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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
AIRFASTTICKETS, INC.,	Chapter 11
Debtor.	Case No. 15-11951 (SHL)

BRIEF IN SUPPORT OF CONFIRMATION OF
THE DEBTOR'S PLAN AND OMNIBUS REPLY TO CONFIRMATION OBJECTIONS

Airfasttickets, Inc., the debtor and debtor-in-possession (the "Debtor")[1], by its undersigned counsel, submits this *Brief in Support of Confirmation and Omnibus Reply to Confirmation Objections* (the "Confirmation Brief"), and *Declarations of Brian S. Weiss and Adam Meislik in Support Thereof* (the "Confirmation Declarations"), and respectfully represents as follows:

[1] Unless otherwise defined herein, capitalized terms used are defined in the Debtor's Plan.

PRELIMINARY STATEMENT

1. The Debtor's Plan was proposed in good faith, meets the Bankruptcy Code's confirmation requirements, and has the requisite support from the creditor body – all Classes entitled to vote on the Plan voted overwhelmingly in favor of the Plan. Further, and as evident by the record before the Court in this case (from the date the Debtor's case was converted from involuntary chapter 7 case to chapter 11 to the Confirmation Hearing), the Debtor and its professionals have worked diligently to manage the Debtor's affairs under chapter 11 to maximize value for the benefit of the Debtor's Estate and its creditors. Therefore, the Debtor respectfully submits that the Plan should be confirmed.

2. The only two parties objecting to the Plan – (i) Fareportal, Inc., a non-debtor third party that, until just recently on October 3, 2016, had no interest in or claim against the Estate; and (ii) Nikolaos Koklonis, the Debtor's majority shareholder, an insider, and a target of the Estate's pending and upcoming litigation claims – did not vote for or against the Plan and, as will be shown below, do not even have valid claims against the Estate and thus lack standing to object to confirmation.[2] Regardless, the parties' objections, or described more appropriately as last-minute frail attempts to frustrate the Debtor's confirmation process, are not supported by any evidence and, more importantly, do not raise any issue that would prevent this Court from confirming the Plan.

3. Nonetheless, in light of these two short confirmation objections, this Confirmation Brief is divided into two primary parts. The first part responds directly to the *Limited Objection of Fareportal Inc. to the Debtor's First Amended Plan of Liquidation* [Doc. No. 232] (the

[2] The Debtor's objection to the completely undocumented and unsubstantiated claim of Nikolaos Koklonis is scheduled to be heard concurrently with this Confirmation Hearing. With respect to Fareportal Inc.'s proof of claim, which was filed on October 3, 2016, after the Claims Bar Date, asserting a claim in the amount of "not less than $10,000,000", such claim lacks substantiating evidence and appears to have been filed solely as a last minute calculated attempt to gain standing to object to the Plan. It too will be the subject to an objection in due course.

"Fareportal Objection") and *Nikolaos Koklonis's Objection to Confirmation of Debtor's First Amended Chapter 11 Plan* [Doc. No. 236] (the "Koklonis Objection"). The second part of this Confirmation Brief contains information in support of the Court's findings that the Bankruptcy Code's statutory requirements for confirming the Debtor's plan are satisfied.[3] Finally, the Confirmation Declarations, filed concurrently herewith in support of the Plan, provide the necessary evidentiary support for confirmation of the Plan. For the foregoing reasons, and as further provided below, the Debtor respectfully requests that the Court enter the Debtor's proposed order confirming the Plan.

I. THE OBJECTIONS TO CONFIRMATION SHOULD BE OVERRULED

A. Introductory Statement

4. Instead of addressing true confirmation issues, if there are any, Fareportal Inc. ("Fareportal") and Nikolaos Koklonis ("NK") attempt to use this confirmation hearing as a platform to raise objections that, if relevant at all, should have been raised in connection with the sale hearing held before the Court on November 24, 2015. For example, nearly a year after substantially all property of the Estate was sold, Fareportal now wants to reserve rights to "pursue a revocation of the Sale Order" despite the fact that the *Order Authorizing the Sale of Property Free and Clear of Liens, Claims, and Encumbrances and Other Interests* [Doc. No. 65] (the "Sale Order") is final and no appeal was taken from such Sale Order.[4] Simply put, the efforts of Fareportal and NK amount to too little, too late. The Sale Order has become final and unappealable; the Claims Bar Date passed; the deadline for voting on the Plan passed and neither

[3] This part also includes a separate section addressing the Plan's exculpation and release provisions, which are limited in scope, supported by applicable case law, and are ordinarily approved in this District.

[4] Moreover, even if Fareportal had timely appealed the Sale Order, such appeal would have likely been dismissed for lack of standing as the Sale Order, per its own terms, only effectuated a transfer of "property of the Estate" and sold such property "As Is, Where Is". Therefore, it would seem axiomatic, that the Sale Order did not sell any property that was not property of this Debtor's bankruptcy estate since this Debtor and this Court (absent some exceptions not relevant here) would not be able to effectuate a sale of property of a non-debtor. *See, e.g., TM Patents, L.P. v. International Business Machines Corp.*, 121 F.Supp.2d 349 (S.D.N.Y. 2000)

objecting party even voted; the votes in favor of and against the Plan were tallied and show overwhelming support for the Plan; and, most importantly, the Plan otherwise satisfies all of the requirements of the Bankruptcy Code. Accordingly, the Plan should be confirmed, and the confirmation objections should be overruled.

5. Under the Sale Order, the Sale Order did not effectuate a sale of anything but property of the Estate. Therefore, any argument premised on the allegation that somehow the Sale Order transferred property that was not Estate property is simply wrong. Moreover, neither Fareportal nor NK can credibly argue that they hold a secured claim against this Estate because no secured proof of claim was timely filed by either party and no evidence has been produced that can support a secured claim.[5]

6. In short, the objections of Fareportal and NK should be overruled because (1) neither objecting party has filed a secured claim or has put forth admissible evidence showing any basis for a secured claim that would attach to the sale proceeds; (2) the Confirmation Hearing is not a forum for revisiting the Sale Order that has long since become final and unappealable; and (3) any general unsecured claim or claims of the objecting parties, even if valid, can be sorted out and, if allowed, paid from the Liquidating Trust Assets under the Plan.

B. <u>Fareportal Objection Must Be Overruled</u>

7. Fareportal Objection does not raise any issue that would prevent this Court from confirming the Plan and, in any event, should be overruled for the reasons stated below. In its objection, Fareportal summarizes its three arguments as follows:

> Fareportal seeks protective language in the confirmation order that (1) retains Fareportal's rights vis a vis the Debtor and the Sale Order, (2) clarifies that nothing in the Plan shall impair Fareportal's pending and future litigation against

[5] NK's Proof of Claim filed on April 6, 2016 clearly states in response to question No. 9 that no part of the claim is secured. Similarly, Fareportal's Proof of Claim filed October 3, 2016 clearly states in response to question No. 9 that no part of the claim is secured.

> Travana on causes of action that may or may not be related to the bankruptcy case – i.e. including based on property that may have been transferred under the Sale Order, and (3) clarifies that the exculpation and third-party release provisions of the Plan do not apply to bind Fareportal.

Fareportal Objection at 2. Each of these three arguments put forward by Fareportal are examined separately below and should be overruled by this Court.

8. Fareportal's first request that the order confirming the Plan (the "Confirmation Order") contain language that "retains Fareportal's rights vis a vis the Debtor and the Sale order" does not make sense and, in any case, is unnecessary and, practically speaking, impossible. Under the Plan, all assets of the Debtor are to be transferred to the Liquidating Trust on the Effective Date and the Debtor is to be dissolved shortly thereafter. As such, why would Fareportal want to retain rights against an entity – the post-confirmation Debtor with no assets – that is being dissolved? With respect to the Sale Order, that order is a final order, and no party appealed it or sought a stay of that order and the sale transaction closed. Accordingly, the parties affected by the final Sale Order will continue to have whatever rights they have under the Sale Order, and no clarification of the Sale Order is necessary under the Confirmation Order.

9. Fareportal's second request is that confirmation of the Plan should not impair its rights vis a vis Travana - a non-debtor third party. On one hand, Fareportal acknowledges that confirmation of the Plan does not, and cannot, do this. *See* Fareportal Objection at p. 2. Indeed, nothing in the Plan affects any rights of a third party non-debtor (such as Fareportal) against another third-party non-debtor (such as Travana). On the other hand, Fareportal still requests additional "comfort" language in the Confirmation Order clarifying what Fareportal already admits is the case under applicable law. This is not a valid confirmation objection, and there is no need to further amend the Plan, or add language to the Confirmation Order, because nothing

in the Plan or the proposed Confirmation Order can or does impair Fareportal's independent rights against Travana.

10. Fareportal's third request deals with the exculpation / release provisions of the Plan. As set forth more fully in Section III below, the exculpation / release language in the Plan is appropriate and confirmable, and there is no reason for it to be amended. That said, nothing in the Plan's exculpation and releases provisions is designed to protect Travana. If the Court determines that the Plan's language is ambiguous, however, the Debtor is prepared to add express language that nothing in the Plan exculpates or releases Travana.

C. Koklonis Objection Should Be Overruled

11. Much like the Fareportal Objection, the Koklonis Objection also tries to use the Confirmation Hearing as an improper forum to reargue and revisit this Court's Sale Order. While it is unclear what sort of "interest" NK argues he had in the Estate's property that was sold back in November 2015, it is certain that NK did not have a validly perfected security interest in the Estate's property that could attach to the sale proceeds. No admissible evidence of such security interest was attached to NK's proof of claim or any other document filed with this Court.[6] Indeed, and as set forth in the Declaration of Brian S. Weiss, a search of UCC-1 filings for Airfasttickets, Inc. shows that NK has no perfected security interest in the Debtor's property.

12. Knowing that he cannot meet his burden of proving a perfected security interest in property of Estate, NK argues, without any documentary support, that some portion of the property sold under the Sale Order was actually not Estate's property but was somehow owned by NK. Indeed, NK's argument is much the same as Fareportal's argument that somehow the

[6] The Debtor's objection to NK's proof of claim in the amount of over $45.9 million was set on notice for a hearing concurrently with the Confirmation Hearing because the Debtor does not believe NK has a valid claim and, as such, did not want NK's claim to affect the creditors' voting in support of the Plan. Evidently, NK failed to vote his proof of claim either in favor or against the Plan.

Sale Order improperly effectuated the sale of non-estate property (which it did not). This contention, however, is belied by the language of the Sale Order and the black letter law, as discussed next.

13. The Sale Order is clear that "as of the Closing, the transfer of the Property to Buyer will be a legal, valid and effective transfer of the Property, and *will vest Buyer with all right title and interest of the Debtor in and to the Property,* free and clear of all claims." Sale Order at ¶ O (emphasis added). Moreover, the term "Property" is defined as "all of the *Debtor's* intellectual property and software and certain related assets". *See* Sale Motion at ¶ 29 (emphasis added). Pursuant to footnote 1 of the Sale Order, this definition of the term "Property" is specifically incorporated by the Sale Order. *See* Sale Order at fn. 1. As such, the only thing sold pursuant to the Sale Order was property of the Estate, and the Sale Order simply did not and could not authorize the transfer and sale of anything that was owned by NK (or Fareportal).

14. If there was any doubt regarding the language of the Sale Order, the applicable case law is also clear that a bankruptcy sale can only effectuate property of the estate because the Bankruptcy Court's jurisdiction only extends to property of the bankruptcy estate.

> The filing of a bankruptcy case does not, and cannot, give a debtor or its creditors greater rights in property than the debtor had prior to bankruptcy. As a result, the Bankruptcy Court's jurisdiction does not extend to property that is not part of a debtor's estate, and even a confirmed bankruptcy plan cannot furnish anyone rights to what was not property of the debtor's estate. Thus, the Bankruptcy Court could not have passed title to the '773 patent if [the debtor] had no title to pass.

TM Patents, L.P. v. International Business Machines Corp., 121 F.Supp.2d 349 (S.D.N.Y. 2000) (internal citations and quotations omitted). As such, any argument that NK somehow has an interest in the proceeds of the sale authorized by the Sale Order because NK held an interest in the property sold must be overruled since the proceeds of

the sale could only have derived from the sale of Estate property pursuant to the terms of the Sale Order and applicable law.

II. THE PLAN SHOULD BE CONFIRMED BECAUSE IT SATISFIES 11 U.S.C. § 1129

A. The Plan Satisfies the Necessary Provisions of 11 U.S.C. § 1129(a)

15. Section 1129(a) governs confirmation of chapter 11 plans. As set forth more fully below, the Plan meets all requirements of 11 U.S.C. § 1129(a) except for Section 1129(a)(8)[7] and those provisions that are inapplicable to this case and therefore irrelevant.

i. The Plan Complies With Section 1129(a)(1)

16. Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of 11 U.S.C. § 1129(a)(1) explains that this provision encompasses the requirements of 11 U.S.C. §§ 1122 and 1123 governing classification of claims and contents of a plan, respectively. H.R. REP. NO. 95-595, at 412 (1977); S. REP. NO. 95-989, at 126 (1978); *see also In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986); *In re Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

17. As shown below, the Plan complies with the requirements of 11 U.S.C. §§ 1122 and 1123 (as well as all other applicable provisions of the Bankruptcy Code).

ii. The Plan Complies With the Requirements of Bankruptcy Code Section 1122

18. Section 1122 provides that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to other claims or interests of such

[7] The Plan can be confirmed, however, notwithstanding the failure to satisfy the provisions of 11 U.S.C. § 1129(a)(8) pursuant to the "cramdown" provisions of 11 U.S.C. § 1129(b), as described in more detail in Section II.(B) below.

class." 11 U.S.C. § 1122(a). By its plain language, Section 1122 prohibits only the classification of dissimilar claims in the same class. *See* 7 COLLIER ON BANKRUPTCY, ¶ 1122.03[1][a] (Alan N. Resnick & Henry J. Summer eds., 16th ed.). As a result, courts have broad discretion to determine the propriety of classification schemes in light of the facts of each case. *See Steelcase Inc. v. Johnston (In re Johnston)*, 21 F.3d 323, 327 (9th Cir. 1994) ("bankruptcy court judges must have discretionary power in classifying claims under § 1122(a)"). In addition, § 1122(b) expressly permits the separate classification of certain claims for purposes of administrative convenience. 11 U.S.C. § 1122(b).

19. Plan proponents are given broad discretion to classify claims in a chapter 11 reorganization plan. *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994); *In re Multiut Corp.*, 449 B.R. 323, 335 (Bankr.N.D.Ill. 2011); *In re 11, 111, Inc. dba Energy Conservation Consultants*, 117 B.R. 471, 476 (Bankr.D.Minn. 1990) ("§ 1122 authorizes flexibility in classification consistent with the rehabilitative purposes of chapter 11."). While a plan proponent may not separately classify claims solely in order to gerrymander an affirmative vote on reorganization, claims may be classified separately if "significant disparities exist between the legal rights of the holder[s of the different claims] which render the two claims not substantially similar." *Id.* at 318. Claims may also be separately classified if there are "good business reasons" to do so or if the claimants have sufficiently different interests in the plan. *See In re U.S. Truck Co.*, 800 F.2d 581, 583-87 (6th Cir. 1986); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1166-67 (5th Cir. 1993), cert. denied, 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993).

20. Here, the Plan properly classifies claims in classes that group together substantially similar claims or interests as required by Section 1122. NK argues in his objection

that the Plan fails to "separately classify the holders of Replacement Interests" and therefore should not be confirmed. This argument fails because the Claims Bar Date passed and there are no secured claims other than the secured claim of American Contractors Indemnity Company, which is properly and separately classified as required by Section 1122 of the Bankruptcy Code. The Bottom line is that NK's claim, subject to pending objection, is, on its face, a simple general unsecured claim and is properly classified as such. Therefore the Plan satisfies Section 1122 of the Bankruptcy Code.

iii. The Plan Satisfies the Mandatory Requirements of Section 1123(a)

21. *Section 1123(a)(1)*: Section 1123(a)(1) requires that a plan designate classes for all claims and interests, other than the types of claims specified in 11 U.S.C. § 507(a)(2) (administrative expense claims), 507(a)(3) (claims arising during the "gap" period in an involuntary bankruptcy case) and 507(a)(8) (priority tax claims). 11 U.S.C. § 1123(a)(1). As is noted above, Article III of the Plan complies with this requirement by expressly classifying all claims against the Debtor, other than administrative claims and priority tax claims, which are unclassified.

22. *Section 1123(a)(2):* Section 1123(a)(2) requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Because Article III of the Plan specifically identifies each Class that is not impaired, this requirement is also satisfied.

23. *Section 1123(a)(3):* Section 1123(a)(3) requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article IV of the Plan provides the specific treatment of each Class of Claims or Interests under the Plan. As such this Section is satisfied.

24. *Section 1123(a)(4):* Section 1123(a)(4) requires that a plan provide that each claim or interest in a particular class receive the same treatment as other members of the same class. Article IV of the Plan satisfies this requirement by providing that each Claim that is classified in a particular Class under the Plan will receive the same treatment as the other Claims included in such Class. As such, there is no discrimination of creditors within a particular Class.

25. *Section 1123(a)(5):* Section 1123(a)(5) requires that a plan "provide adequate means for the plan's implementation," and sets forth examples of typical means for implementing a plan. 11 U.S.C. § 1123(a)(5). The Plan satisfies this requirement by setting forth specific means for its implementation in Article V entitled "Implementation of the Plan." Moreover, the Confirmation Declarations filed concurrently herewith further describe how the Plan will be implemented and assures that it is feasible.

26. *Section 1123(a)(6):* Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of non-voting equity securities and requires that reorganized debtors' charters so provide. Here, the Plan does not provide for the issuance of non-voting equity securities and so this Section is inapplicable.

27. *Section 1123(a)(7):* Section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Here, Article V of the Plan provides that all officers and directors will be deemed to have resigned as of the Effective Date and that the Liquidating Trustee will have the power of an officer of the Debtor. As such, the Plan complies with this Section.

28. *Section 1123(a)(8):* Section 1123(a)(8) requires that, in a case in which the debtor is an individual, the plan provides for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan. 11 U.S.C. § 1123(a)(8). Here, the Debtor is not an individual and so this Section is inapplicable.

iv. The Plan Complies with Section 1129(a)(2)

29. Section 1129(a)(2) requires that a plan "compl[y] with the applicable provisions" of the Bankruptcy Code, which is generally intended to ensure that a plan proponent has complied with the requirements of the Bankruptcy Code governing the solicitation of acceptances of a plan. *See In re Texaco Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988).

30. Here, as set forth in Keven A. Martin's Affidavit of Service [Doc. No. 201] filed on August 26, 2016, the Plan Proponent fully complied with this Court's Disclosure Statement Order and particularly its provisions governing the service of the Solicitation Package and solicitation of the Plan. Thus, the Plan Proponent submits that Section 1129(a)(2) is satisfied.

v. The Plan Complies with Section 1129(a)(3)

31. Section 1129(a)(3) requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although not defined by the Bankruptcy Code, "good faith" has been described to include (i) a showing the plan was proposed with honesty and good intentions, *see Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2nd Cir. 1988), and (ii) the existence of a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code, *Traders State Bank v. Mann Farms, Inc. (In re Mann Farms, Inc.)*, 917 F.2d 1210, 1214 (9th Cir. 1989) (interpreting analogous provision under chapter 12); *see also In re Nite Lite Inns*, 17 B.R. 367, 370 (Bankr.

S.D. Cal. 1982). Moreover, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Id.*

32. The objective of the Plan Proponent here in proposing the Plan has been to appropriately conclude this chapter 11 case and provide for a fair distribution to the creditors. *See* Confirmation Declarations. Given its objective and terms, there is substantial evidence in front of this Court that the Plan has been proposed in good faith and not by any means forbidden by law, and therefore it complies with Section 1129(a)(3) of the Bankruptcy Code.

vi. The Plan Complies with Section 1129(a)(4)

33. Section 1129(a)(4) of the Bankruptcy Code requires that payments "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case," be approved by the Court as reasonable. 11 U.S.C. § 1129(a)(4). In other words, 11 U.S.C. § 1129(a)(4) requires that the Court review and approve any payments on account of non-ordinary course administrative fees and expenses. *See e.g. In re Resort Int'l, Inc.*, 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990); *In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (Bankruptcy Code section 1129(a)(4) satisfied where plan provides for payment of "allowed" administrative expenses); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988). Pursuant to Article II of the Plan, each Estate professional must file and serve an application for final allowance of compensation and reimbursement of expenses no later than 60 (60) days after the Confirmation Date and, pursuant to the Bankruptcy Code, only the amount of fees allowed by the Court will be required to be paid. Accordingly, this Section is satisfied.

vii. The Plan Complies with Section 1129(a)(5)

34. Section 1129(a)(5) requires that (i) the plan proponent disclose the identity of any individual that will serve after confirmation of the plan as a director, officer, or voting trustee of the debtor or that will be a successor to the debtor under the plan and that the appointment of any such individual be consistent with the interests of creditors and shareholders and public policy and (ii) the plan proponent disclose the identity of any insider that will be employed by the reorganized debtor and the nature of the compensation that they will receive. 11 U.S.C. §§ 1129(a)(5)(A), (B). This Section is satisfied because the Plan and the Liquidating Trust Agreement specifies that the Debtor will be dissolved and that Adam Meislik will be appointed as the Liquidating Trustee. *See* Plan, Article V.

viii. Section 1129(a)(6) is Inapplicable

35. Bankruptcy Code Section 1129(a)(6) requires that any regulatory commission with jurisdiction over the rates of a debtor approve any changes in rate regulations provided in a Plan. 11 U.S.C. § 1129(a)(6). Because the Debtor is not subject to any such regulation and the Plan does not propose any such rate changes, 11 U.S.C. § 1129(a)(6) is inapplicable and therefore consent from a regulatory agency is not required.

ix. The Plan Complies with Section 1129(a)(7)

36. Bankruptcy Code section 1129(a)(7) requires that, with respect to each class of impaired claims or interests under a plan, every holder of a claim or interest in such impaired class either (i) accept the Plan, or (ii) receive or retain property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7). Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test." Under the best interests test, the court "must find that each [non-accepting] creditor will receive or retain value

that is not less than the amount he would receive if the debtor were liquidated [under chapter 7 of the Bankruptcy Code]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 440 (1999); *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228 (1996). The best interests test focuses on individual dissenting creditors rather than classes of claims. *See 203 N. LaSalle St. P'ship*, 526 U.S. at 440.

37. Here, the liquidation analysis attached to the Disclosure Statement as Exhibit B and explicitly incorporated by reference and adopted by the Declaration of Brian S. Weiss filed concurrently herewith shows in detail that creditors under the plan will receive or retain value that is not less than the amount such creditor would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. Additionally, in chapter 7, distributions to creditors, if any, would be delayed due to, among other things: (a) the setting of a new bar date for the filing of proofs of claim, which could also result in the filing of additional claims and thus reduce distribution to creditors, (b) the chapter 7 trustee and his professionals getting up to speed in this case and the preparation of the chapter 7 trustee's final reports to the United States Trustee, and (c) the administrative activities of the United States Trustee and the Court's clerk's office in connection with, among other activities, converting and closing this case. A such, Section 1129(a)(7) of the Bankruptcy Code is satisfied.

x. <u>The Plan Does Not Meet the Requirements of Section 1129(a)(8), but Can Still Be Confirmed Pursuant to Section 1129(b)</u>

38. Section 1129(a)(8) requires that each class of claims and interests established under a plan either accept the plan or not be impaired under the plan. 11 U.S.C. § 1129(a)(8). A class of claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of claims in that class vote to accept the plan, counting only those claims

whose holders actually vote. *See* 11 U.S.C. § 1126(c); *see also* § 1126(d) (governing classes of interests).

39. Here, a review of the Plan's treatment of each Class of Claims shows that Class 1 is unimpaired. Classes 2-A, 2-B, 3, and 4, however are impaired. Moreover, because Class 3 (Existing Equity Interests) receive nothing under the Plan and are being cancelled, Class 3 is deemed to reject the Plan. Accordingly, notwithstanding the fact that all Classes that were entitled to vote on the Plan voted overwhelmingly in favor of the Plan, the Plan nevertheless fails to satisfy Section 1129(a)(8) because the Class of Existing Equity Interests are impaired and deemed to reject the Plan. Despite the failing to satisfy Section 1129(a)(8) of the Bankruptcy Code, however, the Plan may still be confirmed pursuant to 1129(b) as set forth more particularly below in Section II.(B).

xi. The Plan Complies with Section 1129(a)(9)

40. Bankruptcy Code Section 1129(a)(9) provides that, unless the holder of a claim agrees to a different treatment of its claim:

> (A) the holder of a claim entitled to priority under section 507(a)(2) or (3) must receive cash equal to the allowed amount of its claim on the effective date of the plan;
>
> (B) the holder of a claim entitled to priority under section 507(a)(1), (4), (5), (6), or (7) must receive either cash in the allowed amount of such claim on the effective date of the plan or deferred cash payments of a value, as of the effective date, equal to the allowed amounts of such claim; and
>
> (C) the holder of a tax claim entitled to priority under section 507(a)(8) must receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a

> value, as of the effective date of a plan, equal to the allowed amount of such claim.

11 U.S.C. § 1129(a)(9).

41. The Plan's proposed treatment of Administrative Expense Claims; Professional Compensation and Reimbursement Claims; Priority Tax Claims; and United States Trustee Fees set forth in Article II satisfies the requirements of Bankruptcy Code section 1129(a)(9) by providing for the payment of such claim as required under the Code. With respect to Administrative Expense Claims, the Plan provides that all Allowed Administrative Expense Claims fees and expenses will be paid on or as soon as reasonable practicable after the later of (a) the Effective Date or (b) the date on which such Administrative Expense Claim becomes Allowed by Final Order. *See* Plan, Article II.

42. With respect to Professional Compensation and Reimbursement Claims, the Plan provides that such Claims shall be paid in full in such amounts as are Allowed by the Bankruptcy Court (A) on the date on which the order relating to any such Professional Compensation and Reimbursement Claim is entered or (B) upon such other terms as may be mutually agreed upon between the holder of such Professional Compensation and Reimbursement Claim and the Liquidating Trustee. *See* Plan, Article II. With respect to post-petition tax liabilities, the Debtor believes that all post-petition tax claims have been paid as they come due. However, certain taxing authorities conduct audits which may result in a post-petition tax liability and such liabilities will be paid when/if they become due. *See* Plan, Article II.2.3. With respect to United States Trustee Fees, all fees payable pursuant to § 1930 of title 28 of the United States Code and any applicable interest thereon pursuant to section 3717 of title 31 of the United States Code that

are due and payable as of the Confirmation Date shall be paid on the Confirmation Date. Based on the foregoing the Trustee asserts that the Plan satisfies Section 1129(a)(9).

xii. The Plan Complies with Section 1129(a)(10)

43. Section 1129(a)(10) requires that at least one class of claims that is impaired under the plan has voted to accept the plan, determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10). As stated in the *Declaration of the Debtors' Voting Agent Regarding Solicitation and Tabulation of Votes in Connection with the Debtor's First Amended Chapter 11 Plan of Liquidation* [Doc. No. 233] filed on October 6, 2016, all Classes entitled to vote on the Plan have accepted it and overwhelmingly have voted in favor of the Plan. As such, the Plan complies with Section 1129(a)(10).

xiii. The Plan Complies with Section 1129(a)(11)

44. Section 1129(a)(11) requires a court to find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). The plan must present only "a reasonable probability of success." *In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir. 1986); *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the Plan offers a reasonable assurance of success. Success need not be guaranteed."). "The mere potential for failure of the Plan or the prospect of financial uncertainty is insufficient to disprove feasibility." *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756, 762 (Bankr. D. Nev. 1998) (citing *In re Drexel Lambert Group, Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992)). In short, "the test is whether the things which are to be done after confirmation can be done as a practical matter under the facts…." (*S&P, Inc. v Pfeifer*, 189 B.R. 173, 183 (N.D. Ind.) (*quoting In re Bergman*, 585 F. 2d 1171, 1179 (2nd Cir. 1978)). Here,

because the Confirmation Declarations filed concurrently herewith show that the Debtor has sufficient funds to make all payments under the Plan, this Section is satisfied and the feasibility requirements of 11 U.S.C. § 1129(a)(11) are satisfied.

xiv. The Plan Complies with Section 1129(a)(12)

45. Section 1129(a)(12) requires that a plan provide that all fees payable under 28 U.S.C. § 1930 (consisting primarily of quarterly fees owing to the United States Trustee) be paid on or before the effective date of the plan. Here, Article II.2.4 of the Plan provides for the payment of all such fees. Thus, the Plan complies with 11 U.S.C. § 1129(a)(12).

xv. Section 1129(a)(13) Is Inapplicable

46. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. The Debtor does not have any present obligations to pay retiree benefits within the meaning of 11 U.S.C. § 1129(a)(13). Thus, this Section is inapplicable.

xvi. Section 1129(a)(14) Is Inapplicable

47. Section 1129(a)(14) requires that, if applicable, the debtor pay all domestic support obligations. Here, because the Debtor is a corporation and is not required by any judicial or administrative order to pay domestic support obligations, this Section is inapplicable.

xvii. Section 1129(a)(15) Is Inapplicable

48. Section 1129(a)(15) provides that "[i]n a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of plan" that such individual chapter 11 debtor pay all unsecured claims in full *or* that the debtor's plan devote an amount equal to five years' worth of the debtor's projected disposable income to unsecured creditors. Here the Debtor is not an individual and therefore this Section is inapplicable.

xviii. Section 1129(a)(16) Is Inapplicable

49. Section 1129(a)(16) requires that transfers of property under the plan shall be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. While a "plausible reading can be put forward that the provision seems to apply to all transfers, and then imposes on all such transfer the same restrictions place on transfers by nonprofit entities, Congress was clear that this provision was meant to 'restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust.'" 7 COLLIER ON BANKRUPTCY, ¶ 1129.02[16] (16th ed. 2011). "It keeps in place the state law restrictions on such nonprofit entities, and buttresses this rule by giving standing to state attorneys general to raise this issue." *Id.* Thus, this Section is inapplicable as the Plan calls for no such transfers after Plan confirmation.

B. The Plan Satisfies the "Cramdown" Requirement of 11 U.S.C. § 1129(b) with Respect to Class 3 and Should Be Confirmed Notwithstanding the Failure to Satisfy 11 U.S.C. § 1129(a)(8) with Respect to Such Class

50. Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met other than Section 1129(a)(8), a plan may be confirmed so long as the requirements set forth in section 1129(b) are satisfied. To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8)), the plan proponent must show that the plan "does not discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes. *See Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477, 480 (2d Cir. 1994), cert. denied, 513 U.S. 1109 (1995). Here, Class 3 (Equity Interests in the Debtor) receive nothing under the Plan and therefore are deemed to reject the Plan. As set forth below, however, because the Plan does not

unfairly discriminate and is fair and equitable with respect to Class 3, the Plan satisfies the "cramdown" requirements with respect to Class 3 and the Plan should be confirmed.

i. The Plan Does Not Unfairly Discriminate with respect to Class 3 Existing Equity Interests

51. While the Bankruptcy Code does define "unfair discrimination", courts typically examine the facts and circumstances of the particular case to make a case by case determination. *See e.g. In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) ("[Courts] have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination"). That said, courts typically find unfair discrimination in violation of section 1129(b) only if said plan provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so. *See, e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y 1986). Here, because the Plan only has one Class of equity holders and all equity holders of the Debtor are treated the same way, the Plan does not unfairly discriminate with respect to Class 3 (or any other Class) and satisfies the requirements of Section 1129(b) that it not discriminate unfairly. Thus, the Plan is fair and equitable and meets the "cramdown" requirements of Section 1129(b) of the Bankruptcy Code.

ii. The Plan is Fair and Equitable with Respect to Class 3

52. A plan is "fair and equitable" with respect to an impaired class of equity interests if "the holder of any interest that is junior to the interest of such class will not receive or retain under the plan on account of such junior interest any property." 11 U.S.C. § 1129(b)(2)(C0(ii). Here, where all equity interests are being cancelled pursuant to the Plan, it is clear that no interest junior to the Class 3 Existing Equity Interests will receive or retain anything under the

Plan. Thus, the Plan is fair and equitable and meets the "cramdown" requirements of Section 1129(b) of the Bankruptcy Code.

C. Sections 1129(c) and (d) of the Bankruptcy Code Are Not Applicable and the Plan Should Be Confirmed

53. Section 1129(c) is applicable to instances where there are competing plans. Here, where no other party has filed a plan, this section of the Bankruptcy Code is not applicable, and the Plan should be confirmed.

54. Section 1129(d) only applies when there has been a "request of a party in interest that is a governmental unit." 11 U.S.C. § 1129(d). Here, no governmental unit (or any other party) has objected on grounds that Section 1129(d) is not satisfied. As such this section is not applicable. In any case, the Confirmation Declarations provide that the principal purpose of the Plan is not the avoidance of taxes of the avoidance of the application of Section 5 of the Securities Act of 1933. Thus, the Plan should be confirmed.

D. The Releases Contained in the Plan Are Appropriate

55. The Plan contains certain exculpation / release provisions in Article X Sections 10.6, 10.9 and 10.10. These provisions exculpate and release the Debtor, the Receiver, and other Estate professionals and their affiliated parties from claims other than "bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud, or self-dealing, or, in the case of an attorney professional and as required under Rule 1.8(h)(1) of the New York State Rules of Professional Conduct or other applicable rule, malpractice." These provisions are intended to prevent collateral litigation against Estate fiduciaries and other parties who acted in good faith to facilitate the chapter 11 case and confirmation of the Plan. Moreover, pursuant to the language of such exculpation / release provisions, they only exculpate and/or release claims that would have been held by the Debtor or Holders of Claims or Interests.

56. In the Southern District of New York, courts regularly approve plan exculpation provisions.[8] The analysis is no different for plans of liquidation.[9] When considering such provisions, courts focus on whether the beneficiaries of the exculpatory provision participated in good faith in negotiating the plan and bringing it to fruition. *See Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 503 (Bankr. S.D.N.Y. 2005) (explaining that the absence an exculpation provision would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition"). An exculpatory provision does not release all claims—instead, it sets a standard of care for willful misconduct and gross negligence for subsequent litigation related to acts arising out of the Chapter 11 process. *Id.* at 501 (explaining that exculpation provision was appropriate due, in part, to its exclusion for gross negligence and willful misconduct); *see also, In re DBSD N. Am., Inc.*, 419 B.R. 179, 219 (Bankr. S.D.N.Y. 2009) ("No release is provided for gross negligence, willful misconduct, fraud, or criminal conduct, and the release covers only conduct in connection with the chapter 11 cases. The language of the exculpation clause substantially conforms to the language that has become standard in this Circuit."), *aff'd*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part on other grounds*, 627 F.3d 496 (2d Cir. 2010).

57. Here, the exculpation / release provisions are narrowly tailored and appropriate and, as such, should be approved. The only parties objecting to the release provisions are

[8] *See, e.g., Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 503 (Bankr. S.D.N.Y. 2005) (expressing approval of plan's exculpation provision precluding liability for, among other things, "any act taken or omitted to be taken in connection with and subsequent to the commencement of the chapter 11 cases"); *In re AMR Corp.*, No. 11-15463 (SHL) (Bankr. S.D.N.Y. Oct. 22, 2013) (Lane, J.) (confirming plan with exculpatory provision); *In re Terrestar Corp., Case No.* 11-10612 (Bankr. S.D.N.Y. Oct. 24, 2012) (Lane, J.) (finding that plan's exculpation provision is appropriate "because it is part of a Plan proposed in good faith, was vital to the Plan formulation process and is appropriately limited in scope"); *In re Jobson Med. Info. Holdings LLC*, No. 12-10434 (SHL) (Bankr. S.D.N.Y. Mar. 5, 2012) (Lane, J.) (approving plan with exculpatory provision).

[9] *See, e.g., In re Last Mile, Inc.*, No. 11-14769 (SHL) (Bankr. S.D.N.Y.) (Lane, J.) (confirming plan of liquidation with exculpatory provision); *In re Borders Grp.*, No. 11-10614 (MG) (Bankr. S.D.N.Y. Dec. 21, 2011) (Glenn, J.) (same); *In re Finlay Enterprises, Inc.*, No. 09-14873 (JMP) (Bankr. S.D.N.Y. June 29, 2010) (Peck, J.) (same); *In re Advance Watch Co. Ltd.*, No. 15-12690 (MG) (Bankr. S.D.N.Y. Jan. 25, 2016) (Glenn, J.) (same).

Fareportal (and NK who joined in the Fareportal Limited Objection). Of course, Fareportal just recently filed its proof of claim on October 3, 2016, and therefore its standing to object to confirmation is dubious at best[10] and Fareportal's objection to the exculpation / release language only appears to be concerned that such provisions may release the third party buyer of the Debtor's assets – something which is contrary to the express language contained in the Plan. As such, all creditors and interested parties, other than Fareportal and NK, have either (i) specifically and affirmatively consented to the Plan's exculpation / release provisions[11] or not objected to such provisions. As such, the Plan, including the exculpation / release provisions, should be confirmed.

[*remainder of page intentionally left blank*]

[10] *See In re W.R. Grace & Co.*, 475 B.R. 34, 176–77 (D. Del. 2012), *aff'd sub nom. In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013), *aff'd*, 532 F. App'x 264 (3d Cir. 2013), *aff'd*, 729 F.3d 311 (3d Cir. 2013), *aff'd sub nom. In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013) ("a party challenging a reorganization plan in bankruptcy court must meet both the constitutional requirements for standing under Article III of the U.S. Constitution, as well as the statutory standing requirements put forth by the Bankruptcy Code in 11 U.S.C. § 1109(b)."). *See also In re Comcoach Corp.*, 698 F.2d 571, 573-74 (2d Cir. 1983) (holding that the bank was not a "party in interest" within the meaning of the Bankruptcy Code because it had no right to payment from the bankrupt); In re Gulf States Long Term Acute Care of Covington, LLC, 487 B.R. 713, 726 (Bankr. E.D. La. 2013) ("Only 'a party in interest' has standing to object to confirmation of a plan. Generally, noncreditor third parties lack standing to object to confirmation of a plan.").

[11] As set forth in the *Declaration of the Debtor's Voting Agent Regarding Solicitation and Tabulation of Votes in Connection with the Debtor's First Amended Chapter 11 Plan of Liquidation* [Doc. No. 233], the ballots received in favor of the Plan contained an option to specifically opt in to the exculpation / release provisions of the Plan and the vast majority of creditors who voted on the Plan did so.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an order (1) overruling the Fareportal Objection; (2) overruling the Koklonis Objection; (3) confirming the Debtor's Plan; and (4) grant such further relief as may be just and proper.

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New York, New York

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