IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re: Curae Health, Inc., *et al.*[1] 1721 Midpark Road, Suite C300 Knoxville, TN 37921 Debtors.	Chapter 11 Lead Case No. 18-05665 Judge Walker Jointly Administered

PLAN PROPONENTS' MEMORANDUM OF LAW IN SUPPORT OF ENTRY OF AN ORDER CONFIRMING THE JOINT CHAPTER 11 PLAN OF LIQUIDATION OF CURAE HEALTH, INC., *et al.*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Curae Health, Inc. (5638); Amory Regional Medical Center, Inc. (2640); Batesville Regional Medical Center, Inc. (7929); and Clarksdale Regional Medical Center, Inc. (4755); Amory Regional Physicians, LLC (5044); Batesville Regional Physicians, LLC (4952); Clarksdale Regional Physicians, LLC (5311).

Curae Health, Inc., et al. (collectively, the "**Debtors**"), the debtors-in-possession in the above-captioned chapter 11 cases, and the Official Committee of Unsecured Creditors (the "**Committee**", together with the Debtors, the "**Plan Proponents**") appointed in these cases jointly submit this memorandum of law (this "**Memorandum**") in support of confirmation of the *Joint Chapter 11 Plan of Liquidation* [Docket No. 834] (as subsequently revised or amended, the "**Joint Plan**").[1] The Debtors and the Committee respectfully request confirmation of the Joint Plan pursuant to the proposed form of order filed contemporaneously herewith (the "**Confirmation Order**"). In support of the Joint Plan, the Debtors and the Committee rely upon and incorporate by reference (a) the *Declaration of Stephen N. Clapp, Chief Executive Officer of Curae Health, Inc. in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 49] (the "**First Day Declaration**"); (b) the *Declaration of Kevin Martin of BMC Group, Inc. Regarding Voting and Tabulation of Ballots Accepting and Rejecting the Joint Chapter 11 Plan of Liquidation of Curae Health, Inc., et al.* (the "**Tabulation Declaration**"); and (c) the *Declaration of Stephen N. Clapp, Chief Executive Officer of Curae Health, Inc. in Support of Confirmation of the Disclosure Statement and Joint Chapter 11 Plan of Liquidation of Curae Health, Inc., et al.* (the "**Confirmation Declaration**").[2]

[1] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Joint Plan.

[2] All representations in the First Day Declaration and the Confirmation Declaration are the representations of Stephen N. Clapp as Chief Executive Officer of Curae Health, Inc., and the Committee relies on these representations solely to the extent that they demonstrate satisfaction of the requirements for confirmation of the Plan under the Bankruptcy Code. In all other respects, including with respect to any statements of fact regarding the period prior to the Petition Date (as defined below), the representations in the First Day Declaration and the Confirmation Declaration are not statements or representations of the Committee, the Liquidating Trustee, or the Debtor Representative; are not adopted as such; shall not bind the Committee, the Liquidating Trustee, or the Debtor Representative; and shall not be construed to constitute admissions of any fact or waivers or limitations of any right by the Committee, the Liquidating Trustee, or the Debtor Representative. All rights, claims, and defenses of, or assertable by, the Committee, the Liquidating Trustee, or the Debtor Representative with respect to such representations are expressly reserved and preserved.

PRELIMINARY STATEMENT

1. The Plan Proponents respectfully request confirmation of the Joint Plan, which is supported by a majority of creditors entitled to vote. The Joint Plan is the result of extensive arm's-length negotiations between the Debtors and the Committee and provides an efficient and value-maximizing mechanism for the liquidation of the Debtors' remaining assets and distribution of the same to creditors.

BACKGROUND

A. General Background

2. On August 24, 2018 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the Middle District of Tennessee (the "**Bankruptcy Court**").

3. As set forth more fully in the First Day Declaration and Joint Plan, the Debtors are healthcare providers. Curae Health, Inc. ("**Curae**") is a Tennessee nonprofit corporation, and the sole member and sponsoring organization of the Tennessee nonprofit corporations Amory Regional Medical Center, Inc. ("**Amory Medical**"), Batesville Regional Medical Center, Inc. ("**Batesville Medical**"), and Clarksdale Regional Medical Center, Inc. ("**Clarksdale Medical**"). Amory Medical is the sole member of Amory Regional Physicians, LLC ("**Amory Physicians**"); Batesville Medical is the sole member of Batesville Regional Physicians, LLC ("**Batesville Physicians**"); and Clarksdale Medical is the sole member of Clarksdale Regional Physicians, LLC ("**Clarksdale Physicians**"), each Tennessee limited liability companies.

4. In 2017, the Debtors acquired three Mississippi hospitals from CHS/Community Health Systems, Inc. (together with its affiliates and subsidiaries, "**CHS**"): (1) Gilmore Medical Center in Amory, Mississippi (the "**Amory Hospital**"), owned and operated by Amory Medical,

(2) Panola Hospital and other health-care related facilities in Batesville Mississippi (together, the "**Batesville Hospital**"), owned and operated by Batesville Medical, and (3) Northwest Mississippi Regional Medical Center (the "**Clarksdale Hospital**", together with the Batesville Hospital and the Amory Hospital, the "**Hospitals**") in Clarksdale, Mississippi, owned and operated by Clarksdale Medical.

5. Debtors entered bankruptcy with the intent to sell the Hospitals to new operators that could keep them open for the benefit of their respective communities. In furtherance of that goal, Debtors engaged in three separate sale processes for each of the Hospitals.

Amory Hospital

6. On August 31, 2018, the Debtors filed *Debtors' Motion for Entry of an Order (I) Authorizing and Approving Bidding Procedures for the Sale of Gilmore Medical Center, (II) Authorizing the Sale of Gilmore Medical Center Free and Clear of All Liens, Claims, Encumbrances and Other Interests, (III) Approving Stalking Horse Purchaser, Break-up Fee, and Overbid Protections, (IV) Establishing Certain Procedures for the Assumption and Assignment of Executory Contracts and Unexpired Leases, (V) Scheduling an Auction, (VI) Scheduling a Hearing and Objections Deadlines With Respect to the Sale of Gilmore Medical Center, (VII) Approving the Form and Manner of Notice Thereof, and (VIII) Granting Related Relief* [Docket No. 79] (the "**Amory Procedures Motion**"), seeking to, *inter alia*, sell all, or substantially all, of their assets related to Gilmore Medical Center (the "**Amory Hospital**").

7. On September 28, 2018, the Bankruptcy Court entered an order on the Amory Procedures Motion (the "**Amory Procedures Order**") [Docket No. 260] and set a sale hearing for November 27, 2018.

8. On November 30, 2018, the Bankruptcy Court entered an order, *inter alia*, approving the Asset Purchase Agreement for the sale of the Amory Hospital to NMHS (the "**Amory APA**") and authorizing the Debtors to sell the Amory Hospital to NMHS free and clear of all liens, claims, encumbrances, and other interests [Docket No. 506] (the "**Amory Sale Order**").

9. On December 31, 2018, the closing of the sale of the Amory Hospital occurred, with an effective time of 12:01 a.m. on January 1, 2019 (the "**Effective Time**").

Batesville Hospital

10. On November 6, 2018, the Debtors filed their *Motion for Entry of an Order (I) Authorizing and Approving Bidding Procedures for the Sale of Panola Medical Center, (II) Authorizing the Sale of Panola Medical Center Free and Clear of All Liens, Claims, Encumbrances and Other Interests, (III) Approving Stalking Horse Purchaser, Break-up Fee, and Overbid Protections, (IV) Establishing Certain Procedures for the Assumption and Assignment of Executory Contracts and Unexpired Leases, (V) Scheduling an Auction, (VI) Scheduling a Hearing and Objections Deadlines With Respect to the Sale of Panola Medical Center, (VII) Approving the Form and Manner of Notice Thereof, and (VIII) Granting Related Relief* [Docket No. 401] (the "**Batesville Procedures Motion**"), seeking to, *inter alia*, sell all, or substantially all, of their assets related to Panola Medical Center (the "**Batesville Hospital**").

11. On November 30, 2018, the Bankruptcy Court entered an order on the Batesville Procedures Motion (the "**Batesville Procedures Order**") [Docket No. 507], approving the Batesville Procedures Motion and setting a sale hearing.

12. On January 22, 2019, the Bankruptcy Court entered an order, *inter alia*, approving the Asset Purchase Agreement for the sale of the Batesville Hospital to Progressive (the

"**Batesville APA**") and authorizing the Debtors to sell the Batesville Hospital to Progressive free and clear of all liens, claims, encumbrances, and other interests [Docket No. 694] (the "**Batesville Sale Order**").

13. On March 13, 2019, the Court entered the *Expedited Consent Order (I) Approving the First Amendment to the Panola APA, (II) Authorizing the Debtors to Pay the Purchase Price from the Sale of Panola Medical Center to ServisFirst Bank, (III) Authorizing Certain Releases, and (IV) Granting Related Relief* [Docket No. 876] (the "**Supplemental Sale Order**").

14. On March 14, 2019, the sale of the Batesville Hospital closed in accordance with the terms set forth in the Supplemental Sale Order, with an effective time of 12:01 a.m. on March 1, 2019.

Clarksdale Hospital

15. After the Petition Date, the financial performance of the Northwest Mississippi Regional Medical Center (the "**Clarksdale Hospital**") was significantly worse than forecasted in the Debtor's budget. On October 12, 2018, Debtors filed the *Expedited Motion for Entry or an Order Authorizing Debtors to: (I)(A) Shut Down the Clarksdale Hospital; (B) Reject Unexpired Leases and Contracts of Clarksdale; and (C) Receive Related Relief; or, in the Alternative; (II)(A) Transfer Operations of the Clarksdale Hospital to a New Operator Free and Clear of any Liens, Claims, or Encumbrances Pursuant to an Operations Transfer Agreement to be Filed with the Court; (B) Assume and Assign the Coahoma County Lease and Certain Other Unexpired Leases and Contracts Requested by the New Operator; and (C) Receive Related Relief* [Docket No. 314] (the "**Clarksdale Shutdown Motion**").

16. On December 13, 2018, following extensive negotiations among the Debtors, Coahoma County, Mississippi (the "**County**"), the Official Committee of Unsecured Creditors,

the Debtors' secured creditors, and CHS and multiple hearings on the Clarksdale Shutdown Motion, the Court entered the *Order (I) Authorizing the Debtors to Enter into the Interim Management Services Agreement with Clarksdale HMA, LLC, Coahoma County, and CHS/Community Health Systems, Inc., and (II) Granting Related Relief* [Docket No. 558] (the "**Clarksdale IMSA Order**"), pursuant to which the Court, *inter alia*, approved the Interim Management Services Agreement (the "**IMSA**"). Effective December 16, 2018, Debtors transferred management of the Clarksdale Hospital on an interim basis to CHS to allow the hospital to remain open for the benefit of its community.

17. On April 23, 2019, Debtors filed the *Debtors' Expedited Motion for Entry of an Order (I) Authorizing the Sale of Northwest Mississippi Regional Medical Center Free and Clear of all Liens, Claims, Encumbrances and Other Interests, (II) Approving the Clarksdale APA; (III) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* [Docket No. 962] (the "**Clarksdale Sale Motion**"), seeking to, *inter alia*, sell all, or substantially all, of their assets related to the Clarksdale Hospital to CHS. A hearing on the Clarksdale Sale Motion is set for May 9, 2019 at 9:00 a.m.

Bar Date Motion

18. On December 5, 2018 the Debtors filed the *Motion to Set Bar Date for Filing Proofs of Claim, Approving Administrative Expense Proof of Claim Form, and Approving the Form and Manner of Notice Thereof* [Docket No. 521] (the "**Bar Date Motion**"). Among other things, the Bar Date Motion sought to establish certain dates by which Proofs of Claim against the Debtors must be submitted (collectively, the "**Bar Dates**"). No responses or objections were received. The Court entered an order granting the Bar Date Motion on December 11, 2018,

setting: (i) January 21, 2019 as the General Bar Date; (ii) January 21 as the 503(b)(9) Bar Date; and (iii) February 20, 2019 as the Governmental Bar Date.

B. The Joint Plan Process

19. After extensive negotiations between the Debtors and the Committee, the Joint Plan was filed on March 4, 2019. Contemporaneously therewith, the Debtors filed the *Disclosure Statement for Joint Chapter 11 Plan of Liquidation* [Docket No. 835] (the "Disclosure Statement") and *Motion for an Order (I) Approving Disclosure Statement; (II) Establishing Forms and Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan; (III) Establishing Deadline and Procedures for Filing Objections to the Confirmation of the Plan; and (IV) Granting Related Relief* [Docket No. 836] (the "**Disclosure Statement and Procedures Motion**").

20. The Joint Plan is a liquidating plan and provides for the creation of a Liquidating Trust and appointment of a Liquidating Trustee for the benefit of the Debtors' creditors, to which the remaining assets of the Debtors will be transferred. Following the Effective Date, the Debtors' assets, except the D&O Claims, Tort Claims, and rights in and proceeds of any related Insurance Policies, will be transferred to the Liquidating Trust for the benefit of Holders of Allowed Claims the "**Liquidating Trust Assets**").

21. On March 7, 2019, the Court entered the *Order (I) Approving Disclosure Statement; (II) Establishing Forms and Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan; (III) Establishing Deadline and Procedures for Filing Objections to the Confirmation of the Plan; and (IV) Granting Related Relief* [Docket No. 841] (the "**Disclosure Statement and Procedures Order**"). The Disclosure Statement and Procedures Order, among other things, approved the Disclosure Statement as containing adequate information, set dates related to approval of the Joint Plan, including the Confirmation Hearing

to consider confirmation, and approved various solicitation procedures (the "**Solicitation Procedures**"). The deadline for receipt of votes was set as 4:00 p.m. (prevailing Central Time) on April 17, 2019 (the "**Voting Deadline**").

22. Following entry of the Disclosure Statement and Procedures Order, the Debtors commenced solicitation of the Joint Plan by sending solicitation packages (the "**Solicitation Packages**") to Holders of Claims in Class 5 (General Unsecured Claims, Holders of Claims in Class 6 (Deficiency Claims of ServisFirst), and Holders of Claims in Class 7 (Deficiency Claims of CHS) (together, the "**Voting Classes**").

23. As set forth in the Tabulation Declaration and in detail below, the Joint Plan meets all of the requirements for confirmation under the Bankruptcy Code.

ARGUMENT.

A. The Joint Plan Meets the Bankruptcy Code's Requirements and Should be Approved

24. By this Memorandum, the Plan Proponents submit that confirmation of the Joint Plan is appropriate as it satisfies Bankruptcy Code sections 1123, 1125, and 1129.

(i) Debtors Complied with the Solicitation Procedures

25. Bankruptcy Code section 1125(b) provides that "[a]n acceptance or rejection of a plan may not be solicited . . ., 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 approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b).

26. Here, as set forth in more detail in the Tabulation Declaration, the Plan Proponents have complied with the Disclosure Statement and Procedures Order, including the Solicitation Procedures, in all respects. Votes to accept or reject the Joint Plan have been

solicited and tabulated fairly, in good faith, and in a manner consistent with the Bankruptcy Code and the Bankruptcy Rules, the Solicitation Procedures, and applicable nonbankruptcy law. Accordingly, the Plan Proponents submit that solicitation of the Joint Plan complied with Bankruptcy Code section 1125.

(ii) Section 1129(a)(1): The Joint Plan Complies With the Applicable Provisions of the Bankruptcy Code

27. To achieve confirmation of the Joint Plan, the Debtors must demonstrate, by a preponderance of the evidence, that the Joint Plan complies with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). *See also Matter of Briscoe Enterprises, Ltd.,* II, 994 F.2d 1160, 1165 (5th Cir. 1993); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008). As set forth in this Memorandum, the Joint Plan satisfies all provisions of Bankruptcy Code section 1129 and complies with all other applicable Bankruptcy Code sections, the Bankruptcy Rules, the Local Rules, and applicable nonbankruptcy law. *See In re W.R. Grace & Co.*, 475 B.R. 34, 173 (D. Del. 2012).

(iii) Section 1122: The Joint Plan Classifications Are Appropriate

28. Bankruptcy Code section 1122 provides, in pertinent part:

> (a) 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.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122. Bankruptcy Code section 1122 affords the proponent of a plan with significant flexibility in the classification of claims and interests, so long as there is a reasonable basis for such classification. *See In re U.S. Truck Co., Inc*., 800 F.2d 581, 586 (6th Cir. 1986)

(noting that courts have been "given broad discretion to determine proper classification according to the factual circumstances of each individual case"); *Zentek GBV Fund IV v. Vesper*, 19 F. App'x 238, 249 (6th Cir. 2001); *In re Tribune Co.*, 476 B.R. 843, 854 (Bankr. D. Del. 2012) (finding that "Section 1122(a) is permissive," in that "it does *not* provide that *all* similar claims must be placed in the same class"). *See also In re John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158-59 (3d Cir. 1993); *Olympia & York Fla. Equity Corp. v. Bank of N.Y. (In re Holywell Corp.)*, 913 F.2d 873, 880 (11th Cir. 1990); *Inre Avia Energy Dev., LLC*, Case No. 05-39339 (BJH), 2007 WL 2238039, at *2 (Bankr. N.D. Tex. Aug. 2, 2007).

29. Here, the Joint Plan designates the following Classes:

Class 1 – Priority Non-Tax Claims

Class 2 – Alleged ServisFirst Secured Claim

Class 3 – Alleged CHS Secured Claim

Class 4 – Secured Claims of Other Lienholders

Class 5 – General Unsecured Claims

Class 6 – Deficiency Claims of ServisFirst

Class 7 – Deficiency Claims of CHS

Class 8 – Corporate Interests

Such classifications comply with Bankruptcy Code section 1122. All Claims and Corporate Interests within a Class are substantially similar. Additionally, each Claim and Corporate Interest differs from Claims and Corporate Interests in other Classes based upon such Claim or Corporate Interest's legal or factual nature. Specifically, and as set forth in more detail below, the Plan Proponents have substantial justification for the separate classification of the deficiency claims of ServisFirst and CHS.

30. Thus, the Debtors submit that the classification scheme within the Joint Plan is consistent with Bankruptcy Code section 1122.

(iv) Section 1123(a): The Joint Plan's Content is Appropriate

31. Bankruptcy Code section 1123(a) sets forth seven requirements which a plan must contain. 11 U.S.C. § 1123(a). Here, each such requirement has been met:

a. As set forth above, the Joint Plan designates Classes of Claims and Interests as required by Bankruptcy Code section 1123(a)(1). *See* Article III.

b. The Joint Plan sets forth which Classes of Claims are impaired or unimpaired as required by Bankruptcy Code sections 1123(a)(2) and (a)(3). *See* Article IV.

c. The Joint Plan provides for equal treatment within each Class as required by Bankruptcy Code section 1123(a)(4). *See* Article IV.

d. The Joint Plan provides for adequate means for implementation including: (i) the establishment of the Liquidating Trust and appointment of the Liquidating Trustee; (ii) the transfer of the Liquidating Trust Assets to the Liquidating Trust; and (iii) the procedures for distributions to Holders of Allowed Claims. Together with the Plan Supplement, the Joint Plan contains adequate means for implementation as required by Bankruptcy Code section 1123(a)(5). *See* Article VII.

e. The Debtors are non-profit corporations. As such, Bankruptcy Code section 1123(a)(6) is not applicable.

f. The Joint Plan and Plan Supplement provide for the appointment of the Liquidating Trustee, and the establishment of the Liquidating Trust. The Liquidating Trust will be administered and controlled by the Liquidating Trustee for the interests of general unsecured creditors. Thus, the Debtors submit that Bankruptcy Code section 1123(a)(7) has been met as selection of the Liquidating Trustee is consistent with the interests of creditors, holders of equity interests, and public policy.

(v) Section 1123(b): the Joint Plan Contains Certain Permissible Provisions

32. Bankruptcy Code section 1123(b) sets forth permissive provisions which may be incorporated into a plan. A plan may: impair or leave unimpaired any class of claims; provide for the assumption or rejection of executory contracts and unexpired leases; provide for the

settlement or retention of a debtor's claims; modify or leave unaffected the rights of holders of claims; and include any provision not inconsistent with the Bankruptcy Code. 11 U.S.C. § 1123(b).

33. The Joint Plan provides for the classification and impairment or unimpairment of certain Classes. *See* Article IV. The Joint Plan also contains procedures for the distributions and the allowance or disallowance of Claims. *See* Article VIII.

(a) The Joint Plan's Release, Exculpation, and Injunction Provisions are Appropriate and Should be Approved

34. Consistent with Bankruptcy Code section 1123(b), the Joint Plan also contains: (a) releases by the Debtors and their estates (the "**Debtor Releases**"); and (b) provisions related to injunction and exculpation. *See* Article XI. As detailed below, the aforementioned provisions are proper under the circumstances of these Chapter 11 Cases because they are fair and equitable, given for reasonable consideration, and an integral part of the Joint Plan.

35. At the outset, the Debtors note the limited definition contained in the Joint Plan:

> "**Released Parties**" means, individually and collectively, in each case solely in their capacity as such, each and all of: (a) the Debtors' current Professionals; (b) the Debtors' directors and officers who are serving in such capacity as of the Petition Date; and (c) the Committee and members of the Committee in their capacity as members of the Committee. With respect to each of the foregoing identified in subsection (c), each and all of their respective Professionals.

36. Such definition is wholly appropriate in these Chapter 11 Cases and consistent with applicable law. Each party is or was an estate fiduciary during the pendency of these Chapter 11 Cases. As set forth below, such releases should be approved.

(1) Debtor Releases

37. Article XI.C of the Joint Plan contains certain the Debtor Releases. The Debtor Releases provide that on the Effective Date, the Debtors and the Estates will release claims and

causes of action against the Releasing Parties subject to the express limitations on such release set forth in Article XI.C.

38. Debtor releases are explicitly allowed under the Bankruptcy Code. Pursuant to Bankruptcy Code section 1123(b)(3)(A), debtors may release claims "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable and in the best interests of the estate." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *accord In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009), *aff'd*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part*, 627 F.3d 496 (2d Cir. 2010) (finding that the "releases and discharges of claims and causes of action by the Debtors, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of the estate"); *see also In re Midway Gold US, Inc.*, 575 B.R. 475, 509 (Bankr. D. Colo. 2017); *In re Pac. Gas & Elec. Co.*, 304 B.R. 395, 416 (Bankr. N.D. Cal. 2004).

39. "The decision of whether to approve a particular compromise lies within the discretion of the Bankruptcy judge and pursuant to Bankruptcy Rule 9019(a)." *In re Texaco Inc.*, 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988). "Whether the compromise is effected separately or in the body of a reorganization plan will not affect the approval analysis required of the bankruptcy court." *In re Dow Corning Corp.*, 192 B.R. 415, 421 (Bankr. E.D. Mich. 1996) (citing *In re Texaco Inc.*, 84 B.R. at 901 ("Compromises may be effected separately during reorganization proceedings or in the body of the reorganization plan itself.")).

40. "A proposed settlement should only be approved by the bankruptcy judge upon a determination that the settlement is 'fair and equitable.'" *In re Dow Corning Corp.*, 192 B.R. at 421 (citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v.*

Anderson, 390 U.S. 414, 424 (1968)). "[T]he court need not conduct a mini-trial on the merits of the settlement." *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991); *In re Energy Co-op., Inc.*, 886 F.2d 921, 927 n.6 (7th Cir. 1989). Instead, the obligation of the court is to "canvass the issues and see whether the settlement 'falls below the lowest point in the range of reasonableness.'" *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 497 (Bankr. S.D.N.Y. 1991) (quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied, Cosoff v. Rodman*, 464 U.S. 822 (1983)); *see also In re Dow Corning Corp.*, 192 B.R. at 421.

41. "Any factor 'relevant to a full and fair assessment of the wisdom of [a] proposed compromise' should be considered by the bankruptcy court." *In re Dow Corning Corp.*, 198 B.R. 214, 222 (Bankr. E.D. Mich. 1996) (quoting *TMT Trailer*, 390 U.S. at 424). "However, in determining whether a proposed settlement agreement is fair and equitable, courts have found the following factors to be the most pertinent:

42. The balance between the likelihood of the plaintiff's or defendant's success should the case go to trial compared to the present and future benefits offered by the settlement; the prospect of complex, costly and protracted litigation if settlement is not approved; the proportion of class members who do not object or who affirmatively support the proposed settlement; the competency and experience of counsel who support the settlement; the relative benefits to be received by individuals or groups within the class; the nature and breadth of releases to be obtained by officers and directors; and the extent to which the settlement is the product of arm's length bargaining. *In re Dow Corning Corp.*, 198 B.R. at 222–23 (citing *In re Texaco Inc.*, 84 B.R. at 902).

43. With respect to release of causes of action against a debtor's directors and officers, Courts also consider the effect of indemnification provisions. In *In re Texaco Inc.*, the Bankruptcy Court for the Southern District of New York found that "[t]he value of the derivative actions against Texaco's own officers and directors [was] further diminished by the fact that under Texaco's By-laws, its officers and directors [were] indemnified for liabilities incurred while acting on behalf of Texaco." 84 B.R. at 904. Because "the claims asserted by the derivative plaintiffs would be offset pursuant to the By-law indemnifications[,]" the court found that "[t]he issuance of releases and indemnifications under the Plan to Texaco's officers and directors would represent no additional relinquishment of causes of action by Texaco." *In re Texaco Inc.*, 84 B.R. at 904–05 (holding that the debtor's plan satisfied all requirements to confirmation).

44. Here, the Debtor Releases are fair, reasonable, and in the best interests of the Debtors' estates. Each of the Released Parties provided valuable services to the Estates during the course of these Bankruptcy Cases. Further, as set forth in Article XI.C of the Plan, with respect to the Debtors' directors and officers included in the definition of "Released Parties," the Debtor Releases simply mirror and preserve any protections already provided by Tennessee law. Any claims against the Debtors' directors and officers that could provide value to the Debtors' estates are not being released under the Joint Plan, which expressly reserves and preserves all causes of action against the Debtors' officers and directors to which they are not immune (in addition to all claims and causes of action against any other party unless otherwise expressly provided in the Plan). Weighing all of the costs and benefits of the Debtor Releases, Debtors firmly believe that the Debtor Releases are fair, reasonable, and in the best interests of the Debtors' Estates and creditors.

(2) Injunction and Exculpation Provisions

45. Injunction Provisions. Article XI.E of the Joint Plan contains certain injunction provisions related to the parties who have held, hold, or may hold Claims against the Debtors. The injunction provisions are necessary to effectuate the Joint Plan. Without such injunction provisions, the Debtors and Liquidating Trust would be unable to fulfill their respective responsibilities under the Joint Plan. The injunction provisions in the Joint Plan are narrowly tailored and should be approved.

46. Exculpation Provisions. Article XI.B of the Joint Plan provides for limited exculpation of certain parties. Exculpation provisions in a plan are appropriate when the protection is necessary and given in exchange for fair consideration. *Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 211–14 (3d Cir. 2000). *See also In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (holding that an exculpation provision "does not affect the liability of third parties, but rather sets forth the appropriate standard of liability"); *Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir.1992). Estate fiduciaries, lenders, and other parties participating in the plan process are frequently the subject of exculpation provisions. *See, e.g.*, *In re W.R. Grace & Co.*, 446 B.R. 96, 132-33 (Bankr. D. Del. 2011); *In re Wash Mut. Inc.*, 442 B.R. at 350–51; *In re Indianapolis Downs, LLC*, 486 B.R. at 306. Without protection for these parties, the participation of key constituents in the plan process would have been and will be impaired.

47. For these reasons, the Debtors submit that the exculpation provisions in the Joint Plan should be approved.

(vi) Section 1129(a)(2): The Joint Plan Complies With the Bankruptcy Code

48. Bankruptcy Code section 1129(a)(2) requires that the plan proponent "compl[y] with the allocable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The legislative

history of Bankruptcy Code section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under Bankruptcy Code sections 1125 and 1126. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *In re Johns-Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1987). *See also In re Toy & Sports Warehouse, Inc.*, 37 B.R. at 149; *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992). As set forth below, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of Bankruptcy Code sections 1125 and 1126 regarding plan solicitation.

49. As discussed herein and in the Tabulation Report, the Joint Plan meets the requirements of Bankruptcy Code sections 1125 and 1126. The Debtors have complied with applicable Bankruptcy Code provisions, the Bankruptcy Rules, the Local Rules, including Local Rule 3016-2, and other applicable law in the transmission of the Joint Plan, the Ballots, and related documents and notices. Accordingly, the Debtors have complied with the provisions of Bankruptcy Code sections 1125 and 1126, thus fulfilling the requirements of Bankruptcy Code section 1129(a)(2).

(vii) Section 1129(a)(3): The Joint Plan has Been Proposed in Good Faith

50. As required by Bankruptcy Code section 1129(a)(3), the Joint Plan has been "proposed in good faith and not by any means forbidden by law." The determination of good faith should be left simply to the Court's common sense and judgment. *See In re Okoreeh-Bahm*, 836 F.2d 1030, 1033 (6th Cir. 1988).

51. Where courts address the good faith standard under Bankruptcy Code section 1129(a)(3), they find that "[f]or purposes of determining good faith under section 1129(a)(3) . . .

the important point on inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives of the Bankruptcy Code." *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3rd Cir. 2000); *Fed. Nat. Mortg. Ass'n v. Vill. Green I, GP*, No. 13-2643-STA, 2014 WL 288974, at *3 (W.D. Tenn. Jan. 27, 2014) ("[G]ood faith" means that the plan will likely achieve a result consistent with the objectives and purposes of the Code."); *In re Trenton Ridge Inv'rs,* LLC, 461 B.R. 440, 468 (Bankr. S.D. Ohio 2011); *In re Sylmar Plaza*, L.P., 314 F.3d 1070, 1074 (9th Cir. 2002) ("A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code."); *In re Lernout & Hauspie Speech Prods. N.V.*, 308 B.R. 672, 675 (D. Del. 2004) (finding that good faith requires "that (1) the plan be consistent with the objectives of the Bankruptcy Code; (2) the plan be proposed with honesty and good intentions and with a basis for expecting that reorganization can be achieved; or (3) there was fundamental fairness in dealing with the creditors.").

52. The Joint Plan is the result of months of arm's-length negotiations among the Debtors and the Committee. The voting support also demonstrates the fairness of the Joint Plan. The goal of the Joint Plan is to maximize distributions to creditors, a legitimate and honest purpose. Further, the Joint Plan has been proposed in compliance with all applicable laws, rules, and regulations. As such, the Joint Plan complies with Bankruptcy Code section 1129(a)(3).

(viii) Section 1129(a)(4): The Joint Plan Provides for Approval of Certain Administrative Expenses

53. Bankruptcy Code section 1129(a)(4) requires that payments by a debtor "for services or for costs and expenses in connection with the case, or in connection with the plan and incident to the case," either be approved by the Court as reasonable or subject to approval of the Court as reasonable. 11 U.S.C. § 1129(a)(4). *See also In re Resorts Int'l, Inc.*, 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990); *In re Lisanti Foods*, 329 B.R. 491, 503 (D.N.J. 2005).

54. The Joint Plan provides that any payments made or promised by the Debtors for services rendered in connection with the Chapter 11 Cases have been or will be subject to review by the Court and other parties in interest. These procedures satisfy Bankruptcy Code section 1129(a)(4).

(ix) Section 1129(a)(5): The Joint Plan Contains Proper Disclosures

55. Bankruptcy Code section 1129(a)(5) requires that a plan proponent disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor of the debtor under the plan." 11 U.S.C. § 1129(a)(5)(A)(i).

56. The Plan Proponents are in the process of interviewing individuals who may serve as the Liquidating Trustee and will identify the Liquidating Trustee on or before the Confirmation Hearing. The appointment of the Liquidating Trustee is consistent with the best interests of Holders of Claims and Corporate Interests in the Debtors and public policy. Accordingly, Bankruptcy Code section 1129(a)(5) will be met on or before the date of the Confirmation Hearing.

(x) Section 1129(a)(6): No Governmental Regulatory Commission Has Jurisdiction Over the Debtors

57. Bankruptcy Code section 1129(a)(6) provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Joint Plan does not provide for any rate changes over which a governmental regulatory commission has jurisdiction. The Debtors submit that this provision of the Bankruptcy Code is not applicable to the Joint Plan.

(xi) Section 1129(a)(7): The Joint Plan is in the Best Interest of All Creditors

58. Bankruptcy Code section 1129(a)(7) requires that a plan be in the best interests of creditors and equity holders, commonly referred to as the "best interests" test. The best interests test requires that holders of impaired claims:

> (i) have 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.

11 U.S.C. § 1129(a)(7)(A). The best interests test thus focuses on dissenting impaired holders of claims and interests as individuals, rather than on entire classes of claims or interests. *See Bank of Am. Nat'l Trust & Savings Assoc. v. 203 N. LaSalle St. Partnership*, 526 U.S. 434, 441 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."). A plan may satisfy this requirement if the Court finds that each such nonconsenting member of an impaired class of claims would receive at least as much under the plan as it would under a chapter 7 liquidation. *See In re Washington Mut., Inc.*, 461 B.R. 200, 241 (Bankr. D. Del. 2011); *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."). *See, e.g., In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990).

59. The Plan Proponents submit that, if the Chapter 11 Cases were converted to cases under chapter 7 of the Bankruptcy Code, the value of distributions to each impaired class of

Claims or Corporate Interests would be less than the value of distributions under the Joint Plan. As detailed in the liquidation analysis to be filed prior to the Confirmation Hearing (the "**Liquidation Analysis**"), the assets available for distribution under chapter 7 would be substantially less than the Joint Plan.

60. These are liquidating Chapter 11 Cases. There are no further business operations of the Debtors, and with substantially all of the assets being sold, the Debtors cannot commence operations again. Conversion to cases under Chapter 7 is not a desirable exit strategy in the view of the Plan Proponents. Conversion to cases under Chapter 7 would require a Chapter 7 trustee to be appointed, and, without any background in these cases, the cost for the Chapter 7 trustee and his/her professionals to gain insight into what the Plan Proponents and the Liquidating Trustee already know would be a significant cost would reduce the available funds that might otherwise go to pay the claims of unsecured creditors. Because the Plan is a plan of orderly liquidation, each Class of Claims and interests will receive substantially the same treatment that it would receive if the Debtors' Assets were liquidated pursuant to chapter 7 of the Bankruptcy Code, except that the Estates will neither be taxed with the additional expenses and commissions of a chapter 7 trustee nor delayed by such a trustee's appointment and need to become familiar with these cases. There will be a greater distribution to Creditors and interest holders pursuant to the Plan than Creditors would receive in a hypothetical chapter 7 liquidation. Accordingly, the Plan Proponents believe the Plan satisfies the "best interests" of impaired Creditors and interest holders test.

61. For these reasons, the Debtors believe that the Joint Plan is in the best interests of creditors. Holders of Claims in Class 5 have voted to accept the Joint Plan. Further, Holders of

Claims in Classes 5, 6, and 7 would receive as much if not more under the Joint Plan than under Chapter 7.

(xii) Section 1129(a)(8): Acceptance by Impaired Voting Classes

62. Bankruptcy Code section 1129(a)(8) requires that each class of claims either vote to accept a plan or are not impaired under a plan. 11 U.S.C. § 1129(a)(8). As detailed in the Tabulation Declaration: (a) Holders of Claims in Class 1, Class 2, Class 3, and Class 4 are unimpaired and deemed to accept the Joint Plan; (b) Holders of Claims in Class 5 have voted to accept the Joint Plan; (c) Holders of Claims in Class 6 and Class 7 rejected the Joint Plan; and (d) Holders of Claims in Class 8 are deemed to reject the Joint Plan. However, as set forth below, the Joint Plan may nevertheless be confirmed pursuant to Bankruptcy Code section 1129(b).

(xiii) Section 1129(a)(9): The Joint Plan Provides for Payment in Full of Allowed Priority, Administrative, and Tax Claims

63. Bankruptcy Code section 1129(a)(9) requires that certain types of priority claims must receive specific treatment, unless the holders of such claims agree to different treatment. 11 U.S.C. § 1129(a)(9). The Joint Plan provides for the payment of Allowed Administrative Expense Claims, Professional Fee Claims, Priority Tax Claims, and Priority Non-Tax Claims. Therefore, the Joint Plan meets the requirements of Bankruptcy Code section 1129(a)(9).

(xiv) Section 1129(a)(10): At Least One Class of Impaired Classes Has Accepted the Joint Plan

64. Bankruptcy Code section 1129(a)(10) requires affirmative acceptance of a plan by at least one class of impaired claims "determined without including any acceptance of the plan by any insider" if a class of claims is impaired by such plan. 11 U.S.C. § 1129(a)(10). The Joint Plan was accepted by Class 5, which is impaired under the Joint Plan and which is not an insider. Thus, Bankruptcy Code section 1129(a)(10) has been met.

(xv) Section 1129(a)(11): The Joint Plan is Feasible

65. Bankruptcy Code section 1129(a)(11) requires that the Court find that

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

11 U.S.C. § 1129(a)(11). This is referred to as the "feasibility" standard and requires two determinations: (a) the debtor's ability to consummate the provisions of the plan, and (b) the debtor's ability to reorganize as a viable entity. *See Kane v. 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."); *Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006) ("A 'relatively low threshold of proof' will satisfy the feasibility requirement.") (quoting *In re Brotby*, 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)); *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (stating that the definition of feasibility "has been slightly broadened and contemplates whether [a] debtor can realistically carry out its Plan . . . and [b] whether the Plan offers a reasonable prospect of success and is workable").

66. The Joint Plan contemplates the transfer of Liquidating Trust Assets (other than the D&O Claims, Tort Claims, and related Insurance Policies, which shall revest in the applicable Debtors for prosecution by the Debtor Representative) to the Liquidating Trust and the orderly liquidation of any of the Debtors' remaining assets upon the Effective Date, thus minimizing or eliminating the need to demonstrate feasibility. *In re Credentia Corp.*, Case No. 10-10926, 2010 WL 3313383, at *9 (Bankr. D. Del. May 26, 2010) ("The Plan provides for a workable scheme of liquidation and, therefore, satisfies section 1129(a)(11) of the Bankruptcy Code."); *In re Revco*, 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (holding that "Section

1129(a)(11) is satisfied as the plan provides that the property of [the] Debtors shall be liquidated"). Because the Debtors will be liquidated, feasibility has been met.

(xvi) Section 1129(a)(12): All Statutory Payment Obligations Have Been or Will be Paid

67. Bankruptcy Code section 1129(a)(12) requires that a plan provide for the payment of fees payable under 28 U.S.C. § 1930. 11 U.S.C. § 1129(a)(12). Bankruptcy Code section 507 provides that such fees are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2).

68. The Joint Plan provides that all statutory fees will be paid by the Liquidating Trustee on or before the date that is thirty (30) days after the Effective Date. Following the Effective Date, all fees payable pursuant to section 1930 of title 28 of the United States Code will be paid by the Liquidating Trustee until the Chapter 11 Cases are closed, converted, or dismissed. Therefore, Bankruptcy Code section 1129(a)(12) has been met.

(xvii) Section 1129(a)(13) Through Section 1129(a)(15) Do Not Apply to the Joint Plan

69. Bankruptcy Code section 1129(a)(13) requires that a plan provide for the continuation of all retiree benefits as defined by Bankruptcy Code section 1114. 11 U.S.C. 1129(a)(13). The Debtors no longer provide retiree benefits, therefore, Bankruptcy Code section 1129(a)(13) is not applicable.

70. Bankruptcy Code section 1129(a)(14) relates to the payment of domestic support obligations. 11 U.S.C. § 1129(a)(14). The Debtors are not subject to any domestic support obligations; therefore, this provision is not applicable.

71. Bankruptcy Code section 1129(a)(15) only applies to cases where the debtor is an individual. 11 U.S.C. § 1129(a)(15). Therefore, this provision does not apply to the Joint Plan.

(xviii) Section 1129(a)(16): All Transfers of Property Were Made in Accordance With Applicable Nonbankruptcy Law

72. Bankruptcy Code section 1129(a)(16) requires transfers of property by a corporation or trust that is not money, business, or commercial corporation or trust to be made in accordance with applicable provisions of nonbankruptcy law. 11 U.S.C. § 1129(a)(16). In transferring the properties, the Debtors have complied with applicable nonbankruptcy law, therefore Bankruptcy Code section 1129(a)(16) is satisfied.

(xix) Section 1129(b): The Joint Plan Satisfies the "Cram Down Requirements"

73. Bankruptcy Code section 1129(b) provides a mechanism to confirm a plan when not all of the requirements of Bankruptcy Code section 1129(a) have been met. This mechanism is commonly referred to as the "cram down."

74. In relevant part, Bankruptcy Code section 1129(b) provides:

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

11 U.S.C. § 1129(b)(1). Therefore, a court may "cram down" a plan over rejection by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. *Kane v. Johns-Manville Corp.*, 843 F.2d at 650.

75. To determine whether "unfair discrimination" exists, courts look to the facts and circumstances of the particular case. *In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established."); *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 Feymiller 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"). A plan unfairly discriminates when it treats similarly-situated classes materially different without a compelling justification. *In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (collecting cases).

76. A plan is fair and equitable with respect to an impaired class of unsecured claims or interests that rejects a plan if it follows the absolute priority rule.[3] 11 U.S.C. § 1129(b)(2)(B)(ii) and (C)(ii). *See In re Armstrong World Indus.*, 320 B.R. at 532 (finding the fair and equitable requirement to be rooted in the absolute priority rule). The absolute priority rule provides that "absent full satisfaction of a creditor's allowed claims, no member of a class junior in priority to that creditor may receive anything at all on account of their claim or equity interest." *In re Dow Corning Corp.*, 456 F.3d 668, 672 (6th Cir. 2006). Additionally, courts have held that "a plan must be fair and equitable in a broad sense, as well as in the particular manner specified in 11 U.S.C. § 1129(b)(2)." *In re Bryson Properties, XVIII*, 961 F.2d 496, 505 (4th Cir.1992); *In re Dow Corning Corp.*, 244 B.R. 678, 694–95 (Bankr. E.D. Mich., 1999) ("The prevailing and better view is that the phrase 'fair and equitable' is as broad as it sounds.") (collecting cases). Thus, "the Court's task is to determine whether the entire plan in the context of the rights of the creditors under state law and the particular facts and circumstances is fair and equitable." *Fed. Nat. Mortg. Ass'n v. Vill. Green I, GP*, No. 13-2643-STA, 2014 WL 288974, at *8 (W.D. Tenn. Jan. 27, 2014) (internal quotation marks omitted).

[3] The absolute priority rule is arguably inapplicable to the Joint Plan because Debtors are non-profit corporations. *See In re Wabash Valley Power Ass'n*, 72 F.3d 1305, 1314 (7th Cir. 1996); *Sec. Farms v. Gen. Teamsters (In re Gen. Teamsters)*, 265 F.3d 869, 873 (9th Cir. 2001).

77. The Joint Plan is fair and equitable. The treatment of Class 8 is appropriate as there are no similarly situated classes of Claims or Corporate Interests. As discussed herein, the Plan Proponents have compelling justification for separately classifying the claims of creditors in Class 5, Class 6, and Class 7. However, the claims in Class 5, Class 6, and Class 7 receive the same treatment under the Joint Plan. Such treatment is appropriate as the classes all contain unsecured claims. Accordingly, treatment of Class 5, Class 6, and Class 7 is fair and equitable.

78. To the extent the absolute priority applies, the Joint Plan also satisfies the absolute priority rule as no junior Holder of a Claim or Interest will receive any distribution under the Joint Plan.

79. The Plan Proponents, therefore, submit that the cram down requirements of Bankruptcy Code section 1129(b) have been satisfied as the Joint Plan is fair and equitable and does not unfairly discriminate.

(xx) Section 1129(c) Through Section 1129(e) Have Been Satisfied

80. Bankruptcy Code section 1129(c) requires the Court confirm only one plan. 11 U.S.C. § 1129(c). The Joint Plan is the only plan being confirmed in these Chapter 11 Cases, thus satisfying Bankruptcy Code section 1129(c).

81. The principal purpose of the Joint Plan is not the avoidance of taxes or the application of section 5 of the Security Act of 1933. Therefore, Bankruptcy Code section 1129(d) is satisfied.

82. Bankruptcy Code section 1129(e) is not applicable as none of these Chapter 11 Cases are "small business cases."

B. <u>The Objections Should Be Overruled and the Joint Plan Should Be Confirmed</u>

83. The Plan Proponents received six objections to confirmation. HHS Culinary & Nutritional Solutions, LLC ("**HHS Culinary**") and HHS Environmental Services ("**HHS**

Environmental," together with HHS Culinary and each of their affiliates, "**HHS**") filed an objection to confirmation of the Joint Plan [Docket No. 947] (the "**HHS Objection**"). Coahoma County, Mississippi ("**Coahoma County**") filed an objection to confirmation of the Joint Plan [Docket No. 949] (the "**Coahoma County Objection**"). United Healthcare Insurance Company ("**United**") filed an objection to confirmation of the Joint Plan [Docket No. 950] (the "**United Objection**"). The HHS Objection, the Coahoma County Objection, and the United Objection have been fully resolved as set forth in the proposed Confirmation Order.

84. The State of Mississippi, Mississippi Division of Medicaid ("**MDOM**") filed an objection to confirmation of the Joint Plan [Docket No. 948] (the "**MDOM Objection**"). ServisFirst Bank ("**ServisFirst**") filed an objection to confirmation of the Joint Plan [Docket No. 953] (the "**ServisFirst Objection**"). CHS filed an objection to confirmation of the Joint Plan [Docket No. 953] (the "**CHS Objection**"). As set forth below, the Plan Proponents submit that the MDOM Objection, the ServisFirst Objection, and the CHS Objection should be overruled and the Joint Plan should be confirmed.

(i) MDOM Objection

85. MDOM objects to the Joint Plan largely on the ground that the Joint Plan does not provide for proper treatment of its asserted claims against the Debtors. While MDOM makes additional arguments that certain provisions of the Joint Plan violate MDOM's rights under Mississippi state law, the crux of its argument relates entirely to the treatment of its asserted administrative expense claim. The Plan Proponents submit that MDOM's claims are general unsecured claims. Because MDOM's claims are properly characterized as general unsecured claims, the Joint Plan complies with the Bankruptcy Code in its treatment of MDOM's claims.

86. On February 13, 2019, MDOM filed the *State of Mississippi Division of Medicaid's Motion to (I) Approve its Administrative Expense, and Compel Payment Thereof, and*

(II) Upon Any Failure to Pay that the Debtor(s) Be Required to Appear at a Hearing to Show Cause and for the Court to Hear and Consider Whether to Dismiss or Convert the Proceedings [Docket No. 758] (the "**MDOM Motion**"). The MDOM Motion is fully incorporated herein by reference. In the MDOM Motion, MDOM asserts certain claims (the "**MDOM Claims**"), including administrative expense claims, against the Debtors for failure to pay certain statutory obligations to MDOM ("**MDOM Obligations**").

87. On March 26, 2019, the Debtors and the Committee filed the *Joint Objection of the Debtors and Official Committee of Unsecured Creditors Opposing the State of Mississippi Division of Medicaid's Motion and Joint Cross Motion of the Debtors and Official Committee of Unsecured Creditors Seeking (A) Payment of Actual Damages for the State of Mississippi Division of Medicaid's Willful Violations of the Automatic Stay and (B) Turnover of Estate Funds* [Docket No. 901] (the "**Cross-Motion**"). The Cross-Motion and all arguments set forth therein are fully incorporated herein by reference. In the Cross-Motion, Debtors and the Committee assert certain claims (the "**Estate Claims**") against MDOM regarding, *inter alia*, MDOM's failure to pay supplement payments, including Mississippi Hospital Access Program ("**MHAP**") payments, to the Debtors.

88. A hearing on the MDOM Motion and Cross-Motion was set for April 9, 2019 (the "**Hearing**"). At the Hearing, the parties agreed to adjourn the Hearing to May 9, 2019 (the "**Adjourned Hearing**") to pursue good-faith settlement negotiations. Following the Hearing, the Debtors, Committee, MDOM, NMHS, and Progressive reached a proposed settlement and resolution of the MDOM Claims and Estate Claims (as defined herein) as they relate to the Amory Hospital and the Batesville Hospital.

89. On April 29, 2019, the Debtors filed the *Expedited Motion of Debtors for Entry of an Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving (I) the Amory MDOM Settlement Agreement and (II) the Batesville MDOM Settlement Agreement* (the "**MDOM Settlement Motion**"), seeking approval of the Amory Settlement Agreement and the Batesville Settlement Agreement. The MDOM Settlement Motion is fully incorporated herein by reference. The Amory Settlement Agreement provides for full resolution of the MDOM Claims with respect to the Amory Hospital. The Batesville Settlement Agreement provides for full resolution of the MDOM Claims with respect to the Batesville Hospital. Approval of MDOM Settlement Motion would result in, *inter alia*, (i) elimination of the MDOM Claims with respect to the Amory Hospital and the Batesville Hospital, (ii) reduction of MDOM's total alleged administrative expense claims against the Debtors' estates to $1,724,248.83, and (iii) elimination of the risk of future litigation costs related to the Amory MDOM Claim and the Batesville MDOM Claim.

90. The Debtors, Committee, MDOM, and CHS have not yet reached a resolution of their respective claims as they relate to the Clarksdale Hospital, although good-faith settlement negotiations among those parties are ongoing. In light of the MDOM Settlement Motion, the Plan Proponents submit that the MDOM Claims would likely be reduced to a maximum of approximately $1.7 million related solely to the Clarksdale Hospital. Moreover, only approximately $900,000 of the $1.7 million relate to pre-IMSA time periods when the Debtors operated the Clarksdale Hospital.

91. Here, as provided in detail in the Cross-Motion, the MDOM Claims are fees and not taxes under the Bankruptcy Code and cannot be afforded administrative priority. Moreover, even if the MDOM Claims could be classified as taxes, the MDOM Claims all accrued prior to

the Petition Date and cannot be afforded administrative priority. MDOM does not have an allowed administrative expense claim and has the heavy burden of establishing that the MDOM Claims qualify as administrative expenses under the Bankruptcy Code. In the event MDOM fails to meet this burden, the MDOM Objection should be overruled as the Joint Plan provides proper treatment of the MDOM Claims.

92. Even if MDOM succeeds in meeting its heavy burden to establish that the MDOM Claims should be afforded administrative priority, the Joint Plan proposes to pay administrative expenses in full as discussed below. Accordingly, the MDOM Objection should be overruled and the Joint Plan should be confirmed.

(ii) ServisFirst Objection

93. ServisFirst objects to the Joint Plan on the grounds that (i) the Joint Plan is not feasible and (ii) ServisFirst believes it would receive more under Chapter 7 of the Bankruptcy Code. ServisFirst's arguments assume that the MDOM Claims will be allowed as administrative expense claims. ServisFirst's arguments also assume that ServisFirst's entire claim will be allowed, despite the pending adversary proceeding filed by the Committee against ServisFirst [Adversary Proceeding Case No. 18-05665] the ("**ServisFirst Adversary Proceeding**").

94. As discussed above, the Joint Plan complies with Bankruptcy Code section 1129(a)(11), which requires that a plan meet the "feasibility" standard. The Joint Plan contemplates the transfer of Liquidating Trust Assets to the Liquidating Trust and the orderly liquidation of any of the Debtors' remaining assets upon the Effective Date, thus minimizing or eliminating the need to demonstrate feasibility. *See, e.g.*, *In re Revco*, 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (finding that "Section 1129(a)(11) is satisfied as the plan provides that the property of [the] Debtors shall be liquidated"); *In re Credentia Corp.*, Case No. 10-10926, 2010

WL 3313383, at *9 (Bankr. D. Del. May 26, 2010) ("The Plan provides for a workable scheme of liquidation and, therefore, satisfies section 1129(a)(11) of the Bankruptcy Code.").

95. "Feasibility is fundamentally a factual question since it necessarily depends upon a determination of the reasonable probability of payment." *In re Howard*, 212 B.R. 864, 878 (Bankr. E.D. Tenn. 1997); *In re Brice Rd. Developments*, L.L.C., 392 B.R. 274, 283 (B.A.P. 6th Cir. 2008). In order to be feasible pursuant to § 1129(a)(11), "[t]he plan does not need to guarantee success, but it must present reasonable assurance of success." *In re Made in Detroit, Inc.*, 299 B.R. 170, 176 (Bankr. E.D. Mich. 2003), *aff'd*, 414 F.3d 576 (6th Cir.2005). "Importantly, the Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility." *In re Brice Rd. Developments, L.L.C.*, 392 B.R. 274, 283 (B.A.P. 6th Cir. 2008) (internal quotation marks omitted).

96. Here, the Joint Plan is feasible and it complies with section 1129(a)(9)(A) with respect to payment of Allowed Administrative Expense Claims. ServisFirst argues that the Joint Plan is not feasible because the Debtors do not have sufficient unencumbered cash to pay Allowed Administrative Expense Claims. Under the Joint Plan, Allowed Administrative Expense Claims receive the following treatment:

> [E]ach Holder of an Allowed Administrative Expense Claim shall receive, in full and final satisfaction of its Allowed Administrative Expense Claim, Cash in an amount equal to the amount of such Allowed Administrative Expense Claim, on or before the date that is thirty (30) Business Days after the later of (i) the Effective Date and (ii) entry of a Final Order determining and allowing such Allowed Administrative Expense Claim, or as soon thereafter as is practicable.

Only Administrative Expense Claims that are "Allowed" will be paid in full. The Joint Plan contemplates a claims adjudication process to determine whether and to what extent any Administrative Expense Claims will be Allowed. At this time, no Administrative Expense

Claims have been Allowed. These provisions comply with section 1129(a)(9)(A). *See In re Lisanti Foods, Inc.*, 329 B.R. 491, 502–03 (D.N.J. 2005), *aff'd sub nom. In re Lisanti Foods Inc.*, 241 F. App'x 1 (3d Cir. 2007) (affirming confirmation of a plan and finding that the plan complied with section 1129(a)(9)(A) where objecting administrative expense claimants whose claims had not been "allowed" under the plan did "not yet have any entitlement to payment of their administrative claims unless and until the Bankruptcy Court so orders" and further finding that "the timing of payment on administrative claims may vary with the facts of a given case"); *In re PWS Holding Corp.*, No. 98–212, 1999 WL 33510165, at *6 (Bankr. D. Del. Dec.30, 1999) (confirming plan providing that "on the later of the Effective Date and the date such Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or as soon thereafter as is practicable, the holder of such Claim will receive on account of such Claim Cash in an amount equal to the Allowed amount of such Claim").

97. Based on the Liquidation Analysis, the Plan Proponents submit that the Joint Plan is feasible and that there is a reasonable probability that Allowed Administrative Expense Claims will be paid as contemplated under the Joint Plan. Moreover, as discussed above and in the Cross-Motion, the Plan Proponents firmly believe that the MDOM Claims are not administrative expenses and will not affect the feasibility of the Joint Plan. The purpose of the Liquidating Trust is to pursue assets for the benefit of creditors. The Plan Proponents believe that there are significant assets and Causes of Action for the Liquidating Trustee and/or Debtor Representative to pursue and submit that there exists a reasonable probability that the Liquidating Trust will have the necessary funds to make payments as required under the Joint Plan.

98. The Joint Plan also complies with Bankruptcy Code section 1129(a)(7), which requires that a plan be in the best interests of creditors and equity holders, commonly referred to

as the "best interests" test. A plan may satisfy this requirement if the Court finds that each such nonconsenting member of an impaired class of claims would receive at least as much under the plan as it would under a chapter 7 liquidation. *See In re Washington Mut., Inc.*, 461 B.R. 200, 241 (Bankr. D. Del. 2011); *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."). *See, e.g.*, *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990).

99. Here, section 1129(a)(7) is only applicable to ServisFirst's deficiency claim. ServisFirst's secured claim is deemed unimpaired under the Joint Plan as it proposes the following treatment of ServisFirst's secured claim:

> To the extent any Alleged ServisFirst Secured Claim is Allowed, the Holder of any Allowed ServisFirst Secured Claim shall be paid, in Cash, an amount equal to such Claim, on or before the date that is the later of (i) thirty (30) Business Days after the Effective Date and (ii) five (5) Business Days after entry of a Final Order determining and Allowing such Claim, or as soon thereafter as is practicable, in full and final satisfaction of such Claim. To the extent the Collateral securing any Allowed ServisFirst Secured Claim has been or is to be sold pursuant to an Order of the Bankruptcy Court, any amount to be paid to the Holder of such Claim pursuant to the preceding sentence shall be net of the costs of sale of such Collateral and otherwise subject to the rights of the Debtors (in consultation with the Committee) and/or the Liquidating Trustee pursuant to section 506(c) of the Bankruptcy Code.

100. ServisFirst can only object under section 1129(a)(7) with respect to its deficiency claim, which is impaired under the Joint Plan. ServisFirst's argument that it would receive a better recovery under Chapter 7 of the Bankruptcy Code is without merit. Under the Joint Plan, ServisFirst will receive a pro rata share (calculated based upon the collective Claims in Classes 5, 6, and 7) of the net proceeds of the GUC and Deficiency Liquidating Trust Assets.

101. It is unclear how ServisFirst could possibly receive better treatment under Chapter 7. All of the collateral on which ServisFirst asserts a lien has been or will have been liquidated

prior to the Effective Date of the Joint Plan. Similar to the general unsecured creditors, ServisFirst will benefit from the Liquidating Trust's pursuit of Causes of Action.

102. The treatment of ServisFirst's claims under the Joint Plan complies with all applicable provisions of the Bankruptcy Code. Accordingly, the ServisFirst Objection should be overruled and the Joint Plan should be confirmed.

(iii) CHS Objection

103. CHS objects to the Joint Plan on the grounds that (i) the Joint Plan does not provide for proper treatment of MDOM Claims related to the Clarksdale Hospital and (ii) the Joint Plan impermissibly classifies CHS' unsecured claims. First, as discussed above, treatment of the MDOM Claims under the Joint Plan is proper and complies with all applicable provisions of the Bankruptcy Code. Second, the Plan Proponents have legitimate reasons for separately classifying CHS' unsecured claims.

104. CHS' deficiency and unsecured claims must be separately classified because CHS is significantly different than all other creditors in these Chapter 11 Cases. Debtors acquired the Hospitals from CHS and believe they hold significant claims against CHS related to the acquisition of the Hospitals. In addition, Debtors have disputed the amount and nature of CHS' claims since the Petition Date. Moreover, CHS serves as the interim manager of the Clarksdale Hospital and is the proposed purchaser of the Clarksdale Hospital. Because CHS is in a substantially different position than all other unsecured creditors, the Plan Proponents have legitimate reasons for separately classifying CHS' claims. In contrast, the creditors who hold claims in Class 5 are all similarly situated. Classifying the CHS claims in Class 5 with the general unsecured claims would allow CHS to override the overwhelming acceptance of the Joint Plan by the Class 5 creditors.

105. Debtors acquired the Hospitals from CHS in 2017. Since the filing of these Chapter 11 Cases, Debtors have articulated to the Court and other parties in interest that Debtors and their estates hold significant claims against CHS related to, *inter alia*, representations of CHS in connection with the Hospitals' historical financial performance.

106. Bankruptcy Code section 1122 affords the proponent of a plan with significant flexibility in the classification of claims and interests, so long as there is a reasonable basis for such classification. *See In re U.S. Truck Co., Inc*., 800 F.2d 581, 586 (6th Cir. 1986) (noting that courts have been "given broad discretion to determine proper classification according to the factual circumstances of each individual case"). In *In re U.S. Truck Co., Inc.*, the Sixth Circuit found that a Debtor had not impermissibly classified the claims of certain creditors where the interests of the separately classified creditors differed substantially from other creditors. *Id.* at 587; *see also Zentek GBV Fund IV v. Vesper*, 19 F. App'x 238, 249 (6th Cir. 2001) (noting that "varying interests of the creditors allowed for the separate classification of claims" and finding that the "IRS's position was sufficiently different from those of other creditors to support separate classification"). The Sixth Circuit noted that a class of creditors was properly classified separately because they had noncreditor interests—*e.g.*, choosing to reject the plan not because it is less than optimal to it as a creditor, but because rejecting the plan would benefit the creditors in the form of an ongoing employee relationship. *In re U.S. Truck Co., Inc*., 800 F.2d at 587.

107. Here, CHS has a "virtually unique interest" in these Chapter 11 Cases. *See id.* Upon confirmation of the Joint Plan, CHS will likely be the primary target of the Liquidating Trust's litigation efforts, including litigation related to Debtors' acquisition of the Hospitals from CHS and litigation to dispute the amount and nature of CHS' asserted claims. Any recovery from those litigation efforts would inure to the benefit of the general unsecured creditors in Class 5. If

CHS' claims were included in Class 5, the inevitable litigation against CHS would unnecessarily delay the recovery of the other creditors. Separately classifying CHS' claims is not only reasonable and justified under the circumstances, but necessary to the efficient implementation of the Joint Plan.

108. Permitting separate classification of CHS' claim does not automatically result in confirmation of the plan. CHS is still protected by section 1129(b), particularly the requirements that the plan not discriminate unfairly and that it be fair and equitable with respect CHS' claims. *See In re U.S. Truck Co., Inc.*, 800 F.2d 581, 587 (6th Cir. 1986). However, CHS does not and cannot argue that the Joint Plan unfairly discriminates. Nor can it argue that the Joint Plan is not fair and equitable with respect to its claims. To the extent CHS has any allowed unsecured claims, its claims will receive the same treatment as general unsecured claims in Class 5 and the deficiency claims of ServisFirst in Class 6. Accordingly, the CHS Objection should be overruled and the Joint Plan should be confirmed.

109. The Plan Proponents reserve the right to present additional arguments supporting confirmation of the Joint Plan and opposing the objections at the Confirmation Hearing.

C. A Waiver of Any Stay of Confirmation is Appropriate

110. The Debtors request that the Court cause the Confirmation Order to become effective immediately upon its entry, notwithstanding the 14-day stay imposed by Bankruptcy Rule 3020. The purpose of Bankruptcy Rule 3020(e) is to allow parties in interest with time to appeal a confirmation order before such appeal is moot. FED. R. BANKR. P. 3020(e), Adv. Comm. Notes, 1999 Amend.

111. Here, such waiver is appropriate in these circumstances because it allows for the expeditious transfer of assets to the Liquidating Trust on the Effective Date. Immediate consummation of the Joint Plan will not prejudice any party in interest. The creditors will benefit

from the immediate transfer of the Liquidating Trust Assets, which will lead to more substantial recoveries. Therefore, the Plan Proponents submit that good cause exists to waive the requirements of Bankruptcy Rule 3020(e).

CONCLUSION

For all of the foregoing reasons, the Plan Proponents respectfully submit that the Court should confirm the Joint Plan because it fully satisfies all applicable requirements under the Bankruptcy Code.

Dated: May 3, 2019
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