IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SIGNAL INTERNATIONAL, INC., et al.[1]	Case No. 15-11498 (MFW)
Debtors.	Jointly Administered
	RE: Docket Nos. 386, 481, 483, 485, 486, 487, 514, 515, and 518

MEMORANDUM OF LAW AND OMNIBUS REPLY IN SUPPORT OF THE DEBTORS' FIRST AMENDED JOINT PLAN OF LIQUIDATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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Dated: November 20, 2015
Wilmington, Delaware

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Signal International, Inc. (4248); Signal Ship Repair, LLC (2642); Signal International, LLC (5074); Signal International Texas GP, LLC (3050); and Signal International Texas, L.P. (5066). The Debtors' principal offices are located at RSA Battle House Tower, 11 North Water Street, Mobile, Alabama 36602.

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PRELIMINARY STATEMENT

1. This memorandum of law (the "**Memorandum**") is submitted by the debtors and debtors in possession in the above-captioned cases (collectively, the "**Debtors**") in support of confirmation of the *Debtors' First Amended Plan Joint Plan of Liquidation* [D.I. 386] (including all exhibits thereto and as amended, modified or supplemented from time to time, the "**Plan**").[2]

2. The Plan implements a global settlement resolving seven years of protracted and highly contentious multi-action litigation and encompassing a delicate balance of important competing interests. Despite the incredibly complex claims and interests at play, after many months of good-faith, arm's-length negotiations and the commitments for substantial contributions by the TRSA and the ERSA (together, the "**RSA**"), the Supporting Litigation Claimants, and the other Released Parties, the Debtors' major constituents reached the compromises and settlement embodied in the Plan Support Agreement. The Plan Support Agreement paved the way for a significant recovery to Creditors and provided the foundation for the structure and substance of the Plan, which is in the best interests of all Creditors.

3. The first element of the Plan Support Agreement was the formulation and execution of a sale process designed to maximize the value of the Debtors' assets for the benefit of the Debtors' estates and Creditors. To this end, the Debtors, through their Court-approved investment bankers, conducted a 93-day sale process in accordance with the Bidding Procedures Order. This process confirmed that the highest and best bid for the Debtors' assets was the stalking horse bid submitted by the RSA. In conjunction with confirmation of the Plan, the Debtors are seeking Court approval of a sale of substantially all of their assets to the RSA and its designees pursuant to the terms of the Asset Purchase Agreement, with such sale being implemented through the Plan.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

4. The second element of the Plan Support Agreement involves the Court approval of the global settlement embodied in the Plan, which constitutes the only credible option to resolve these chapter 11 cases, while respecting Creditors' rights and achieving a meaningful recovery. The Plan represents a tremendous outcome under the circumstances of these chapter 11 cases, as demonstrated by the overwhelming support from the Debtors' stakeholders. Critically, the Committee, acting in its fiduciary capacity on behalf of all unsecured creditors, was integral in development of the Plan and supports its confirmation.[3] As set forth below and in the supporting declarations, the Debtors respectfully submit that the Plan satisfies the applicable requirements of the Bankruptcy Code and should be confirmed.

5. Notwithstanding the Plan's manifest benefits and broad-based support, eight objections were filed and two informal comments were received. As discussed herein, these objections have been, or anticipated to be, resolved or are not supportable based on the record of these chapter 11 cases, applicable law, or comparable chapter 11 plans confirmed in this jurisdiction.

GENERAL BACKGROUND OF THESE CHAPTER 11 CASES

6. The Court is respectfully referred to the Disclosure Statement, the *Declaration of Christopher S. Cunningham in Support of Chapter 11 Petitions and First Day Motions* [D.I. 12] (the "**First Day Declaration**"), the declarations filed or to be filed in support of confirmation of the Plan, the *Statement of the Southern Poverty Law Center in Support of Confirmation of the Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code*, and the entire record of these chapter 11 cases, including the record presented to the Court

[3] Importantly, the Committee represents the entire compilation of Litigation Claimants and other general unsecured creditors, and two Litigation Claimants serve as members of the Committee, one of which is Committee co-chair. The Committee played an active role in the formulation of the Plan and vigorously advocated on behalf of all of its constituents. The Committee's support of the Plan demonstrates that it represents the best opportunity for all Creditors to obtain a full and fair recovery under the circumstances.

in conjunction with the PSA Order entered on September 1, 2015, for an overview of the Debtors, their pre-Petition Date business, the litigation involving the Litigation Claims, and all other facts relevant to the Plan.

THE PLAN

I. **Plan Formulation Process**

7. The Plan Participants, along with the Committee, have worked diligently to formulate an exit strategy for these chapter 11 cases that distributes the value of the Debtors' estates to creditors in an equitable manner consistent with the principles of the Bankruptcy Code and the parties' respective rights under applicable law. *See Begier v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (observing that the underpinning policy of the Bankruptcy Code is maximizing property available to satisfy creditors). To accomplish this result, the Debtors engaged in negotiations spearheaded by the Supporting Litigation Claimants, the RSA, and, upon its appointment, the Committee, all of whom expended considerable resources to reach the compromises and settlement embodied in the Plan Support Agreement, which is the foundation for the structure and substance of the Plan.

II. **Summary of Plan Structure**

8. The Plan memorializes the significant compromises and agreements by and among the Supporting Litigation Claimants, the Committee, the RSA, and the Debtors. To avoid uncertain and risky litigation against the RSA, the Plan provides mutual interrelated releases by and among the Released Parties (the Debtors, the RSA, the Supporting Litigation Claimants, and their respective Related Parties). The basis for the releases of the RSA, the Debtors, and their respective Related Parties (collectively, the "**Funding Parties**") is, among other things, the significant consideration being provided under the Plan by or on behalf of each of the Funding

Parties. Specifically, the RSA's agreement to bestow, on behalf of the Funding Parties, over $20 million of assets to be purchased pursuant to the terms of the Asset Purchase Agreement. The method to distribute this consideration is through the establishment of two trusts pursuant to section 105 of the Bankruptcy Code: (i) a Litigation Settlement Trust that is responsible for administration and payment of Litigation Claims; and (ii) a Signal Liquidating Trust for the benefit of Allowed Administrative, Professional Fee, Priority Tax, Other Priority, Other Secured, and General Unsecured Claims.

9. The trust and distribution procedures established in the Plan are inextricably intertwined with the corresponding releases, Exculpation, and Channeling Injunction. The Supporting Litigation Claimants, which comprise more than 230 of the 233 of the Litigation Claimants who have a obtained a judgment or have a pending lawsuit, other than the Fair Labor Standards Act ("**FLSA**")[4] and Equal Employment Opportunity (the "**EEOC**")[5] actions, were willing to enter into a settlement if it provided the best option to maximize a recovery with respect to their claims and the Debtors issued an apology. In turn, the Debtors were only willing to issue an apology and compromise claims against the RSA if the years of litigation would be resolved with finality and in a manner that would provide the Supporting Litigation Claimants and Holders of General Unsecured Claims with a meaningful distribution. The RSA was only willing to contribute the substantial consideration necessary to provide those claimants with a meaningful distribution under the Plan if it meant global peace by and among the parties by

[4] There are 165 Litigation Claimants, which are represented by the Southern Poverty Law Center ("**SPLC**"), that have not filed a separate trafficking lawsuit, but "opted in" to the *David* case with respect to claims under FLSA (the "**FLSA Action**"). The SPLC filed a proof of claim for FLSA claims on behalf of those 165 Litigation Claimants and approximately 200 other Litigation Claimants that are represented by other counsel in pending trafficking lawsuits.

[5] The EEOC has filed an action on behalf of each of the approximately 500 H-2B Workers (the "**EEOC Action**").

resolving, with finality, the litigation. If the RSA or the Debtors could be sued either directly or indirectly, the RSA was not interested in settling.

10. Therefore, integral to the parties' willingness to compromise and ability to reach a global settlement are the consensual and non-consensual releases, the Exculpation, and the Channeling Injunction. Without them, to the detriment of all Creditors, there would be no finality to the litigation, no apology, and no substantial contributions made by or on behalf of the Funding Parties. Further, firms representing the Supporting Litigation Claimants have provided thousands of hours of service on a *pro bono* basis, which have resulted in the distributions available to *all* Litigation Claimants and Holders of General Unsecured Claims. These firms, along with certain non-profit organizations representing certain Supporting Litigation Claimants, negotiated the settlement and compromises memorialized in the Plan on the understanding that they would not be subject to future litigation on account of their services. Thus, absent confirmation and approval of the mutually-dependent and interrelated consensual and non-consensual releases, the Exculpation, and the Channeling Injunction, the Debtors would be forced to seek to convert these cases to Chapter 7, without the necessary funding to pursue any causes of action that could provide a return to the Litigation Claimants and Holders of General Unsecured Claims. Confirmation of the Plan, which is the culmination of extensive efforts of the Debtors, the Committee, the RSA, and the Supporting Litigation Claimants, will provide the ability to distribute consideration significantly in excess of that which could be achieved if the cases were converted to chapter 7.

11. The Litigation Settlement Trust is funded from the contribution by the RSA, on behalf of each of the Funding Parties, of a 66.9% participating interest in the Westport Loan with a guaranteed minimum value of $20 million and a potential value up to $22 million. The

Litigation Settlement Trust provides a path to resolving the Litigation Claims with finality in an equitable and orderly fashion, while avoiding lengthy and protracted litigation that would deplete resources and negatively impact all interested parties.

12. The Litigation Claims covered under the Litigation Settlement Trust consist of all Claims against the Debtors or any Released Party by or on behalf of the H-2B Workers or the EEOC (any other agency or instrumentality of any Governmental Unit with responsibility for enforcing laws against employment condition or otherwise relating to conditions of employment) arising out of or related to the employment or recruitment of any of the H-2B Workers, excluding certain enumerated Retained Claims. The Litigation Claims will be channeled to the Litigation Settlement Trust under the Channeling Injunction and the liquidation and payment of Litigation Claims will be administered by the Litigation Settlement Trustee, who has been selected by the Southern Poverty Law Center in accordance with Section 6.F of the Plan.

13. The Signal Liquidating Trust will be funded through the contribution of the GUC Payment Amount[6] by the RSA, on behalf of each of the Funding Parties, along with funds provided through the DIP Facility sufficient to satisfy Administrative, Professional Fee, Priority Tax, Other Priority, and Other Secured Claims that are not assumed by the RSA. The Signal Liquidating Trust will distribute such funds in accordance with the priority scheme of the Bankruptcy Code and will provide Pro Rata recoveries to Holders of Allowed General Unsecured Claims pursuant to the terms of the Plan and the Signal Liquidating Trust Agreement.

PLAN SOLICITATION AND RESULTS THEREOF

14. On September 18, 2015, the Debtors filed the *Debtors' Motion for Order (A) Approving the Disclosure Statement; (B) Approving Form and Manner of Notice of*

[6] The GUC Payment Amount will be an aggregate amount equal to the lesser of $900,000, or an amount equal to fifteen percent (15%) of the total amount of all Allowed General Unsecured Claims.*See* Plan § 1.A.67.

Confirmation Hearing; (C) Approving Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan; (D) Estimating Each Litigation Claim at $1.00 for Voting Purposes; (E) Approving Notice and Objection Procedures in Respect Thereof; and (F) Granting Related Relief [D.I. 337] (the "**Solicitation Motion**").

15. On October 8, 2015, the Court entered an order granting the Solicitation Motion [D.I. 384] (the "**Solicitation Order**"). The Solicitation Order, among other things, (i) approved the *Disclosure Statement for the Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (including all exhibits thereto and as amended, modified or supplemented from time to time, the "**Disclosure Statement**") as containing adequate 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, (iii) authorized the Debtors to solicit acceptances or rejections of the Plan, and (iv) established various deadlines, including November 12, 2015, as the deadline by which all Ballots must be received (the "**Voting Deadline**"). The Court also scheduled a hearing to consider confirmation of the Plan on November 24, 2015, at 2:00 p.m. (ET) (the "**Confirmation Hearing**").

16. On October 14, 2015, the Debtors began soliciting votes on the Plan by distributing the Disclosure Statement and related materials to holders of Claims in Impaired Classes entitled to vote on the Plan. The Classes entitled to vote on the Plan (the "**Voting Classes**") are: (i) Class 4 (Litigation Claims); and (ii) Class 5 (General Unsecured Claims). Specifically, the Debtors transmitted a solicitation package (the "**Solicitation Package**") to known Holders of Claims in the Voting Classes as of October 8, 2015 (the "**Record Date**"), containing, among other things, notice of the Confirmation Hearing and deadlines for filing objections to confirmation of the Plan and copies of the Disclosure Statement and the Plan.

Pursuant to the Solicitation Order, the Voting Deadline was set for November 12, 2015, which provided parties in the Voting Classes with approximately twenty-nine (29) days to consider and cast a vote on the Plan.

17. The Debtors employed Kurtzman Carson Consultants, LLC as balloting agent (the "**Balloting Agent**") to receive and tabulate Ballots on the Plan received from the Voting Classes. In connection with the tabulation of votes, the *Certification of Michael J. Paque with Respect to the Tabulation of Votes on the Debtors' First Amended Joint Plan of Liquidation* sworn to on November 20, 2015 (the "**Voting Certification**") was filed with the Court. As set forth in the Voting Certification, the Debtors received overwhelming acceptance from the Voting Classes.

18. A summary of the voting results is set forth below:

Class Name	Debtor	Members Voted	Members Accepted	Members Rejected	% Members Accepted	% Members Rejected	Total $ Voted	$ Accepted	$ Rejected	% $ Accepted	% $ Rejected
4	Signal International Texas GP, LLC	236	236	0	100.00%	0.00%	236	236	0	100.00%	0.00%
4	Signal International Texas, L.P.	236	236	0	100.00%	0.00%	236	236	0	100.00%	0.00%
4	Signal International, Inc.	301	301	0	100.00%	0.00%	301	301	0	100.00%	0.00%
4	Signal International, LLC	300	300	0	100.00%	0.00%	300	300	0	100.00%	0.00%
4	Signal Ship Repair, LLC	125	125	0	100.00%	0.00%	125	125	0	100.00%	0.00%

Class Name	Class Description	Members Voted	Members Accepted	Members Rejected	% Members Accepted	% Members Rejected	Total $ Voted	$ Accepted	$ Rejected	% $ Accepted	% $ Rejected
5	Signal International Texas GP, LLC	6	6	0	100.00%	0.00%	$3,812,988.07	$3,812,988.07	$0.00	100.00%	0.00%
5	Signal International Texas, L.P.	3	3	0	100.00%	0.00%	$3,756,873.83	$3,756,873.83	$0.00	100.00%	0.00%
5	Signal International, Inc.	14	14	0	100.00%	0.00%	$4,089,354.09	$4,089,354.09	$0.00	100.00%	0.00%
5	Signal International, LLC	35	34	1	97.14%	2.86%	$4,768,675.79	$4,764,296.29	$4,379.50	99.91%	0.09%
5	Signal Ship Repair, LLC	35	33	2	94.29%	5.71%	$950,075.31	$938,543.31	$11,532.00	98.79%	1.21%

19. On November 2, 2015, and November, 10, 2015, the Debtors filed the Plan Supplement [D.I. 447, 476], which includes, among other things, the forms of the Litigation Settlement Trust Agreement and the Signal Liquidating Trust Agreement.

20. Prior to the Confirmation Hearing, the Debtors also will file under notice a proposed form of order confirming the Plan (the "**Proposed Confirmation Order**").

21. In addition, along with the filing of this Memorandum, the following documents were filed or will be filed in support of confirmation of the Plan:

(i) *Findings of Fact, Conclusions of Law and Order Confirming Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "**Proposed Confirmation Order**");

(ii) *Declaration of Christopher Cunningham in Support of Confirmation of the Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code*;

(iii) *Declaration of Jared Morris in Support of (I) Confirmation of the Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code and (II) Approval of Sale Transaction*;

(iv) *Statement of the Southern Poverty Law Center in Support of Confirmation of the Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code*;

(v) affidavits of service evidencing the timely service of the Solicitation Packages [D.I. 447 and 476]; and

(vi) affidavits evidencing publication of the notice of Confirmation Hearing in the *Houston Chronicle*, *The Sun Herald*, *USA Today*, [D.I. 506, 507, 508].[7]

OBJECTIONS TO PLAN

22. The Debtors received eight reservation of rights or objections to the Plan and two (collectively, the "**Objections**") from the following parties: (i) Harris County and Orange County (the "**Texas Tax Entities**"); (ii) Max Specialty Insurance Company ("**Max Specialty**"); (iii) Pinto Island Land Company, Inc. ("**Pinto Island**"); (iv) NewStar Equipment Finance I, LLC ("**NewStar**"); (v) Fireman's Fund Insurance Company ("**Fireman's Fund**"), National Liability and Fire Insurance Company ("**National Liability**"), and QBE Marine & Energy Syndicate 1036 ("**QBE**" and collectively with Fireman's Fund and National Liability, "**Certain Insurers**"); (vi) the EEOC; (vii) the Internal Revenue Service (the "**IRS**"); and (viii) the Acting United

[7] Notice of the Confirmation Hearing also was published in the *Hindustan Times* in India and *Malayalam Manorama* and the Debtors are awaiting affidavits from those publications.

States Trustee for Region 3 (the "**U.S. Trustee**"). The Debtors also received informal comments from the United States Environmental Protection Agency (the "**EPA**") and the Federal Communications Commission (the "**FCC**").

23. For the convenience of the Court, the chart below summarizes the status of each Objection and informal comment:

OBJECTION	STATUS
Texas Tax Entities [D.I. 481]	
Limited objection with respect to liens that may be held by the Texas Tax Entities	Resolved through the inclusion of language in ¶ 52 of the Proposed Confirmation Order that is acceptable to the Texas Tax Entities.
Max Specialty [D.I. 483]	
Reservation of rights with respect to funding of the Plan and Max Specialty escrow	The Debtors anticipate resolving this objection in advance of the Confirmation Hearing as parties are continuing to work together to finalize language to be included in the Proposed Confirmation Order.
Pinto Island [D.I. 485]	
Limited objection preserving Pinto Island's rights regarding the assumption or rejection of Pinto Island's lease with the Debtors	The Debtors anticipate resolving this objection in advance of the Confirmation Hearing as parties are continuing to work together to finalize language to be included in the Proposed Confirmation Order.
NewStar [D.I. 486]	
Reservation of rights regarding the assumption or rejection of NewStar's leases with the Debtors	The Debtors anticipate resolving this objection in advance of the Confirmation Hearing as parties are continuing to work together to finalize language to be included in the Proposed Confirmation Order.
Certain Insurers [D.I. 487]	
Limited objection to allow continuation of the appeal before the Second Circuit in accordance with the Court's order and to clarify that Assets does not include Certain Insurers' rights that were previously assigned to Certain Insurers	Resolved through language included in ¶ EE of the Proposed Confirmation Order that is acceptable to the Certain Insurers.
EEOC [D.I. 514]	
Objection to the definition of "EEOC" (¶ 4)	Resolved through language in ¶¶ EE and FF in the Proposed Confirmation Order
Objection to the extent that the Plan fails to preserve the setoff and recoupment rights of the United States (¶ 5)	Resolved through language in ¶ 51 in the Proposed Confirmation Order that is acceptable to the EEOC

Objection to the Channeling Injunction to the extent it applies to "future" Related Parties (¶ 6)	While the Channeling Injunction applies to "future" Related Parties, it is narrowly tailored to only apply to Claims arising out of or related to the prepetition employment or recruitment of the H-2B Workers. The "future" modifier is necessary to ensure that future Related Parties would not be subject to litigation on account of prepetition acts of the Plan Participants or their respective past or present Related Parties and any such claims would instead be channeled to the Litigation Settlement Trust.
Objection to Section 6.B of the Plan to the extent it allows for the Litigation Settlement TDP to be materially modified with 10 days' notice (¶7).	The Debtors anticipate resolving this objection in advance of the Confirmation Hearing as parties are continuing to work together to finalize language to be included in the Proposed Confirmation Order.
IRS [D.I. 515]	
Objection regarding setoff rights, preservation of rights to pursue third parties for tax liabilities, interest on tax claims, tax characterizations, and necessity to file administrative claims	Resolved through language included in ¶ 51 of the Proposed Confirmation Order that is acceptable to the IRS
U.S. Trustee [D.I. 518]	
Argument reserved with respect to third-party releases (¶¶ 17–30) and the Debtors' releases (¶¶ 31–33) until the Debtors provide an evidentiary record.	The Debtors submit that there is adequate support to demonstrate the specific factual and legal findings necessary to justify the releases for the reasons set forth in Section III herein.
Objection to Exculpation regarding inclusion of non-estate fiduciaries (¶¶ 34–37)	The Debtors submit that the limited expansion of the Exculpation is consistent with applicable law and justified by the unique circumstances of these chapter 11 cases. *See* ¶¶ 86–91 below.
Objection to any discharge of the non-Debtor Released Parties (¶ 38)	In accordance with the Bankruptcy Code, the Plan explicitly provides that the Debtors are not receiving a discharge. *See* Plan § 11.D. However, there is no prohibition on non-Debtors receiving a discharge. Moreover, as detailed below, the non-Debtor Released Parties are receiving a discharge in exchange for substantial consideration and only in two limited circumstances: (1) upon the consensual granting of such a release and discharge (a) by a party to the Plan Support Agreement, *see* Plan § 11.G or (b) by a Holder of a Class 5 Claim who affirmatively voted in favor of the Plan and did not opt out, *see* Plan § 11.H or (2) only after such claim has been transferred and assumed by the Litigation Settlement Trust, *see* Plan §§ 6.D, 11.H, 11.I.
EPA	
Informal comments received	Resolved through language included in ¶ 49 of the Proposed Confirmation Order that is acceptable to the EPA

FCC	
Informal comments received	Resolved through language included in ¶ 50 of the Proposed Confirmation Order that is acceptable to the FCC

The Debtors have attempted to resolve the Objections without the need for litigation. However, to the extent any Objections remain unresolved at the time of the Confirmation Hearing, the Debtors submit that they should be overruled for the reasons detailed below.

ARGUMENT

24. Section 1129(a) of the Bankruptcy Code contains sixteen conjunctive requirements for confirmation of a chapter 11 plan, which, with the exception of the requirement of unanimous acceptance by impaired classes, are either satisfied or inapplicable for the reasons set forth below. The requirement of unanimous acceptance by impaired classes cannot be satisfied due to the deemed rejection of the Plan by Classes 6 (Intercompany Claims) and 7 (Equity Interests). However, as discussed below, the Plan satisfies the cram-down requirements under section 1129(b) with respect to these classes. Accordingly, the Plan should be confirmed notwithstanding its deemed rejection by Classes 6 and 7.

I. The Plan Satisfies Each Mandatory Requirement for Confirmation

25. Section 1129(a) of the Bankruptcy Code provides that the Court shall confirm a chapter 11 plan if all of the requirements of sections 1129(a)(1) through (a)(13) of the Bankruptcy Code are satisfied. *See* 11 U.S.C. § 1129(a). The Plan fully complies with these requirements, and each is addressed in turn.

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

26. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code, including rules governing classification of claims and interests and the contents of a plan. *See* § 1129(a)(1). In determining whether the

Plan complies with section 1129(a)(1), courts primarily consider sections 1122 and 1123 of the Bankruptcy Code. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648–49 (2d Cir. 1988) (observing that the "applicable provisions" in section 1129(a)(1) includes the provisions of chapter 11 "such as section 1122 and 1123"); *In re Mirant Corp.*, Case No. 03-46590, 2007 WL 1258932, at *7 (Bankr. N.D. Tex. Apr. 27, 2007) (stating that section 1129(a)(1) is intended to assure compliance with Bankruptcy Code's scheme governing classification and contents of a plan) (citations omitted).

1. The Plan Satisfies Section 1122 of the Bankruptcy Code

27. Section 1122 of the Bankruptcy Code provides that the claims or interests within a given class must be "substantially similar." 11 U.S.C. § 1122(a). Section 1122(a) does not mandate, however, that all claims or interests be identical or that claims or interests must be classified together solely because they share certain attributes. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060 (3d Cir. 1987) ("The express language of [11 U.S.C. § 1122] explicitly forbids a plan from placing dissimilar claims in the same class . . . ."); *In re DRW Prop. Co. 82*, 60 B.R. 505, 511 (Bankr. N.D. Tex. 1986); *see also John Hancock Mutual Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (instructing that classification is proper where a class is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed").

28. The classification of Claims and Equity Interests under the Plan satisfies the requirements of section 1122 of the Bankruptcy Code because the Claims or Equity Interests placed within each Class are substantially similar. The Plan separately classifies General Unsecured Claims and the Litigation Claims because of the unique nature of the Litigation Claims that all are alleged to arise from similar facts and circumstances surrounding the hiring or recruitment of the H-2B Workers. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136, 147

(holding that it was reasonable to separately classify personal injury claims and general unsecured claims despite their equal priority status); *see also In re Tribune Co.*, 476 B.R. 843, 857 (Bankr. D. Del. 2012) (finding separate classification of senior noteholders was reasonable where distinguishable creditor interests warranted a "separate voice in [the] bankruptcy case").

29. In sum, valid legal and factual reasons exist to validate the Plan's classification scheme. Importantly, the class structure was not created to affect the outcome of voting on the Plan, as evidenced by the overwhelming support of the Voting Classes coupled with the absence of any objection to the Plan's classification scheme. Accordingly, the classification structure established by the Plan is proper, thereby satisfying the requirements of section 1122 of the Bankruptcy Code.

2. The Plan Satisfies the Mandatory Plan Requirements of Sections 1123(a)(1)–(a)(7) of the Bankruptcy Code

30. Section 1123(a) of the Bankruptcy Code sets forth seven mandatory requirements with which every chapter 11 plan must comply. 11 U.S.C. §§ 1123(a)(1)–(7). These requirements are as follows:

> (1) designate classes of claims and interests;
>
> (2) specify impaired classes of claims and interests;
>
> (3) specify unimpaired classes of claims and interests;
>
> (4) provide similar treatment for each claim or interest of a particular class, unless the holder agrees to a less favorable treatment;
>
> (5) provide adequate means for implementation;
>
> (6) prohibition of non-voting equity securities and provision of appropriate distribution of voting power among classes of securities; and
>
> (7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner and selection of the reorganized company's officers and directors.

Id.

31. Article III of the Plan satisfies the first three requirements of section 1123(a) by: (i) designating Classes of Claims and Equity Interests, as required by section 1123(a)(1) of the Bankruptcy Code; (ii) specifying the Classes that are Unimpaired under the Plan, as required by section 1123(a)(2) of the Bankruptcy Code; and (iii) specifying the Classes that are Impaired, as required by section 1123(a)(3) of the Bankruptcy Code. *See* Plan § 3.A, 3.B.

32. The Plan further satisfies section 1123(a)(4) of the Bankruptcy Code because the treatment of each Claim or Equity Interest within a Class is the same as the treatment of each other Claim or Equity Interest within that Class.

33. Articles IV through VIII, along with various other provisions of the Plan, provide adequate means for implementation in accordance with section 1123(a)(5) of the Bankruptcy Code. The Plan provides adequate means for implementation of the Plan through, among other things: (i) the consummation of the Sale Transaction; (ii) the establishment and funding of the Signal Liquidating Trust and the Litigation Settlement Trust and the appointment of the Signal Liquidating Trustee and the Litigation Settlement Trustee with the duties and responsibilities set forth in Articles V and VI of the Plan, respectively, and the Signal Liquidating Trust Agreement, the Litigation Settlement Trust Agreement, and the Litigation Settlement TDP, as relevant; (iii) the provisions governing Distributions under the Plan; (iv) the imposition of the Channeling Injunction; (v) the dissolution and wind-down of the Debtors; (vi) the establishment of certain reserves for the payment of various Claims and post-Effective Date expenses; and (vii) procedures governing the allowance of Claims under the Plan. *See* Plan arts. IV–VIII.

34. The Debtors and their professional advisors have worked diligently with the Committee, the RSA, the Supporting Litigation Claimants, and their respective advisors regarding the foregoing provisions, and submit that the Plan structure will enable successful

consummation of the Plan. The proposed implementation steps, specifically the creation of the Litigation Settlement Trust and the Litigation Settlement TDP, have been carefully developed to ensure that the Plan provides for a viable distribution mechanism for Allowed Claims post-Effective Date. These transactions provide more than adequate means for implementation of the Plan to satisfy section 1123(a)(5).

35. Section 1123(a)(6) is inapposite to the Plan as it provides that as of the Effective Date all Equity Interests in the Debtors shall be cancelled and no new shares will be issued pursuant to the Plan. *See* Plan § 4.J.

36. Finally, section 1123(a)(7), which provides that a plan's provisions with respect to the manner and selection of any officer, director, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy" is satisfied by the Plan. 11 U.S.C. § 1123(a)(7). The Plan provides for the appointment of CohnReznick LLP to serve as trustee of the Litigation Settlement Trust and for the appointment of the trustee of the Signal Liquidating Trust, who will be identified at or prior to the Confirmation Hearing. Accordingly, the Plan satisfies the requirement of section 1123(a)(7) of the Bankruptcy Code.

II. The Discretionary Contents of the Plan are Appropriate and Comply with the Bankruptcy Code

37. Section 1123(b) of the Bankruptcy Code enumerates various discretionary provisions that may be included in a chapter 11 plan. Here, the Plan contains a litany of such provisions, the most critical of which are the releases, the Exculpation, and the Channeling Injunction discussed herein, but all of which are reasonable and appropriate in light of the circumstances of these chapter 11 cases. For example, Article III of Plan provides that certain Classes of Claims will remain unimpaired; Article IX rejects all executory contracts or unexpired

leases not previously assumed or to be assumed and assigned pursuant to the Sale Order; and Articles V through VIII, along with the respective trust agreements and Litigation Settlement TDP, establish procedures for the settlement of Claims and mechanics for distribution with respect to Allowed Claims. *See* §§ 1123(b)(1)–(b)(3)(A).

38. Moreover, section 1123(b)(6) of the Bankruptcy Code provides that a plan "may include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." § 1123(b)(6).

39. Article XII of the Plan provides that, among other things, the Court shall retain jurisdiction over all matters arising out of, or related to, these chapter 11 cases and the Plan, except as otherwise specifically stated therein. This provision is appropriate because the Court otherwise has jurisdiction over all of these matters during the pendency of these chapter 11 cases, and the Third Circuit has established that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation. *See In re Resorts, Int'l, Inc.*, 372 F.3d 154, 164–67 (3d Cir. 2004). Moreover, this continuing jurisdiction is particularly appropriate based on the Channeling Injunction established by the Plan. Accordingly, the continuing jurisdiction of the Court is consistent with applicable law and therefore permissible under section 1123(b) of the Bankruptcy Code.

III. The Releases, Channeling Injunction and Exculpation Embodied in the Plan are Permissible and Should be Approved

40. Section 1123(b)(6) of the Bankruptcy Code authorizes a plan to include any provision "not inconsistent" with the Bankruptcy Code. 11 U.S.C. § 1123(b)(6). The Plan includes release, exculpation, and injunction provisions. These discretionary provisions are proper because, among other things, they are the product of arm's-length negotiations, have been critical to obtaining the support of the various constituencies for the Plan, and, as part of the

Plan, have received substantial support from the Creditors who voted on the Plan. Such release, exculpation, and injunction provisions are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their Estates and Creditors. Therefore, the release, exculpation, and injunction provisions are consistent with the Bankruptcy Code and appropriate relief under Third Circuit law.

A. The Third-Party Releases and Channeling Injunction Should be Approved

41. The Plan provides for certain consensual and non-consensual third-party releases of the Released Parties. As part of the settlement embodied in the Plan, Section 11.G of the Plan provides for consensual, mutual third-party releases by the non-Debtor Released Parties of the other Released Parties. The Plan also provides for a Channeling Injunction that channels all Litigation Claims to the Litigation Settlement Trust. *See* Plan § 6.C. As set forth in Article VI of the Plan, from and after the Effective Date, (i) the sole recourse of any Litigation Claimant on account of a Litigation Claim shall be to the Litigation Settlement Trust in accordance with the Litigation Settlement Trust Agreement and the Litigation Settlement TDP, and (ii) the Released Parties shall be released from all obligations and liabilities with respect to the Litigation Claims. *See also* Plan § 11.I. The Channeling Injunction is supplemented and supported by the consensual third-party releases set forth in Section 11.G of the Plan by the Supporting Litigation Claimants and the non-consensual third-party releases set forth in Section 11.H of the Plan by Litigation Claimants that are not a Released Party (the "**Litigation Releases**").

42. Section 11.H of the Plan also provides for consensual third-party releases by any Holder of a Claim in Class 5 that elected to grant and be bound by the releases set forth in Section 11.H of the Plan by timely and properly submitting a ballot voting in favor of the Plan and not opting out of such releases.

1. Consensual Third-Party Releases under the Plan

43. The Plan provides for consensual third-party releases of the Released Parties (the "**Consensual Releases**") by the (i) the non-Debtor Released Parties and (ii) any Holder of a Claim in Class 5 that elected to grant and be bound by the releases set forth in Section 11.H of the Plan by timely and properly submitting a ballot voting in favor of the Plan and not opting out of such releases (the "**Consenting Class 5 Claimants**").[8]

44. Courts have held that an "affirmative agreement" from an affected creditor will render a release consensual. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999). A chapter 11 plan "is a contract that may bind those who vote in favor of it." *In re Coram Healthcare*, 315 B.R. 321, 336 (Bankr. D. Del. 2004). And voting creditors are free, as a matter of contract law, to release their claims against non-debtor third parties in consideration of their treatment under the plan. *In re Int'l Wireless Communs. Holdings, Inc.*, No. 98-2007, 1999 Bankr. LEXIS 1853, *24–25 (Bankr. D. Del. Mar. 26, 1999).

45. The non-Debtor Released Parties agreed in the Plan Support Agreement to grant the third-party releases contained in the Plan, which agreement was supported by valid consideration. None of the non-Debtor Released Parties voted against the Plan or objected to the

[8] The ability of a Holder of a Claim in Class to "opt-out" was disclosed prominently in the Class 5 ballots. The Class 5 ballots contained the following bolded language in all caps directly above the boxes to accept or reject the Plan:

> **ALL HOLDERS OF CLAIMS IN CLASS 5 ENTITLED TO VOTE ON THE PLAN MAY ELECT TO GRANT AND BE BOUND BY THE RELEASES CONTAINED IN SECTION 11.H OF THE PLAN BY TIMELY AND PROPERLY RETURNING A BALLOT VOTING IN FAVOR OF THE PLAN AND NOT ELECTING TO "OPT-OUT" OF SUCH RELEASES. ANY HOLDER OF A CLAIM IN CLASS 5 THAT EXERCISES ITS RIGHT TO GRANT THE RELEASES WILL RECEIVE A PRO RATA SHARE OF THE GUC PAYMENT AMOUNT AND THE EXCESS SALE OVERPAYMENT, IF ANY, NET OF SIGNAL LIQUIDATING TRUST EXPENSES, AS SET FORTH IN THE PLAN.**
>
> **ANY HOLDER OF A CLAIM IN CLASS 5 THAT CHOOSES NOT TO ELECT TO GRANT AND BE BOUND BY THE RELEASES WILL NOT RECEIVE A PRO RATA SHARE OF THE GUC PAYMENT AMOUNT BUT WILL RECEIVE ONLY A PRO RATA SHARE OF THE EXCESS SALE OVERPAYMENT, IF ANY, NET OF SIGNAL LIQUIDATING TRUST EXPENSES, AS SET FORTH IN THE PLAN.**

Plan. Accordingly, the non-Debtor Released Parties have consented to the releases and are bound under principles of contract law.

46. All of the Consenting Class 5 Claimants voted to accept the Plan, did not opt out of the releases, and are receiving consideration under the Plan. Such consideration is being provided under the Plan solely as part of the global settlement reached as a result of the Released Parties' contributions, as detailed below, which includes the funding of the GUC Payment Amount by or on behalf of each of the Funding Parties. Absent these contributions, no amounts would be available to Consenting Class 5 Claimants, or any unsecured Creditor. Accordingly, the Consenting Class 5 Claimants have consented to the releases set forth in Section 11.H of the Plan and are bound under principles of contract law.

47. As the Consensual Releases have been affirmatively consented to through the signing the Plan Support Agreement or by voting on the Plan and not opting out of the releases, the Consensual Releases are appropriate and should be approved.

2. Non-Consensual Releases and Channeling Injunctions under Third Circuit Law[9]

48. Bankruptcy courts "as courts of equity, have broad authority to modify creditor-debtor relationships." *U.S. v. Energy Resources Co.*, 495 U.S. 545, 549 (1990). To effectuate these broad equitable powers, section 105(a) of the Bankruptcy Code vests a bankruptcy court with broad authority "to issue any order, process, or judgment that is necessary or appropriate to

[9] While a non-consensual third-party release and a channeling injunction are distinct legal concepts, the high degree in similarity of effect renders these largely interchangeable concepts. *See generally Metromedia*, 416 F.3d at 142 (noting the distinction between claims subject to a release that are extinguished and those that are channeled to a settlement fund); *In re Adelphia Commc'ns Corp.*, 364 B.R. at 528 (explaining that proposed channeling injunction shared many important characteristics with third-party release as it proscribed litigation between non-debtor entities and would in substance release the protected party from any further obligations to creditors); *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 778 (Bankr. N.D. Tex. 2007) (characterizing a "release that, in effect, channels the creditors' recovery to a source other than the debtor" as a "channeling release"). Moreover, case law addressing requests for non-consensual releases and channeling injunctions apply an equivalent legal framework. Thus, the facts relevant to the Court in approving the Plan's contemplated non-consensual third-party releases and the Channeling Injunction are indistinguishable in scope and will be analyzed together for purposes of this Memorandum

carry out the provisions of this title." *See* 11 U.S.C. § 105(a); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (recognizing that bankruptcy courts "are able to craft flexible remedies that, while not expressly authorized by the [Bankruptcy] Code, effect the result the Code was designed to obtain.").

49. In accordance with this broad equitable authority under section 105(a) of the Bankruptcy Code, non-consensual third-party releases and channeling injunctions are appropriate where exceptional circumstances warrant such relief. *See Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212–14 (3d Cir. 2000) (examining the propriety of "non-debtor release and permanent injunction provisions"). The Third Circuit has instructed that the "hallmarks" of a permissible non-consensual release are "fairness, necessity to the reorganization and specific factual findings to support these conclusions." *Continental*, 203 F.3d at 214. These hallmarks also include the requirement that the releases be "given in exchange for fair consideration." *In re United Artists Theatre Co.*, 315 F.3d 217, 227 (3d Cir. 2003) (citing *Continental*, 203 F.3d at 214–15).[10]

50. Lower courts within the Third Circuit have approved non-consensual releases and channeling injunctions under section 105(a) of the Bankruptcy Code in extraordinary cases where the *Continental* hallmarks were present. *See, e.g., In re Blitz U.S.A., Inc.*, No. 11-13603, 2014 Bankr. LEXIS 2461, *12–20 (Bankr. D. Del. Jan. 30, 2014) (approving a channeling injunction for tort claims relating to the Debtors' manufactured gasoline cans); *In re Global Indus. Techs., Inc.*, No. 02-21626, 2013 WL 587366, at *39 (Bankr. W.D. Pa. Feb. 13, 2013)

[10] The Third Circuit's decision in *Continental* did not explicitly identify "fair consideration" as a "hallmark" for a third party release and channeling injunction, however, the Third Circuit's subsequent decision in *United Artists* discussed *Continental* and clarified that "[a]dded to these requirements [i.e., *Continental's* three hallmarks,] is that the releases 'were given in exchange for fair consideration.'" *United Artists*, 315 F.3d at 227 (quoting *Continental*, 203 F.3d at 215).

(approving channeling injunction for tort claims relating to silica products under section 105(a) of the Bankruptcy Code); *Kaiser*, 2006 WL 616243 (Bankr. D. Del. Feb. 6, 2006) (approving three separate channeling injunctions under section 105(a) for mass tort claims relating to silica and coal tar pitch volatile products and noise-induced hearing loss); *In re Am. Family Enters.*, 256 B.R. 377, 406–08 (D.N.J. 2000) (authorizing issuance of third-party release and channeling injunction for consumer fraud claims under 11 U.S.C. § 105(a)).[11] Indeed, the Third Circuit itself has read *Continental* to permit non-consensual third-party releases in exceptional circumstances[12] when an adequate record in support is developed. *See, e.g., In re Lower Bucks Hosp.*, 571 Fed. Appx. 139, 144 (3d Cir. 2014) (considering a plan containing a non-consensual third-party release and finding that it could not conclude that the non-consensual third-party

[11] Other decisions within the Third Circuit have acknowledged that *Continental* permits non-consensual release in certain circumstances even though the facts of those cases did not warrant such releases. *See, e.g., In re Lower Bucks Hosp.*, 471 B.R. 419, 464, n. 43 (Bankr. E.D. Pa. 2010) ("Confirmation of a plan that includes a third-party release requires that the court makes specific factual findings regarding the release's fairness and necessity." (citing *Continental*, 203 F.3d at 214)); *In re Saxby's Coffee Worldwide, LLC*, 436 BR 331, 338 (Bankr. E.D. Pa 2010) (denying requested releases under the circumstances, but acknowledging that non-consensual releases are permissible when the "plan is widely supported by the creditor constituency that includes the parties being restrained, accords significant benefits to that constituency and . . . the creditors being restrained are also being treated fairly"); *In re Congoleum Corp.*, 362 B.R. 167, 192 (Bankr. D.N.J. 2007) (denying request for third party release because "under the general jurisprudence for nonconsensual third party releases . . . [m]any of [the *Continental*] hallmarks are lacking in the proposed releases."); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001) (citing to the "threshold *Continental* criteria of fairness and necessity for approval of non-consensual third-party releases," but finding releases inappropriate under the circumstances).

[12] As shown above, the clear weight of authority in the Third Circuit is that non-consensual third-party releases and channeling injunctions are permissible in the appropriate circumstances. Thus, any decisions directing that consent is a prerequisite for such relief are inapposite. First, those cases are rooted in a contract theory of binding releasing parties, rather than through a bankruptcy court's general equitable powers under section 105(a) of the Bankruptcy Code. *See Coram Healthcare*, 315 B.R. at 336 ("[A] Plan is a contract that may bind those who vote in favor of it.") (citation omitted); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506 (Bankr. D.N.J. 1997) ("When a release of liability of a nondebtor is a consensual provision, however, agreed to by the effected [sic] creditor, it is no different from any other settlement or contract . . . ."). Second, cases that have ruled that consent is a prerequisite for granting a third party release did not involve rare or unique circumstances. *See, e.g., Zenith*, 241 B.R. at 111; *In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) (holding that releases must be consensual, but acknowledging that while the "Third Circuit has not barred third party releases, it has recognized that they are the exception, not the rule."). Indeed, the Third Circuit in *Continental* expressly considered the *Zenith* decision and distinguished it on the ground that it did not involve any extraordinary circumstances, such as mass litigation. *Continental*, 203 F.3d at 214 n. 11; *see also Genesis Health*, 266 B.R. at 608 (citing to *Zenith* reference in *Continental* and concluding that "the message of *Continental* appears to be that the type of financial restructuring plan under consideration here would not present the extraordinary circumstances required to meet even the most flexible test for third party releases."). Thus, cases focusing on non-consensual releases in typical financial reorganization are inapposite to the Court's analysis under *Continental* and its progeny.

release "was exchanged for adequate consideration or was otherwise fair" (citing *Continental*, 203 F.3d at 215; *In re Spansion Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) ("describing an element of the *Continental*-derived test as 'whether the non-consenting creditors received reasonable compensation in exchange for the release'"))); *In re Global Indus. Techs., Inc.*, 645 F. 3d 201, 207 (3d Cir. 2011) (considering a plan containing a trust and channeling injunction for silica tort claims and explaining in dicta that "for the Plan to be approved as designed (i.e., with the inclusion of the Silica Injunction), the debtors needed to show that the Plan's resolution of silica-related claims is necessary or appropriate under 11 U.S.C. § 105(a), which, under our precedent, requires showing with specificity that the Silica Injunction is both necessary to the reorganization and fair." (citing *Continental*, 203 F.3d at 214)).

51. Moreover, courts outside of the Third Circuit repeatedly have recognized, consistent with *Continental*, that a non-consensual third party release and corresponding channeling injunction are appropriate under section 105(a) of the Bankruptcy Code where "extraordinary circumstances" exist to justify this relief. *See e.g., Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141–43 (2d Cir. 2005); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657–59 (6th Cir. 2002) (authorizing channeling injunction for silicone breast implant claims); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285 (2d Cir. 1992) (authorizing channeling injunction for securities class action claims); *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989) (authorizing channeling injunction for Dalkon Shield birth control device claims); *In re Fidelis, Inc.*, 481 B.R. 503, 535 (Bankr. E.D. Mo. 2012) (approving non-consensual third-party releases for consumer fraud claims).

3. Framework for Approval of Non-Consensual Third-Party Releases and Channeling Injunction

52. Based on the foregoing, a chapter 11 plan that includes a compelled third-party release and channeling injunction is permissible under section 105(a) of the Bankruptcy Code provided that an adequate record is presented (i) showing exceptional circumstances warranting the releases and permanent injunction and (ii) demonstrating that the releases and permanent injunction satisfy the hallmarks of fairness, are necessary to the success of the chapter 11 plan, and are given in exchange for fair consideration. *See Continental*, 203 F.3d at 214–15; *United Artists*, 315 F.3d at 227 (citing *Continental*, 203 F.3d at 215). In determining whether the proposed releases and channeling injunctions are fair, necessary, and given in exchange for fair consideration, courts have formulated various multi-factor tests to expound upon the *Continental* hallmarks.[13]*See generally Continental*, 203 F.3d at 217 n.17 (listing items courts consider when evaluating the propriety of a permanent injunction).

53. The considerations employed by courts in analyzing whether non-consensual releases and channeling injunctions are appropriate under the circumstances were distilled aptly by the Sixth Circuit's decision in *Dow Corning* as follows:

> (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
>
> (2) a substantial contribution to the plan by the non-debtor;

[13] As discussed further herein, the factors considered by courts in approving releases on behalf of a debtor's estate mirror the considerations regarding third-party releases and permanent injunctions. These overlapping criteria are: (i) an identity of interest between the debtor and non-debtor; (ii) a substantial contribution by the released party; (iii) the necessity of the release to the plan; (iv) the overwhelming acceptance of the plan by creditors; and (v) a mechanism to pay all or substantially all of the claims of the creditors and interest holders affected by the release. *See Wash. Mut.*, 442 B.R. at 347. As discussed herein, the record presented before the Court supports the factual and legal findings for releases by third parties as well as the Debtors' estates.

(3) the necessity of the release to the plan;[14]

(4) the overwhelming acceptance of the plan and release by creditors and interest holders;

(5) the plan provides a mechanism to pay all or substantially all of the claims of the creditors and interest holders affected by the release;

(6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and

(7) the bankruptcy court made a record of specific factual findings that support its conclusions

See Dow Corning, 280 F.3d at 658; *see also Global Indus.*, 645 F. 3d at 207 (analyzing channeling injunction under sections 105(a) and 1123 for tort claims relating to silica products and relying on *Dow Corning* factors).

54. Although the considerations set forth in *Dow Corning* are instructive in analyzing third-party releases in a chapter 11 plan, these should not be viewed as a set of conjunctive requirements. *See Dow Corning*, 280 F.3d at 658 (explaining that the factors represented a summary of the considerations employed by other courts, including the *Continental* decision); *see also Metromedia*, 416 F. 3d at 142 (citing to *Dow Corning* and *Continental* and explaining

[14] This factor has been phrased as the release or injunction being essential to the debtor's "reorganization." As discussed further herein, while the majority of cases have examined third-party releases and injunctions in the context or reorganization cases, as opposed to liquidating plans in chapter 11, *Continental* or decisions interpreting it have not conditioned such relief on a reorganization of a debtor's going-concern business. *See, e.g., Blitz U.S.A.*, 2014 Bankr. LEXIS 2461, at *12–13 (approving channeling injunction as part of chapter 11 plan of liquidation); *Official Comm. of Unsecured Creditors v. Bechtle (In re Labrum & Doak)*, 237 B.R. 275, 283, 305 (Bankr. E.D. Pa. 1999) (approving of a post-confirmation permanent injunction even though the debtor-partnership filed a chapter 11 liquidating plan);*Greer v. Gaston & Snow (In re Gaston & Snow)*, 1996 WL 694421, at *2-*5 (S.D.N.Y. Dec. 4, 1996) (holding that the non-debtor releases in the debtor-partnership's liquidating chapter 11 plan were valid); *Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 184 B.R. 648, 654–55 (S.D.N.Y. 1995) (upholding a non-debtor release contained in the corporate debtors' chapter 11 liquidating plan); *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 666-68, 685-87 (Bankr. D.D.C. 1992); *Polygram Distrib., Inc. v. B-A Sys., Inc. (In re Burstein-Applebee Co.)*, 63 B.R. 1011, 1012, 1018–20 (Bankr. W.D. Mo. 1986) (approving permanent non-debtor injunction in liquidating a chapter 11 plan). Moreover, recent cases have authorized third-party releases in a liquidation scenario outside of the context of a chapter 11 plan altogether. *See, e.g., Apps v. Morrison* (*In re Superior Homes & Invs., LLC*, Case No. 12-15451, 2013 WL 2477057 (11th Cir. June 10, 2013) (issuing a "bar order" enjoining claims against settling defendants in a chapter 7 case); *O'Toole v. McTaggart (In re Trinsum Grp., Inc.)*, Case No. 08-12547, 2013 WL 1821592 (Bankr. S.D.N.Y. Apr. 30, 2013) (issuing a "bar order" enjoining non-consenting third party claims against settling defendants in a post-confirmation liquidating chapter 11 case).
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that the analysis of whether sufficiently unique circumstances exist to justify third party releases is "not a matter of factors and prongs"); *see generally Wash. Mut.*, 442 B.R. at 346 (analyzing debtor releases and applying certain factors cited in *Dow Corning*, and explaining that these are not exclusive or conjunctive requirements); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 303–04 (Bankr. D. Del. 2013) (approving debtor releases where broad creditor support existed despite finding that two of the same factors cited in *Dow Corning* were not met under the circumstances).[15] The considerations abridged in *Dow Corning* are helpful in weighing the equities of the case after a fact-specific review, however, the guidepost for the Court's analysis remains whether the *Continental* "hallmarks" are established.

4. Exceptional Circumstances Exist in these Chapter 11 Cases

55. As set forth above, courts have found that extraordinary circumstances warranted the approval of channeling injunctions and related third-party releases in cases where a central focus of the chapter 11 plan involved the resolution of mass litigation or tort claims.

56. These chapter 11 cases were similarly precipitated by mass-tort litigation and present exceptional circumstances that justify the approval of the Channeling Injunction and Litigation Releases. The Debtors have been involved in 7 years of protracted and highly contentious mass-tort litigation involving 13 separate actions across 3 different states brought by or on behalf of approximately 500 H-2B Workers, which litigation has resulted in approximately

[15] The United States Bankruptcy Court for the Eastern District of Pennsylvania articulated a more flexible, albeit similar, framework for analyzing third party releases based on the following:

> (1) whether the third party who will be protected by the injunction or release has made an important contribution to the reorganization; (2) whether the requested injunctive relief or release is "essential" to the confirmation of the plan; (3) whether a large majority of the creditors in the case have approved the plan; (4) whether there is a close connection between the case against the third party and the case against the debtor; and (5) whether the plan provides for payment of substantially all of the claims affected by the injunction or release.

In re Saxby's Worldwide Coffee, 436 B.R. 331 (Bankr. E.D. Pa. 2010) (citing *In re South Canaan Cellular Investments, Inc.*, 427 B.R. 44 (Bankr. E.D. Pa. 2010)).

$20 million in litigation fees and expenses and in judgements with respect to 5 of the plaintiffs totaling approximately $12 million plus fees, costs, and expenses. The Debtors, who would bear the principal (if not entire) liability for the resultant claims if proven, have no available funds to satisfy such claims. However, the Funding Parties are willing to provide substantial funding for material Distributions to the Litigation Claimants (and Holders of General Unsecured Claims) that, absent the finality and protection provided by the Channeling Injunction and Litigation Releases, would not otherwise be available to satisfy their claims. Hence, exceptional circumstances exist in these chapter 11 cases that warrant approval of the Channeling Injunction and Litigation Releases upon a showing that they are fair, necessary to the Plan, and given in exchange for fair consideration.

5. The Litigation Releases and Channeling Injunction are Fair, Necessary, and Given in Exchange for Fair Consideration

57. As discussed in further detail herein, an adequate record exists to establish the hallmarks required under *Continental* (as well as the criteria summarized in *Dow Corning*) to support a finding that the Litigation Releases and Channeling Injunction are appropriate.

(i) *Identity of Interest with the Released Parties*

58. The Released Parties consist of the Debtors, the RSA, the Supporting Litigation Claimants, and each of their respective Related Parties. The non-Debtor Released Parties share an identity of the interest with the Debtors sufficient to approve the Litigation Releases and Channeling Injunction. The RSA, the secured lender and funder of the Plan, and the Supporting Litigation Claimants, the Debtors' largest creditors, are critical stakeholders in these chapter 11 cases that share the common goal of consummating a chapter 11 plan. The unified interest of the non-Debtor Released Parties in formulating and confirming the Plan establishes an identity of interest. *See Coram Healthcare*, 315 B.R. at 335 ("Although the Noteholders do not share an

identify of interest with the estate on the matter of the litigation (unlike a debtor's insurance carrier or directors and officers who may have indemnification agreements with the debtor), as the largest creditors and preferred shareholders they do share a common goal of achieving a reorganization of the Debtors."); *Zenith*, 241 B.R. at 111 (stating that the parties being released "who were instrumental in formulating the Plan, similarly share an identity of interest [with the Debtor] in seeing the Plan succeed"); *In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) (holding that debtors and their secured lenders "share the common goal of confirming the [] Plan" and implementing the consummation thereof, thus creating an identity of interest between the parties).

59. An identity of interest also exists between a debtor and a released third-party when "a suit against any such non-Debtor either is, in essence, a suit against one or more of the Debtors, or will otherwise deplete the assets of the Debtors' estates." *See Am. Family Enters.*, 256 B.R. at 392. This identify of interest typically exists where a debtor maintains an indemnification obligation to the released party. *See Indianapolis Downs*, 486 B.R. at 303; *Wash. Mut.*, 442 B.R. at 347. Significant financial relationships exist between the Debtors, on the one hand, and the RSA, on the other hand, arising from the Debtors' prepetition and postpetition financing agreements and the Asset Purchase Agreement. Thus, there are numerous instances where the Debtors have indemnification obligations to the RSA and its Related Parties. *See, e.g.*, DIP Loan Agreement § 8.5. These indemnification obligations are sufficient to establish an identity of interest between the Debtors and the RSA and its Related Parties.

60. The Debtors' Related Parties also have direct or indirect indemnification rights against the Debtors arising out of one or more of the following: (i) specific board actions or resolutions; (ii) certificates of incorporation, certificates of limited partnership, articles of

organization or certificates of formation of the Debtors (as applicable); (iii) bylaws and operating agreements of the Debtors; (iv) employment agreements; or (v) statutory or common law. Any indemnification claims asserted under any of the foregoing bases would deplete the assets of the Debtors' estates and establishes an identity of interest between the Debtors and their Related Parties.

(ii) ***Substantial Contribution by the Released Parties***

61. Each of the Released Parties has provided, or has agreed to provide, a substantial contribution that was necessary to make the Plan feasible and provide a fair result for affected creditors. The RSA, on behalf of each of the Funding Parties, is contributing, among other contributions and benefits, (i) a 66.9% participating interest in the Westport Loan with a guaranteed minimum value of $20 million, and a potential value of $22 million, to fund the Litigation Settlement Trust and (ii) the GUC Payment Amount, in an initial amount of $900,000,[16] to fund the Signal Liquidating Trust.

62. Beyond these Plan contributions, the RSA funded and sustained these chapter 11 cases and the Plan process by providing the Debtors with postpetition financing critical for administration of these chapter 11 cases. These funds were, or will be, used for, among other things, mailing and publishing notices related to the Bar Date and Plan solicitation, soliciting the Plan, and satisfying in full, or reserving for, Allowed and Disputed Unclassified Claims, Other Priority Claims, and Other Secured Claims, absent which confirmation of the Plan (or any chapter 11 plan) would not be possible. There was no other party that was willing to provide similar postpetition financing to the Debtors. Further, as part of the Sale Transaction, which is to

[16] Because the aggregate amount of Allowed and Disputed General Unsecured Claims currently exceeds $6,000,000, the GUC Payment Amount currently is $900,000, pending resolution of the Disputed General Unsecured Claims. *See* Plan § 1.A.67.

be implemented through the Plan, the RSA is assuming million in assumed liabilities, which significantly reduces the amount of General Unsecured Claims.

63. In addition, the non-Debtor Released Parties each have agreed to waive their claims and any distributions, other than those Distributions provided for in the Plan, to which each would be entitled on account of such claims against the Debtors and the other Released Parties. These claims include actual out of pocket fees and expenses and contingent indemnification claims triggered by continuing litigation by the Debtors and the Litigation Claimants. Without the settlement set forth in the Plan Support Agreement and embodied in the Plan, these claims would not be waived, could potentially be the subject of litigation as to priority and amount, and, in addition to potentially impairing the Debtors' ability to confirm the Plan, certainly would dilute recoveries of general unsecured creditors.

64. The Supporting Litigation Claimants and their Related Parties extensively negotiated, assisted in formulating, and entered into the Plan Support Agreement, which provides substantial benefits to the Debtors' estates, the Litigation Claimants, and Holders of General Unsecured Claims as a result of the contributions made by and on behalf of the Released Parties under the Plan Support Agreement. Because of the number of Supporting Litigation Claimants and the amount of their claims, without the efforts of the Supporting Litigation Claimants and their Related Parties prior to and during these chapter 11 cases with respect to the Plan Support Agreement and the Plan, and the agreement to have their claims channeled to the Litigation Settlement Trust, the Debtors' ability to confirm a chapter 11 plan would have been crippled, if not, destroyed.

65. Simply put, without the foregoing contributions, there would be no basis for the Plan. In light of these contributions, the Plan is the only viable opportunity to provide for

payment in full of Allowed Unclassified Claims, Other Priority Claims, and Other Secured Claims, as well as a meaningful recovery for Allowed Litigation Claims and General Unsecured Claims.

(iii) ***The Litigation Releases and Channeling Injunction are Indispensable to Plan***

66. The Litigation Releases and Channeling Injunction are indispensable to the Plan because they are a condition precedent to the RSA's Plan funding commitments. Absent such funding, the Debtors cannot confirm the Plan, or any chapter 11 plan.

67. Courts examining whether a release or injunction is critical to the proposed plan often have phrased this consideration as whether the relief is "essential to the debtor's reorganization." *See, e.g.*, *Dow Corning*, 280 F. 3d at 658. While the majority of cases have examined third-party releases and injunctions in the context of reorganization cases, as opposed to liquidating plans in chapter 11, *Continental* and subsequent decisions have not held that reorganization of a going-concern business is a mandatory precondition to such relief.[17]

68. Rather than focusing on whether a chapter 11 plan contemplates reorganization or liquidation, the proper inquiry is the criticality of the release or injunction to the implementation of the proposed plan. *See In re Union Fin. Servs. Grp., Inc.*, 303 B.R. 390, 428 (Bankr. E.D. Mo. 2003) ("Where the success of the reorganization is premised in substantial part on such releases, and the failure to obtain releases means the loss of a critical financial contribution to the debtor's plan that is necessary to the plan's feasibility, such releases should be granted."). This approach is consistent with the well-established principle that a chapter 11 plan is an appropriate means to effectuate the orderly liquidation of a debtor's business. *See In re Insilco Techs., Inc.*, 480 F.3d 212, 214 n.1 (3d Cir. 2007) (stating that it is "not uncommon for debtors to use the

[17] *See supra* text accompanying note 10.

Chapter 11 process to liquidate . . . because [it] provides more flexibility and control in determining how to go about selling off the various aspects of the debtor's business and distributing the proceeds."); *In re EBC I, Inc.*, 380 B.R. 348, 364 (Bankr. D. Del. 2008) ("[A] debtor can liquidate its assets under chapter 11 as well as under chapter 7 of the Bankruptcy Code."); *see also Loop Corp. v. U.S. Trustee*, 379 F.3d 511, 517 n. 3 (8th Cir. 2004) (recognizing that liquidation under chapter 11 is permitted by most courts); *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1352 (5th Cir.1989) (discussing the propriety of liquidating reorganizations and noting that "although Chapter 11 is titled 'Reorganization,' a plan may result in the liquidation of the debtor" (quoting *In re Coastal Equities, Inc.*, 33 Bankr. 898, 904 (Bankr. S.D. Cal. 1983))).

69. The Plan is wholly predicated upon the compromises and settlement reached under the Plan Support Agreement, which is the foundation for structure and substance of the Plan. The Litigation Releases, which are supplemented by the Channeling Injunction, were a key component of the negotiations with respect to the Plan Support Agreement. Absent the Plan Support Agreement, the Plan, which provides material Distributions to Creditors, could not have been proposed, and the only assets available to Holders of Claims (other than the DIP Facility Claim) would be the proceeds, if any, of claims against the RSA, as the Debtors' prepetition secured lender. *See* Final DIP Order ¶¶ 26, 33. Prosecuting such claims would be costly and time consuming and there is no certainty of success. Moreover, absent the Plan Support Agreement, the Debtors would face costly and unnecessary litigation with no funds available to prosecute such claims.

70. The Litigation Releases and Channeling Injunction were negotiated at arm's length and are explicitly tethered to the contributions by the Released Parties based on the mutually-interdependent elements of the Plan Support Agreement and Plan. The Supporting

Litigation Claimants were only willing to enter into a settlement if it provided the best option to maximize a recovery with respect to their claims and the Debtors issued an apology. In turn, the Debtors were only willing to issue an apology and compromise claims against the RSA if the years of litigation would be resolved with finality and in a manner that would provide the Supporting Litigation Claimants and Holders of General Unsecured Claims with a meaningful Distribution. The RSA was only willing to contribute the substantial consideration necessary to provide those Creditors with a meaningful Distribution if it meant global peace by and among the parties by resolving, with finality, the litigation. Therefore, integral to the parties' willingness to compromise and ability to reach a global settlement are the consensual and non-consensual releases and the Channeling Injunction. Without the protections afforded by them, there would be no finality to the litigation, no apology, and, as a result, no monetary contributions made by or on behalf of each of the Funding Parties for Distribution to Holders of Allowed Litigation Claims and General Unsecured Claims. Without these contributions, the Debtors are left without any assets to satisfy Claims. Consequently, if the Plan is not confirmed, these chapter 11 cases will be converted to chapter 7 or dismissed.

71. In addition, failure to approve the Litigation Releases and Channeling Injunction may jeopardize the Sale Transaction because of concerns about the potential effect of the lack of finality on the on-going business operations and the hiring of current employees and management.

72. Based on the foregoing, the Litigation Releases and Channeling Injunction are indispensable keystones of the Plan and, thus, this factor weighs in favor of approving the Litigation Releases and Channeling Injunction.

(iv) *Voting Classes Have Overwhelmingly Accepted the Plan*

73. As evidenced by the Voting Certification, the 305 Litigation Claimants voting in Class 4, which is the Class subject to the Channeling Injunction and Litigation Releases, voted unanimously to accept the Plan. Moreover, none of the individual Litigation Claimants objected to the Plan.[18] The unanimous voting in support of the Plan reflects that the Creditors most directly affected by the Litigation Releases and Channeling Injunction recognize that the Plan provides the best scenario for recovery under the unique circumstances of these chapter 11 cases. Indeed, the approval percentages here far surpass the statutory requirement for approval in asbestos cases. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (requiring that the class of claimants subject to the channeling injunction "votes, by at least 75 percent of those voting, in favor of the plan"). The unanimous approval of Class 4 constitutes overwhelming acceptance[19] and demonstrates the fairness of the Litigation Releases and the Channeling Injunction consistent with *Continental.* Consequently, this factor weighs heavily in favor of confirmation of the Plan. *See Indianapolis Downs*, 486 B.R. at 304 (approving plan containing debtor releases despite finding releases not essential and the plan not providing a mechanism for substantial payment of claims in light of the overwhelming creditor support in favor of the plan).[20]

[18] The EEOC, which is a Litigation Claimant as a result of the EEOC Action, filed a very limited objection as outlined above.

[19] *See A.H. Robins Co.*, 880 F.2d at 698, 702 (finding overwhelming acceptance when 94.38% of personal injury claimants subject to channeling injunction voted in favor of the plan); *Coram Healthcare*, 315 B.R. at 335 (finding overwhelming acceptance by general unsecured creditors voting 96.6% in amount and 87.2% in number in favor of the plan); *Master Mortgage*, 168 B.R. at 938 (finding that the two classes most affected by the injunction overwhelming supported it when analyzing voting results indicating that between 93.4% and 96.2% supported the plan).

[20] Notably, at least one court as suggested that overwhelming support should be viewed as "the single most important factor" in determining whether to grant non-consensual releases. *See Master Mortgage*, 168 B.R. at 938.

(v) *Plan Includes Mechanism for Payment of Affected Claims*

74. This concept is rooted in the Third Circuit's instruction that fair consideration must be provided in exchange for the release. *See United Artists*, 315 F.3d at 227 (citing *Continental*, 203 F.3d at 214–15). Courts have interpreted this factor as necessitating a substantial satisfaction of the claims affected by the third-party releases and channeling injunction. *See In re Exide Techs.*, 303 B.R. 48, 74 n. 37 (Bankr. D. Del. 2003) (noting that this factor may be satisfied "upon presentation of a consensual plan, in the absence of objection to the release/injunction provisions, or upon a [] meaningful distribution to unsecured creditors"). The necessity of showing fair consideration is satisfied where the Plan provides a mechanism to generate a significant contribution to affected claims that otherwise would be unavailable. *See Am. Family*, 256 B.R. at 386–87, 390–92, 405–08 (approving third-party release and injunction even though the plan did not provide for payment in full on the extinguished claims, where claimants received approximately 90% projected recovery on their claims); *Metromedia*, 416 F. 3d at 142 (explaining that a finding of "good and sufficient consideration" being paid to an enjoined creditor has weight in equity, but is not an absolute requirement to justify a third-party release); *Drexel Burnham*, 960 F.2d at 288–93 (approving multi-billion dollar settlement of 850 securities claims against debtor, but where creditors did not receive payment in full from contributing debtor personnel); *Fidelis*, 481 B.R. at 520 (approving non-consensual third-party release permissible where creditors were set to receive a meaningful distribution under the plan).

75. The Plan provides for a substantial contribution of between $20 and $22 million to the Litigation Settlement Trust to be used for Distributions on account of Allowed Litigation Claims. As evidenced in the Liquidation Analysis, the undisputed result of the collective contributions by the Released Parties as described herein has been the Debtors' ability to propose a Plan that provides for substantial recoveries by Holders of Allowed Litigation Claims (and

General Unsecured Claims) that would have otherwise not received Distributions on account of such Claims.

76. Moreover, the substantial contributions of the Released Parties are more than fair consideration in exchange for the third-party releases being granted. There is no evidence that there are any claims remaining in the possession of the third parties that could be asserted against the non-Debtor Released Parties. Despite 7 years of protracted and highly contentious multi-action litigation involving approximately 500 H-2B Workers, not one Litigation Claim has been asserted or filed against any of the non-Debtor Released Parties. Moreover, the statute of limitations has expired with respect to any potential Litigation Claims that could be asserted. *See* Litigation Settlement TDP § 4.3(a),(c) (identifying only two claim components that have statute of limitations that have not yet expired). It is, therefore, unlikely that these third-party claims could, or would, ever be asserted and, thus, there is little to no value in the Litigation Releases. Consequently, the substantial contributions provided by the non-Debtor Released Parties are certainly a fair exchange for the Litigation Releases. *See Freedom Rings*, Case No. 05-14268 (Bankr. D. Del.), Hr'g Tr. 115:25–117:8, Apr. 20, 2006 (stating that receiving "something for nothing or next to nothing" was a fair exchange).[21]

77. Under the circumstances of these chapter 11 cases, denial of the Litigation Releases and Channeling Injunction would not result in any better recovery to Creditors, and in fact, likely would result in Litigation Claimants not receiving any recovery on account of the Litigation Claims, which would frustrate and undermine the Debtors' efforts to maximize the value of the Estates for the benefit of all Creditors.

[21] A copy of the relevant portions of the transcript is attached hereto as Exhibit A.

(vi) ***Litigation Settlement TDP Provides Access to the Tort System***

78. The Litigation Settlement TDP will provide a mechanism for Litigation Claimants who dispute the resolution of their asserted Litigation Claim by the Litigation Settlement Trust (i) to have the Bankruptcy Court determine final allowance of the asserted Litigation Claim or (ii) to commence litigation in the tort system to have a federal district court determine allowance of the asserted Litigation Claim. Because Litigation Claimants will have the opportunity to have final allowance of their respective Litigation Claims determined in the tort system, this weighs in favor of approving of the Litigation Releases and Channeling Injunction.

(vii) ***Record Supports Specific Factual and Legal Findings***

79. The evidence to be produced at the Confirmation Hearing will provide more than adequate support to demonstrate the specific factual and legal findings required to justify the Litigation Releases and Channeling Injunction set forth in the Plan. Moreover, the Confirmation Order will set out each of these necessary findings in detail to establish that the record justifies the requested relief.

6. Injunction Against Barred Claims

80. Section 11.J of the Plan establishes a contribution bar that prevents a non-settling,[22] alleged joint tortfeasor from asserting a contribution or indemnity claim or cause of action against a Released Party, and provides that such joint tortfeasor shall, instead, be entitled to a judgement reduction in the amount required by non-bankruptcy law applicable to the underlying action. *See* Plan § 11.J.

81. Contribution bars are routinely entered in connection with settlement agreements involving alleged joint tortfeasors. *See, e.g.*, *Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3d Cir.

[22] Section 11.J of Plan enjoins actions by an alleged joint tortfeasor, who is not a Litigation Claimant, and, consequently not subject to the Channeling Injunction, that has not settled and consensually released the Released Parties.

1996) ("Many states have enacted settlement bar statutes, which allow a bar to the right of contribution if the settlement is made in good faith and the non-settling defendants are entitled to a setoff against any judgment ultimately entered against them."); *Schadel v. Iowa Interstate R.R. Ltd.*, 381 f.3d 671, 677 (7th Cir. 2004) (affirming approval of contribution bar with judgment reduction); *Scholes v. Stone, McGuire & Benjamin*, 839 f. Supp. 1314, 1320 (N.D. Ill. 1993) (entering contribution bar in conjunction with good faith finding).

82. The contribution bar set forth in Section 11.J of the Plan is necessary to facilitate the global settlement embodied in the Plan and protect the Released Parties from indirect claims and causes of action relating to Litigation Claims that have been released pursuant to the Plan. *See Munford v. Munford, Inc. (In re Munford, Inc.)*, 97 F.3d 449, 455 (11th Cir. 1996) (affirming bankruptcy court's approval of a contribution bar and stating that "'defendants buy little peace through settlement unless they are assured they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes of action related to the underlying litigation.'" (quoting *U.S. Oil & Gas v. Wolfson*, 967 F.2d 489,494 (11th Cir. 1992))). Moreover, as set forth below, the Plan, including the global settlement embodied therein, has been proposed in good faith. Accordingly, the provisions of Section 11.J of the Plan should be approved.

B. The Debtor Releases Should be Approved

83. Integral to the settlement embodied in the Plan, Section 11.F of the Plan provides for certain releases by the Debtors of the Released Parties. The Debtors' releases are permissible under section 1123(b)(3)(A) of the Bankruptcy Code. As noted above, a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). The standard for approval of plan settlements is generally the same as the general standard for approval of settlements under Bankruptcy Rule

9019. *See Coram Healthcare*, 315 B.R. at 334 (holding that standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019). Under Rule 9019, a settlement of a cause of action should generally be approved if it exceeds the lowest point in the range of reasonable litigation outcomes. *See, e.g.*, *In re Exaeris Inc.*, 380 B.R. 741, 746-47 (Bankr. D. Del. 2008); *In re New Century TRS Holdings, Inc.*, 390 B.R. 140 (Bankr. D. Del. 2008); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006). The release of an estate cause of action in the context of a chapter 11 plan will generally be approved "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see Wash. Mut.*, 442 B.R. at327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" (internal citation omitted)).

84. In evaluating the fairness and reasonableness of the release, the court may also consider the following factors: (i) an identity of interest between the debtor and the non-debtor releasee; (ii) whether the non-debtor releasee has made a substantial contribution to the debtor's reorganization; (iii) whether the release is essential to the debtor's reorganization; (iv) agreement by a substantial majority of creditors to support the release; and (v) whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release. *See Zenith*, 241 B.R. at 110 (citing *Master Mortg.*, 168 B.R. at 935); *Spansion*, 426 B.R. at 143 n.47 (citing the *Zenith* factors); *Wash. Mut.*, 442 B.R. at 346 (same). However, not all of these factors need to be satisfied for a Court to approve a debtor release. *See Wash. Mut.*, 442 B.R. at 346 ("These factors are neither exclusive nor conjunctive requirements, but simply provide guidance

in the [c]ourt's determination of fairness."); *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that *Zenith* factors are not exclusive or conjunctive requirements).

85. Section 11.F of the Plan provides for releases by the Debtors, as of the Effective Date, of, among other things, certain claims, rights, and causes of actions that the Debtors, their affiliates, or the Estates may have against the Released Parties. The releases are based on the Debtors' business judgment, and meet the applicable legal standard because they are fair, reasonable, and in the best interests of the Debtors and the Estates.[23] These releases were negotiated prepetition in connection with the Plan Support Agreement and it is pursuant to the Plan Support Agreement that the Released Parties have contributed, or will contribute, significant value in furtherance of the Plan. Without the release provisions, the Debtors would not have received the necessary support from the RSA and the Supporting Litigation Claimants to formulate and confirm the Plan, which provides certainty of Distributions to Creditors that otherwise would be unavailable. Moreover, other than the U.S. Trustee's limited objection, there are no objections to the Debtors' releases, and the Creditors that voted on the Plan voted overwhelming to accept it, including the releases (which were disclosed prominently in the Ballots, the Disclosure Statement, and the notice of the Confirmation Hearing). For these reasons, the Debtors' releases are justified, are in the best interests of Creditors, are an integral part of the Plan, and satisfy key factors considered by courts in determining whether a debtor release is proper.

[23] The Court is respectfully referred to the foregoing discussion for more in-depth analysis as to the *Master Mortgage* factors, which overlap with the considerations summarized by *Dow Corning* discussed above. The Debtors submit that the same factual findings underlie each analysis and are established by the record in support of the Plan.

C. Exculpation Should be Approved

86. It is well established in the Third Circuit that exculpation is appropriate for certain individuals and entities acting on behalf of a debtor's estate, including the debtors' officers, directors, employees and professionals, as well as a creditors' committee, its members and advisors. *See In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *Wash. Mut.*, 442 B.R. at 350. The underlying rationale for approval of these releases is that the covered individuals are acting in a fiduciary capacity on behalf of the debtor's estate. *See Wash. Mut.*, 442 B.R. at 350–51. Therefore, the Exculpation set forth in Section 11.E of the Plan is appropriate and customary with respect to Exculpated Parties serving as officers, directors, and employees of the Debtors and members of the Committee, as well as their respective professionals.

87. With respect to the remaining Exculpated Parties, the limited expansion of the Exculpation is consistent with applicable law and should be approved. As discussed below, sections 1129(a)(2) and (3) of the Bankruptcy Code require that, as prerequisite to confirmation of the Plan, (i) the plan proponents have complied with the applicable provisions of the Bankruptcy Code, and (ii) the Plan has been proposed in good faith and not by any means forbidden by law. If these two facts are true, which they must be for the Exculpation to take effect, then it is difficult to imagine what liability the Exculpated Parties could have to a party in interest in these chapter 11 cases that would not be subsumed within the carve outs for fraud, gross negligence, or willful misconduct. In fact, courts in the Third Circuit have reached the same conclusion when analyzing similar exculpation provisions for parties who are not estate fiduciaries. *See In re W.R. Grace & Co.*, 446 B.R. 96, 122–23 (Bankr. D. Del. 2011) (finding that an exculpation of parties who are not estate fiduciaries in connection with the consummation of the plan "unless such conduct constitutes gross negligence or willful misconduct is appropriate . . . [and] in accord with the standards for releases set forth in *In re PWS Holding*

Corp., 228 F.3d 224 (3d Cir. 2000)). Further, the Exculpation is narrowly circumscribed to actions or omissions "in connection with or in contemplation of the Restructuring." Plan § 11.E. Where an exculpation is limited, courts have found that such provisions are permissible even absent extraordinary circumstances. *See W.R. Grace*, 446 B.R. at 123 (approving exculpation provision absent extraordinary circumstances where exculpation "applies to acts or omissions 'in connection with or arising out of the Chapter 11 Cases' and does not excuse, or release, those to which it applies from willful misconduct or gross negligence.").

88. Moreover, section 1125(e) of the Bankruptcy Code, provides a safe harbor for all plan proponents, not just estate fiduciaries, who act in good faith:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, . . . of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan . . . .

11 U.S.C. § 1125(e).

89. Furthermore, the unique circumstances of these chapter 11 cases demonstrate that the Exculpation is appropriate. The efforts of the firms representing the Supporting Litigation Claimants, while not estate fiduciaries, will, upon the Effective Date, result in substantial recoveries for *all* Litigation Claimants, who account for the vast majority of unsecured claims against the Debtors. Many of these firms have provided their services on a *pro bono* basis, while other firms are non-profit entities who stand to receive very little for services that they are typically only able to perform on the understanding that they will be able to recover attorney's fees and expenses. Exposing such firms to future actions based on their good deeds would not only be unfair, but may also discourage firms from representing underserved creditor constituencies in future bankruptcies on a *pro bono* basis.

90. These chapter 11 cases and the related transactions have been negotiated and implemented in good faith and with a high degree of transparency, including the extensive negotiations among the Debtors, the RSA, the Committee, and the Supporting Litigation Claimants in formulating the Plan Support Agreement and the Plan. The Exculpation is necessary to protect those parties who have made substantial contributions to these chapter 11 cases and participated in good faith in the negotiation, formulation, solicitation, and, eventually, the implementation of the Plan from future collateral attacks related to such actions.

91. Also, the Plan, including the Exculpation, has the overwhelming support of Creditors that voted on the Plan. For these reasons, among others, the Debtors submit that the Exculpation is appropriate under the facts and circumstances of these chapter 11 cases.

IV. The Plan Complies with Section 1129(a)(2) of the Bankruptcy Code

92. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of the [Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). While section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of the plan, section 1129(a)(2) mandates compliance with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. *See PWS Holding*, 228 F.3d at 248; *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)."). The Debtors have satisfied section 1129(a)(2) by distributing the Disclosure Statement and soliciting acceptances of the Plan through their Balloting Agent pursuant to the procedures authorized by the Solicitation Order.

93. The Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation 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. The Disclosure Statement, the Plan, Ballots, notices, and other related documents were distributed to parties in the Voting Classes in accordance with the Solicitation Order. Furthermore, the Debtors have complied with all orders of the Court entered during the pendency of these chapter 11 cases and with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules with respect to disclosure and solicitation of votes on the Plan. Accordingly, the requirements of section 1129(a)(2) are satisfied.

V. **The Plan has been Proposed in Good Faith (1123(a)(3))**

94. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Bankruptcy Code does not define "good faith" for purposes of section 1129(a)(3). The good faith standard requires that the Plan be proposed with good intentions to obtain a result that is consistent with the objectives and the purposes of the Bankruptcy Code. *See PWS Holding*, 228 F. 3d at 243 ("'For purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986))); *see also In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004) ("At its most fundamental level, the good faith requirement ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy . . . .").

95. Whether the good-faith requirement is established is a fact intensive inquiry based on the totality of the facts and circumstances" that affords considerable discretion to the Court. *See In re W.R. Grace & Co.*, 475 B.R. 34, 88 (D. Del. 2012); *Coram Healthcare*, 271 B.R. at 234; *accord Am. Family*, 256 B.R. at 401. The Plan has been proposed in good faith, with the

legitimate and honest purpose of allowing Creditors to realize the highest possible recoveries under the circumstances of these chapter 11 cases. The Plan is the culmination of significant arm's-length, good-faith negotiations among the Debtors, the Committee, RSA, and the Supporting Litigation Claimants. The Plan is fundamentally fair to all stakeholders and has been proposed with the legitimate purpose of selling the Debtors' assets and expeditiously making Distributions to Creditors. Notably, in light of the Committee's statutorily-charged duty of representing all unsecured creditors' interest, its role in formulating and supporting the Plan speaks volumes to the finding of good faith under section 1129(a)(3).

96. The Plan is a concerted effort among the Debtors, the Committee, the RSA, and the Supporting Litigation Parties to resolve all outstanding issues and provide finality to all parties in interest. The Plan provides for an orderly and prompt resolution of the Litigation Claims. In addition, the Signal Liquidating Trust is established through funds provided by or on behalf of the Funding Parties RSA to administer and distribute such funds to Holders of Allowed Administrative, Professional Fee, Priority Tax, Other Priority, Other Security, and General Unsecured Claims in a manner consistent with the priority scheme under the Bankruptcy Code. The substantial compromises embodied in the Plan along with the broad-based, overwhelming support by most of the Debtors' constituents negate any suggestion of bad faith or collusion. The Plan satisfies the objectives of the Bankruptcy Code, and is in no way an attempt to abuse the judicial process or delay of frustrate the legitimate efforts of creditors to enforce their rights. *See In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988). In short, the Plan accomplishes the precise goals underpinning the Bankruptcy Code.

97. For these reasons, the Plan was filed in good faith to promote the objectives and purpose of the Bankruptcy Code, and therefore satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

VI. **The Plan Provides for Approval of Professional Fees and Expenses (1123(a)(4))**

98. Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor for post-petition professional fees remain subject to the Court's review and approval for reasonableness. 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) has been construed to require that all payments for professional fees and expenses be subject to the Court's review and approval. *See In re Resorts Int'l, Inc.*, 145 B.R. 412, 476 (Bankr. D.N.J. 1990).

99. In accordance with section 1129(a)(4) of the Bankruptcy Code, all payments made or to be made by the Debtors for services rendered or expenses incurred in connection with these chapter 11 cases prior to the Effective Date, including Claims for Professional Fees, will be paid only after allowance of such Claims by the Court to the extent not previously approved and paid in accordance with existing orders from the Court. *See* Plan § 2.B. In addition, the Court will retain jurisdiction after the Effective Date 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. *See* Plan § 12.B.8. Thus, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

VII. **Plan Discloses Necessary Information Regarding Directors and Officers (1123(a)(5))**

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

of creditors and equity security holders and public policy. 11 U.S.C. § 1129(a)(5)(A)(i)–(iii). In addition, a plan must disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B).

101. The requirements of section 1129(a)(5) of the Bankruptcy Code have been fully satisfied since the trustees of both the Signal Liquidating Trust and the Litigation Settlement Trust have been identified or will be identified at or prior to the Confirmation Hearing. These appointments are consistent with the best interests of Holders of Claims and Equity Interests. The trustees for each of the Litigation Settlement Trust and Signal Liquidating Trust are not "insiders," as defined in section 101(31) of the Bankruptcy Code. Thus, section 1123(a)(5) is satisfied.

VIII. The Plan Does Not Require Governmental Regulatory Approval (1129(a)(6))

102. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the debtor post-confirmation to approve any rate change provided for the in the debtor's plan. 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) is inapplicable to these chapter 11 cases because the Debtors' business does not involve the establishment of rates subject to approval of any governmental regulatory commission.

IX. The Plan is in the Best Interests of Creditors and Interest Holders (1129(a)(7))

103. 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 debtors liquidated under chapter 7 of [the Bankruptcy Code] on such date. 11 U.S.C. § 1129(a)(7).

104. As section 1129(a)(7) makes clear, the liquidation analysis applies only to individual holders of impaired claims or interests that do not accept the plan. *See Bank of Am. Nat'l Trust*, 526 U.S. at 441 n.13 ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."). Section 1129(a)(7)(A) requires a determination whether "a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization." *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) (internal quotation marks and citation omitted). The measuring date for such a comparative recovery is the effective date of the proposed bankruptcy plan. Thus, a bankruptcy court must contrive a hypothetical chapter 7 liquidation on the effective date of the plan to determine each creditor's treatment. *See Lason*, 200 B.R. at 232 (citing *In re Sierra-Cal*, 210 B.R. 168, 171–72 (Bankr. E.D. Cal. 1997)). Given that a hypothetical chapter 7 liquidation is inherently speculative, it is appropriate for bankruptcy courts to rely on credible assumptions and judgments. *See In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 366–67 (Bankr. S.D.N.Y. 2007).

105. With respect to each Impaired Class of Claims or Equity Interests, the Voting Certification and the Liquidation Analysis indicate that each Holder of a Claim or Equity Interest in an Impaired Class has accepted the Plan or will receive or retain under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date, that is not less than the amount that such Holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date. The Liquidation Analysis was prepared by GGG Partners, LLC, the Debtors' financial advisor in connection with these chapter 11 cases, under the Debtors' direction and supervision, and with the assistance of other personnel and

professional advisors of the Debtors. The Liquidation Analysis is subject to the assumptions, qualifications, and limitations set forth therein.

106. The Debtors believe that the estimated liquidation values set forth in the Liquidation Analysis are fair and reasonable estimates of the value of the Debtors' assets upon a liquidation under chapter 7 of the Bankruptcy Code, and that, based on those estimates, each Class of Claims or Equity Interests will receive at least as much as that Class would receive in a hypothetical chapter 7 liquidation. Specifically, the Liquidation Analysis examines the effects that a conversion of these chapter 11 cases to cases under chapter 7 could have on the assets available for distribution to Holders of Allowed Claims. A chapter 7 liquidation likely would result in both a liquidation of the Debtors' assets at a distressed value and an increase in Administrative Claims, because there would be an additional tier of Administrative Claims by the chapter 7 trustee and related professionals. As set forth in the Liquidation Analysis, such a conversion likely would result in the DIP Facility Claims receiving less than a full recovery and the Priority Tax Claims, Other Priority Claims, Other Secured Claims, the Litigation Claims and General Unsecured Claims receiving no recovery. Under the Plan, the DIP Facility Claims, Priority Tax Claims, Other Priority Claims, and Other Secured Claims will be satisfied in full and the Litigation and General Unsecured Claims will receive a partial recovery.

107. The mechanics of the Plan and the Debtors' illiquidity demonstrates that each Holder of a Claim or Equity Interest will receive at least as much under the Plan as they would receive in a chapter 7 liquidation. The proposed administration of the Debtors' assets under the Plan is more efficient, less expensive, and more likely to result in maximum Distributions to Holders of Allowed Claims. The best interests test is satisfied as to each Holder of an Impaired Claim or Equity Interest. Accordingly, the Plan satisfies the requirements of section 1129(a)(7).

X. Acceptance of Impaired Classes (Section 1129(a)(8))

108. Section 1129(a)(8) of the Bankruptcy Code requires that, with respect to each class of claims or interests, such class has accepted the plan or is not impaired under the plan. 11 U.S.C. § 1129(a)(8). As reflected in the Voting Certification, the Plan of each Debtor has been accepted by Creditors holding well in excess of two-third in amount and one-half in number in the Voting Classes, the Impaired Classes entitled to vote on the Plan. Classes 1 (Other Priority Claims), 2 (Other Secured Claims) and 3 (First Lien Loan Agreement Claims) are unimpaired and deemed to accept the Plan, whereas Classes 6 (Intercompany Claims) and 7 (Equity Interests) are not entitled to receive or retain any property under the Plan and, therefore, are deemed to have rejected the Plan. 11 U.S.C. §§ 1126(f), (g). Class 6 (Intercompany Claims) and Class 7 (Equity Interests) shall be referred to herein as the "**Rejecting Classes**." The Debtors seek confirmation of the Plan despite the rejection by Rejecting Classes pursuant to section 1129(b) of the Bankruptcy Code, as described herein.

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

109. Section 1129(a)(9) of the Bankruptcy Code requires that persons holding allowed claims entitled to priority under section 507(a) receive full compensation absent agreement to differing treatment. *See* 11 U.S.C. § 1129(a)(9). As required by section 1129(a)(9), Articles II and III of the Plan provide for full payment to Holders of DIP Facility Claims, Allowed Administrative Claims, Allowed Professional Fee Claims, Allowed Priority Tax Claims, Allowed Other Priority Claims, and Allowed Other Secured Claims. Accordingly, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

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

110. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of at least one impaired class of claims, excluding the votes of any insider. 11 U.S.C.

§ 1129(a)(10). As set forth in the Voting Certification, Holders of Claims in Class 4, which is an Impaired Class, have voted unanimously to accept the Plan for each Debtor. In addition, Holders of Claims in Class 5, which also is an Impaired Class, have voted either unanimously or by an overwhelming majority to accept the Plan. The Plan, therefore, satisfies the requirements of section 1129(a)(10).

XIII. The Plan is Feasible (Section 1129(a)(11))

111. Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition precedent to confirmation, the Court find that the Plan is feasible. Specifically, the 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). Even a planned liquidation 'must be feasible.'" *In re Am. Capital Equip.*, LLC, 688 F. 3d 145, 155-56 (3d Cir. 2012) (quoting *In re Calvanese*, 169 B.R. 104, 107 (Bankr. E.D. Pa. 1994)).

112. "[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed." *Johns-Manville Corp.*, 843 F.2d at 649; *see 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." (quoting *In re Brotby*, 303 B.R. 177, 191 (9th Cir. B.A.P. 2003))). The key element of feasibility is whether there exists a reasonable probability that the provisions of the Plan can be performed. *See W.R. Grace*, 475 B.R. at 115 ("The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." (internal citations and quotations omitted)); *In re Aleris Int'l, Inc.*, No. 09-10478, 2010 WL 3492664, at *28 (Bankr. D. Del. May 13, 2010). The purpose of

the feasibility test is to protect against visionary or speculative plans. *See Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985).

113. The feasibility test is satisfied with respect to the Plan because the Debtors will be able to satisfy all the conditions precedent to the Effective Date and there are sufficient funds to meet all post-Effective Date obligations to pay for the costs of administering and fully consummating the Plan and closing these chapter 11 cases. Following entry of the Confirmation Order, the Debtors will be able to secure the necessary funding for the Plan through the contributions of the RSA described above, which contributions include adequate amounts to pay all Allowed Administrative Claims, Professional Fee, Priority Tax, Other Priority, and Other Secured, and to provide a Pro Rata distribution on account of Allowed Litigation and General Unsecured Claims. All DIP Facility Claims will be satisfied in full pursuant to the Sale Order.

114. Based on the foregoing reasons, the Debtors have demonstrated that sufficient assets will be made available to administer and consummate the Plan, satisfy the projected post-Effective Date obligations, and close these chapter 11 cases when necessary. Therefore, the Plan is workable and has a reasonable likelihood of success, thereby satisfying the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

XIV. All Statutory Fees will be Paid (1129(a)(12))

115. Section 1129(a)(12) requires the payment of all fees payable under 28 U.S.C. § 1930. 11 U.S.C. § 1129(a)(12). Section 14.A of the Plan provides that all such fees payable before the Effective Date shall be paid by the Debtors, and all such fees payable after the Effective Date shall be paid by the Signal Liquidating Trustee. Accordingly, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

XV. Sections 1129(a)(13)–(a)(16) are Inapplicable

116. Section 1129(a)(13) of the Bankruptcy Code requires that a chapter 11 plan provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). The Debtors have no obligation to provide any such retiree benefits. Sections 1129(a)(14) and (15) of the Bankruptcy Code apply only to individual debtors. *See* §§ 1129(a) 14 (relating to the payment of domestic support obligations), 1129(a)(15) (relating explicitly only individuals). Finally, each of the Debtors is a "moneyed, business, or commercial corporation" and, therefore, section 1129(a)(16) does not apply. *See* § 1129(a)(16) (relating to transfers of property by non-profit debtors). Accordingly, the Debtors submit that the requirements of sections 1129(a)(13)–(16) of the Bankruptcy Code are inapplicable.

XVI. Plan Satisfies the "Cram Down" for Rejecting Classes (11 U.S.C. § 1129(b))

117. Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met, then a court may confirm a plan over the dissenting vote of an impaired class of claims as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class or classes. § 1129(b)(1). The express terms of section 1129(b) dictate that its requirements are only applicable to a class of creditors that rejects a plan. *See id.* (instructing that requirements apply only "with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." (emphasis added)). Thus, a dissenting creditor in an accepting class is without standing to object to the plan on the basis of unfair discrimination or absolute priority. *See Jersey City Med. Ctr.*, 817 F.2d at 1062. Given the overwhelming support received by the Voting Classes, the prerequisites for "cram down" are only relevant to those Classes that are deemed to have rejected the Plan, namely Class 6 (Intercompany Claims) and Class 7 (Equity Interests). The Plan may be confirmed as to each

of these Classes pursuant to section 1129(b) of the Bankruptcy Code because no party in any of the Rejecting Classes has challenged the satisfaction of section 1129(b). Notwithstanding the consent of each of the Rejecting Classes, the Plan is consistent with the priorities afforded to each Class as established by the Bankruptcy Code.

A. The Plan Does Not Discriminate Unfairly

118. Section 1129(b)(1) does not prohibit discrimination between classes. Instead, it prohibits only discrimination that is unfair with respect to the dissenting class. The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment. *See Exide*, 303 B.R. at 78; *In re Kennedy*, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); *In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990). The unfair discrimination standard of section 1129(b) "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (citing *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986)); *Aleris*, 2010 WL 3492664, at *31. "Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes; it only prohibits discrimination that is unfair." *Aleris*, 2010 WL 3492664, at *31 (citing *Armstrong*, 348 B.R. 111, 121 and *In re 11, 111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990)).

119. "In considering whether a plan unfairly discriminates, courts apply a rebuttable presumption that unfair discrimination exists if there is: (1) a dissenting class, (2) another class of the same priority, and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of net present value of all payments) or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed

distribution." *Aleris*, 2010 WL 3492664, at *31(citing *Armstrong*, 348 B.R. 111, 121 and *In re Dow Corning Corp.*, 244 B.R. 696, 701 (Bankr. E.D. Mich. 1999)); *see also In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (explaining rebuttable presumption); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 228 (Bankr. D.N.J. 2000) (adopting rebuttable presumption test). Absent such factors, there cannot be unfair discrimination. Further, the presumption can be rebutted by a showing that there is a reasonable basis for disparate treatment. *Genesis Health*, 266 B.R. at 611–12.

120. The Plan does not discriminate unfairly with respect to Intercompany Claims and Equity Interests in the Rejecting Classes, as such Claims and Equity Interests are legally and factually distinct from the Claims in the other Classes set forth in the Plan, which Claims and Equity Interests are properly classified under the Plan. Class 6 is the only Class that contains Claims asserted by one Debtor against another Debtor and intercompany claims are routinely placed in separate classes from other claims. Class 7 is the only Class of Equity Interests; all others contain Claims. Accordingly, there are no similarly situated Classes to the Rejecting Classes and, if there were, sufficient basis exists to justify the disparate treatment afforded to that Class. *See, e.g.*, *Lernout*, 301 B.R. at 661-62 (finding no unfair discrimination in the disparate treatment of subordinated claims); *Aleris*, 2010 WL 3492664, at *31 (same).

121. Accordingly, the treatment of the Rejecting Classes does not discriminate, unfairly or otherwise, in contravention of the section 1129(b)(1) of the Bankruptcy Code.

B. The Plan is Fair and Equitable

122. Section 1129(b)(2) sets forth the standards for determining whether a plan is "fair and equitable" with respect to impaired dissenting claims or interests. Section 1129(b)(2)(B) and (C) summarize the "absolute priority rule" with respect to unsecured claims and interests, and provide that a plan is fair and equitable with respect to a class of impaired claims or interests if it

provides that the holder of any claim or interest in a class junior to the claims or interests of such class will not receive or retain under the plan on account of such junior claim or interest any property. 11 U.S.C. §§ 1129(b)(2)(B)(ii) and (C)(ii); *Nw. Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (stating that absolute priority rule "provides that dissenting class of unsecured creditors must be provided for in full before any junior class can recover or retain any property.") (citation omitted). "[A] corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims." *Exide*, 303 B.R. at 61 (citing *Genesis Health*, 266 B.R. at 612).

123. The Plan is "fair and equitable" within the meaning of section 1129(b) of the Bankruptcy Code. Section 1129(b)(2)(C) provides that a plan is "fair and equitable" with respect to a class of interests if either: (i) the holder of the interest receives or retains the greater of the allowed amount of any liquidation preference, redemption price or the value of the interest or (ii) no holder of a junior interest receives or retains any property on account of its interest. First, no Holder of an Intercompany Claim or Equity Interest has challenged whether its respective treatment is fair and equitable under the Plan. Moreover, no Holder of an Intercompany Claim or Equity Interest would be entitled to retain or receive any value in a proceeding under chapter 7 of the Bankruptcy Code. Further, there are no Holders of interests that are junior in priority to Intercompany Claims or Equity Interests that will be receiving any property on account of such interests under the Plan. Accordingly, the Plan satisfies the requirement of section 1129(b) of the Bankruptcy Code.

XVII. **The Plan Satisfies Sections 1129(c), (d), and (e) of the Bankruptcy Code**

124. The Plan is the only current plan on file presented for confirmation in these chapter 11 cases and, as such, section 1129(c) of the Bankruptcy Code does not apply. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of Section 5 of the

Securities Act of 1933, and no party in interest has alleged otherwise. The principal purpose of the Plan is to effectuate the Debtors' orderly liquidation through a distribution mechanism that will maximize creditor recoveries. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code Finally, these chapter 11 cases are not "small business cases" as defined in the Bankruptcy Code and, accordingly, section 1129(e) of the Bankruptcy Code does not apply.

CONCLUSION

125. For all the foregoing reasons, and based on the authorities and evidence presented above, and as will be further demonstrated at the Confirmation Hearing, the Debtors submit that the Plan satisfies all of the applicable requirements of the Bankruptcy Code and the Bankruptcy Rules and should be confirmed. Accordingly, the Debtors respectfully request that the Court enter the Proposed Confirmation Order confirming the Plan and all provisions thereof and grant such other relief as is just and proper.

Dated: November 20, 2015
Wilmington, Delaware

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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IN RE:                         .    Chapter 11
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Freedom Rings LLC.,            .
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        Debtor(s).             .    Bankruptcy #05-14268 (CSS)
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Wilmington, DE
April 20, 2006
9:30 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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consensual releases: one, fairness; two, necessity to the reorganization; and three, specific factual findings supporting items one and two.

Interestingly, the 3rd Circuit does not focus on the issue of whether such releases are only appropriate in extraordinary cases. As discussed at oral argument, I think that focusing on whether a case is sufficiently extraordinary to justify a third party release is not particularly helpful. Every case is unique, and many are extraordinary. Indeed, small cases such as this present their own challenges and are in may ways more extraordinary than your run-of-the-mill, $100 million Debtor case.

In order to meet the burden of establishing that the third party releases are fair an necessary to the reorganization, I hold that the Plan proponents must establish by a preponderance of the evidence that, one, there is material, specific and identifiable consideration flowing from the releases to the releasors, either directly or through the Plan, that is a fair exchange for the releases being granted, and two, it is unlikely that the Debtor will be able to confirm a Plan, not necessarily the specific Plan before the Court, absent such releases. In this case, I find that the Plan proponents have met their burden of establishing that the third party releases are fair and necessary to the reorganization.

Specifically, I find that, one, KKDC is providing the following consideration: A) KKDC is forgoing payment of $225,000 that will otherwise be available to General Unsecured Creditors; B) KKDC is waiving its right to share in the proceeds of avoidance actions; and C) KKDC is waiving its right to share in approximately $30,000 in deposit claims. Two, the pre-petition secured lender is providing the following consideration: It is waiving it's contingent secured claim against the Debtor. Three, this consideration is flowing to the benefit of the third party releasors through the Plan of Reorganization. The amounts forgone are waived by KKDC will be available to fund a distribution to Unsecured Creditors and the waiver of the secured claim, even though it is contingent, inures to the benefit of the releasors because were the claim to be liquidated in any significant amount, it would forgo any recovery to junior Creditors. Four, the consideration is material. Even though the amounts are not particularly large, they need to be examined in the context of this case. The uncontroverted evidence is that the recovery to Unsecured Creditors in increasing three to four times as a result of the settlement. That is a material improvement. Five, the consideration being provided by KKDC and the pre-petition secured lender is a fair exchange for the releases being granted. First, given the D-I-P order in this case, there is a significant issue as to whether there are any claims remaining in the possession of the third parties that can be asserted against KKDC. And second, given the small size of this case and the small size of the average claim in this case, it is highly unlikely that these third party claims would ever be asserted. Thus, the releases are arguably receiving something for nothing or next to nothing, which is certainly a fair exchange for them. Six, and finally, it is clear that these third party releases are the lynch-pin to be able to confirm any Plan in this case.

KKDC and Credit Suisse are the deep pockets in this case. Given the possible exposure to litigation in this case and others like it, it is clear that KKDC and Credit Suisse will demand a release in exchange for funding a Plan in this case and others like it. The only alternative to a Plan here would be to convert the case to Chapter 7. And while a Liquidating Plan such as this does not implicate the policies behind rehabilitating businesses under Chapter 11, such as preserving jobs, I believe that it does serve the policy of the Code in general, and that is the orderly and efficient liquidation of the Debtor's estate for the benefit of its Creditors.

Thus, for the reasons set forth on the record and based on the evidence presented in support of confirmation, I will approve the Plan and sign the Confirmation Order submitted. Are there any comments?

MR. MCMAHON: Your Honor, Joseph McMahon. Just one request in light of Your Honor's ruling. With respect to --