan only if "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The phrase "applicable provisions" has been interpreted to include Bankruptcy Code sections 1122 and 1123, which govern the classification of claims and interests and the contents of a chapter 11 plan. 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., Nos. 90-400-SLR, 90-401-SLR, 1993 WL 239489, at *6 (D. Del. Feb. 10, 1993); H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978). Accordingly, the determination of whether the Plan complies with section 1129(a)(1) of the Bankruptcy Code requires an analysis of the Debtors' compliance with sections 1122 and 1123 of the Bankruptcy Code. As explained below, the Plan complies with both sections in all respects.

A. The Plan Properly Classifies Claims and Equity Interests Under Section 1122 of the Bankruptcy Code

26. Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or an interest in a particular class only if it is "substantially similar" to the other claims or interests in that class. See In re Caldwell, 76 B.R. 643, 644 (Bankr. E.D. Tenn. 1987); see also 11 U.S.C. § 1122(a) (providing, in relevant part, that "a plan *may* place a claim or an interest in a particular class . . . .") (emphasis added). Claims or interests in a class, however, need not be identical, but should be similar in legal character or effect with respect to the debtor. See In re AOV Indus., Inc., 792 F.2d 1140, 1150-51 (D.C. Cir. 1986) (affirming plan confirmation where claims guaranteed by third party were grouped with non-guaranteed claims); In re DRW Prop. Co. 82, 60 B.R. 505, 511 (Bankr. N.D. Tex. 1986).

27. Section 1122 of the Bankruptcy Code likewise does not require classifying claims together simply because they may share some attributes. See, e.g., In re Jersey City Med. Ctr., 817 F.2d 1055, 1060 (3d Cir. 1987) ("The express language of this statute explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes."). Instead, section 1122 of the Bankruptcy Code provides a plan proponent with significant flexibility and discretion in classifying claims so long as some reasonable basis exists for the classification or if the creditor or interest holder consents to the classification. See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 159 (3d Cir. 1993) (as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); Jersey City, 817 F.2d at 1060-61 ("Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case."); Teamsters Nat'l Freight Indus.

Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.), 800 F.2d 581, 585 (6th Cir. 1986) ("Section 1122(a) specifies that only claims which are 'substantially similar' may be placed in the same class. It does not require that similar claims *must* be grouped together, but merely that any group created must be homogenous."); In re Atlanta W. VI, 91 B.R. 620, 626 (Bankr. N.D. Ga. 1988) ("[F]lexibility [in claims classifications] both promotes the rehabilitative purposes of Chapter 11 reorganization and enables plan proponents to deal with the complex commercial realities which debtor estates often confront.").

28. The debtor must simply advance a legitimate reason supported by credible proof for the separate classification. See In re Heritage Org., L.L.C., 375 B.R. 230, 298 n.86 (Bankr. N.D. Tex. 2007) (finding that if creditors had different legal rights under equitable subordination, then separate classification would be appropriate); In re Kaiser Aluminum Corp., No. 02-10429, 2006 WL 616243, at *4-6 (Bankr. D. Del. Feb. 6, 2006) (permitting classification scheme after consideration of the diverse characteristics of each class and creditors' legal rights); In re Magnatrax Corp., No. 03-11402, 2003 WL 22807541, at *4 (Bankr. D. Del. Nov. 17, 2003) (permitting separate classification based on valid business, factual, and legislative reasons). Thus, section 1122 of the Bankruptcy Code provides debtors with a large amount of flexibility to create classification schemes that will facilitate reorganization.

29. The Plan's classification scheme is summarized as follows:

SUMMARY OF CLASSIFICATION, STATUS AND VOTING RIGHTS		
Class	**Designation**	**Impairment**
Unclassified	DIP Claims	Unimpaired
Unclassified	Administrative Expense Claims	Unimpaired
Unclassified	Fee Claims	Unimpaired
Unclassified	U.S. Trustee Fees	Unimpaired
Unclassified	Priority Tax Claims	Unimpaired

Class 1	Priority Non-Tax Claims	Unimpaired
Class 2	Secured Lender Claims	Impaired
Class 3	Other Secured Claims	Unimpaired
Class 4	Noteholder Claims	Impaired
Class 5	Other Unsecured Claims	Impaired
Class 6	Existing Securities Law Claims	Impaired
Class 7	Existing Common Stock Interests and Existing Securities Laws Claims on Account Thereof	Impaired

30. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Claims or Interests in each Class are substantially similar to the other Claims or Interests in such Class, and all Claims or Interests in each Class differ from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria. Furthermore, similar Claims and Interests have not been placed into different Classes in order to affect the outcome of the vote on the Plan.

31. Because each Class consists of only substantially similar Claims or Interests, the Court should approve the classification scheme as set forth in the Plan as consistent with section 1122(a) of the Bankruptcy Code.

B. The Plan Satisfies the Seven Mandatory Plan Requirements of Sections 1123(A)(1)-(A)(7) of the Bankruptcy Code

32. The Plan meets the seven mandatory requirements of section 1123(a) of the Bankruptcy Code, which specifically require that a plan:

(1) designate classes of claims and interests;

(2) specify unimpaired classes of claims and interests;

(3) specify treatment of impaired classes of claims and interests;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for implementation of the plan;

(6) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and

(7) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.

33. Articles IV-V of the Plan satisfy the first three requirements of this section by: (i) designating Classes of Claims and Interests, as required by section 1123(a)(1) of the Bankruptcy Code; (ii) specifying the Classes of Claims and Interests that are unimpaired under the Plan, as required by section 1123(a)(2) of the Bankruptcy Code; and (iii) specifying the treatment of each Class of Claims and Interests that is impaired, as required by section 1123(a)(3) of the Bankruptcy Code. The Plan also satisfies 1123(a)(4) of the Bankruptcy Code because the treatment of each claim or interest within a class is consistent between claims or interests therein.

34. Article VII of the Plan provides adequate means for the Plan's implementation, thereby satisfying section 1123(a)(5) of the Bankruptcy Code.[5] Specifically, Article VII of the Plan sets forth the means for implementation of the Plan. These implementation mechanisms include:

- the authority to effectuate the Restructuring Transactions, see Plan § 7.1;
- the consummation of the Rights Offering, see Plan § 7.2;

[5] Section 1123(a)(5) of the Bankruptcy Code specifies that adequate means for implementation of a plan may include: (a) retention by the debtor of all or part of its property; (b) the transfer of property of the estate to one or more entities; (c) cancellation or modification of any indenture; (d) curing or waiving any default; (e) amendment of the debtor's charter; and (f) issuance of securities for cash, for property, or for existing securities, in exchange for claims or interests or for any other appropriate purpose.

- the continued corporate existence of the Reorganized Debtors and the authorization of various corporate actions, including the adoption of any new or amended and restated operating agreements, certificates of incorporation and by-laws of the Reorganized Debtors, see Plan § 7.3;

- the authorization to execute, deliver, file or record all necessary documents and transactions to effectuate the Plan, see Plan § 7.4;

- the cancellation of the Debtors' existing securities and agreements, see Plan § 7.5;

- the continuation of all Intercompany Interests following the Effective Date, see Plan § 7.6;

- the cancellation of existing security interests, see Plan § 7.7;

- the appointment of the Reorganized Debtors' officers and directors, see Plan § 7.8;

- the authorization to execute the Management Agreements and adopt the Management Equity Plan, see Plan § 7.9;

- the authorization, issuance and delivery of New Common Stock and New Preferred Stock, see Plan § 7.10;

- the exemption of the issuance of New Common Stock and New Preferred stock from securities laws, see Plan § 7.11;

- the authority to enter into the Amended and Restated Secured Credit Agreement and Exit LC Facility, see Plan § 7.12;

- the exemption from certain transfer taxes, see Plan § 7.13;

- the continued enforceability and preservation of any policies of insurance, see Plan § 7.14;

- the non-solicitation of any Debtors that would be entitled to vote or accept or reject the Plan, see Plan § 7.15;

- the establishment of the Litigation Trust, see Plan § 7.16;

- the establishment of the Creditor Representative Fund, see Plan § 7.17; and

- the understanding that none of transactions contemplated by the Plan constitutes a "change in ownership" or "change of control," see Plan § 7.18.

35. The Debtors believe that these transactions, including entry into and implementation of the various agreements and other documents contemplated in the Plan, will enable the Debtors to successfully and efficiently consummate the Plan. The proposed implementation steps have been carefully developed to ensure that the Debtors have the financial ability to fund their obligations under the Plan and operate as a viable going concern after emergence. The Debtors believe that, through these steps and transactions, the Plan provides adequate means for its implementation thereby satisfying the requirement of section 1123(a)(5) of the Bankruptcy Code.

36. The sixth requirement of section 1123(a) of the Bankruptcy Code (i.e., that a plan prohibit the issuance of nonvoting equity securities) is satisfied because the Plan specifically provides that "[t]he certificates of incorporation or operating agreements, as applicable, of each Reorganized Debtor shall, *inter alia*, prohibit the issuance of nonvoting stock to the extent required by section 1123(a)(6) of the Bankruptcy Code." See Plan § 7.3. Accordingly, section 1123(a)(6) is satisfied here.

37. Finally, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code, which 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." 11 U.S.C. § 1123(a)(7). Pursuant to Section 7.8 of the Plan, on the Effective Date, the initial boards of directors and officers of the Reorganized Debtors shall consist of those individuals identified on Exhibit K and Exhibit L to the Plan Supplement.

38. The appointment to or continuance in office of the officers and directors provided for under the Plan is consistent with the interests of creditors and interest holders and with public

policy. Furthermore, no party in interest has objected to the manner of selection of the board of directors or the officers of the Reorganized Debtors. Accordingly, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

VI. THE DISCRETIONARY CONTENTS OF THE PLAN ARE APPROPRIATE

39. Section 1123(b) of the Bankruptcy Code sets forth certain permissive plan provisions that may be, but need not necessarily be, included in a chapter 11 plan. The Plan contains certain of the provisions contemplated by section 1123(b). Specifically:

- In accordance with section 1123(b)(1) of the Bankruptcy Code, Article IV and Article V of the Plan impair or leave unimpaired, as the case may be, each Class of Claims and Interests;

- In accordance with section 1123(b)(2) of the Bankruptcy Code, Article X of the Plan provides for the assumption or rejection of the Debtors' executory contracts and unexpired leases that have not been previously assumed or rejected pursuant to section 365 of the Bankruptcy Code and orders of the Court;

- In accordance with section 1123(b)(3)(A) of the Bankruptcy Code, Article XII of the Plan provides for the settlement or adjustment of claims or interests belonging to the Debtors and their estates;

- In accordance with section 1123(b)(3)(B) of the Bankruptcy Code, Section 12.2 of the Plan provides that, except as otherwise provided in the Plan, on the Effective Date all property comprising the Estates (including, subject to any releases provided for in the Plan, any claim, right or cause of action which may be asserted by or on behalf of the Debtors) shall be vested in the Reorganized Debtors.

- In accordance with section 1123(b)(5) of the Bankruptcy Code, Article V of the Plan modifies or leaves unaffected, as the case may be, the rights of holders of Claims in each Class; and

- In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with applicable provisions of the Bankruptcy Code.

40. The Debtors believe that these permissive provisions are consistent with section 1123(b) and other applicable provisions of the Bankruptcy Code.

VII. THE DISCHARGE, INJUNCTION, RELEASE AND EXCULPATION PROVISIONS EMBODIED IN THE PLAN ARE PERMISSIBLE AND SHOULD BE APPROVED

41. Article XII of the Plan includes customary discharge, release, exculpation and injunction provisions that are commonly afforded to debtors, reorganized debtors and certain qualifying third parties. These discretionary provisions are appropriate because, among other things, they are (i) integral to the terms, conditions and settlements contained in the Plan; (ii) fair, equitable and reasonable and in the best interests of the Debtors and their estates; (iii) the product of extensive, arm's length negotiations among sophisticated parties; and (iv) supported by fair consideration. Moreover, since the commencement of the Reorganization Cases, the Debtors have cooperated willingly with the independent investigations of each of its major stakeholders, who have had the opportunity to verify that the releases contained in the Plan are not unduly costly to the Debtors' estates. Furthermore, creditors support the Plan overwhelmingly, and, no creditors have objected to these provisions of the Plan. The releases were consented to by all Voting Classes – the only creditors who would stand to benefit from any potential litigation among the Debtors and the Released Parties – and the only creditor that filed an objection to these provisions (which was a tactical objection) – the Internal Revenue Service – has been resolved. Such support further justifies approval of these provisions.

42. The Plan's release, exculpation and injunction provisions will eliminate the costs and risks of litigation and allow, among other things, the principals of the Reorganized Debtors to focus entirely on operations after emergence. The release, exculpation and injunction provisions have been critical to obtaining the support of the major creditor constituencies and no party with an economic stake in the Debtors' distributable value has a presently pending objection to them. The Debtors submit that the release, exculpation and injunction provisions of

the Plan are necessary and appropriate under the circumstances and are not inconsistent with the Bankruptcy Code. As such, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

A. The Injunction and Discharge Provisions Set Forth in the Plan Comply with the Bankruptcy Code

43. Section 12.7 of the Plan provides for an injunction which, in general, provides that all Persons who have held, hold or may hold Claims against or Interests in the Debtors or the Estates are permanently enjoined from taking certain actions against or affecting the Debtors, the Reorganized Debtors, the Estates or any of their respective property on account of such Claims or Interests. This injunction is necessary to preserve and enforce the releases in the Plan and the exculpation provisions and it is narrowly tailored to achieve that purpose. Accordingly, the Debtors submit that the injunction provision should be approved.

44. Section 12.3 of the Plan provides for the broad discharge contemplated by section 1141 of the Bankruptcy Code, which provides, in relevant part:

> the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a).

45. In light of the fulsome support of parties in interest, as evidenced by the votes accepting the Plan, the Debtors respectfully submit that the discharge and injunction provisions contained in the Plan are reasonable and appropriate, consistent with the Bankruptcy Code, and should be approved.

B. The Releases by the Debtors in the Plan Are Fair, Reasonable, and in the Best Interests of the Estates

46. Section 12.8 of the Plan releases the Released Parties from certain claims that the Debtors or Reorganized Debtors may have been entitled to assert against them.[6] A debtor may release claims in a plan "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.), 426 B.R. 114, 143 (Bankr. D. Del. 2010); see also 11 U.S.C. § 1123(b)(3)(A). In determining whether the exercise of that business judgment is valid, courts consider the "specific facts and equities of each case," typically by reference to the five factors outlined in In re Zenith Elecs. Corp., 241 B.R. 92 (Bankr. D. Del. 1999).[7] Those factors are: (i) an identity of interest between the debtor and non-debtor, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (ii) a substantial contribution to the plan by the non-debtor; (iii) the necessity of the release to the reorganization; (iv) the overwhelming acceptance of the plan and release by creditors and interest holders; and (v) the payment of all or substantially all of the claims of the creditors and interest holders affected by the releases under the plan. See Zenith, 241 B.R. at 110; see also In re Wash. Mut.,

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[6] The "Released Parties," as defined in Section 1.135 of the Plan, means, each of, and solely in its capacity as such, (a) the Debtors and the Released Debtor Parties, (b) the Creditors' Committee and its members (solely in their capacity as members of the Creditors' Committee but not in their capacity as individual creditors), (c) the Administrative Agents, (d) the DIP Lenders, (e) the Secured Lenders, (f) the Consenting Noteholders, (g) the Exit Preferred Holders, (h) the Disbursing Agent, (i) the Notes Trustee, and (j) with respect to each of the foregoing entities in clauses (b) through (i), such entity's current affiliates, successors, assigns, subsidiaries, officers, directors, principals, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, equity holders, partners and other professionals. With respect to category (j) in the preceding sentence, the individuals and entities released are released solely in the identified capacity with respect to the other Released Parties in categories (b) through (i).

[7] See Spansion, 426 B.R. at 142-43 (citing Zenith, 241 B.R. at 110).

Inc., 442 B.R. 314, 348-50 (Bankr. D. Del. 2011).[8] This five-factor test is not a list of conjunctive requirements, nor is it an exhaustive list of considerations. See Master Mortg., 168 B.R. at 935; see also In re Indianapolis Downs, LLC, 486 B.R. 286, 304 (Bankr. D. Del. 2013) (approving the releases even though the third and fifth Zenith factors were not satisfied where the record reflects overwhelming creditor support of the plan).

47. Here, each of the Zenith factors is satisfied. First, there is an identity of interest among the Debtors and many of the non-Debtor Released Parties arising out of the shared "common goal" of confirming and implementing the Plan.[9] Moreover, the Debtors submit that certain of the Released Parties share an identity of interest with the Debtors such that a claim against any of the Released Parties would be, in essence, a claim against the Debtors. Certain of the Released Parties (including, but not limited to, certain of the Debtors' employees, directors and officers, as well as the DIP Lenders and the DIP Administrative Agent) are entitled to indemnification arising out of certain indemnity relationships. Under these indemnity agreements, any claim asserted against a Released Party that the Debtors are obligated to indemnify would essentially be a claim against the Debtors. As a result, the Debtors' finite assets could be depleted if these entities were sued and sought indemnification from the Debtors, resulting in reduced recoveries for creditors and interest holders. Accordingly, many of the Released Parties have an identity of interest with the Debtors.

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[8] The Zenith factors had been previously enunciated in In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994).

[9] The Zenith Court granted the releases sought by the debtor, holding that the various released parties had an identity of interest on the basis that they were instrumental in formulating the plan of reorganization. Zenith, 241 B.R. at 110; see also In re Tribune Co., 464 B.R. 126, 187 (Bankr. D. Del. 2011) (holding that the debtors and their secured lenders "share the common goal of confirming the . . . Plan" and implementing the consummation thereof, thus giving rise to an identity of interest between those parties).

48. The Released Parties have made significant monetary and non-monetary contributions to the Plan and the Plan process. The Released Parties all made important contributions to these Chapter 11 Cases including, among other things, negotiating and entering into the RSA, negotiating and formulating the Plan and agreeing to various compromises and concessions of their legal rights necessary to achieve consensus regarding its terms. There is little doubt that, absent this cooperation, the Debtors' Plan process would have been heavily contested. Instead, the cooperation of the Released Parties in negotiating and agreeing to a pre-arranged bankruptcy obviated any need for complex and contentious litigation that could have materially delayed the Debtors' emergence from bankruptcy, likely reduced distributions to all creditors, and may have precluded the possibility of emerging as a viable reorganized Company.

49. In addition, the Released Parties provided other specific and substantial consideration to the cases, including, among other things, the following: (a) in the case of the Consenting Noteholders, committing to purchase the Rights Offering Stock, the proceeds of which will be used to pay all DIP Claims, fund other payments required under the Plan and for ordinary course operations, as well as agreeing to convert their debt into equity in the Reorganized Debtors, (b) in the case of the Secured Lenders, agreeing to the necessary amendments to the prepetition secured credit facility to enter into the Amended and Restated Secured Credit Agreement which will provide financing to the Reorganized Debtors, entering into the Exit LC Facility which will refinance or replace all existing letters of credit issued under the prepetition senior secured credit facility, allowing use of cash collateral and agreeing to be primed by the DIP Facility, (c) in the case of the DIP Lenders, providing a $75 million DIP Facility and allowing use of cash collateral, which was integral to the Debtors' ability to effectuate their pre-negotiated restructuring and (d) in the case of the Debtors' officers, directors

and employees, their efforts on behalf of the Debtors prior to, and continuing throughout, the Chapter 11 Cases to effectuate the restructuring set forth in the Plan. Without the releases, many of the Released Parties would have been unwilling to contribute financially to the Plan process, which would have reduced the enterprise value available for distribution to creditors and would have negatively impacted the Debtors' restructuring.

50. The discharges, injunctions, releases, and exculpations are integral to the Plan as a whole, which will ultimately result in meaningful distributions to the Debtors' creditors. The threat of litigation – and any litigation that ultimately came to fruition, no matter how baseless – would be a significant distraction to the Released Parties, the result of which would be the incurrence of potentially tremendous cost, time and labor, all of which would be better spent on developing the Debtors' business post-emergence. Furthermore, certain of the Released Parties, including the Consenting Noteholders and the Consenting Lenders, bargained for this protection prior to the Petition Date as evidenced in the terms of the RSA. Without such protection, the Plan would never have garnered such widespread support among the major stakeholders, making it impossible for the Debtors' near-term emergence from chapter 11. Any delay would have inevitably diminished the value of the emerging entity.

51. The Debtors' creditors also overwhelmingly accepted the Plan. As noted above, the Debtors' Voting Classes are the only parties that are arguably affected by the release of any underlying claims or causes of action and have accepted the Plan and the releases.

52. The Plan also provides for distributions on account of all or substantially all of the Claims held by the creditors affected by the releases. The Plan provides for distributions to holders of Secured Lender Claims, Noteholder Claims and Other Unsecured Claims. See Plan, §§ 5.2, 5.4 and 5.5. In addition, the Plan provides for full payments to holders of DIP Claims,

Administrative Expense Claims, Fee Claims, Priority Tax Claims, Priority Non-Tax Claims, and Other Secured Claims. See Plan, §§ 3.1, 3.2, 3.3, 3.5, 4.1, 4.2, 5.1, and 5.3. Furthermore, through the Plan, holders of Allowed Unsecured Claims were able to elect distributions of cash or stock, neither of which would be available in a liquidation.[10]

53. Accordingly, the Debtors believe that, under the specific facts and equities of these Chapter 11 Cases, the releases contained in Section 12.8 of the Plan constitute a valid exercise of the Debtors' business judgment and should be approved.

C. The Consensual Third-Party Releases Set Forth in the Plan Are Appropriate and Consistent with Established Precedent and Therefore Should Be Approved

54. The Plan does not include non-consensual, third-party releases of Claims and Interests. Rather, Section 12.8(b) of the Plan provides for consensual releases only by those Holders of Claims and Interests who chose not to "opt-out" of such releases (the "Non-Debtor Releases"). Specifically, this was prominently featured on the Ballots, and the Ballots clearly instructed holders of Claims and Interests how to "opt-out" of the Non-Debtor Releases. See Disclosure Statement Order, Exhibits 2A, 2B and 2D. Those who voted to reject the Plan and who did not wish to grant the Non-Debtor Releases were able to opt out of the Non-Debtor Releases by checking the appropriate boxes on their Ballots. Those who voted to accept the Plan were deemed to have released claims against the Released Parties pursuant to the Non-Debtor Releases.

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[10] See Zenith, 241 B.R. at 111 (explaining that the fifth factor was met because "the Plan does provide a distribution to the creditors in exchange for the Releases" and supporting that conclusion by explaining that creditors received more under the plan than they would have in a liquidation); see also In re Exide Techs., 303 B.R. 48, 74 n.37 (Bankr. D. Del. 2003) (noting that the fifth factor may be satisfied "upon presentation of a consensual plan, in the absence of objection to the release/injunction provisions, or upon a more meaningful distribution to unsecured creditors").

55. Courts have held that an "affirmative agreement" from an affected creditor will render a release consensual. See Zenith, 241 B.R. at 111. Although the parameters of what constitutes "affirmative agreement" are fact specific, courts have held that by simply voting in favor of a plan with non-debtor releases, a creditor will be found to have affirmatively agreed to such releases. See Spansion, 426 B.R. at 144 ("[A] third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan.") (citation omitted); In re Coram Healthcare Corp., 315 B.R. 321, 336 (Bankr. D. Del. 2004) ("[T]o the extent creditors or shareholders voted in favor of the Trustee's Plan, which provides for the release of claims they may have against Noteholders, they are bound by that."). Accordingly, the Debtors submit that the Non-Debtor Releases in Section 12.8(b) of the Plan should be approved.

D. The Exculpation Provision Set Forth in the Plan Are Appropriate and Consistent with Established Precedent and Therefore Should Be Approved

56. It is well established in the Third Circuit that exculpation is appropriate for fiduciaries in a bankruptcy case. See In re PWS Holding Corp., 228 F.3d 224, 245-47 (3d Cir. 2000). In addition, in appropriate circumstances, exculpation may be extended to other parties with significant beneficial involvement in a debtor's chapter 11 case, even when exculpation is contested. See, e.g., In re Leslie Controls, Inc., No. 10-12199, 2010 WL 4386935 (Bankr. D. Del. Oct. 28, 2010) (exculpating ad hoc committee and DIP lender); In re Premier Int'l Holdings, Inc., Case No. 09-12019 (Bankr. D. Del. Apr. 29, 2010) (exculpating prepetition lenders, backstop purchasers, and ad hoc committee of over objection of the U.S. Trustee's office); In re ACG Holdings, Case No. 08-11467 (Bank. D. Del. Aug. 26, 2008) (exculpating noteholders and indenture trustee).

57. Here, the exculpation provision set forth in Section 12.9 of the Plan (the "**Exculpation Provision**") provides an exculpation and limitation of liability for the Exculpated

Parties for any prepetition or postpetition act or omission in connection with the negotiation and execution of the Restructuring Support Agreement, the Plan, the Plan Documents, the Reorganization Cases, the Disclosure Statement, the dissemination of the Plan, the solicitation of votes for and pursuit of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan.[11] Section 12.9 of the Plan expressly excludes any acts that constitute fraud, willful misconduct or gross negligence and is consistent with the exculpation clause approved in In re PWS Holding Corp., 228 F.3d 224. Furthermore, the Exculpation Provision does not provide releases that will contravene Rule 1.8(h)(1) of the Delaware Lawyers' Rules of Professional Conduct, Rule 1.8(h)(1) the New York Rules of Professional Conduct or any similar applicable ethical rule.

VIII. THE DEBTORS HAVE COMPLIED WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE (SECTION 1129(A)(2))

58. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The cases and legislative history discussing this section indicate that it principally requires compliance with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. See PWS, 228 F.3d at 248; In re Worldcom, Inc., No. 02-13533, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that

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[11] The "Exculpated Parties," as defined in Section 1.70 of the Plan means each of, and solely in its capacity as such, (a) the Debtors and their current officers, Released Directors, principals, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, equity holders, partners and other professionals, (b) the Creditors' Committee and its members (solely in their capacity as members of the Creditors' Committee but not in their capacity as individual creditors), (c) the Administrative Agents, (d) the DIP Lenders, (e) the Secured Lenders, (f) the Consenting Noteholders, (g) the Exit Preferred Holders, (h) the Disbursing Agent, (i) the Notes Trustee, and (j) with respect to each of the foregoing entities in clauses (b) through (i), such entity's current affiliates, successors, assigns, subsidiaries, officers, directors, principals, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, equity holders, partners and other professionals.

section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code"); In re Lapworth, No. 97-34529, 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); S. Rep. No. 95-989, at 126 (1978); H.R. Rep. No. 95-595, at 412 (1977). The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code by distributing the Disclosure Statement and soliciting acceptances of the Plan through its solicitation agent DRC pursuant to the procedures authorized by the Disclosure Statement Order.

59. The Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code and the Bankruptcy Rules, modified by the Disclosure Statement Order, governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. The Court approved the Disclosure Statement as containing adequate information. In the Disclosure Statement Order, the Court also approved, *inter alia*, the procedures for soliciting acceptances and rejections to the Plan (the "Solicitation Procedures"), including the Solicitation Package. The Solicitation Procedures set forth, among other things: (a) the method of distribution of the Solicitation Package; (b) procedures for the temporary allowance of Claims for voting purposes; (c) the method of distribution of notices to non-voting creditors and other interested parties; (d) the qualifications for creditors entitled to vote on the Plan; and (e) procedures for tabulating the ballots and master ballots submitted to the DRC. By soliciting votes on the Plan following approval of the Disclosure Statement and in accordance with the Disclosure Statement Order, the requirements of section 1129(a)(2) have been satisfied.

IX. THE PLAN HAS BEEN PROPOSED IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW (SECTION 1129(A)(3))

60. Section 1129(a)(3) requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). While the Bankruptcy Code does not define "good faith" as that term is used in this section, courts in this district have indicated that "[f]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code" in light of the particular facts and circumstances of the case. In re Combustion Eng'g, Inc., 391 F.3d 190, 247 (3d Cir. 2004) (quoting PWS, 228 F.3d at 242); see also Armstrong World Indus., 348 B.R. at 164; In re Burns & Roe Enters., Inc., No. 08-4191, 2009 WL 438694, at *27 (D.N.J. Feb. 23, 2009). This inquiry typically focuses on whether a plan has been proposed with a legitimate purpose and with a basis for expecting that reorganization can be effectuated consistent with the Bankruptcy Code's objectives. See, e.g., Zenith, 241 B.R. at 108 (finding good faith where the plan was "proposed with the legitimate purpose of restructuring [the debtor's] finances to permit [the debtor] to reorganize successfully. . . . exactly what chapter 11 of the Bankruptcy Code was designed to accomplish"); In re Surfango, Inc., No. 09-30972, 2009 WL 5184221, at *8 (Bankr. D.N.J. Dec. 18, 2009) (In determining good faith, "[t]wo relevant inquiries deserve focus: (1) whether the plan serves a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing value, and (2) whether the plan is proposed to obtain a tactical litigation advantage."); Nat'l Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) (recognizing that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources").

61. "[D]enial of confirmation for failure to satisfy section 1129(a)(3) should be reserved for only the most extreme of cases." 7 Collier on Bankruptcy § 1129.02; see also In re Sound Radio, Inc., 93 B.R. 849, 853 (Bankr. D.N.J. 1988) ("To find a lack of 'good faith' courts have examined whether the debtor intended to abuse the judicial process and the purposes of the reorganization provisions. A finding of a lack of good faith is especially appropriate when no realistic possibility of an effective reorganization exists and it is evident that the debtor seeks to delay or frustrate the legitimate efforts of secured creditors to enforce their rights"). Good faith is not lacking simply because a plan "may not be one which the creditors would themselves design and indeed may not be confirmable." Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship), 116 F.3d 790, 802 (5th Cir. 1997) (bankruptcy court's finding of good faith upheld against allegations that debtor did not effectively market the property so as to produce a bidder who would compete against lender at confirmation hearing); In re Montgomery Court Apartments of Ingham Cnty., Ltd., 141 B.R. 324, 330 (Bankr. S.D. Ohio 1992) ("The Court fails to see how Greyhound's unhappiness with the Plan's terms can give rise to a finding of bad faith on the part of the Debtor under 11 U.S.C. § 1129(a)(3). Chapter 11 plans routinely alter the contractual rights of parties."); Zenith, 241 B.R. at 107 (fundamental fairness not offended by one group receiving better treatment than another under plan).

62. Fundamentally, the good faith standard does not demand that a debtor offer more to its creditors than the Bankruptcy Code requires. See In re G-I Holdings Inc., 420 B.R. 216, 262 (D.N.J. 2009). "'In enacting the Bankruptcy Code, Congress made a determination that an eligible debtor should have the opportunity to avail itself of a number of Code provisions which adversely alter creditors' contractual and nonbankruptcy rights. [T]he fact that a debtor proposes

a plan in which it avails itself of an applicable Code provision does not constitute evidence of bad faith." Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1075 (9th Cir. 2002) (citations omitted) (quoting In re PPI Enters., Inc., 228 B.R. 339, 344-45, 347 (Bankr. D. Del. 1998)).

63. Here, the Plan's purpose and contents are honest, legitimate and viable. The Plan's paramount objectives are the reorganization of the Debtors' existing business as a going concern, the restructuring of the Debtors' liabilities and the preservation and maximization of the value of the Debtors' estates that allows creditors to realize a fair and meaningful recovery on their Claims. The Plan preserves jobs and puts the Reorganized Debtors in a position to be competitive in the ambulance services and fire protection industry, to the benefit of customers, employees and vendors alike. The Plan satisfies these objectives, and is in no way an attempt to abuse the judicial process or delay or frustrate the legitimate efforts of creditors to enforce their rights. See Sound Radio, Inc., 93 B.R. at 853. In short, the Plan accomplishes the very goals of the Bankruptcy Code.

64. Moreover, the Plan is the product of extensive, arm's length negotiations among the Debtors and their key creditor constituencies. As discussed above, prior to the Petition Date, the Debtors successfully negotiated a comprehensive financial restructuring with the majority of their prepetition institutional debt holders by entering into the RSA. After the commencement of these Chapter 11 Cases, the Debtors continued to negotiate extensively with the Creditors' Committee, Consenting Lenders and Consenting Noteholders regarding the terms of the Plan. The overwhelming support for the Plan received from the Voting Classes provides independent evidence of good faith. For these reasons, the Plan was filed in good faith to promote the

rehabilitative objectives and purposes of the Bankruptcy Code, and therefore satisfies the requirements of 1129(a)(3) of the Bankruptcy Code.

X. THE PLAN PROVIDES FOR BANKRUPTCY COURT APPROVAL OF CERTAIN ADMINISTRATIVE PAYMENTS (SECTION 1129(A)(4))

65. Section 1129(a)(4) of the Bankruptcy Code requires that all postpetition professional fees promised or received in the Chapter 11 Cases remain subject to the Court's review. See In re Drexel Burnham Lambert Grp., Inc., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992). Courts have construed this provision to require that all payments of professional fees using funds from estate assets be subject to review and approval by the Court as to their reasonableness. See In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (Before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation.").

66. Sections 3.2(c) of the Plan provides for payment of Allowed Administrative Expense Claims in Cash in full. Section 3.2(a) of the Plan sets forth procedures for filing Administrative Expense Claims. Section 3.3(a) of the Plan sets forth procedures for filing Fee Claims and procedures for payment of professional fees. Moreover, the proposed Confirmation Order contains additional provisions regarding applications of Professional Persons for final approval of fees and expenses in these cases. In addition, Section 13.1(a)(iv) of the Plan provides for the Bankruptcy Court's retention of jurisdiction to grant or deny applications for allowance of Claims for professional fees or reimbursement of expenses authorized pursuant to orders of the Court, the Bankruptcy Code or the Plan. Thus, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

XI. THE DEBTORS HAVE DISCLOSED ALL NECESSARY INFORMATION REGARDING THE DEBTORS' POST-EMERGENCE DIRECTORS AND OFFICERS AND THEIR APPOINTMENT IS CONSISTENT WITH PUBLIC POLICY (SECTION 1129(A)(5))

67. Section 1129(a)(5)(A) of the Bankruptcy Code requires that, prior to confirmation, the Debtors disclose the identity and affiliations of the proposed officers and directors of the Reorganized Debtors and that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy. In addition, the Debtors must disclose the identity of any "insider" (as defined by 11 U.S.C. § 101(31)) to be employed or retained by the reorganized debtors and the "nature of any compensation for such insider." See 11 U.S.C. § 1129(a)(5)(B). The Plan satisfies these requirements because the Plan Supplement disclosed (i) the identities and affiliations of any known Person designated to serve as an officer or director of the Reorganized Debtors and (ii) that it is expected that the officers would be compensated on substantially the same terms as prior to the Petition Date. See Plan, § 7.8; Farber Dec. ¶ 30.

68. The appointment of the proposed directors of the board of the Reorganized Debtors in accordance with Section 7.8 of the Plan also complies with section 1129(a)(5)(A)(ii) of the Bankruptcy Code because the appointment of the proposed directors is in the best interests of creditors and equity security holders and conforms with public policy. This section asks a court to ensure that the post-confirmation governance of the reorganized debtors are in "good hands," which courts have concluded to mean experience in the reorganized debtors' business and industry and experience in financial and management matters. See Drexel, 138 B.R. at 760; In re Rusty Jones, Inc., 110 B.R. 362, 372 (Bankr. N.D. Ill. 1990); In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984); In re Stratford Assocs. Ltd. P'ship, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); In re Sherwood Square Assocs., 107 B.R. 872, 878

(Bankr. D. Md. 1989). The proposed directors and officers of the Reorganized Debtors as set forth in Exhibit K and Exhibit L of the Plan Supplement, filed with the Bankruptcy Court, satisfy this standard.

XII. THE PLAN DOES NOT REQUIRE GOVERNMENTAL REGULATORY APPROVAL OF A RATE CHANGE (SECTION 1129(A)(6))

69. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission that will have jurisdiction over a debtor after confirmation approve any rate change provided for in the debtor's plan. The Plan does not provide for or contemplate any rate change that would require the approval of any regulatory agency. Accordingly, section 1129(a)(6) is inapplicable in the Debtors' cases.

XIII. THE PLAN IS IN THE BEST INTERESTS OF CREDITORS AND INTEREST HOLDERS (SECTION 1129(A)(7))

70. Section 1129(a)(7) of the Bankruptcy Code – the "best interests test" – requires that, with respect to each class, each holder of a claim or an equity interest in such class either:

> (i) has accepted the plan; or
>
> (ii) will 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)(i)-(ii).

71. The best interests test applies to individual dissenting holders of claims and interests and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization. As section 1129(a)(7) of the Bankruptcy Code makes clear, the best interests test applies only to non-accepting holders of

impaired claims or interests. Pursuant to section 1126(f) of the Bankruptcy Code, each holder of a Claim or Interest in a Class that is not impaired is conclusively presumed to have accepted the Plan. With respect to Claims in Class 1 (Priority Non-Tax Claims) and Class 3 (Other Secured Claims), section 1129(a)(7) is not implicated because the creditors in such Classes are unimpaired and are conclusively presumed to have accepted the Plan. Claims and Interests in all other Classes are impaired under the Plan, and therefore, the "best interests" test must be applied to holders of Claims and Interests in such Classes that voted to reject the Plan.

72. Exhibit 4 to the Disclosure Statement contains a detailed liquidation analysis (the "Liquidation Analysis"), which establishes that the best interests test is satisfied with respect to Claims and Interests in impaired Classes under the Plan. See Disclosure Statement, Exhibit 4; Aebersold Dec. ¶ 10. The Liquidation Analysis demonstrates that the following impaired Classes of Claims and Interests would have a zero percent (0%) recovery on their Claims or Interests in a hypothetical chapter 7 liquidation: Class 4 (Noteholder Claims), Class 5 (Other Unsecured Claims), Class 6 (Existing Securities Laws Claims) and Class 7 (Existing Common Stock Interests and Existing Securities Laws Claims on Account Thereof). In addition, the Liquidation Analysis demonstrates that holders of Claims in Class 2 (Secured Lender Claims) would recover, in a hypothetical chapter 7 liquidation, 14.8% - 23.5% on their Claims, whereas under the Plan, such holders will receive 100% of their Claims. As the estimated recovery under the Plan available to holders of such Claims and Interests is equal to or exceeds the estimated recovery that would be available to such holders in a hypothetical chapter 7 liquidation, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code. See Disclosure Statement, Exhibit 4; Aebersold Dec. ¶ 10.

XIV. ACCEPTANCE OF IMPAIRED CLASSES (SECTION 1129(A)(8))

73. Section 1129(a)(8) of the Bankruptcy Code, when read together with section 1129(b)(1) of the Bankruptcy Code, requires that each class of claims or interests must either accept a plan or be unimpaired thereunder, or the debtor must satisfy the so-called "cramdown" provisions of section 1129(b) with respect to such claims or interests. Pursuant to section 1126(c) of the Bankruptcy Code, a class of impaired claims accepts a plan if the holders who vote to accept the plan constitute (i) at least two-thirds in dollar amount and (ii) more than one-half in number of the claims in that class that actually vote to accept or reject the plan. A class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan. See 11 U.S.C. § 1126(f). Conversely, a class is conclusively deemed to have rejected a plan if the plan provides that the claims or interests of such class do not receive or retain any property under the plan on account of such claims or interests. See 11 U.S.C. § 1126(g).

74. As set forth in the Voting Certification, all of the impaired Classes of Claims that are entitled to vote to accept or reject the Plan have voted overwhelmingly to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code. However, as described above, because the holders of Class 6 and Class 7 Claims and Interests will not receive any distributions or retain any property under the Plan, such holders are conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Therefore, the Debtors seek confirmation of the Plan despite the deemed rejection by Class 6 and Class 7 pursuant to section 1129(b) of the Bankruptcy Code, as described below in section XX.

XV. THE PLAN PROVIDES FOR PAYMENT IN FULL OF ALL ALLOWED PRIORITY CLAIMS (SECTION 1129(A)(9))

75. Section 1129(a)(9) of the Bankruptcy Code requires a chapter 11 plan to provide that all persons holding claims entitled to priority under section 507(a) of the Bankruptcy Code will be fully compensated for their claims in cash unless the holder of a particular claim agrees to a different treatment with respect to such claim. As required by section 1129(a)(9) of the Bankruptcy Code, Section 3.2 of the Plan provides for full payment in Cash of all Allowed Administrative Claims. In addition, Section 3.5 of the Plan provides for full payment of Allowed Priority Tax Claims. With respect to Allowed Priority Non-Tax Claims, Section 5.1(a) of the Plan provides that unless a holder of such a Claim agrees to less favorable treatment, on, or as soon thereafter as is reasonably practicable, the later of the Effective Date and the first Monthly Distribution Date after the date a Priority Non-Tax Claim becomes an Allowed Claim, the holder of such Allowed Priority Non-Tax Claim shall receive Cash in an amount equal to such Claim. Therefore, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

XVI. AT LEAST ONE IMPAIRED CLASS OF CLAIMS HAS ACCEPTED THE PLAN, EXCLUDING THE ACCEPTANCES OF INSIDERS (SECTION 1129(A)(10))

76. Section 1129(a)(10) of the Bankruptcy Code requires that to the extent there is an impaired class of claims under the Plan, at least one impaired class of claims must accept the Plan, excluding the votes of any insider. As described in the Voting Certification, all of the Classes that are entitled to vote to accept or reject the Plan have voted to accept the Plan by far more than the requisite majority, exclusive of insiders. Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

XVII. THE PLAN IS FEASIBLE (SECTION 1129(A)(11))

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

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

11 U.S.C. § 1129(a)(11).

78. A debtor must prove a chapter 11 plan's feasibility by a preponderance of the evidence. See Briscoe Enters., 994 F.2d at 1165 (rejecting "clear and convincing" as the applicable standard); CoreStates Bank, N.A. v. United Chem. Techs., Inc., 202 B.R. 33, 45 (E.D. Pa. 1996). To demonstrate that a plan is feasible, however, it is not necessary that success be guaranteed. See In re U.S. Truck Co., 47 B.R. 932, 944 (E.D. Mich. 1985). Rather, a bankruptcy court must determine whether a plan is workable and has a reasonable likelihood of success. Mercury Capital Corp. v. Milford Conn. Assocs., L.P., 354 B.R. 1, 9 (D. Conn. 2006) ("A relatively low threshold of proof will satisfy the feasibility requirement.") (internal quotation marks omitted). The key element of feasibility is whether there is a reasonable likelihood that the provisions of the plan can be performed and that the debtor will be commercially viable after the plan's effective date. See In re Texaco Inc., 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988) ("All that is required is that there be reasonable assurance of commercial viability.").

79. In evaluating a plan's feasibility, courts have considered the following factors as probative: (i) the adequacy of the capital structure; (ii) the earning power of the reorganized debtor; (iii) economic and market conditions; (iv) the ability of management and the likelihood that the same management will continue; and (v) any other related matter that determines the

prospects of a sufficiently successful operation to enable performance of the provisions of the plan. See, e.g., In re Prussia Assocs., 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 226-27 (Bankr. D.N.J. 2000) (citing In re Temple Zion, 125 B.R. 910, 915 (Bankr. E.D. Pa. 1991)).

80. Here, the Financial Projections attached as Exhibit 5 to the Disclosure Statement, together with the Aebersold Declaration, demonstrate that the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code. The Debtors have thoroughly analyzed their ability to meet their obligations under the Plan and to continue as a going concern without further financial reorganization, and have carefully negotiated and developed the various transactions and ancillary documents to ensure the successful implementation of the Plan and the Debtors' subsequent emergence.

81. Under the Plan, the Debtors have certain payment obligations due on or as soon as practicable after the Effective Date, including cash distributions under the Plan. To make these payments and to fund their ongoing working capital needs, the Debtors' emergence from the Chapter 11 cases is predicated on funding from: (a) Cash on hand as of the Effective Date; (b) the Rights Offering, which will provide $135 million in capital to the Reorganized Debtors; and (c) the Exit LC Facility, a $41,350,000 letter of credit facility, backstopped by the Backstop Term Loan. As demonstrated by the Financial Projections, the Debtors believe that these funding sources will provide the Reorganized Debtors with sufficient capital and liquidity to make the required payments under the Plan and successfully operate outside of bankruptcy protection.

82. The Debtors have established by a preponderance of the evidence that confirmation of the Plan is not likely to be followed by liquidation or the need for further

reorganization of any of the Reorganized Debtors. For all the reasons set forth above and in the Aebersold Declaration, the Debtors submit that the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

XVIII. THE PLAN PROVIDES FOR THE PAYMENT OF ALL FEES UNDER 28 U.S.C. § 1930 (SECTION 1129(A)(12))

83. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. Article XIII of the Plan provides that all such fees will be paid on and after the Effective Date as appropriate. The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

XIX. THE PLAN ADEQUATELY AND PROPERLY TREATS RETIREE BENEFITS (SECTION 1129(A)(13))

84. Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continued payment of certain retiree benefits "for the duration of the period the debtor has obligated itself to provide such benefits" at the level established by section 1114 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(13). Section 13.2 of the Plan provides that, on and after the Effective Date, the Reorganized Debtors shall continue to pay all retiree benefits, if any, at the level established in accordance with section 1114 of the Bankruptcy Code, at any time prior to the Confirmation Date, for the duration of the period for which the Debtors had obligated themselves to provide such benefits. Therefore, the Plan satisfies section 1129(a)(13) of the Bankruptcy Code.

XX. THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS (SECTION 1129(B))

85. Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met, then – notwithstanding the existence of a class of impaired claims or interests that has not accepted the plan, so that the plan does not comply with

section 1129(a)(8) – the plan may be confirmed so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan. See 11 U.S.C. § 1129(b)(1). Thus, to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" against, and is "fair and equitable" with respect to, the non-accepting impaired classes. See John Hancock Mut. Life Ins. Co., 987 F.2d at 157 n.5. Here, the Debtors satisfy the "cram down" requirements in section 1129(b) of the Bankruptcy Code necessary to confirm the Plan over the deemed rejections by Classes 6 and 7.

XXI. THE PLAN IS FAIR AND EQUITABLE WITH RESPECT TO THE DEEMED REJECTING CLASSES

86. Section 1129(b)(2) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a particular class of unsecured claims or impaired interests if the holder of any claim or interest in a class junior to the claims or interests of that particular class will not receive or retain property under the plan on account of such junior claim or interest. See 11 U.S.C. §§ 1129(b)(2)(B)(ii) and (C)(ii). This central tenet of bankruptcy law – the "absolute priority rule" – requires that, if the holders of claims or interests in a particular class that vote to reject a plan receive less than full value for their claims or interests, no holder of claims or interests in a junior class may receive or retain any property under the plan. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988) (The absolute priority rule "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan."); Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441-42 (1999) ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the

holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

87. Another condition under the absolute priority rule is that senior classes cannot receive more than a 100% recovery for their claims. See Exide Techs., 303 B.R. at 61 ("[A] corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."); Genesis, 266 B.R. at 612 (same).

88. The Plan satisfies the absolute priority rule with respect to Classes 6 and 7. *First*, no Class of Claims or Interests junior to the Rejecting Classes will receive or retain any property under the Plan. *Second*, no Class of Claims will receive or retain property under the Plan that has a value greater than 100% of such Class's Claims. Accordingly, the Plan satisfies the requirements of sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) and, therefore, is fair and equitable with respect to such Rejecting Classes.

XXII. THE PLAN DOES NOT UNFAIRLY DISCRIMINATE WITH RESPECT TO THE DEEMED REJECTING CLASSES

89. The Plan does not discriminate unfairly with respect to the Deemed Rejecting Classes. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. See In re 203 N. LaSalle St. Ltd. P'ship, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), rev'd on other grounds, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"). Rather, courts typically examine the facts and circumstances of each particular case to determine whether unfair discrimination exists. See In re Bowles, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether

or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis . . . ."); see also In re Freymiller Trucking, Inc., 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"). At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without sufficient justifications for doing so. See Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship), 115 F.3d 650, 655 (9th Cir. 1997); In re Aztec Co., 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

90. With respect to Class 6 (Existing Securities Laws Claims) and Class 7 (Existing Common Stock Interests and Existing Securities Laws Claims on Account Thereof), there is no unfair discrimination because there are no holders of similarly situated Claims or Interests, as applicable, receiving any distribution under the Plan. Accordingly, the Plan does not unfairly discriminate with respect to the Deemed Rejecting Classes, and the cram down test of section 1129(b) of the Bankruptcy Code is satisfied.

XXIII. THE PLAN SATISFIES THE "ONLY ONE PLAN" REQUIREMENT (SECTION 1129(C))

91. Section 1129(c) of the Bankruptcy Code provides that "the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144" of the Bankruptcy Code. 11 U.S.C. § 1129(c). No other plan has been confirmed in these Chapter 11 cases, and therefore section 1129(c) is satisfied.

XXIV. THE PLAN SATISFIES THE "PRINCIPAL PURPOSE OF THE PLAN" REQUIREMENTS (SECTION 1129(D))

92. Section 1129(d) of the Bankruptcy Code provides that "on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. 1129(d). No governmental unit has requested that the Plan not be confirmed on the such grounds, and the primary purpose of the Plan is not the avoidance of taxes or the avoidance of the requirements of section 5 of the Securities Act of 1933. Accordingly, the Plan satisfies the requirements of section 1129(d).

XXV. THE DEBTORS' RESPONSE TO CONFIRMATION OBJECTIONS

93. A Confirmation Objection was filed by Lisa McCall-Stowers, individually and as guardian of Rhonda McCall, and guardian of D.M., and Roger W. McCall, Sr., Wilma McCall and Roger W. McCall Jr. (the "McCall Plaintiffs").[12] While the Debtors worked with the McCall Plaintiffs in an attempt to resolve consensually the McCall Objection, it remains outstanding. For the reasons articulated below, the Debtors believe that the McCall Objection should be overruled.

94. The McCall Plaintiffs objected to the Plan on the grounds that, among other things, the Plan's proposed treatment of a policy of healthcare professional liability insurance

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[12] Joinders to the McCall Objection were filed on December 5, 2013, see *Joinder of Carol DeWitt and the Estate of Richard DeWitt, Ruth Blevins and the Estate of Teddy Blevins, and Hubert Kelso and Sharyel Graul, Individually and As Personal Representative of Marie Kelso to Preliminary Objection to First Amended Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 721], December 6, 2013, see *Joinder of Martha Ann Carey, Individually and on Behalf of the Statutory Beneficiaries of David Carey, to Preliminary Objection to First Amended Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 726], and December 9, 2013, *Joinder of Aaron and Stephanie Miller, Individually and on Behalf of the Estate of A.M., a Minor, to Preliminary Objection to First Amended Chapter 11 Plan of Reorganization for Rural/Metro Corporation and Its Affiliated Debtors* [Docket No. 746].

issued by Lexington Insurance Company (the "Policy") is impermissible because the Policy is an executory contract required to be assumed or rejected by the Debtors.[13] See McCall Objection ¶¶ 7-10. In support, the McCall Plaintiffs assert that "the Policy is an executory contract as that phrase is described by applicable bankruptcy law." Id. ¶ 2 (citing In re Exide Techs., 340 B.R. 222 (Bankr. D. Del. 2006)). The McCall Plaintiffs argue that the Debtors are seeking to retain the benefits of the Policy without formally assuming the Policy and performing their contractual obligations thereunder. Id. ¶ 8.

95. Despite the McCall Plaintiffs' assertions to the contrary, it is not settled law that an insurance contract is executory. In fact, courts have held that insurance policies are not executory where, as is the case here, the policy premiums have been paid in full. See In re Federal-Mogul Global Inc., 385 B.R. 560, 575 (Bankr. D. Del. 2008) ("Under the Countryman definition courts have recognized that where one of the parties to the insurance policy has fulfilled the central agreement to such contract, such as the obligation of the insured to pay the premium in exchange for the insurer's defense and payment of indemnity claims against the insured, the contract is no longer executory."), aff'd, 402 B.R. 625 (D. Del. 2009), aff'd, 684 F.3d 355 (3d Cir. 2012); Admiral Ins. Co. v. Grace Indus., Inc. (In re Grace Indus., Inc.), 341 B.R. 399, 402-03 (Bankr. E.D.N.Y. 2006) (concluding that for purposes of section 365, "the debtor's payment of the initial policy premium constitutes substantial compliance with its contractual obligations" regardless of continuing obligations such as payment of costs within a

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[13] In support of their argument that the Policy should be deemed executory, the McCall Plaintiffs also assert that the "Debtors freely have acknowledged that the Policy is an executory contact by identifying it as such in their sworn to Schedule G of Executory Contracts." See McCall Objection ¶ 2. Contrary to this assertion, however, in filing Schedule G, the Debtors expressly stated that "the listing of any contract on Schedule G does not constitute an admission by the Debtors as to the validity of any such contract or that such contract is an executory contract . . . ." See Docket No. 268, page 11.

deductible), aff'd, 409 B.R. 275 (E.D.N.Y. 2009); Westchester Surplus Lines Ins. Co. v. Surfside Resort & Suites, Inc. (In re Surfside Resort & Suites, Inc.), 344 B.R. 179, 186-87 (Bankr. M.D. Fla. 2006) (insurance policy was not executory because the premium had been paid in full and thus, the insured had no further obligations under the policy); Am. Safety Indem. Co. v. Vanderveer Estates Holding, LLC (In re Vanderveer Estates Holding, LLC), 328 B.R. 18, 25 (Bankr. E.D.N.Y. 2005) ("In short, courts interpreting § 365 of the Bankruptcy Code have made it clear that, for purposes of that provision, the debtor's payment of the policy premium constitutes substantial compliance with its contractual obligations."); In re CVA Gen. Contractors, Inc., 267 B.R. 773, 779 (Bankr. W.D. Tex. 2001) ("[A]n insured's payment of all premiums due under an insurance policy prior to the bankruptcy filing nullifies the 'sole basis' for holding an insurance policy to be an executory contract: the continuing obligation of the debtor to make premium payments."); Firearms Imp. & Exp. Corp. v. United Capitol Ins. Co. (In re Firearms Imp. & Exp. Corp.), 131 B.R. 1009, 1013 (Bankr. S.D. Fla. 1991) (insurance policy was non-executory because the debtor had already paid the premiums in full).

96. Here, the Debtors already paid all of the Policy's premiums in the amount of approximately $726,742 (the "Premium Payment") prior to filing for bankruptcy. The Premium Payment was made to Lexington on or about May 14, 2013.[14] The facts surrounding the Policy support the position that the Policy is not executory and the Plan's proposed treatment of the Policy is permissible as the Debtors cannot assume or reject a contract that is non-executory.

97. Courts have held that an insurance contract may be deemed executory when the debtor has a continuing obligation to make premium payments under the policy. See Pester Ref.

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[14] The Policy is financed pursuant to a premium financing agreement with First Insurance Funding Corporation ("First Insurance"). First Insurance made the Premium Payment on or prior to May 14, 2013 on behalf of the Debtors and accordingly, all Premium Payments were made prior to the Petition Date.

Co. v. Ins. Co. of N. Am. (In re Pester Ref. Co.), 58 B.R. 189, 191 (Bankr. S.D. Iowa 1985); In re B. Siegel Co., 51 B.R. 159, 161 (Bankr. E.D. Mich. 1985). Since the Debtors no longer have any premium obligations under the Policy, there is likely no basis for the Policy to be construed as executory. Furthermore, ministerial ongoing obligations of the insured-debtor under an insurance policy, such as duties to pay SIR's and unpaid deductibles and penalties, do not constitute the requisite material obligations necessary to render the policy executory. See Federal-Mogul Global Inc., 385 B.R. at 575-76 (rejecting argument that debtors' ongoing obligations of cooperation, deductibles and notice made the policy executory); Grace Indus., Inc., 341 B.R. at 402-03 (insurance policy was non-executory despite debtor's duties to pay deductible).

98. However, the Plan has been drafted to avoid unnecessary litigation with the Debtors' insurers (who, notably, have not objected to the Plan) regarding whether insurance policies are executory. Such litigation would certainly distract the Debtors from their restructuring efforts and deplete the court and estate's resources. Instead of forcing adjudication over the precise nature of the Policy, the Plan provides that it does not diminish or impair the enforceability of any insurance policies to cover claims against the Debtors, and that the Debtors' insurance program, including the Policy, will vest in the Reorganized Debtors as of the Effective Date. See Plan § 7.14. While the Debtors believe that, if forced to litigate the issue, the Policy could very well be determined not to be executory, the Plan provides essentially that result for the Reorganized Debtors and all parties in interest by providing that the Policy stays in

place without burdening the estates with substantial prepetition self insured retentions and deductibles, without the attendant risks and costs of litigating the issue to completion.[15]

[Remainder of page intentionally left blank.]

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[15] For the avoidance of doubt, Section 7.14 of the Plan shall not apply in any way to the ACE Insurance Program, as further set forth in the Plan.

CONCLUSION

99. For the reasons set forth herein, the Debtors submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and respectfully request that this Court confirm the Plan.

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December 13, 2013

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