IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
CONEXANT SYSTEMS, INC., *et al.*,[1]	)	Case No. 13-10367 (MFW)
	)	Jointly Administered
Debtors.	)	**Re: Docket Nos. 206**

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF AN ORDER CONFIRMING THE SECOND MODIFIED JOINT PLAN OF REORGANIZATION OF CONEXANT SYSTEMS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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Dated: May 31, 2013

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: Conexant Systems, Inc. (9439); Conexant CF, LLC (6434); Brooktree Broadband Holding, Inc. (5436); Conexant, Inc. (8218); and Conexant Systems Worldwide, Inc. (0601). The Debtors' main corporate address is 1901 Main Street, Suite 300, Irvine, California 92614.

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Conexant Systems, Inc. ("***Conexant***") and its debtor affiliates, as debtors and debtors in possession in the above-captioned Chapter 11 Cases[2] (each, a "***Debtor***" and, collectively, the "***Debtors***"), by and through their undersigned counsel, hereby submit this memorandum of law in support of confirmation of the *Second Modified Joint Plan of Reorganization of Conexant Systems, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (as modified, amended or supplemented from time to time, the "***Plan***") [Dkt. Nos. 12, 190, 206] and respectfully state as follows:

Preliminary Statement

1. The Debtors respectfully submit that the Plan should be confirmed.[3] In addition to complying with the applicable provisions of the Bankruptcy Code, the Plan is the result of extensive, good faith, arm's-length negotiations among the Debtors, its sole prepetition secured lender, QP SFM Capital Holdings Limited, an entity managed by Soros Fund Management LLC (the "***Secured Lender***"), Golden Gate Private Equity, Inc. ("***Golden Gate***"), August Capital ("***August***," and together with Golden Gate, the "***Equity Sponsors***") and the official committee of unsecured creditors (the "***Creditors' Committee***"). The Plan, which the Debtors seek to consummate in less than 100 days, embodies a global settlement that maximizes value for all of the Debtors' stakeholders. And most importantly, the Plan has unanimous consent of all creditors that voted.

2. Before these chapter 11 cases, the Debtors, through the support of their advisors and the Equity Sponsors, and in close consultation with the Secured Lender, marketed their

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2 Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the Plan.

3 Unless otherwise indicated herein, any reference to or citation of a statute is to title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "***Bankruptcy Code***").

assets in the quest to maximize value and stakeholder recoveries. In addition to the formal marketing process, the Debtors explored and considered various restructuring alternatives, including the exploration of out of court restructuring transactions. Following the marketing process, and after extended negotiations with the Secured Lender, the Debtors (through the advice and counsel of their advisors and the Equity Sponsors) determined that value would be maximized through a chapter 11 plan that not only accomplished a significant deleveraging, but also provide for the payment of administrative and priority claims as part of any chapter 11 case. In the end, and notwithstanding the Secured Lender's desire to move forward with a sale transaction pursuant to section 363 of the Bankruptcy Code, the Debtors and the Equity Sponsors were able to successfully negotiate the framework for a stand-alone restructuring that would inure to the benefit of all stakeholders and enable the Debtors to restructure swiftly and ensure satisfaction of all chapter 11-related administrative costs and expenses.

3. As described more fully herein, the Plan provides for, among other things, the conversion of $194 million of debt into 100% of the new common stock in the Reorganized Debtors and $76 million in non-recourse, unsecured notes issued by a new holding company. Additionally, the Secured Lender has agreed to provide $15 million of working capital for the Reorganized Debtors in addition to the $15 million in debtor in possession financing that was provided in connection with the commencement of these cases. Moreover, the Plan provides for a $2.9 million distribution to be made for the benefit of unsecured creditors, together with the Secured Lender's agreement to waive its unsecured deficiency claim totaling $114.5 million.[4]

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[4] As discussed in the First Day Declaration (defined herein), as of the Petition Date, the Secured Lender held approximately $175 million of secured notes, plus accrued interest.

4. As of the filing of this memorandum of law there are no unresolved objections to confirmation of the Plan, and the two classes of creditors entitled to vote on the Plan — Class 3-Secured Notes Claims and Class 4-General Unsecured Claims — unanimously voted to accept the Plan.[5]

5. In support of confirmation, the Debtors have filed concurrently herewith the *Declaration of Shawn Hassel in Support of Confirmation of the Second Modified Joint Plan of Reorganization of Conexant Systems, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "***Hassel Declaration***"), a copy of which is attached hereto as **Exhibit B**.

6. This memorandum, together with the Hassel Declaration, establishes that the Plan meets the confirmation requirements under section 1129 of the Bankruptcy Code. Among other things, the Plan is fair, reasonable and economically feasible, and all creditors and interest holders will receive more under the Plan than they would in a chapter 7 liquidation. Thus, the Plan should be confirmed.

Background

Commencement of the Chapter 11 Cases

7. Conexant is a market leader in the semiconductor (*i.e.*, microchip) industry, providing innovative technology to some of the world's largest consumer and commercial electronics manufacturers. For over fifty years, Conexant and its predecessor entities have been at the forefront of communications, audio, video and imaging technology. Unfortunately, a combination of business divestitures and associated declining revenue, increasing costs

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[5] *See Declaration of Brad Daniel on Behalf of BMC Group, Inc., Regarding Solicitation and Tabulation of Ballots Accepting and Rejecting the Debtors' Second Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code*, dated May 30, 2013 [Docket No. 271] (the "***Voting Certification***").

(including over-market, underutilized legacy lease obligations) and significant debt obligations overburdened Conexant, necessitating commencement of these chapter 11 cases on February 28, 2013 (the "***Petition Date***").

8. The Debtors commenced these "pre-arranged" chapter 11 cases after several months of arm's length, good faith negotiations with the Secured Lender, the Equity Sponsors and their respective advisors to explore strategic options to achieve a restructuring of the Debtors' prepetition debt obligations. As a result of those efforts, on the Petition Date, the Debtors, the Secured Lender and the Equity Sponsors entered into a restructuring support agreement (the "***RSA***")[6] and filed the Plan.

9. In addition to the debt for equity exchange and new money contribution to be supported and provided by the Secured Lender, the RSA and the Plan contemplated a distribution of $2 million to be shared pro rata among holders of Allowed General Unsecured Claims and a waiver of the Secured Lender's $114.5 million Unsecured Deficiency Claim if holders of General Unsecured Claims voted in favor of the Plan.

10. With respect to the $2 million payment for the benefit of the holders of general unsecured claims, the Secured Lender agreed to the distribution notwithstanding that it believed it had a lien on all assets and was massively impaired. To avoid the administrative costs and potential delay associated with any challenge to the Secured Lender's claimed liens, the Debtors assumed—for purposes of negotiating with the Secured Lender on the terms of the Plan—that the Secured Lender did not have a lien on cash and certain receivables. As a result, and

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6 A copy of the RSA is attached to the *Declaration of Sailesh Chittipeddi, President and CEO of Conexant Systems, Inc. In Support of Chapter 11 Petitions and First Day Pleadings* (the "***First Day Declaration***") [Docket No. 3] as Exhibit B.

consistent with the Liquidation Analysis, the Debtors negotiated with the Secured Lender for a recovery of $2 million (more than the $1.9 million contemplated in the Liquidation Analysis) for holders of Allowed General Unsecured Claims to ensure that the Plan provides a greater distribution for such claimants than would otherwise be in a hypothetical Chapter 7 liquidation.[7]

11. Among other pleadings filed on the Petition Date, the Debtors also filed the *Debtors' Motion for Entry of an Order Authorizing the Rejection of Certain Unexpired Leases, Effective Nunc Pro Tunc to the Petition Date* [Docket No. 18] (the "***Lease Rejection Motion***"), in which the Debtors sought to reject certain leases and subleases. As fully described in the Disclosure Statement, the two landlords and one of the subtenants that were affected by the Lease Rejection Motion objected to the relief requested therein.[8]

Formation of the Creditors' Committee, the Global Settlement and Modified Plan of Reorganization

12. On March 8, 2013, the United States Trustee for the District of Delaware (the "***U.S. Trustee***") appointed the Creditors' Committee [Docket No. 72]. Soon after the formation of the Creditors' Committee, the Debtors and the Secured Lender engaged in several weeks of negotiations and discussions with the Creditors' Committee in an effort to reach overall consensus that would ensure achievement of the milestones under the RSA.

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7 The Debtors determined that any chapter 11 plan would need to provide a distribution of at least $1.9 million to ensure that holders of Allowed General Unsecured Claims received more under the Plan than in a hypothetical Chapter 7 liquidation.

8 *See Objection of ELPF Scranton Road Limited Partnership to Debtors' Motion for Entry of an Order Authorizing the Rejection of Certain Unexpired Leases, Effective Nunc Pro Tunc to the Petition Date* [Docket No. 130]; *and PRES-4340 Von Karmen LP's Objection to Debtors' Motion for Entry of an Order Authorizing the Rejection of Certain Unexpired Leases, Effective Nunc Pro Tunc to the Petition Date* [Docket No. 138]. *Additionally, CCH Incorporated, a Sublease counterparty, filed CCH Incorporated's Limited Objection to Debtors' Motion for Entry of An Order Authorizing the Rejection of Certain Unexpired Leases, Effective Nunc Pro Tunc to the Petition Date* [Docket No. 139].

13. The parties agreed upon a global settlement (the "***Global Settlement***") that consensually resolves all outstanding issues. Specifically, the Global Settlement provides as follows:

a) a $900,000 increase in funds available for holders of Allowed General Unsecured Claims for an aggregate amount of $2.9 million available to such holders (the "***General Unsecured Claim Recovery Pool***"),

b) the formation of a liquidating trust for beneficial holders of the General Unsecured Claim Recovery Pool,[9] pursuant to which the general unsecured claim reconciliation process will be administered; and

c) upon the Effective Date of the Plan, the Secured Lender's waiver of its Secured Notes Deficiency Claim and its right to participate in and/or receive any distribution from the General Unsecured Claims Recovery Pool.

14. In addition, the Debtors, the Creditors' Committee and the Secured Lender worked collaboratively to negotiation a resolution with respect to the Lease Rejection Motion. (including issues related to the subleases subject to the Lease Rejection Motion (the "***Lease Settlement***"). The terms of the Lease Settlement are reflected in the *Agreed Order Resolving the Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Unexpired Leases Effective Nunc Pro Tunc to the Petition Date*, which was entered on May 17, 2013 [Docket No. 255], a copy of which is attached hereto as **Exhibit C**.

15. On April 19, 2013, the Debtors filed the *Disclosure Statement for the Second Modified Joint Plan of Reorganization of Conexant Systems, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 207] (as amended from time to time, the "***Disclosure Statement***") and the *Second Modified Joint Plan of Reorganization of*

[9] A draft of the Liquidating Trust Agreement and Declaration of Trust was included in the Plan Supplement filed in the Plan Supplement on May 13, 2013 [Docket No. 241]

Conexant Systems, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 206], incorporating the terms of the Global Settlement.

16. The Court approved the Debtors' Disclosure Statement on April 19, 2013, and on April 24, 2013, the Debtors commenced solicitation of votes to accept or reject the Plan by distributing the Disclosure Statement to holders of Class 3 Secured Notes Claims and Class 4 General Unsecured Claims.

17. As evidenced in the Voting Certification prepared by BMC Group, Inc. (the "***Voting and Claims Agent***"), the voting results are as follows:

		Percentage Voting to Accept the Plan		**Percentage Voting to Reject the Plan**	
Class	***Claim*/Interest**	**Number**	**Amount**	**Number**	**Amount**
3	Secured Notes Claims	100%	100%	0%	0%
4	General Unsecured Claims	100%	100%	0%	0%

18. After solicitation of the Plan, the Debtors received informal comments from the U.S. Trustee and other parties in interest (described further below). Accordingly, on the date hereof, the Debtors filed the proposed *Findings of Fact, Conclusions of Law and Order Confirming the Second Modified Joint Plan of Reorganization of Conexant Systems, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*, a copy of which is attached hereto as **Exhibit A** (the "***Confirmation Order***"), which incorporates such comments.

Argument

19. The Debtors respectfully submit that the Court should confirm the Plan because it satisfies section 1129 and the other provisions of the Bankruptcy Code and maximizes the value of the Debtors for the benefit of all stakeholders.[10]

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

A. The Plan Complies with the Applicable Provisions of the Bankruptcy Code (§ 1129(a)(1)).

20. Pursuant to section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]."[11] The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan of reorganization, respectively.[12] As explained below, the Plan complies with the requirements of sections 1122 and 1123, as well as other applicable provisions of the Bankruptcy Code.

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

21. The classification requirement of section 1122 provides, in pertinent part, as follows:

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[10] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616 n.23 (Bankr. D. Del. 2001); *see also In re Bally Total Fitness of Greater New York, Inc.*, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) ("The Debtors, as proponents of the Plan, have the burden of proving the satisfaction of the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence.").

[11] 11 U.S.C. § 1129(a)(1).

[12] *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977); *In re S&W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was more directly aimed at were sections 1122 and 1123.").

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.[13]

22. For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class. Instead, claims or interests designated to a particular class must be substantially similar to each other.[14] Courts in this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[15]

23. The Plan's classification of Claims and Equity Interests satisfies the requirements of section 1122 because the Plan places Claims and Equity Interests into seven separate Classes, with each Class differing from the Claims or Equity Interests, as applicable, in each other Class in a legal or factual nature or based on other relevant criteria.[16] Moreover, each of the Claims or

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13 11 U.S.C. § 1122(a).

14 *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (D. Del. 2006).

15 Courts have identified grounds justifying separate classification, including: (a) where members of a class possess different legal rights and (b) where there are good business reasons for separate classification. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (As long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper.); *Matter of Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes); *Frito-Lay, Inc., v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956-57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis; where separate classification was based on bankruptcy court-approved settlement); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan."); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (Although discretion is not unlimited, "the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case."); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar claims be grouped together.").

16 *See* Plan, Article III.

Equity Interests in a particular Class is substantially similar to the other Claims or Equity Interests in such a Class.

24. Article III.A of the Plan separately classifies Claims and Equity Interests into the seven Classes based on differences in the legal nature and/or priority of such Claims and Equity Interests — except for Administrative Claims, Fee Claims and Priority Tax Claims — into seven different Classes as follows:

a. Class 1 provides for the separate classification of all Priority Non-Tax Claims;

b. Class 2 provides for the separate classification of all Other Secured Claims;

c. Class 3 provides for the separate classification of all Secured Notes Claims;

d. Class 4 provides for the separate classification of all General Unsecured Claims;

e. Class 5 provides for the separate classification of all Intercompany Claims;

f. Class 6 provides for the separate classification of all Intercompany Interests; and

g. Class 7 provides for the separate classification of all Interests in Conexant.

25. Each Class is composed of substantially similar Claims or Equity Interests, respectively, and each instance of separate classification of similar Claims and Equity Interests is based on valid business, factual and legal reasons. For example, Secured Claims are classified separately from General Unsecured Claims, and Equity Interests are classified separately from Claims. More specifically, Interests in Conexant are classified separately from Intercompany Interests because the ownership structure of the Debtors is dependent on maintaining the Intercompany Interests and, therefore, such Interests are preserved under the Plan for the

administrative convenience of ensuring preservation of the Debtors' corporate structure after the Effective Date.[17]

26. In short, Claims or Equity Interests assigned to each particular Class described above are substantially similar to the other Claims or Equity Interests in each such Class and the distinctions among Classes are based on valid business, factual and legal reasons. Accordingly, the Plan satisfies section 1122(a) of the Bankruptcy Code.

2. The Plan Satisfies the Seven Mandatory Plan Requirements of Section 1123(a)(1) through (a)(7) of the Bankruptcy Code.

27. Section 1123(a) of the Bankruptcy Code sets forth seven requirements that every chapter 11 plan must satisfy.[18] As discussed below, the Plan satisfies each of these requirements.

a. Designation of Classes of Claims and Equity Interests (§ 1123(a)(1)).

28. As discussed above, Article III of the Plan properly designates classes of Claims and Equity Interests, and thus satisfies the requirement of section 1122 of the Bankruptcy Code.[19]

b. Specification of Unimpaired Classes (§ 1123(a)(2)).

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17 *See In re ION Media Networks, Inc.*, No. 09-13125 (Bankr. S.D.N.Y. Nov. 24, 2009) ("This technical preservation of equity is a means to preserve the corporate structure that does not have any economic substance and that does not enable any junior creditor or interest holder to retain or recover any value under the Plan. The Plan's retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure.").

18 *See* 11 U.S.C. § 1123(a).

19 *See* Plan, Article III.

29. Section 1123(a)(2) requires that the Plan "specify any class of claims or interests that is not impaired under the plan."[20] The Plan meets this requirement by identifying each Class in Article III that is Unimpaired.[21]

c. Treatment of Impaired Classes (§ 1123(a)(3)).

30. Section 1123(a)(3) requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan."[22] The Plan meets this requirement by setting forth the treatment of Impaired Classes in Article III.[23]

d. Equal Treatment within Classes (§ 1123(a)(4)).

31. Section 1123(a)(4) requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[24] The Plan meets this requirement because Holders of Allowed Claims or Equity Interests will receive the same rights and treatment as other Holders of Allowed Claims or Equity Interests within such Holders' respective Class, except to the extent they agree to less favorable treatment.[25]

e. Means for Implementation (§ 1123(a)(5)).

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20 11 U.S.C. § 1123(a)(2).

21 *See* Plan, Article III.B.

22 11 U.S.C. § 1123(a)(3).

23 *See* Plan, Article III.C.

24 11 U.S.C. § 1123(a)(4).

25 *See* Plan, Article III.C.

32. Section 1123(a)(5) requires that the Plan provide "adequate means" for its implementation.[26] The Plan satisfies this requirement because Article IV of the Plan, as well as various other provisions of the Plan, provides for the means by which the Plan will be implemented. Among other things, Article IV of the Plan provides for:

a. the implementation of the Debtors' issuance of New Common Stock and New Notes;

b. a description of the sources of consideration for Plan distributions, including the issuance of New Common Stock and the General Unsecured Claim Pool, which will be administered pursuant to that certain Liquidation Trust and Declaration of Trust, a draft of which was filed in the Plan Supplement on May 13, 2013 [Docket No. 241];

c. the general settlement of Claims and Interests;

d. the cancellation of existing securities and other documents;

e. the authorization for the Debtors or the Reorganized Debtors to take all actions necessary to effectuate the Plan, including filing certificates of incorporation and bylaws of the Reorganized Debtors;

f. the authorization for the Debtors or the Reorganized Debtors to undertake certain restructuring transactions, including those contemplated by or necessary to effectuate the Plan;

g. the appointment of officers and directors of the Reorganized Debtors;

h. the exemption of certain taxes and fees; and

i. the preservation of certain Causes of Action.

f. Issuance of Non-Voting Securities (§ 1123(a)(6)).

[26] *See* 11 U.S.C. § 1123(a)(5).

33. Section 1123(a)(6) requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities.[27] Article IV.I of the Plan prohibits the issuance of non-voting equity securities. Specifically, the New Certificate of Incorporation will prohibit the issuance of non-voting equity securities, thus satisfying section 1123(a)(6).

g. Officers and Directors (§ 1123(a)(7)).

34. Section 1123(a)(7) requires that the Plan's provisions with respect to the manner of selection of any director, officer or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy . . . ."[28] Article IV.J of the Plan satisfies the seventh element of section 1123(a) because the procedures for selecting officers and directors of the Reorganized Debtors are consistent with the interests of creditors and equity security holders and with public policy. The Debtors have identified — as part of the Plan Supplement in Exhibit G [Docket Nos. 241 and 262] — the identity and affiliations of all individuals or entities proposed to serve on or after the Effective Date as directors of the Holdco Board and the New Subsidiary Boards as well as the proposed officers of Holdco and the New Subsidiaries.

35. Based upon the foregoing, the Plan complies fully with each of the requirements of 1123(a) of the Bankruptcy Code.

3. The Plan Complies with the Permissive Provisions of Section 1123(b) of the Bankruptcy Code.

a. Overview of Plan's Compliance with Section 1123(b) of the Bankruptcy Code.

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27 *See* 11 U.S.C. § 1123(a)(6).

28 11 U.S.C. § 1123(a)(7).

36. Section 1123(b) sets forth various permissive provisions that may be incorporated into a chapter 11 plan.[29] Among other things, section 1123(b) provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases; (c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[30]

37. The Plan is consistent with section 1123(b) of the Bankruptcy Code. Specifically, pursuant to Article III of the Plan, Classes 1, 2, 5 and 6 are rendered Unimpaired because the Plan leaves unaltered the legal, equitable and contractual rights of the Holders of such Claims.[31] Further, Classes 3, 4 and 7 are rendered Impaired, as the Plan modifies the rights of the Holders of such Claims and Equity Interests as contemplated in section 1123(b)(1) of the Bankruptcy Code.[32] In addition, in accordance with section 1123(b)(2) of the Bankruptcy Code, Article V of the Plan provides for the assumption or rejection of the Debtors' Executory Contracts and Unexpired Leases not previously assumed or rejected under section 365 of the Bankruptcy Code. Indeed, the Debtors filed the list of Executory Contracts and Unexpired Leases [Docket No. 262] that are to be assumed or rejected pursuant to the Plan and a list of all known cure Claims associated with the Executory Contracts and Unexpired Leases that the Debtors intend to assume pursuant to the Plan.

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29 *See* 11 U.S.C. 1123(b).

30 *See* 11 U.S.C. § 1123(b)(1)-(6).

31 *See* Plan, Article III.C.

32 *Id.*

b. The Plan's Release, Exculpation, and Injunction Provisions Satisfy Section 1123(b) of the Bankruptcy Code.

38. The Plan includes: (a) the release by the Debtors of certain parties in interest; (b) the release by certain third parties of the Debtors; (c) an exculpation provision; and (d) an injunction provision.[33] The Debtors believe these provisions are appropriate in these chapter 11 cases because they are supported by the facts and circumstances of the case. Section II of this memorandum provides specific legal and factual support for the appropriateness of the Plan's release, exculpation and injunction provisions. Accordingly, the Debtors submit that the Plan's release, exculpation and injunction provisions should be approved.

4. The Plan Complies with Section 1123(d) of the Bankruptcy Code.

39. Section 1123(d) states that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and non-bankruptcy law."[34]

40. Article V of the Plan provides for the satisfaction of all monetary defaults under each Executory Contract and Unexpired Lease assumed pursuant to the Plan in accordance with section 365 by payment of the default amount on the Effective Date, subject to the limitations described in Article V of the Plan, or on such other terms as the parties to such Executory Contracts or Unexpired Leases may otherwise agree.[35] The Debtors, in accordance with the

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33 Plan, Article VIII.

34 *See* 11 U.S.C. 1123(d).

35 Plan, Article V.C.

Plan, distributed notices of proposed assumption to the applicable third parties.[36] These notices included procedures for objecting to proposed assumptions of Executory Contracts and Unexpired Leases and any Claim for Cure, as well as a process for resolving any disputes by the Court. Accordingly, the Debtors submit that the Plan complies with section 1123(d).

B. The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code (§ 1129(a)(2)).

41. The Debtors have satisfied section 1129(a)(2), which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code.[37] The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126.[38] As discussed below, the Debtors have complied with sections 1125 and 1126 regarding disclosure and solicitation of the Plan and section 1127 regarding modification of the Plan before the Confirmation Hearing.

1. The Debtors Have Complied with Section 1125 of the Bankruptcy Code.

42. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan of reorganization "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement

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36 *See First Supplement to the Plan Supplement to the Second Modified Joint Plan of Reorganization of Conexant Systems, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 262].

37 *See* 11 U.S.C. § 1129(a)(2).

38 *See In re Lapworth*, 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)."); *In re Worldcom, Inc.*, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code"); S. Rep. No. 989, 95th Cong., 2d Sess., at 126 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 412 (1977).

approved, after notice and a hearing, by the court as containing adequate information."[39] The purpose of section 1125 of the Bankruptcy Code is to ensure that parties in interest are fully informed regarding the condition of the debtor, the means for implementation of the plan and related transactions and the treatment of all classes of claims and interests, all so they may make an informed decision whether to approve or reject the plan.[40]

43. The Debtors have satisfied section 1125 of the Bankruptcy Code. Before the Debtors began soliciting votes on the Plan, the Court approved the Disclosure Statement, as containing adequate information, and the procedures for soliciting and tabulating the votes on, and for objecting to, the Plan.[41] After notice and a hearing held on April 19, 2013, the Court entered the Disclosure Statement and Solicitation Order pursuant to section 1125 of the Bankruptcy Code as providing Holders of Claims with "adequate information" to make an informed decisions to whether to accept or reject the Plan. The Solicitation Procedures Order specifies in detail the content of the various solicitation materials that the Debtors provided to holders of Claims and Equity Interests and the timing and method of delivery of the solicitation materials.[42] As detailed further in the Voting Certification, through their Voting and Claims Agent the Debtors did not solicit the acceptance or rejection of the Plan from any Holder of a

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39 11 U.S.C. § 1125(b).

40 *See Momentum Mfg. Corp. v. Employee Creditors Comm.* (*In re Momentum Mfg. Corp.*), 25 F.3d 1132, 1136 (2d Cir. 1994) (finding that section 1125 of the Bankruptcy Code obliges a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

41 *See Order (A) Approving the Disclosure Statement Dated 4/19/13; (B) Approving Solicitation Packages and Procedures for the Distribution Thereof; (C) Approving the Forms of Ballots and Manner of Notice; (D) Approving the Voting Record Date, Solicitation Deadline and Voting Deadline; and (E) Establishing Notice and Objection Procedures for Confirmation of the Second Modified Joint Plan of Reorganization* [Docket No. 209] (the "***Disclosure Statement and Solicitation Order***").

42 *See* Disclosure Statement and Solicitation Order & Exhibits.

Claim before approval of the Disclosure Statement. Moreover, appropriate materials were distributed to all parties in interest. Specifically, Holders of Claims entitled to vote on the Plan received the following materials: (a) the Disclosure Statement, including all exhibits; (b) the Plan; (c) the Disclosure Statement Order; (d) the Confirmation Hearing Notice; (e) the appropriate ballot; (f) a cover letter from Sailesh Chittipeddi and (g) a letter from the Creditors' Committee describing its support of the Plan. In addition, Holders of Claims and Interests that were not entitled to vote to accept or reject the Plan were provided with certain non-voting materials approved by the Court in the Disclosure Statement Order.

44. Additionally, as reflected in the affidavit of publication filed on May 7, 2013 [Docket. No. 219], the Debtors caused the Confirmation Hearing Notice to be published in the New York Times in a timely fashion. Based on the foregoing, the Debtors submit that they have complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Solicitation Procedures Order.

2. The Debtors Have Complied with Section 1126 of the Bankruptcy Code.

45. Section 1126 specifies the requirements for acceptance of a plan of reorganization.[43] Specifically, under section 1126, only holders of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan. Section 1126 provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .

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[43] *See* 11 U.S.C. § 1126.

> (b) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (c) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.[44]

46. In accordance with section 1126, the Debtors solicited acceptances or rejections of the Plan from the holders of Allowed Claims in Classes 3 and 4, the only Classes of Impaired Claims that are to receive a distribution under the Plan. The Debtors did not solicit votes from holders of Claims in Classes 1, 2, 5 or 6, because holders of Claims in these Classes are conclusively presumed to have accepted the Plan. Additionally, Class 7 will receive no distribution under the Plan. Thus, pursuant to section 1126(g), Holders of Claims and Equity Interests in Class 7 are conclusively presumed to have rejected the Plan and were not entitled to vote to accept or reject the Plan.

47. As to Classes 3 and 4, the only Impaired Classes entitled to vote to accept or reject a plan, section 1126(c) specifies the requirements for acceptance of a plan by classes of claims and interests:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected the plan.[45]

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44 11 U.S.C. § 1126(a), (f) and (g).

45 11 U.S.C. § 1126(c) and (d).

48. Here, the Impaired Classes of Claims voting to accept the Plan did so by sufficient amounts, as indicated in the Voting Certification — 100% in number and 100% in amount of Class 3 Secured Notes Claims and Class 4 General Unsecured Claims.[46]

49. Based on the foregoing and the evidence that will be presented at the Confirmation Hearing, the Debtors submit that they have satisfied the requirements of section 1129(a)(2).

3. The Debtors Have Complied with Section 1127 of the Bankruptcy Code.

50. Section 1127(a) provides a plan proponent with the right to modify the plan "at any time" before confirmation[47] and section 1127(d) provides that all stakeholders that previously have accepted a plan should also be deemed to have accepted the modified plan.[48] In addition, the proposed modification must comply with the disclosure requirements as set forth in section 1125.[49] Further solicitation, however, is only necessary when the proposed modification materially and adversely impacts a claimant's treatment.[50]

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46 *See* Voting Certification.

47 11 U.S.C. § 1127(a) provides:

> The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of section 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

48 11 U.S.C. § 1127(d) provides:

> Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

49 *See* 11 U.S.C. § 1127(c).

50 *See In re Best Prods. Co., Inc.*, 177 B.R. 791, 802 (S.D.N.Y. 1995) (noting that the key inquiry was whether the modification materially altered the plan so that a claimant's treatment was adversely affected); *In re New Power* (Continued...)

51. A proposed plan modification will be considered material "if it so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance."[51] Thus, a "clear and obvious improvement to the position of the creditors affected by the modification" will not require re-solicitation of a plan.[52] This reading of section 1127(c) is entirely consistent with the disclosure requirements in section 1125 because a modification that is not material is, "by definition one which will not affect an investor's voting decision," and thus, "[a]dditional disclosure would serve no purpose."[53]

52. As reflected in the proposed Confirmation Order, attached hereto as **Exhibit A**, the Debtors have agreed to modify certain provisions in the Plan through discussions with the office of the United States Trustee. More specifically, the Debtors have excluded certain parties as "Exculpated Parties" under the Plan and made clear that the third party release provision in Article VIII.E of the Plan will apply only to those creditors affirmatively voting on the Plan and not otherwise opting-out of such release provision. The Debtors submit that no further solicitation is required pursuant to section 1127 of the Bankruptcy Code because no creditor that previously voted on the plan is adversely impacted as a result of these changes.

Co., 438 F.3d 1113, 1117-18 (11th Cir. 2006) (noting "as an initial matter, we consider whether there was any material and adverse modifications from the First Amended Plan" and "the bankruptcy court may deem a claim or interest holder's vote for or against a plan as a corresponding vote in relation to a modified Plan unless the modification materially and adversely changes the way that claim or interest holder is treated"); *In re Calpine Corp.*, 2007 WL 4565223, at *6 (Bankr. S.D.N.Y. Dec. 19, 2007), *aff'd*, 354 Fed. Appx. 479 (2nd Cir. 2009) (approving immaterial modification to plan without requiring the debtors to resolicit the plan); *In re Kmart Corp.*, 2006 WL 952042, at *27 (Bankr. N.D. Ill. Apr. 11, 2006) (If modification does not adversely change the treatment of claims, then resolicitation is not required.); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 813, 823 (Bankr. M.D. Fla. 2006), *aff'd*, Fed. Appx. 282 (11th Cir. 2009) (same).

51 9 COLLIER ON BANKRUPTCY, ¶ 3019.01 (16th ed. 2009).

52 *In re Concrete Designers, Inc.*, 173 B.R. 354, 356 (Bankr. S.D. Ohio 1994).

53 *In re American Solar Corp.*, 90 B.R. 808, 824 n.28 (Bankr. W.D. Tex. 1988).

C. The Plan Was Proposed in Good Faith (§ 1129(a)(3)).

53. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law."[54] Where the plan satisfies the purposes of the Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) is satisfied.[55] To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[56]

54. The fundamental purpose of chapter 11 is to enable a distressed business operation to reorganize its affairs and avoid the adverse economic effects associated with disposing of assets at their liquidation value.[57] Courts look to the reorganization plan itself to determine whether the plan seeks relief consistent with the Bankruptcy Code.[58] Thus, where the plan proponent proposes the plan with the legitimate and honest purpose to reorganize and has a

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54 11 U.S.C. § 1129(a)(3).

55 *See In re Century Glove, Inc.*, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) (quoting *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985)); *see also Matter of T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 802 (5th Cir. 1997) (same); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002) (same).

56 *See Platinum Cap., Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1074 (9th Cir. 2002); *see also In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984) (stating that to determine compliance with section 1129(a)(3), the court examines the plan "in light of the totality of the circumstances surrounding confection of the plan") (internal citation omitted).

57 *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *see also B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) (stating "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start").

58 *See In re Sound Radio*, 93 B.R. at 849, 854 (3d Cir. 1997).

reasonable hope of success, the plan proponent satisfies the good faith requirement of section 1129(a)(3) of the Bankruptcy Code.[59]

55. Here, the Debtors have proposed the Plan in good faith, with the legitimate and honest purposes of reorganizing the Debtors' ongoing business and maximizing value and the recovery for all creditors.[60] The Plan is the product of arm's-length negotiations with the Debtors' significant stakeholders and was only pursued after careful consideration of all alternatives, including a potential asset sale.[61] In particular, the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code by significantly de-leveraging the Debtors' balance sheet, satisfying all administrative obligations and paying general unsecured creditors more than they could expect to receive under any alternative scenario.

56. Specifically, as set forth in the Liquidation Analysis included in the Disclosure Statement, the Plan provides each Holder of a Claim who does not otherwise vote in favor of the Plan with 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.[62] Consequently, the Debtors submit that the Plan has been designed to maximize creditor recoveries in accordance with the Debtors' obligations and expectations under the Bankruptcy Code.

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59 *See In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

60 *See* Hassel Declaration, ¶ 24.

61 *See* Hassel Declaration, ¶ 24.

62 *See* Exhibit G to Disclosure Statement; *see also* Hassel Declaration, ¶ 9.

57. Throughout these chapter 11 cases, the Debtors and their officers and directors have appropriately discharged their fiduciary obligations and taken all reasonable and necessary steps to maximize enterprise value and stakeholder recoveries. It is no surprise that the Plan is supported by all of the Debtors' key stakeholders, including the Creditors' Committee, and received unanimous consent from creditors at large voting on the Plan. And all creditors in each of the Classes entitled to vote on the Plan voted to accept the Plan.

58. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Provides that Payments Made by the Debtors for Professional Fees and Expenses are Subject to Court Approval (§ 1129(a)(4)).

59. Section 1129(a)(4) requires that certain professional fees and expenses paid by the plan proponent, by the debtor or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable.[63] Specifically, section 1129(a)(4) requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, 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, has been approved by, or is subject to approval of, the court as reasonable.[64]

Section 1129(a)(4) has been construed to require that all payments of professional fees paid out of estate assets be subject to review and approval by the Court as to their reasonableness.[65]

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63 11 U.S.C. § 1129(a)(4).

64 *Id.*

65 *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988); *see also In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

1. The Debtors' and Creditors' Committee's Professional Fees.

60. Pursuant to the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals* [Docket No. 168] (the "***Interim Compensation Order***"), the Debtors will request that the Court authorize and approve the payment of certain fees and expenses of professionals retained in these chapter 11 cases on a final basis.

61. In addition, pursuant to sections 503(b)(3) and (4) of the Bankruptcy Code, the Court must review any applications for substantial contribution to ensure compliance with the statutory requirements and that the fees requested are reasonable.[66] All payments to be made in connection with the Effective Date or which otherwise are required to be disclosed, including any amounts to be paid to officers and directors, have been disclosed previously or will be disclosed.

62. In addition to the fees incurred by the Debtors' professionals, the Plan contemplates paying the reasonable and documented fees and expenses of (a) Akin Gump Strauss Hauer & Feld LLP, counsel to the Secured Lender, (b) local co-counsel to the Secured Lender, (c) The Blackstone Group, financial advisor to the Secured Lender, (d) the Secured Notes Trustee and (e) counsel to the Secured Notes Trustee.[67]

63. Here, all payments the Debtors have made or will make for costs or expenses in connection with these chapter 11 cases, including those allowable under sections 328, 330, 331 or 1103 of the Bankruptcy Code, have either already been approved by the Court or are subject to approval by the Court. Article II.A.2 of the Plan further provides that professionals shall file

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66 *See* 11 U.S.C. § 503(b)(3), (4).

67 Plan, Article IV.N.

all final requests for payment of claims of professionals no later than 30 days after the Effective Date.[68] After notice and a hearing in accordance with the procedures established by the Bankruptcy Code, the Bankruptcy Rules and the Plan, the Court shall determine the allowed amounts of such Claims.[69] In addition, Article II.A.2. of the Plan provides that the Court will retain jurisdiction after the Effective Date to hear and determine all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan.

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68 *See* Plan, Art. II.A.2.

69 *See id.*

2. The Emergence Bonus Plan Is Appropriate, Permissible and Should be Approved.

64. Article VII. M of the Plan contemplates the adoption of an emergence bonus plan (the "***Emergence Bonus Plan***"). The plan is still being developed by the Debtors and its terms, conditions and payment structures will be extensively negotiated with the Debtors' future owner, the Secured Lender. Information related to the Emergence Bonus Plan initially was disclosed in both the original and solicitation versions of the Plan, Disclosure Statements and Plan Supplement.

65. Additionally, Article VII.L of the Plan contemplates the adoption of a Management Incentive Program, the terms of which have not been finalized and will be approved by the board of the Reorganized Debtors. Indeed, because the Debtors believe this is a post-Effective Date compensation and benefit plan, it is included in the Plan and herein primarily for the purpose of disclosure.

66. The Debtors believe that if any legal standard applies to such programs, it must be found in section 1129 of the Bankruptcy Code — *i.e.*, if a plan of reorganization is confirmable after giving effect to the payments made under the compensation programs, then the plan should be confirmed.

67. As noted above, section 1129(a)(4) of the Bankruptcy Code subjects certain fees and payments under a plan to a requirement of reasonableness, which requires disclosure and an objective determination as to reasonableness, but is also subject to less scrutiny than if the payments were to be distributed from assets of the bankruptcy estate itself.[70] Here, the Debtors

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[70] *In re Journal Register Co.*, 407 B.R. 520, 537-38 (Bankr. S.D.N.Y. 2009) (quoting *In re Cajun Elec. Power Coop., Inc.*, 150 F.3d 503, 517 (5th Cir. 1998)).

and their principal constituents have made an informed and good faith determination that the Emergence Bonus Plan and Management Incentive Plans are reasonable and will provide the Reorganized Debtors' management with appropriate post-Effective Date incentives to maximize value for the Debtors' future owners.

68. Based upon the foregoing, the Debtors submit that the Plan complies with the requirements of section 1129(a)(4).

E. The Debtors Have Disclosed All Necessary Information Regarding Directors, Officers and Insiders (§ 1129(a)(5)).

69. Section 1129(a)(5)(A) requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors.[71] The Bankruptcy Code further provides that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy. Section 1129(a)(5)(B) also requires a plan proponent to disclose the identity of an "insider" (as defined by 11 U.S.C. § 101(31)) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider.[72]

70. The Plan satisfies section 1129(a)(5)(A)(i) of the Bankruptcy Code because the Debtors have disclosed in the Plan Supplement filed on May 5, 2013 and May 24, 2013 [Docket Nos. 249 and 262] the identities and affiliations of any known members of the Holdco Board and the New Subsidiary Board as well as the proposed officers of Holdco and the New Subsidiary.

71. The Debtors submit that the Plan complies with section 1129(a)(5)(A)(ii) of the Bankruptcy Code because the individuals who will serve as directors and officers of the

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71 *See* 11 U.S.C. § 1129(a)(5)(A).

72 *Id.*

Reorganized Debtors, and the process by which they will be selected, ensures that the Debtors will be in "good hands" after emergence. As described in the Disclosure Statement and demonstrated by the Debtors' recent financial performance (including during chapter 11), the members of the current management contemplated to remain in their respective positions post-emergence are competent, have relevant, deep-rooted and comprehensive business and industry experience, and together with the New Boards will provide both continuity and fresh insights into running the reorganized business. Therefore, the requirements of section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied.

72. Finally, the Plan satisfies section 1129(a)(5)(B) of the Bankruptcy Code because the Debtors have disclosed the identities and affiliations of insiders to be employed or retained by the Reorganized Debtors as directors and officers, and the nature and amount of their compensation, which shall be substantially the same as reported in the Debtors' schedules and statements (i.e., consistent with existing compensation arrangements). Accordingly, the Debtors have satisfied the requirement of section 1129(a)(5) of the Bankruptcy Code.

F. The Plan is in the Best Interests of All the Debtors' Creditors (§ 1129(a)(7)).

73. Section 1129(a)(7), commonly known as the "best interests test," provides, in relevant part:

> With respect to each impaired class of claims or interests —
>
> (A) each holder of a claim or interest of such class —
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or

> retain if the debtor were liquidated under chapter 7 of this title on such date. . . .[73]

74. The best interests test applies to individual dissenting holders of claims and interests rather than classes, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[74] As § 1129(a)(7) makes clear, the best interests test applies only to holders of non-accepting impaired claims or interests. The Plan contemplates a distribution to two Impaired Classes — Classes 3 and 4. Accordingly, to satisfy the best interests test, the Debtors must demonstrate that each creditor holding a Claim in these Classes will receive at least as much under the Plan as that creditor would receive in a chapter 7 liquidation.[75]

75. Comparing the Plan's projected recoveries with the Debtors' liquidation analysis contained in Exhibit G of the Disclosure Statement (the "***Liquidation Analysis***") demonstrates that the Plan satisfies the best interests test. The Liquidation Analysis provides an estimated range of proceeds of between $26.2 million and $40.5 million for allocation (net required costs and expenses) as a result of a hypothetical chapter 7 liquidation. These figures take into account the assumption that a liquidation of the Debtors' assets would create a class of administrative and

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73 11 U.S.C. § 1129(a)(7)(A).

74 *See Bank of Am. Nat. Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *see also In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (Section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation."); *Century Glove, Inc.*, 1993 WL 239489, at *7.

75 *See In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("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.'").

priority claims of approximately $7.9 - $8.9 million, including wind-down costs, professional fees and trustee fees. This class of claims would recover before any distribution to any other classes of claims, and would result in diminished recoveries to the holders of the Secured Notes Claim and General Unsecured Claims.

76. The Liquidation Analysis clearly demonstrates that the value that may be realized by the Holders of Claims and Equity Interests in connection with a disposition of the Debtors' assets in a hypothetical chapter 7 liquidation is equal to or less than the value of the recoveries (if any) to such Classes provided for under the Plan. Specifically, the projected recoveries under the Plan and the results of the Debtors' liquidation analysis for the Impaired Classes are as follows:

Class	**Plan Recovery**	**Liquidation Recovery**
Class 3 (*Secured Notes Claims)*	41%	6-12%
Class 4 *(General Unsecured Claims)*	6-9%	3-4%

77. As described in the Disclosure Statement and the Hassel Declaration, with respect to Class 4-General Unsecured Claims, the Plan provides for a General Unsecured Claims Pool with $2.9 million of funds available for holders of Allowed Class 4 Claims, which the Debtors believe is approximately $1 million more than holders of Allowed Class 4 Claims would receive in connection with a hypothetical Chapter 7 liquidation.

78. Based upon the foregoing, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(7).

G. The Plan Can be Confirmed Notwithstanding the Requirements of Section 1129(a)(8).

79. Section 1129(a)(8) requires that each class of claims or interests must either accept a plan or be unimpaired under a plan.[76]

80. Of the three Impaired Classes of Claims or Equity Interests under the Plan (Classes 3-Secured Notes Claims, Class 4-General Unsecured Claims, and Class 7-Interests in Conexant), two have voted in favor of the Plan (Classes 3 and 4). Holders of Claims in Class 7 are deemed to have rejected the Plan under section 1126(g) because Holders of Class 7-Interests in Conexant are not entitled to receive or retain any property under the Plan.

81. Thus, while the Plan does not satisfy 1129(a)(8) with respect to Class 7, the Plan is confirmable because it satisfies sections 1129(a)(10) and 1129(b), as discussed below in Section I.L.

H. The Plan Provides for Payment in Full of All Allowed Priority Claims (§ 1129(a)(9)).

82. Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under section 507(a) receive specified cash payments under the plan.[77] Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) requires the plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

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76 *See* 11 U.S.C. § 1129(a)(8).

77 *See* 11 U.S.C. §1129(a)(9).

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive —

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash;

(i) of a total value, as of effective date of the Plan, equal to the allowed amount of such Claim; and

(ii) over a period ending not later than 5 years after the date of the order for relief.

83. In accordance with sections 1129(a)(9), Article II.A.1 of the Plan provides as follows:

> Except with respect to Administrative Claims that are Fee Claims and except to the extent that a holder of an Allowed Administrative Claim and the applicable Debtor(s) (with the consent of the Secured Lender) agree to less favorable treatment with respect to such holder, each holder of an Allowed Administrative Claim shall either be paid (a) in full in Cash if such Claims do not exceed the Administrative Claims Cap or (b) a Pro Rata share of $17.5 million if such Claims are Allowed in an amount in excess of the Administrative Claims Cap, to the extent all holders of such Claims consent to such treatment. Such Claims shall be paid on the earlier of (a) on or as soon as reasonably practicable after the Effective Date if such Administrative Claim is Allowed as of the Effective Date and (b) on or as soon as reasonably practicable after the date such Administrative Claim is Allowed; *provided, however*, that Allowed Administrative Claims that arise postpetition in the ordinary course of the Debtors' business shall be paid in full in the ordinary course of business in accordance with the terms and subject to the conditions of any agreements governing, instruments evidencing or other documents relating to such transactions, and

> subject to the budget set forth in the DIP Facility Credit Agreement. Notwithstanding the foregoing, no request for payment of an Administrative Claim need be Filed with respect to an Administrative Claim previously Allowed by Final Order.[78]

84. Moreover, the Plan satisfies the requirements of section 1129(a)(9)(C) with respect to the treatment of Priority Tax Claims under section 507(a)(8). Section 1129(a)(9)(C) permits deferred payments over a period of six years from the date of assessment of the tax so long as the amount so paid has a value, as of the effective date of the plan, equal to the allowed amount of the priority tax claim.[79] Article II.C of the Plan provides as follows:

> Except to the extent that a holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in exchange for full and final satisfaction, settlement, release and discharge of each Allowed Priority Tax Claim, each holder of an Allowed Priority Tax Claim due and payable on or before the Effective Date shall receive, on the Distribution Date, at the option of the Debtors (with the consent of the Secured Lender), one of the following treatments: (1) Cash in an amount equal to the amount of such Allowed Priority Tax Claim, plus interest at the rate determined under applicable non-bankruptcy law and to the extent provided for by section 511 of the Bankruptcy Code; (2) Cash in an aggregate amount of such Allowed Priority Tax Claim payable in installment payments over a period of time not to exceed five years after the Petition Date, pursuant to section 1129(a)(9)(C) of the Bankruptcy Code, plus interest at the rate determined under applicable non-bankruptcy law and to the extent provided for by section 511 of the Bankruptcy Code; or (3) such other treatment as may be agreed upon by such holder and the Debtors or otherwise determined upon an order of the Bankruptcy Court.[80]

85. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(9).

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78 Plan, Article II.A.

79 *See* 11 U.S.C. § 1129(a)(9)(C).

80 Plan, Article II.C.

I. At Least One Class of Impaired, Non-Insider Claims Will Have Accepted the Plan (§ 1129(a)(10)).

86. Section 1129(a)(10) is an alternative requirement to section 1129(a)(8)'s requirement that each class of claims or interests must either accept the plan or be unimpaired under the plan.[81] Section 1129(a)(10) provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider."[82]

87. Because Classes 3 and 4 (which were Impaired and do not include any insiders) voted to accept the Plan, the Plan satisfies the requirements of section 1129(a)(10).

J. The Plan Is Feasible (§ 1129(a)(11)).

88. Section 1129(a)(11) requires that the Bankruptcy Court find that a plan is feasible as a condition precedent to confirmation. 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.[83]

89. To demonstrate that a plan is feasible, it is not necessary that success be guaranteed; the standard is rather that a debtor must demonstrate a reasonable assurance that consummation of the plan will not likely be followed by a further need for financial reorganization.[84] In evaluating feasibility, courts have identified the following factors to

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81 *See* 11 U.S.C. §1129(a)(10).

82 *Id.*

83 11 U.S.C. § 1129(a)(11).

84 *See 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."); *see also In re Briscoe Enters.*, 994 F.2d 1160, 1166 (5th Cir. 1993) ("Only a reasonable (Continued...)

consider, including, the adequacy of the capital structure; the earning power of the business; the economic conditions; the ability of management; the probability of the continuation of the same management; and any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[85]

90. As set forth in the Hassel Declaration, the Plan is feasible.[86] Indeed, the Plan significantly reduces the Debtors' funded debt obligations in excess of $115 million and enables the Debtors to emerge from chapter 11 sufficiently capitalized.

91. The Debtors together with the Secured Lender have thoroughly analyzed their ability to meet obligations under the Plan post-confirmation and submit that Plan confirmation is not likely to be followed by liquidation or the need for further reorganization. As also described in the Hassel Declaration, the Debtors have reliable sources of liquidity, which were considered and taken into account in the preparation of financial projections for the calendar years 2013 through 2017, as described in Exhibit B to the Hassel Declaration (the "***Financial Projections***").[87] These financial projections evidence that the Reorganized Debtors will be able to (a) make all payments and other distributions required under the Plan, (b)

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assurance of commercial viability is required.") (citation omitted); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 832-33 (Bankr. E.D. Pa. 1995) (finding plan is feasible "so long as there is a reasonable prospect for success and a reasonable assurance that the proponents can comply with the terms of the plan."); *The Mut. Life Ins. Co. of N.Y. v. Patrician St. Joseph Partners Ltd. P'ship* (*In re Patrician St. Joseph Partners Ltd. P'ship*), 169 B.R. 669, 674 (Bankr. D. Ariz. 1994) ("A plan meets this feasibility standard if the plan offers a reasonable prospect of success and is workable") (citation omitted).

85 *E.g., In re Aleris Int'l, Inc.*, 2010 WL 3492664 at *28 (Bankr. D. Del. May 13, 2010).

86 *See* Hassel Declaration, ¶¶ 18-22.

87 *See* Hassel Declaration, ¶¶ 19-20.

satisfy ongoing obligations and (c) maintain their business operations on and after the Effective Date.

92. As outlined in the Plan Supplement, the Secured Lender has agreed to provide the Debtors with a $15 million first lien term loan facility (the "***New Working Capital Facility***"). Additionally, the Secured Lender will convert all of the outstanding DIP Facility Credit Agreement commitments—an additional $15 million capital infusion benefitting the Debtors during these chapter 11 cases—into a pro-rata share of the new non-recourse unsecured notes (the "***New Notes***"). The New Notes will be issued at the HoldCo in the amount of $76 million and allow HoldCo to elect to pay cash interest or accrue interest in kind. Importantly, the New Notes are unsecured and have ***no recourse to Reorganized Conexant (or any of the other Reorganized Debtors)***. As a result, the New Notes will not have an adverse impact on the liquidity of the Reorganized Debtors. Access to cash from operations and the New Working Capital Facility will provide ample liquidity to adequately fund the Debtors' post-emergence operations.

93. Thus, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

K. All Statutory Fees Have Been or Will Be Paid (§ 1129(a)(12)).

94. Section 1129(a)(12) requires the payment of "[a]ll fees payable under section 1930 [of title 28 of the United States Code], as determined by the court at the hearing on confirmation of the plan."[88] Section 507 provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative

[88] 11 U.S.C. § 1129(a)(12).

expenses.[89] In accordance with sections 507 and 1129(a)(12), Article II.D of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid for until these Chapter 11 Cases are converted, dismissed or closed, whichever occurs first. Thus, the Plan satisfies the requirements of section 1129(a)(12).

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

95. While two impaired classes have voted to accept the Plan, to confirm the Plan the Debtors must satisfy the Bankruptcy Code's "cram down" requirement as to anyrejecting impaired classes pursuant to section 1129(b) of the Bankruptcy Code.

96. Section 1129(b) provides that if a plan meets all applicable requirements of section 1129(a), but for section 1129(a)(8), the court may confirm the plan so long as it does not discriminate unfairly and it is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan. Thus, to confirm a plan that all impaired classes have not accepted (thereby failing 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.

97. As discussed below, the Debtors meet the requirements of section 1129(b) of the Bankruptcy Code to "cram down" the Plan on the holders of Class 7-Interests in Conexant, the class deemed to reject the Plan.

1. The Plan Is Fair and Equitable (§ 1129(b)(2)(B)(ii)).

98. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority

[89] 11 U.S.C. § 507(a)(1).

rule."[90] This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired accepting class not receive any distribution under a plan on account of its junior claim or interest.[91]

99. Here, the Impaired Class that is deemed to reject the Debtors' Plan is the most junior Class and is not retaining any property or interest or receiving any distribution under the Plan. Moreover, the Equity Sponsors, who hold all of the Interests in Class 7, are parties to the RSA filed on the Petition Date, and pursuant to that agreement, have agreed to support the Plan. Additionally, the Valuation Analysis places the value of the Debtors below the $194.5 million Secured Notes Claim and demonstrates that no value remains for holders of Class 7 Interests in Conexant.

100. Therefore, the Debtors have complied with the absolute priority rule. Thus, the Plan is fair and equitable as to Class 7.

2. The Plan Does Not Unfairly Discriminate with Respect to the Impaired Classes that Have Not Voted to Accept the Plan (§ 1129(b)(1)).

101. The Plan does not discriminate unfairly with respect to Class 7. Although the Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to make the

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90 11 U.S.C. § 1129(b)(2)(B)(ii); *see also LaSalle*, 526 U.S. at 441-42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

91 *See LaSalle*, 526 U.S. at 441-42.

determination.[92] In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so.[93]

102. A threshold inquiry in assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is similarly situated to the class allegedly receiving more favorable treatment. The Plan's treatment of Class 7 is proper because no similar Class of Claims or Equity Interests exist.

103. Thus, the Plan does not discriminate unfairly pursuant to section 1129(b)(1). The Plan's treatment of Claims and Equity Interests in Class 7 is proper because all similarly situated Holders of Claims and Equity Interests will receive substantially similar treatment. Thus, the Plan does not unfairly discriminate with respect to Class 7 and may be confirmed notwithstanding the deemed rejection of the Plan by Class 7.

M. The Debtors Have Complied with Section 1129(d) of the Bankruptcy Code.

104. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no governmental unit or any other party has requested that the

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92 *See In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *Bank of Am.*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"); *see also In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis."); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

93 *See In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination); *In re Ambanc La Mesa* Ltd. Ptship., 115 F.3d 650, 656 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

Court decline to confirm the Plan on such grounds. Accordingly, the Plan satisfies the requirements of section 1129(d).

N. Good Cause Exists to Waive Stay of the Confirmation Order

105. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise."[94] Each rule also permits modification of the imposed stay upon court order.

106. The Debtors respectfully submit that good cause exists for waiving and eliminating any stay of the entry of the Confirmation Order so that the Confirmation Order will be effective immediately upon its entry.[95] As noted above, these chapter 11 cases and the related restructuring transactions are highly consensual and have been negotiated and implemented in good faith and with a high degree of transparency and cooperation. Additionally, each day the Debtors remain in chapter 11 they incur significant administrative and professional costs as well as running the risk that customers and vendor confidence in the Debtor's businesses diminish, particularly in the Debtors' fast-paced, competitive technological landscape. The success of the Debtors' restructuring strategy depends upon a timely exit from chapter 11 so that they may sufficiently prepare for new ventures and message as quickly as possible that the Debtors are ready to viably compete once again. For these reasons, the Debtors are hopeful that the sooner

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94 *See* Fed. R. Bankr. P. 3020(e).

95 *See, e.g., In re Dex One Corp.*, No. 13-10533 (KG) (Bankr. D. Del. Apr. 29, 2013); *In re Amicus Wind Down Corp. (f/k/a Friendly Ice Cream Corp.)*, No. 11-13167 (KG) (Bankr. D. Del. June 4, 2012) (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re Local Insight Media Holdings, Inc.*, No. 10-13677 (KG) (Bankr. D. Del. Nov. 3, 2011) (same); *In re Majestic Star Casino, LLC*, No. 09-14136 (KG) (Bankr. D. Del. Mar. 10, 2011) (same); *In re Appleseed's Intermediate Holdings LLC*, No. 11-10160 (KG) (Bankr. D. Del. Apr. 14, 2011) (same); *In re Source Interlink Cos.*, No. 09-11424 (KG) (Bankr. D. Del. May 28, 2009) (same); *In re Lazy Days' R.V. Ctr., Inc.*, No. 09-13911 (KG) (Bankr. D. Del. Dec. 8, 2009) (same).

the Effective Date of the Plan, the faster they may be able to begin accessing New Working Capital and begin operating with the administrative burdens and expenses of chapter 11 proceedings. Based on the foregoing, the Debtors respectfully request a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

II. The Plan's Release Provisions Are Appropriate and Should Be Approved.

107. The releases given under the Plan are fully consensual and are provided in exchange for significant value. Notably, the Secured Lender, the Equity Sponsors, Creditors' Committee and U.S. Trustee (whose proposed modifications have been incorporated into the proposed Confirmation Order) support the Plan and the Releases contained therein and no party has formally objected to the Plan. Moreover, the Debtors have received unanimous consent from creditors entitled to vote on the plan and all creditors were provided with the option to "opt-out" of the release.[96] The Debtors have, however, made certain modifications to the release and exculpation provisions at the request of the U.S. Trustee as described herein.

108. The releases set forth in the Plan resemble (in nature and scope) the releases approved by this and other courts in this district in other *highly consensual* chapter 11 cases.[97] And the releases provided by the Debtors and certain third party creditors (the "***Releasing***

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[96] Only one creditor—Grace Semiconductor Manufacturing Corporation—who affirmatively voted in favor of the Plan, opted out of the Third Party Release.

[97] *See, e.g., In re Chicago Newspaper Liquidation Corp.*, Case No. 09-11092 (CSS) (Bankr. D. Del. Aug. 17, 2011); *In re Universal Building Prods., Inc.*, Case No. 10-12453 (MFW) (Bankr. D. Del. Jan. 31, 2011); *In re FB Liquidating Estate*, Case No. 09-11525 (MFW) (Bankr. D. Del. Jan. 26, 2011); *In re Goody's Family Clothing, Inc.*, Case No. 08-11133 (CSS) (Bankr. D. Del. Oct. 7, 2008); *In re JHT Holdings, Inc.*, Case No. 08-11267 (BLS) (Bankr. D. Del. Oct. 6, 2008); *In re Hilex Poly Co. LLC*, Case No. 08-10890 (KJC) (Bankr. D. Del. Jun. 26, 2008); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (KJC) (Bankr. D. Del. May 13, 2008).

Parties") under the Plan are fair, equitable, and were a key element of the Debtors' negotiations and were in exchange for valuable consideration and substantial contributions.

109. Without the cooperation of each Released Party, the Debtors' ability to submit a consensual plan of reorganization would have been severely constrained, resulting in substantially lower recoveries for creditors. The actions and support of each Released Party will enable the Debtors' reorganization and ability to emerge as a viable business through a chapter 11 plan, which provides for the satisfaction of all administrative obligations associated with these chapter 11 cases and a meaningful distribution for unsecured creditors, which would not otherwise have been available in connection with a sale pursuant to section 363 of the Bankruptcy Code.

110. In recognition of each Released Party's contribution to the Debtors and their estates, the Debtors and Releasing Parties have agreed to release any claims and causes of action that have arisen prior to the Effective Date of the Plan against the Released Parties. The Debtors submit that the Releases are consistent with the Bankruptcy Code, and the requirements of Bankruptcy Code § 1123(b) are thus satisfied.

A. The Debtors' Releases Are Appropriate

111. Pursuant to the Plan, the Debtors will release certain entities from any claims and causes of action that have arisen prior to the effective date of the Plan against such entities, other than claims relating to actual fraud (the "***Debtors' Releases***").[98] More specifically, the Debtors

[98] Unless any Causes of Action against an Entity are expressly retained in the list of retained Causes of Action included in the Plan Supplement, all Causes of Action shall be waived, relinquished, exculpated, released, compromised or settled in accordance with Article VIII hereof, including, for the avoidance of doubt, all Avoidance Actions. The Debtors expressly reserve the right to alter, modify, amend, remove, augment or supplement the following descriptions at any time.

will release claims against: (a) the Debtors; (b) the Secured Lender; (c) the Secured Notes Trustee; (d) the DIP Facility Lender; (e) the Equity Sponsors; (f) the Creditors' Committee and its members; and (g) with respect to the entities in clauses (a) through (f), such entity's predecessors, successors and assigns, subsidiaries, affiliates, managed accounts or funds, current and former officers, directors, principals, shareholders, members, partners, employees, agents, advisory board members, financial advisors, attorneys, accounts, investment bankers, consultants, representatives, management companies, fund advisors and other Professional (collectively, the "***Released Parties***").[99] Each of the Released Parties is a stakeholder and critical participant in the Plan process.

112. A debtor's release of claims in a chapter 11 plan is a settlement permitted by Bankruptcy Code § 1123(b)(3)(A).[100] As a settlement under the Plan, the Debtors' releases are generally subject to the same standard applied to settlements under Bankruptcy Rule 9019 and, therefore, must "fall within the reasonable range of litigation possibilities."[101] The Debtors have evaluated their claims against the Released Parties and do not believe any constructive purpose would be furthered by preserving or seeking to prosecute any claims against the Released Parties. Further, the Debtors have concluded that the costs involved in pursuing any claims

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99 Plan, Articles. I.B.95, VIII.D.

100 *See* 11 U.S.C. § 1123(b)(3)(A) (providing that chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate").

101 *See In re Coram Healthcare Corp.*, 315 B.R. at 334 (holding that standards for approval of settlement under Bankruptcy Code § 1123 are generally the same as those under Bankruptcy Rule 9019); *see also In re Columbia Gas Sys., Inc.*, No. 91-803, 1995 WL 404892, at *1 (Bankr. D. Del. June 16, 1995) (approving settlement under FED. R. BANKR. P. 9019 as "well within reasonable range of litigation outcomes"); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 291 (Bankr. W.D. Pa. 1990).

against the Released Parties likely would outweigh any potential benefit from pursuing such claims.

1. The Master Mortgage Factors

113. In addition to these factors, courts analyzing debtor releases under a plan have considered certain other factors principally set forth in *Master Mortgage Investment Fund*: "(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; (3) the necessity of the release to the reorganization; (4) the overwhelming acceptance of the plan and release by creditors and interest holders; and (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan."[102] None of these factors is dispositive nor does a debtor need to prove each factor.[103]

114. The central focus in analyzing releases is whether the "equities of the case" weigh in favor of the release, and whether the releases are fair.[104] In these *fully* consensual chapter 11 cases, the Debtors believe the equity of the cases dictate that the releases provided by the Debtors to each Released Party is warranted and justified.

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[102] *See In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) (discussing *Master Mortgage* factors in analyzing debtor release); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 606 (Bankr. D. Del. 2001) (same); *In re Zenith Elec. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (same).

[103] *See, e.g.*, *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 *Master Mortgage* factors are not exclusive or conjunctive requirements); *Master Mortgage*, 168 B.R. at 935 (asserting that there is no rigid "factor test" to apply in each case); *see also Genesis Health*, 266 B.R. at 606 (citing *In re Master Mortgage* proposition that no rigid factor test exists to be applied in every circumstance).

[104] *See, e.g.*, *Wash. Mut.*, 442 B.R. at 346 (stating that the *Master Mortgage* factors "simply provide guidance in the [c]ourt's determination of fairness"); *Exide*, 303 B.R. at 72 (analyzing release with respect to whether "equities of particular case" favor release); *Master Mortgage*, 168 B.R. at 935 (same).

115. ***First***, as an initial matter, each of the Released Parties, as a stakeholder and critical participant in the Plan process shares a common goal with the Debtors in seeing the Plan succeed and having the business reorganized. Additionally, through the assumption of their insurance policies through the Plan, including their directors and officer liability policy, there is a clear identity of interest between the Debtors and their officers and directors. Accordingly, any lawsuits filed by third parties against these individuals could deplete estate assets if they exceed the applicable policy limits or require current management to expend significant resources defending such claims. And while the Debtors do not believe any liabilities exist against current or former directors or officers, the Debtors seek approval of the proposed releases to give full force and effect to the discharge and fresh start they are seeking as part of this chapter 11 case.

116. ***Secondly***, each of the Released Parties has contributed significantly to these chapter 11 cases. Without their contributions, the Debtors' reorganization would not have been accomplished in less than 100 days and recoveries for all stakeholders would have likely been largely diminished.

117. More specifically, the Secured Lender and Secured Notes Trustee could have exercised remedies in the face of defaults or insisted upon a sale process that did not ensure satisfaction of administration obligations as contemplated under the Plan. Instead, the Secured Lender and Secured Notes Trustee agreed to support the chapter 11 plan in accordance with the terms of the RSA. In connection therewith, the Secured Lender provided debtor-in-possession financing—when other parties were unwilling—on terms that were reasonable and competitive, and was willing to concede deficiencies in its collateral package to save the Debtors the administrative burdens and expenses associated with protracted litigation. Once the Creditors' Committee was appointed, the Secured Lender worked immediately with the Debtors and

engaged in several weeks of negotiations and discussions in an effort to reach overall consensus. In the end, it was the Secured Lender that agreed to the additional proceeds provided for the benefit of holders of Allowed General Unsecured Claims that it was otherwise entitled to while agreeing to waive its $114.5 million deficiency claim and its right to participate in the General Unsecured Claim recovery pool, in addition to converting its $194 million of debt into 100% of the new common stock in the Reorganized Debtors and $76 million in non-recourse, unsecured notes issued by a new holding company.[105] Moreover, as provided in the Plan, the Secured Lender will provide a $15 million New Working Facility to ensure the future viability of the Reorganized Debtors in addition to the $15 million in debtor in possession financing that was provided in connection with the commencement of these cases.[106]

118. The efforts of the Equity Sponsors before and during these chapter 11 cases have been crucial in building and maintaining support among the Debtors' key constituents and have enabled the Debtors to avoid the need for a potentially litigious, lengthy and costly restructuring process that could have materially delayed and reduced distributions to all creditors. Notwithstanding that the Equity Sponsors' Interests were fully impaired following its recent take-private of Conexant (a $200 million investment), the Equity Sponsors expended considerable time, energy and effort to negotiate and effectuate the comprehensive restructuring reflected in the RSA and the Plan.

119. Specifically, the Debtors, and their Directors and Officers, with the assistance of the Equity Sponsors and their advisors, marketed their assets in the quest to maximize value and

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105 *See* Hassel Declaration, ¶ 38.

106 Hassel Declaration, ¶ 21.

stakeholder recoveries. In addition to the formal marketing process, the Debtors explored and considered various restructuring alternatives, including the exploration of out of court restructuring transactions.

120. The Equity Sponsors did not seek compensation from the Debtors for these and all other prepetition efforts. Instead, the Equity Sponsors worked with the Debtors and ultimately the Secured Lender to ensure that a going concern restructuring was negotiated for the benefit of all parties in interest. This included an insistence on a chapter 11 plan and a corresponding commitment from the Secured Lender to satisfy administrative expenses incurred during the course of these cases. Moreover, and to facilitate a chapter 11 plan that maximized the Secured Lender's recovery and the Debtors' enterprise value, the Equity Sponsors assisted the Debtors in preserving valuable tax benefits, without which the Debtors would have been faced with considerable loss of valuable tax benefits.[107] Since the Petition Date, the Equity Sponsors have continued to participate in these cases and support the Debtors' restructuring efforts.

121. The Debtors' Directors and Officers also played a crucial role both before and during these chapter 11 cases. The Board, which includes appointees of the Equity Sponsors and an independent director who was appointed in connection with the Debtors' restructuring activities, took an extremely active role in all restructuring-related activities. More specifically, the Board was responsible for oversight of the marketing process and interactions with the Secured Lender to simultaneously negotiate a potential restructuring transaction. When it

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[107] *See In re Charter Communications*, 691 F.3d at 486 (noting that the former equity owner—Paul Allen—made a "substantial contribution" to the debtors' reorganization that justified a third-party release by aiding the preservation of tax attributes of the Debtors).

became apparent that a chapter 11 filing would be necessary, the Board (and the Equity Sponsors) insisted that any restructuring be accomplished in a manner that resulted in satisfaction of administrative claims through the confirmation of a chapter 11 plan. This led to the negotiation of the RSA and the filing of the Plan. Since the Petition Date, the Debtors' Directors and Officer have actively participated in these cases and continue support the management team with various operating issues.[108]

122. The Committee, shortly after its appointment, collectively worked with the Debtors and engaged in negotiations with the Debtors, the Secured Lender and the objecting landlords. These efforts enabled the parties to fully and finally resolve issues related to, among other things, the validity of the Secured Lender's security interests and rejection of certain the Debtors' unexpired real estate leases. The Committee's post-petition efforts directly cleared the path for Plan solicitation on a globally consensual Plan and expedited emergence from these chapter 11 cases, minimizing disruption to these chapter 11 cases, and maximizing recovery for all stakeholders.

123. ***Third***, the Debtor Release was an integral part of, and critically important to, the success of the Plan. The Debtor Releases were key elements in each of the RSA and the Global Settlement. The Secured Lenders and the Equity Sponsors insisted on the Debtor Release in the Plan as a predicate to entering into the RSA and supporting the Plan. The Debtors believe in their business judgment that approval of the Debtor Release is in the best interest of all of its stakeholders.

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[108] See Hassel Declaration, ¶41.

124. ***Fourth***, the Plan was overwhelmingly approved, with votes in favor by holders of 100% of the amount and over 100% Class 3 Secured Notes Claims and 100% of the amount and over 100% Class 4 General Unsecured Claims. The Debtors also gave actual and publication notice of the Plan Confirmation Hearing [Docket No. 229] to all interested parties, and no objections to the Plan (or its releases) were received.

125. ***Fifth***, the Plan provides for a meaningful recovery of all classes affected by the release. The Valuation Report establishes that the Secured Lender was undersecured in excess of $114 million, yet still agreed to a $2.9 million distribution under the Plan for the benefit of holders of Class 4 General Unsecured Claims. Additionally, the Debtors—as authorized by this Court—have paid critical vendors approximately $5.7 million in prepetition payments to date. And finally, as described above, the Equity Sponsors assisted the Debtors in preserving valuable tax benefits and abstained from collecting management fees for the benefit of the Plan voting parties. In sum, absent support of the Released Parties, the available funds for voting claimants, if any, would undoubtedly be substantially lower.

B. The Third-Party Releases Are Appropriate

126. The Plan also provides for the release by certain third parties (the "***Third-Party Releases***") of their claims and causes of action against the Debtors and the Released Parties relating, in general, to the chapter 11 proceedings of the Debtors and arising prior to the effective date of the Plan.[109] Courts in this jurisdiction routinely approve third-party release provisions if they are consensual.[110] The Ballots sent to the Voting Classes explicitly provided the ability to opt-out of the Third Party Releases. [111] Moreover, the Debtors have modified the Third Party Release to ensure that parties who do not return a ballot are not bound by the Third Party Release.

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[109] Plan Art. X.E.

[110] *See In re Wash. Mut.*, 442 B.R. at 352 (observing that consensual third-party releases are permissible); *In re Zenith*, 241 B.R. at 111 (approving non-debtor releases for creditors that voted in favor of the plan); *see also In re Indianapolis Downs, LLC*, 486 B.R. 286, 304-05 (Bankr. D. Del. 2013) (approving as consensual third-party release that applied to unimpaired holders of claims deemed to accept the plan).

[111] The Ballots provided the following opt out language:

> **If you would like to vote to accept the Plan but *not* be subject to the release provision contained in Article VIII.E of the Plan, please indicate so by checking this box: ☐**

The Confirmation Hearing Notice provided the following language:

> ARTICLE VIII OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS, AND **ARTICLE VIII.E. CONTAINS A THIRD-PARTY RELEASE**. THUS, YOU ARE ADVISED TO REVIEW AND CONSIDER THE PLAN CAREFULLY BECAUSE YOUR RIGHTS MIGHT BE AFFECTED THEREUNDER.

127. As noted above, the Third-Party Releases under the Plan are the product of extensive negotiations among the Debtors, the Secured Lender, Equity Sponsors and Creditors' Committee and are required under the RSA.

128. Each of the Releasing Parties entitled to vote on the Plan voted to accept the Plan inclusive of the third-party releases by abstaining from opting out of the release of the Released Parties.[112] Indeed, only consenting parties have released their claims under the Plan.[113] Specifically, the Releasing Parties only include creditors who have (i) affirmatively voted in favor of the Plan **and** did not opt-out of the release in its ballot, or (ii) those that have signed the RSA. As a result, only those creditors that affirmatively approved the terms of the Plan will release their claims against the Released Parties.[114] The agreement of the Releasing Parties to release their claims stands as further recognition of the substantial contribution provided by the Released Parties to the Debtors and their estates, and that the Plan's release provisions are justified.

129. Accordingly, the Debtors submit that the release of the Debtors and certain third parties is supported by creditors and given in exchange for substantial contributions by such

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[112] *See In re Indianapolis Downs, LLC*, 486 B.R. at 305–06 (confirming plan where abstaining parties were "deemed to consent to the Third Party Release") (internal quotation omitted); *In re Lear Corp.*, No. 09-14326 (ALG), 2009 WL 6677955, at *32 (Bankr. S.D.N.Y. Nov. 5, 2009) (confirming plan where parties were given notice that a vote to accept the plan or abstention from voting constitutes assent to the third-party releases).

[113] *See Coram*, 315 B.R. at 336 (holding that creditors are bound by third party plan release if they voted to accept the plan); *Exide*, 303 B.R. at 74 (holding that creditor are bound by third party release upon voting for the plan); *see also In re Specialty Equip. Cos.*, 3 F.3d 1043, 1046-47 (7th Cir. 1993) (holding that upon affirmative agreement of creditor to terms of plan, third party release is consensual and binding); *In re W. Coast Video Enters., Inc.*, 174 B.R. 906, 911 (Bankr. E.D. Pa. 1994) (same).

[114] *See, e.g., In re Local Insight Media Holdings, Inc.*, No. 10-13677 (KG) (Bankr. D. Del. Nov. 3, 2011) (confirming plan that treated holders of claims and interest that did not vote to reject plan or were not members of a class deemed to reject plan as releasing parties); *In re Majestic Star Casino, LLC*, No. 09-14136 (KG) (Bankr. D. Del. Mar. 10, 2011) (confirming plan that treated holders of claims and interests that did not vote to accept plan as releasing parties).

released parties. Thus, the Debtors respectfully submit that they entitled to the releases set forth in the Plan, which have been approved in prior chapter 11 cases.[115]

C. The Exculpation Provision Is Appropriate

130. Exculpation provisions similar to those proposed in the Plan are appropriate where, as here, such provisions do not extend to gross negligence or willful misconduct insofar as the exculpated parties have acted in good faith in negotiating and implementing a plan of reorganization.[116] Courts evaluate the appropriateness of exculpation provisions based on a number of factors, including whether the plan was proposed in good faith, whether liability is limited, and whether the exculpation provision was necessary for plan negotiations.[117]

131. The exculpation provision in Section VIII.G of the Plan is appropriate and vital under the circumstances of these chapter 11 cases. *First*, based on informal comments received from the U.S. Trustee, the exculpation provisions have been modified to only apply to estate fiduciaries. *Secondly*, the Exculpated Parties[118] played a critical role in formulating the RSA, the

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[115] *See, e.g.*, *In re EBHI Holdings, Inc.*, Case No. 09-12099 (MFW) (Bankr. D. Del. Jan. 26, 2010) (granting a release of "the officers, directors, shareholders, members and/or enrollees, employees, representatives, advisors, attorneys, financial advisors, investment bankers or agents of the Debtors" by "each present and former holder of a [c]laim or [i]nterest who votes in favor of the [p]lan"); *In re JHT Holdings, Inc.*, Case No. 08-11267 (BLS) (Bankr. D. Del. Oct. 6, 2008) (approving release of debtors, their officers and directors, advisors, and professionals); *In re Dura Auto Sys., Inc.*, Case No. 06-11202 (KJC) (Bankr. D. Del. May 13, 2008) (same); *In re Foamex Int'l, Inc.*, Case No. 05-12685 (PJW) (Bankr. D. Del. Feb. 1, 2007) (same); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Jun. 21, 2006) (same).

[116] *See In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *In re Indianapolis Downs, LLC* 486 B.R. at 306 (same); *In re Wash. Mut.*, 442 B.R. at 350 (same).

[117] *See, e.g.*, *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (evaluating the exculpation clause based on the manner in which the clause was made a part of the agreement, the necessity of the limited liability to the plan negotiations, and that those who participated in proposing the plan did so in good faith).

[118] In order to resolve the U.S. Trustee's concerns, the Debtors, in consultation with, and with the consent of the Credit Agreement Agents, modified the definition of "Exculpated Party" set forth in Section 1.1(70) of the Plan (Continued...)

Disclosure Statement, the Plan and related documents. Such negotiations and the resulting agreements were extensive and implemented in good faith with a high degree of transparency, the net result of which result is the consensual Plan presently before the Court.[119] The exculpation provision was important to the development of a feasible, confirmable Plan, and the Exculpated Parties relied upon the protections afforded to the constituents involved. *Third*, the scope of the exculpation provision is appropriately limited to the Exculpated Parties' acts or omissions in connection with the RSA and the Chapter 11 Cases and does not protect the Exculpated Parties from liability resulting from gross negligence or willful misconduct.[120] *Fourth*, the exculpation provision is necessary and appropriate to protect parties who have made substantial contributions to the Debtors' reorganization from future collateral attacks related to actions taken in good faith in connection with the Debtors' restructuring. *Fifth*, the Plan, including the exculpation provisions, is supported by all Voting Classes to these chapter 11 cases, and no party in interest has filed an objection to the Plan.

132. Accordingly, under these circumstances, it is appropriate for the Court to approve the exculpation provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[121]

D. The Injunction Provision Is Appropriate

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prior to the filing of this memorandum to remove references to certain parties, as described in more detail below.

[119] Hassel Declaration, ¶ 49.

[120] Plan § VIII.G.

[121] *See In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *In re Indianapolis Downs, LLC* 486 B.R. at 306 (same).

133. The injunction provision set forth in Section VIII.F of the Plan implements the Plan's release and exculpation provisions, in part, by permanently enjoining all Entities from commencing or maintaining any action against the Debtors, the Reorganized Debtors, the Released Parties, or the Exculpated Parties on account of any Claims or Interests that are released, discharged, or subject to exculpation pursuant to the Plan or the Confirmation Order. The injunction provision is thus a key provision of the Plan because it enforces the release and exculpation provisions that are centrally important to the Plan. As such, to the extent the Court finds that the exculpation and release provisions are appropriate, the Debtors respectfully submit that the injunction provision must also be appropriate. Moreover, this injunction provision is narrowly tailored to achieve its purpose, and similar injunctions have been approved by courts in other chapter 11 cases.[122]

[122] *See e.g., In re N. Am. Petroleum Corp.*, 455 B.R. 382 (Bankr. D. Del. 2011) (stating that injunctions in the plan were necessary to preserve and enforce the releases and exculpations granted by the plan and were narrowly tailored to achieve that purpose); *In re Chi. Newspaper Liquidation Corp.*, No. 09-11092 (CSS), 2013 WL 1320806 (Bankr. D. Del. Apr. 3, 2013) (same); *In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *9 (Bankr. D. Del. Apr. 29, 2010) (same).

Conclusion

134. Based on the foregoing, the Debtors respectfully submit that the Court should approve the Disclosure Statement, Solicitation Package and the solicitation process, and confirm the Plan.

Dated: May 31, 2012
Wilmington, Delaware

/s/ Domenic E. Pacitti

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