IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
	)	
	)	Case No. 12-22602
DICKINSON THEATRES, INC.,	)	
a Kansas corporation,	)	Chapter 11
	)	
Debtor.	)	

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTOR'S FIRST AMENDED AND RESTATED PLAN OF REORGANIZATION DATED NOVEMBER 5, 2012, AS MODIFIED

Dickinson Theatres, Inc., debtor and debtor-in-possession (collectively, the "Debtor"), submit this memorandum of law in support of confirmation of the Debtor's First Amended and Restated Plan of Reorganization Dated November 5, 2012 [Docket No. 194][1], as modified through the confirmation hearing (the "Plan"), pursuant to section 1129 of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq*., the "Bankruptcy Code"). In support of confirmation of the Plan, Debtor respectfully states as follows:

PRELIMINARY STATEMENT

Debtor has used the chapter 11 process to the significant advantage of its Creditors and other parties-in-interest. When the Debtor entered Chapter 11, nearly two months ago, it was a party to several burdensome leases and contracts that significantly drained the Debtor's operating cash-flow. During the administration of this Chapter 11 Case, the Debtor has used the protection of the bankruptcy process to relieve itself of the burdensome leases and contracts, to negotiate new leases with certain existing landlords that are more competitive with the current real estate

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan, in the Disclosure Statement and in the Approval Order.

market, and to negotiate various claims. Debtor is now ready to exit chapter 11 under a confirmable Plan that complies in all respects with the Bankruptcy Code.

The Plan is the result of significant negotiations with all of the Debtor's creditor constituencies, and will yield the highest and best value reasonably realizable from the Estate for the benefit of Creditors, employees, vendors, non-Debtor affiliates and Interestholders.

STATEMENT OF FACTS

The facts relevant to confirmation of the Plan are set forth in the *Declaration of Ronald J. Horton, President and CEO of the Debtor Dickinson Theatres, Inc., in Support of the Chapter 11 Petition and First Day Pleadings* [Docket No. 19] (the "Horton First Day Declaration"); the *First Amended Disclosure Statement Dated November 5, 2012* [Docket No. 195] (the "Disclosure Statement"); the *Declaration of Ronald J. Horton in Support of Confirmation of the Debtor's First Amended Plan Dated November 5, 2012* filed contemporaneously herewith (the "Horton Confirmation Declaration"); the *Affidavit of Sharon L. Stolte Certifying Voting on and Tabulation of Ballots Accepting and Rejecting the First Amended and Restated Plan of Reorganization* filed contemporaneously herewith (the "Voting Agent Affidavit") (the Horton Confirmation Declaration and the Voting Agent Affidavit, together, the "Declarations"); the *Certificate of Service of the Approval Order and Solicitation Materials* [Docket No. 215] (the "Notice Certificate"); and the additional evidence to be presented at the confirmation hearing.

PLAN MODIFICATIONS

The modifications to the Plan are set forth in Exhibit A to the Horton Declaration, have been made in a manner consistent with Section 14.2 of the Plan, and do not adversely change the treatment of the Claim of any Creditor who has not voted to accept or reject the modification. Accordingly, pursuant to Bankruptcy Rule 3019, these modifications do not require additional

disclosure under section 1125 of the Bankruptcy Code or re-solicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that holders of Claims be afforded an opportunity to change previously cast acceptances or rejections of the Plan.. Section 1127(a) of the Bankruptcy Code provides a plan proponent with the right to modify a plan "at any time" before confirmation and section 1127(d) of the Bankruptcy Code provides that all stakeholders that previously have accepted the plan should also be deemed to have accepted the modified plan. See 11 U.S.C. §§ 1127(a), (d). Courts routinely allow plan proponents to make changes to a plan without requiring the proponent to resolicit such plan among all creditors for acceptances. *See, e.g., In re New Power Co.*, 438 F.3d 1113, 1117-1118 (11th Cir. 2006) ("the bankruptcy court may deem a claim or interest holder's vote for or against a plan as 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 RIM Dev., LLC*, 448 B.R. 280, 287, n.33 (Bankr. D. Kan. 2010) (citing section 1127(a) in finding that although modified plan was not originally before the court, the modified plan "becomes the plan"); *In re Calpine Corp.*, No. 05-60200, 2007 WL 4565223, *6 (Bankr. S.D.N.Y. Dec 19, 2007) (approving immaterial modification to plan without requiring Debtors to resolicit the plan); *In re Kmart Corp.*, No. 02 B 02474, 2006 WL 950042, at *27 (Bankr. N.D. Ill. Apr. 11, 2006) (if modification does not adversely change the treatment of claims, then resolicitation is not required); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 813, 823 (Bankr. M.D. Fla. 2006) (same). Here, the only modifications to the Plan that were not the subject of a vote to accept or reject the Plan by the relevant creditor is the deletion of payments to Class 5a Creditors prior to May 31, 2013. The possibility of this modification was noted at the hearing on the Disclosure Statement, was noted in the Disclosure Statement itself as approved by this Court, and was the subject of negotiation with the Unsecured Creditors'

Committee as the statutory representative of the Class 5a Creditors, and the members of the Unsecured Creditors' Committee constituted more than 50% in number and more than 67% in amount of all Class 5a Creditors who voted on the Plan. As such, Debtor respectfully submits that it should not be required to resolicit for Plan acceptances and all Creditors that previously voted to accept the Plan should be deemed to accept the Plan as modified. 11 U.S.C. § 1127(d).

ARGUMENT

I. THE BURDEN OF PROOF UNDER SECTION 1129 OF THE BANKRUPTCY CODE IS THE PREPONDERANCE OF THE EVIDENCE.

To confirm the Plan, Debtor must demonstrate that the Plan satisfies the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See, e.g., In re RIM Dev., LLC,* 448 B.R. at 288; *In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 22 (Bankr. D. Kan. 2001); *In re Armstrong World Indus.*, 348 B.R. 111, 120-22 (D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616, n.23 (Bankr. D.Del. 2001), *appeal dismissed, In re Genesis Health Ventures, Inc.*, 280 B.R. 39 (D. Del. 2002). As set forth by the United States Court of Appeals for the Fifth Circuit in *Heartland Federal Say. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)* 994 F.2d 1160, 1165 (5th Cir. 1993):

> The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under § 1129(a) and in a cramdown.

See also In re Kent Terminal Corp., 166 B.R. 555, 561 (Bankr. S.D.N.Y. 1994) ("the final burden of proof at ... the ... confirmation hearings remains a preponderance of the evidence"); 7 Collier on Bankruptcy ¶ 1129.02[4], (15th ed. rev. 2006) (same). Through the Horton Confirmation Declaration and evidence to be proffered and adduced at the Confirmation Hearing (including, without limitation, the Voting Agent Declaration, and the Notice Affidavit), Debtor

will demonstrate, by a preponderance of the evidence, that all of the subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan.

II. THE PLAN COMPLIES WITH ALL APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE.

Pursuant to section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1); *see also In re 1 Ashbury Court Partnerss, LLC*, 2011 Bankr. LEXIS 3922 (Bankr. D. Kan. Oct. 5, 2011) (generally indicating that a debtor must satisfy all requirements of title 11 to have its plan confirmed); *In re Stratford Assoc. Ltd. P'ship*, 145 B.R. 689, 695 (Bankr. D. Kan. 1992) (finding that plan can be confirmed if it meets all applicable provisions of title 11); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) ("In order for a plan of reorganization to pass muster for confirmation purposes, it must comply with all the requirements of Chapter 11 as stated in Code § 1129(a)(1)."). The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *In re Johns-Manville Corp*., 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev 'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd, Kane v. Johns-Manville Corp*., 843 F.2d 636 (2d Cir. 1988). As demonstrated below, the Plan complies fully with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as other applicable provisions of the Bankruptcy Code.

A. The Plan Complies with Section 1122(a) of the Bankruptcy Code.

Section 1122(a) of the Bankruptcy Code provides as follows:

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

11 U.S.C. § 1122(a). Under this section, a plan may provide for multiple classes of claims or interests as long as each claim or interest within a class is substantially similar to other claims or interests in that class. "[C]lassification is constrained by two straight-forward rules: Dissimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason." *The Aetna Casualty and Surety Co. v. Clerk, U.S. Bankruptcy Court, New York, NY (In re Chateaugay Corp.),* 89 F.3d 942, 949 (2d Cir. 1996); *Friesen v. Seacoast Capital Partners II, L.P. (In re QuVis, Inc.)*, 446 B.R. 490, 497, n.33 (Bankr. D. Kan. 2011) ("Only creditors whose interests are 'substantially similar' may be classified. 11 U.S.C. § 1122(a).")

The Plan provides for the separate classification of Claims and Interests into the following Classes based upon differences in the legal nature and/or priority of such Claims and Interests:

- Class 1 (Other Priority Claims) provides for the separate classification of all Other Priority Claims, which are Claims entitled to priority pursuant to section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim, against the Debtor.

- Class 2 (Secured Claim of Peoples Bank) provides for the separate classification of the Secured Claim of Peoples Bank, one of Debtor's pre-petition secured lenders and DIP lenders..

- Class 3 (Secured Claim of 6801 West 107th LLC) provides for the separate classification of the Secured Claim of 6801 West 107th LLC, one of Debtor's DIP lenders.

- Class 4 (Secured Claim of Hawthorn Bank) provides for the separate classification of the Secured Claim of Hawthorn Bank, one of Debtor's pre-petition secured lenders.

- Class 5a (General Unsecured Claims) provides for the separate classification of all Allowed General Unsecured Claims against the Debtor, but excluding Administrative Claims, the Hartley Trust Unsecured

Claim, Administrative Convenience Claims, the Class 7 Spirit Claims, and Other Priority Claims.

- Class 5b (Hartley Trust Unsecured Claim) provides for the separate classification of the Hartley Trust Unsecured Claim represented by a certain Unconditional Guaranty of Payment dated as of January 23, 2012 and held by the John W. Hartley Revocable Trust under Agreement dated October 30, 2001 and John W. Hartley.

- Class 6 (Administrative Convenience Claims) provides for the separate classification of holders of Administrative Convenience Claims against Debtor that are General Unsecured Claims that are (a) for $2,500 or less, or (b) for more than $2,500 if the holder of such Claim has made the Convenience Class Election on its appropriate Ballot.

- Class 7 (Spirit Unsecured Claims) provides for the separate classification of the Spirit Unsecured Claim and the Spirit Contingent Unsecured Claim against Debtor.

- Class 8 (Interests) provides for the treatment of holders of Interests in Debtor.

Each of the Claims or Interests in each Class is substantially similar to other Claims and Interests, as the case may be, in each such Class. Moreover, as described herein below, valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, and such Classes do not unfairly discriminate between or among holders of Claims and Interests. *See* Horton Confirmation Declaration. Debtor's classification scheme has a rational basis because it is based upon the respective legal rights of each holder of a Claim or Interest. Also, the classification scheme was in no way created to manipulate class voting. Accordingly, the classification of Claims and Interests in the Plan complies with section 1122(a) of the Bankruptcy Code.

B. The Plan Complies with Section 1123 of the Bankruptcy Code.

Section 1123(a) of the Bankruptcy Code sets forth seven requirements[2] with which every chapter 11 plan must comply. *See* 11 U .S.C. § 1123(a). The Plan complies with each such requirement.

- Section 1123(a)(1) of the Bankruptcy Code: Article III of the Plan designates Classes of Claims and Interests as required by section 1123(a)(1) of the Bankruptcy Code and Article II of the Plan provides for the treatment of Administrative Claims and Priority Tax Claims.

- Sections 1123(a)(2) and 1123(a)(3) of the Bankruptcy Code: Article IV of the Plan specifies whether each Class of Claims and Interests is Impaired under the Plan and Article V specifies the treatment of each such Class, as required by sections 1123(a)(2) and 1123(a)(3) of the Bankruptcy Code, respectively.

- Section 1123(a)(4) of the Bankruptcy Code: As required by section 1123(a)(4), the Plan provides that each Claim in a Class receives the same treatment as all other Claims in that Class, unless the Holder of a Claim or Interest has agreed to a less favorable treatment.

- Section 1123(a)(5) of the Bankruptcy Code: Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provides "adequate means" for its implementation. Means for implementation of a plan may include retention by the debtor of all or part of its property, the transfer of property of the estate to one or more entities, satisfaction or modification of any lien, cancellation or modification of any indenture or similar instrument, curing or waiving of any default, extension of a maturity date or change in an interest rate or other term of outstanding securities, amendment of the debtor's charter, or issuance of securities for cash, for property, for existing securities, in exchange for claims or interests or for any other appropriate purpose. Article VII and various other provisions of the Plan set forth "adequate means" for implementation of the Plan as required by section 1123(a)(5) of the Bankruptcy Code. Those provisions include, among other things, the following: (i) the automatic retention and revesting of Property of the Estate of Debtor, including, but not limited to, all Avoidance Actions and all Causes of Action, in Reorganized Debtor, free and clear of all Claims, liens, contractually-imposed restrictions, charges, encumbrances and Interests of Creditors and Interestholders on the Effective Date, with all such Claims, liens, contractually-imposed

[2] Paragraph (a)(8) of section 1123 of the Bankruptcy Code imposes an eighth requirement for individual debtors. Since the Debtor in this Chapter 11 Case is not an individual, section 1123(a)(8) of the Bankruptcy Code is not applicable to the Chapter 11 Case.

restrictions, charges, encumbrances and Interests being extinguished except as otherwise provided in the Plan.

- Sections 1123(a)(6) and 1123(a)(7) of the Bankruptcy Code: Section 7.4 of the Plan provide for the prohibition of the issuance of nonvoting equity securities in Reorganized Debtor and appropriate amendment to the certificate of incorporation to ensure compliance with section 1123(a)(6) of the Bankruptcy Code. Sections 7.1 and 7.2 of the Plan provide for the selection of officers and directors of the Reorganized Debtor in a manner consistent with the interests of Creditors, equity security holders, and public policy in accordance with section 1123 (a)(7) of the Bankruptcy Code.

Based upon the foregoing, the Plan complies fully with the requirements of sections 1122 and 1123 of the Bankruptcy Code and thus satisfies the requirements of section 1129(a)(1) of the Bankruptcy Code.

III. DEBTOR HAS COMPLIED WITH THE PROVISIONS OF THE BANKRUPTCY CODE.

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The legislative history of section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See In re Valley View Shopping Ctr., L.P.*, 260 B.R. at 26-27 (finding that section 1129(a)(2) of the Bankruptcy Code requires compliance "with the solicitation procedures of § 1125…"); *Johns-Manville*, 68 B.R. at 630; *Toy & Sports Warehouse*, 37 B.R. at 149; *In re Texaco, Inc*., 84 B.R. 893, 907 (Banks. S.D.N.Y. 1988), *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1988) ("The principal purpose of section 1129(a)(2) is to assure that the proponents have complied with the requirements of section 1125 in the solicitation of acceptances to the plan."); H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."). Debtor has complied with the

applicable provisions of the Bankruptcy Code, including the provisions of sections 1125 and 1126 of the Bankruptcy Code regarding disclosure and Plan solicitation.

A. The Debtor Has Complied with Section 1125 of the Bankruptcy Code.

Section 1125 of the Bankruptcy Code provides in pertinent part:

> (b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, 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...
>
> (c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

11 U.S.C. § 1125(b), (c).

By the *Order (1) Approving the Form and Manner of Notice of the Disclosure Statement Hearing, (2) the Disclosure Statement, (3) Cure Procedures for Executory Contracts or Unexpired Leases to be Assumed Pursuant to the Plan, (4) the Record Date, Voting Deadline and Certain Other Procedures, (5) the Form and Manner of Notice of the Confirmation Hearing and Procedures for Filing Objections to the Plan, and (6) Solicitation Procedures for Confirmation* [Docket No. 197] (the "Approval Order") entered November 5, 2012, after notice and a hearing, the Bankruptcy Court approved the Disclosure Statement pursuant to section 1125 of the Bankruptcy Code as containing "adequate information" of a kind and in sufficient detail to enable hypothetical, reasonable investors typical of the Creditors to make an informed judgment to accept or reject the Plan. The Approval Order also approved: (a) all materials to be transmitted to Claimholders and Interestholders entitled to vote on the Plan; (b) the timing and method of

delivery of the solicitation materials; and (c) the rules for tabulating votes to accept or reject the Plan. As set forth in the Notice Certificate, the Disclosure Statement, together with the additional solicitation materials approved by the Bankruptcy Court in the Approval Order, were transmitted in solicitation packages to each Creditor that was entitled to vote to accept or reject the Plan, as well as to other parties in interest in the Chapter 11 Case, in compliance with section 1125 of the Bankruptcy Code and the Approval Order. In addition, Creditors that were not entitled to vote to accept or reject were provided with certain non-voting materials approved by the Bankruptcy Court in the Approval Order. Debtor did not solicit the acceptance or rejection of the Plan by any Creditor prior to the transmission of the Disclosure Statement. Additionally, Debtor caused the Confirmation Hearing Notice to be published on Debtor's bankruptcy case website at www.bmcgroup.com/dickinsontheatres.

B. Compliance with Section 1126

Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Under section 1126 of the Bankruptcy Code, only holders of allowed claims and allowed equity interests in impaired classes of claims or equity interests that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. As set forth in section 1126 of the Bankruptcy Code:

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

> (g) 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.

11 U.S.C. § 1126(a), (f), (g).

As set forth in the Disclosure Statement and in the Voting Agent Declaration, in accordance with section 1126 of the Bankruptcy Code, Debtor solicited acceptances or rejections of the Plan from the holders of all Allowed Claims in each Class of Impaired Claims that are to receive distributions under the Plan. Claims in Classes 1, 4, 6 and 7a were designated under the Plan as Unimpaired. As a result, pursuant to section 1126(f) of the Bankruptcy Code, Holders of Claims in those Classes are conclusively presumed to have accepted the Plan. Claims in Classes 2, 3, 5a, 5b, 7b and 8 are Impaired and Holders of such Claims will receive distributions under the Plan. As a result, pursuant to section 1126(a) of the Bankruptcy Code, Holders of Claims in such Impaired Classes were entitled to vote to accept or reject the Plan.

As to impaired classes entitled to vote to accept or reject a plan, sections 1126(c) and 1126(d) of the Bankruptcy Code specify the requirements for acceptance of a plan by classes of claims and classes of equity interests, respectively:

> (c) 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.
>
> (d) A class of interests has accepted the plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than

> any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c), (d). Tabulating ballots only of Claims allowed for voting purposes, only Class 7b voted to reject the Plan. Nevertheless, as set forth below, pursuant to section 1129(b) of the Bankruptcy Code, the Plan may be confirmed over the rejection of Class 7b because the Plan does not discriminate unfairly and is fair and equitable with respect to such Classes. *See* 11 U.S.C. § 1129(b). Based upon the foregoing, the requirements of section 1129(a)(2) have been satisfied.

IV. THE PLAN HAS BEEN PROPOSED IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW.

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The good faith standard requires that the plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." *In re Zenith Elecs. Corp*., 241 B.R. 92, 107 (Bankr. D. Del. 1999) (quoting *In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988), *aff'd in part, remanded in part*, 103 B.R. 521 (D.N.J. 1989), *aff'd* 908 F.2d 964 (3d Cir. *1990)); In re Pikes Peak Water Co.*, 779 F.2d 1456, 1460 (10th Cir. 1985) ("Not confirming a plan for lack of good faith is appropriate particularly when there is no realistic possibility of an effective reorganization and it is evident that the debtor seeks merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights."); *see also In re SGL Carbon Corp.,* 200 F.3d 154, 165 (3d Cir. 1999) (finding good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11). In the context of a chapter 11 plan, courts have held that "a plan is proposed in good faith 'if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code.'" *In re The Leslie Fay Co., Inc*., 207 B.R.

764, 781 (Bankr. S.D.N.Y. 1997) (quoting *Texaco*, 84 B.R. at 907). "The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan." *Id*. (citations omitted).

The primary goal of chapter 11 is to promote the rehabilitation of the debtor. Congress has recognized that the continuation of the operation of a debtor's business as a viable entity benefits the national economy through the preservation of jobs and continued production of goods and services. The Supreme Court similarly has recognized that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *see also In re Drexel Burnham Lambert Group, Inc*., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992) (quoting *Bildisco & Bildisco*).

The Plan proposed by Debtor accomplishes these rehabilitative goals by restructuring Debtor's obligations and providing the means through which Debtor may continue to operate as a viable enterprise. The Plan is also in the best interests of Creditors, as it satisfies Prepetition Secured Claims, Priority Claims and Administrative Expense Claims in full and provides full payment over time to General Unsecured Creditors. Holders of General Unsecured Claims will recover under the Plan at least as much as what they would receive if the Debtor were to be liquidated under chapter 7 of the Bankruptcy Code. *See* Horton Confirmation Declaration and the Liquidation Analysis at Appendix 2 to the Disclosure Statement.

The Plan is the result of extensive good faith, arm's-length negotiations among Debtor, the Committee, Peoples Bank, 6801 West 107th LLC, Hawthorn Bank, John W. Hartley Jr. Revocable Trust and various other parties. The Plan is overwhelmingly supported by Creditors.

The support of the Plan by such key constituencies underscores the fact that the Plan is fundamentally fair to Creditors and the Estate.

V. THE PLAN PROVIDES THAT PAYMENTS MADE BY DEBTOR FOR SERVICES OR COSTS AND EXPENSES ARE SUBJECT TO COURT APPROVAL.

Section 1129(a)(4) of the Bankruptcy Code 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.

11 U.S.C. § 1129(a)(4). Section 1129(a)(4) of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval as to their reasonableness by the Bankruptcy Court. *See, e.g., In re Valley View Shopping Ctr., L.P.*, 260 B.R. at 22-23 (Bankr. D. Kan. 2001); *Drexel Burnh*am, 138 B.R. at 760; *Johns-Manville*, 68 B.R. at 632; 7 Collier on Bankruptcy ¶ 1129.03[41 (15th ed., rev. 2006).

All Professional Claims remain subject to final review for reasonableness by the Bankruptcy Court under section 330 of the Bankruptcy Code. To that end, Section 10.1 of the Plan provides that all Professionals seeking compensation in the Chapter 11 Case pursuant to sections 503(b)(2) through (b)(5) of the Bankruptcy Code are required to file a final application for compensation with the Bankruptcy Court no later than thirty (30) days after the Effective Date.

In addition, pursuant to sections 503(b)(3) and (4) of the Bankruptcy Code, the Bankruptcy Court must review any applications for substantial contribution to ensure compliance with the statutory requirements and that the fees requested are reasonable. All payments to be made in connection with the Effective Date or which relate to the success of the reorganization

or which otherwise are required to be disclosed, including any amounts to be paid to officers and directors, have been disclosed in a previous filing with the Bankruptcy Court, the Disclosure Statement or the Plan.

The foregoing procedures for the Bankruptcy Court's review and ultimate determination of the fees and expenses to be paid by the Debtor satisfy the objectives of section 1129(a)(4) of the Bankruptcy Code. *See In re Elsinore Shore Assoc.*, 91 B.R. 238, 268 (Banks. D.N.J. 1988) (requirements of section 1129(a)(4) satisfied where plan provided for payment of only "allowed" administrative expenses); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) ("Court approval of payments for services and expenses is governed by various Code provisions — *e.g.,* §§ 328, 329, 330, 331, and 503(b) — and need not be explicitly provided for in a Chapter 11 plan."); 7 Collier on Bankruptcy ¶ 1129.03 [4] (15th ed., rev. 2006).

Based upon the foregoing, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

VI. DEBTOR HAS DISCLOSED ALL NECESSARY INFORMATION REGARDING DIRECTORS, OFFICERS AND INSIDERS.

Section 1123(a)(7) of the Bankruptcy Code requires that a plan of reorganization "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan." 11 U.S.C. § 1123(a)(7). This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which directs a court to examine the methods by which the management of the reorganized debtor is to be chosen to provide adequate representation of those whose investments are involved in the reorganization — *i.e.*, creditors. *See In re Sunflower Racing*, 219 B.R. 587, 605-06 (Bankr. D. Kan. 1998) ("§ 1129(a)(5) requires…not only the identity of individuals, but also for their affiliations and a showing the appointment or continuance in office

of such individuals is consistent with the interests of creditors and equity security holders and with public policy."); 7 Collier on Bankruptcy ¶ 1123.01[7] (15th ed., rev. 2006).

Section 7.2 sets forth that the current directors and officers of Debtor will continue in their same capacity with Reorganized Debtor. Thus, the Plan complies with both sections 1123(a)(7) and 1129(a)(5) by properly and adequately disclosing identities and affiliations of all individuals or entities proposed to serve on or after the Effective Date as officers and directors of the Reorganized Debtor.

The employment of officers and directors by Reorganized Debtor, described above, is consistent with the interests of Creditors and is essential to the ongoing viability of Debtor's business. The current officers of the Debtor generally have been employed by Debtor for over ten years and are intimately familiar with Debtor's business. Retention of these officers is needed to maintain critical business relationships with suppliers, vendors, movie distributors, and other parties. *See In re Apex Oil Co.,* 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990) (where debtors as well as creditors' committee believe control of entity by proposed individuals will be beneficial, section 1129(a)(5) requirements are satisfied); *Toy & Sports Warehous*e, 37 B.R. at 149-50 (continuation of debtor's president and founder, who had many years of experience in the debtor's business, satisfied section 1129(a)(5)).

Based upon the foregoing, Debtor has satisfied the requirements of both sections 1123(a)(7) and section 1129(a)(5), including section 1129(a)(5)(A)(ii), which requires that the Bankruptcy Court find that the proposed directors and officers are qualified and honest.[3]

[3] *See* 7 Collier on Bankruptcy ¶ 1129.03[5][b] (15th rev. ed. 2006) ("public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."); *Bank of America, Ill. v. 203 North LaSalle Street P'ship*, 195 B.R. 692, 703-04 (Bankr. N.D. Ill. 1996), *aff'd*, 126 F.3d 955 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434 (1999) (rejecting argument that proposed management of reorganized debtors was incompetent for purposes of section 1129(a)(5)(A)(ii) because of management's failure to pay real estate taxes during case).

VII. THE PLAN DOES NOT PROVIDE FOR ANY RATE CHANGE SUBJECT TO REGULATORY APPROVAL.

Section 1129(a)(6) of the Bankruptcy Code is applicable only to debtors whose rates are subject to governmental regulatory authority and requires 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). In this Chapter 11 Case, section 1129(a)(6) of the Bankruptcy Code is not applicable because the Plan is not premised on any rate changes or the establishment of rates over which any regulatory commission has jurisdiction or will have jurisdiction after confirmation.

VIII. THE PLAN IS IN THE BEST INTERESTS OF ALL CREDITORS OF DEBTOR.

Section 1129(a)(7) of the Bankruptcy Code provides, in relevant part, that: "[w]ith 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."

11 U.S.C. § 1129(a)(7)(A). This section is often referred to as the "best interests" test. *See Leslie Fay*, 207 B.R. at 787. The best interests test focuses on individual dissenting creditors rather than classes of claims. *See Id.; see also 203 North LaSalle*, 526 U.S. 424, 441 n.13 (1999). Under the best interests test, the court "must find that each creditor receive under the pplan property that has a value, as of the effective date of the plan, that is not less than the amount such creditor would receive if the debtor's assets were liquidated under Chapter 7 of the bankruptcy code." In

re Pikes Peak Water Co., 779 F.2d at 1460. As section 1129(a)(7) of the Bankruptcy Code makes clear, the liquidation analysis applies only to non-accepting impaired claims or equity interests. A court, in considering whether a plan satisfies the "best interests" test, is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all of the debtor's assets under chapter 7 of the Bankruptcy Code. *See In re Crowthers McCall Pattern, Inc*., 120 B.R. 279, 298 (Bankr. S.D.N.Y. 1990); *In re Valley View Shopping Ctr., L.P.*, 10 B.R. at 29-30.

In the instant case, the best interests test is inapplicable to Classes 1, 4, 6 and 7a because each such Class is Unimpaired and, pursuant to section 1126(1) of the Bankruptcy Code, deemed to have accepted the Plan. As demonstrated by the Horton Confirmation Declaration and the Liquidation Analysis attached as Appendix 2 to the Disclosure Statement, the values that likely would be realized by the Claimholders in all Classes that are Impaired under the Plan upon disposition of Debtor's assets pursuant to a hypothetical chapter 7 liquidation are significantly less than the value of recoveries to such Classes provided for under the Plan. In fact, were Debtor to be liquidated, no Impaired Classes (whether such Classes will receive a distribution under the Plan or not) would receive any distribution on account of their Allowed Claims.

IX. ACCEPTANCE OF IMPAIRED CLASSES

Subject to the exceptions contained in section 1129(b), section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or interests accepts the plan, as follows:

> With respect to each class of claims or interests —
> (A) such class has accepted the plan; or
> (B) such class is not impaired under the plan.

11 U.S.C. § 1129(a)(8). Classes 1, 4, 6 and 7a are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Thus, section 1129(a)(8) of the Bankruptcy Code is satisfied with respect to Classes 1, 4, 6 and 7a. With respect to Classes 2, 3, 5a, 5b, 7b and 8, Section 1129(b) of the Bankruptcy Code provides the mechanism by which the Plan may be confirmed and over the rejection of any such dissenting Class. In fact, Classes 2, 3, 5a, 5b and 8 voted to accept the Plan, and only Class 7b voted to reject the Plan. This rejection by Class 7b is discussed further below.

X. THE PLAN PROVIDES FOR PAYMENT IN FULL OF ALL ALLOWED ADMINISTRATIVE CLAIMS, PRIORITY TAX CLAIMS AND OTHER PRIORITY CLAIMS.

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

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) 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;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 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 the effective date of the plan, equal to the allowed amount of such claim;
>
> (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302 or 303; and
>
> (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b))...

11 U. S.C. § 1129(a)(9). Section 2.1 of the Plan provides that unless otherwise agreed in writing by the holder of an Administrative Claim with the Debtor or the Reorganized Debtor, as the case may be, or as the Bankruptcy Court may order, each holder of an Allowed Administrative Claim will receive in full satisfaction, settlement, release, and discharge of, and in exchange for, such Administrative Claim, Cash equal to the unpaid portion of such Allowed Administrative Claim. Thus, the requirements of section 1129(a)(9)(A) and (B) of the Bankruptcy Code are satisfied.

The Plan satisfies the requirements of sections 1129(a)(9)(C) and (D) of the Bankruptcy Code in respect of the treatment of Priority Tax Claims and Secured Claims under section 507(a)(8) of the Bankruptcy Code. Section 1129(a)(9)(C) of the Bankruptcy Code permits deferred payments over a period of five 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. *See* 11 U .S.C. § 1129(a)(9)(C). Section 2.3 of the Plan provides that, at the option of Debtor or Reorganized Debtor, as the case may be, each holder of an Allowed Priority Tax Claim will receive in full satisfaction, settlement, release, and discharge of, and in exchange for: (a) equal Cash payment made on the last Business Day of every three-month period following the Effective Date, over a period not exceeding six years after the assessment of

the tax on which such Claim is based, totaling the principal amount of such Claim plus simple interest on any outstanding balance from the Effective Date calculated at the interest rate available on ninety (90) day United States Treasuries on the Effective Date, (b) such other treatment agreed to by the Allowed Priority Tax Claimholder and Debtor (or Reorganized Debtor), provided such treatment is on more favorable terms to Debtor (or Reorganized Debtor after the Effective Date) than the treatment set forth in clause (a) hereof, or (c) payment in full in Cash. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

XI. AT LEAST ONE CLASS OF IMPAIRED CLAIMS HAS ACCEPTED THE PLAN.

Section 1129(a)(10) of the Bankruptcy Code provides that:

> If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10); *See In re Ruti-Sweetwater, Inc.*, 1988 U.S. App. LEXIS 1988, 14-15 (10th Cir. Feb. 1, 1988); *In re Martin*, 66 B.R. 921, 924 (Bankr. D. Mont. 1986) (where three classes of impaired creditors accepted plan, exclusive of insiders, requirement of section 1129(a)(10) was satisfied). Here Classes Classes 2, 3, 5a, 5b and 8 voted to accept the Plan, and Classes 2, 5a and 5b unequivocally do not include "insiders" under the Bankruptcy Code. Accordingly, Section 1129(a)(10) of the Bankruptcy Code has been satisfied.

XII. THE PLAN IS FEASIBLE.

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

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

11 U.S.C. § 1129(a)(11). As described below, and as will be demonstrated at the Confirmation Hearing, the Plan is feasible within the meaning of this provision.

The feasibility test set forth in section 1129(a)(11) of the Bankruptcy Code requires a court to determine whether a plan is workable and has a reasonable likelihood of success. *See In re Pikes Peak Water Co.,* 779 F.2d at 1460; ("The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promises creditors and equity security holder more under a certain proposed plan than the debtor can possibly attain after confirmation.") (citing *Pizza of Hawaii, Inc.*, 761 F.2d, 1374, 1382 (9th Cir. 1985); *Leslie Fay*, 207 B.R. at 788; *In re Woodmere Investors Ltd. P'ship*, 178 B.R. 346, 361 (Bankr. S.D.N.Y. 1995); *Drexel Burnham*, 138 B.R. at 762; *Johns-Manville*, 68 B.R. at 635.

Section 1129(a)(11) of the Bankruptcy Code does not require a guarantee of success. *See In re U.S. Truck Co*., 47 B.R. 932, 944 (E.D. Mich. 1985) ("Feasibility does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986); *In re One Times Square Assocs. Ltd. P'ship*, 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993) ("It is not necessary that the success be guaranteed, but only that the plan present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success.") (quoting 5 Collier on Bankruptcy ¶ 1129.02[11], at 1129-54 (15th ed. 1992)); *Texaco*, 84 B.R. at 910 ("All that is required is that there be reasonable assurance of commercial viability."); *In re Prudential Energy Co*., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11).").

Rather, the key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. The purpose of the feasibility test is to protect

against visionary or speculative plans. As noted by the United States Court of Appeals for the Ninth Circuit:

> The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.

Pizza of Haw., Inc. v. Shakey's, Inc. (*In re Pizza of Haw., Inc*.), 761 F.2d 1374, 1382 (9th Cir. 1985) (quoting 5 Collier on Bankruptcy ¶ 1129.02, at 1129-36.11 (15th ed. 1984)). However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds. *See US. Truck*, 47 B.R. at 944.

Applying the foregoing standards of feasibility, courts have identified the following factors as probative:

(1) the adequacy of the capital structure;

(2) the earning power of the business;

(3) economic conditions;

(4) the ability of management;

(5) the probability of the continuation of the same management; and

(6) any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

See Leslie Fay, 207 B.R. at 789 (citing 7 Collier on Bankruptcy ¶ 1129 LH[2], at 1129-82 (15th ed., rev. 1996)); *See also Texaco*, 84 B.R. at 910; *Prudential Energy*, 58 B.R. at 862-63. The foregoing list is neither exhaustive nor exclusive. *Drexel Burnham*, 138 B.R. at 763; *cf. U.S. Truck*, 800 F.2d 581, 589 (6th Cir. 1986).

For purposes of determining whether the Plan satisfies the feasibility standard, the single most important factor is that the projections in the DIP financing order have proven accurate, if not conservative, so far in the case, and hence the projections to the Disclosure Statement are sufficiently reliable to find that the Plan is feasible. Based upon the foregoing, the Plan satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

XIII. ALL STATUTORY FEES HAVE BEEN OR WILL BE PAID.

Section 1129(a)(12) of the Bankruptcy Code requires the payment of " all 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." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, Section 10.3 of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid in cash on or before the Effective Date. Thus, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

XIV. DEBTOR DOES NOT PROVIDE RETIREE BENEFITS.

Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for "the continuation...of payment of all retiree benefits...for the duration of the period the debtor has obligated itself to provide such benefits." Debtor is not obligated to provide retiree benefits (as defined in Bankruptcy Code section 1114) under any plan, fund or program maintained or established prior to the Petition Date. Accordingly, section 1129(a)(13) of the Bankruptcy Code is not applicable in the Chapter 11 Case.

XV. DEBTOR DOES NOT OWE ANY DOMESTIC SUPPORT OBLIGATIONS.

Section 1129(a)(14) of the Bankruptcy Code provides that, if a chapter 11 debtor is subject to a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor must pay all amounts related to any such obligation accruing postpetition under such order or statute. Section 1129(a)(14) of the Bankruptcy Code is not applicable in the Chapter 11 Case because the Debtor is not required to pay any domestic support obligations pursuant to either order or statute.

XVI. DEBTOR IS NOT AN INDIVIDUAL WITH DISPOSABLE INCOME.

Section 1129(a)(15) of the Bankruptcy Code requires, in cases involving individual debtors, either that the individual debtor pay all unsecured claims in full or that the debtor's plan devote an amount equal to five years' worth of the debtor's disposable income to unsecured creditors. Section 1129(a)(15) of the Bankruptcy Code is not applicable in the Chapter 11 Case because Debtor is not an individual debtor.

XVII. DEBTOR IS NOT A NON-PROFIT ENTITY.

Section 1129(a)(16) of the Bankruptcy Code provides that applicable nonbankruptcy law will govern all transfers of property under a plan to be made by "a corporation or trust that is not a moneyed, business, or commercial corporation or trust." The legislative history of section 1129(a)(16) of the Bankruptcy Code demonstrates that this section was intended to "restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust." *See* H.R. Rep. No. 109-31, 109th Cong. 1st Sess. 145 (2005). Debtor is not such an entity.. Accordingly, the Plan satisfies the requirements of section 1129(a)(16) of the Bankruptcy Code.

XVIII. THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS OF THE BANKRUPTCY CODE BECAUSE IT DOES NOT DISCRIMINATE UNFAIRLY AND IS FAIR AND EQUITABLE WITH RESPECT TO CLASS 7b.

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either accept a plan or be unimpaired under the plan. 11 U.S.C. § 1129(a)(8). Here, Class 7b (Spirit Contingent Unsecured Claim) has not accepted the Plan, which otherwise prevents the Plan from complying with section 1129(a)(8).

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation or "cram down" of a plan in circumstances where the plan is not accepted by all impaired classes of claims and equity interests. Section 1129(b) of the Bankruptcy Code provides in pertinent part:

> Notwithstanding section 510(a) of [the Bankruptcy Code], if all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] 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). Thus, under section 1129(b) of the Bankruptcy Code, a court may "cram down" a plan over the deemed rejection by impaired classes of claims or equity interests that receive no distributions under the plan as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes.

A. The Plan Does Not Discriminate Unfairly.

Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes; it prohibits only discrimination that is unfair. *In re Mulberry Agric. Enter., Inc.*, 113 B.R. 30, 32 (D. Kan 1990); *In re 11,111, Inc*., 117 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment. *See In re Buttonwood Partners*, *Ltd*., 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990). Accordingly, as between two classes of claims or two classes of

equity interests, there is no unfair discrimination if: (i) the classes are comprised of dissimilar claims or interests, *See*, e.*g., Johns-Manville*, 68 B.R. at 636; or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment, *See*, *e.g., Buttonwood Partners*, 111 B.R. at 63; *In re Rivera Echevarria*, 129 B.R. 11, 13 (Bankr. D.P.R. 1991).

The threshold inquiry in assessing whether a proposed plan of reorganization unfairly discriminates against a non-accepting class is whether the non-accepting class is equally situated to a class allegedly receiving more favorable treatment. Debtor respectfully submits that Class 7b is materially different from Class 5a (General Unsecured Claims) because there is no present Class 7b claim and there may never be if Debtor's pending appeal never prevails. Moreover, even if Class 7b is not materially different from Class 5a, Class 7b is being treated substantially the same as Class 5a in that Class 7b is being paid the same proportional amount as it would have received if it were included in Class 5a as of the date the Class 7b claim is ever allowed. As such, Debtor submits that the Plan does not discriminate unfairly against Class 7b, and thus the Plan satisfies section 1129(b)(1) of the Bankruptcy Code.

B. The Plan Is Fair and Equitable.

Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" with respect to secured claims, unsecured claims and interests. With respect to unsecured claims, section 1129(b)(2)(B) of the Bankruptcy Code provides that "fair and equitable" means that (i) each impaired unsecured creditor receives or retains under the plan property of a value equal to the amount of its allowed claim, or (ii) the holders of claims and interests that are junior to the claims of the dissenting class will not receive or retain any property under the plan on account of such junior interest. *See* 11 U.S.C. § 1129(b)(2)(B).

In the instant case, the "fair and equitable" requirement is satisfied as to Class 7b because (i) Class 7b is being paid in full as of the date its claim is allowed, and (ii) no holders of Interests junior to Class 7b will receive any distribution under the Plan on account of such Interests (Class 8 Interests are retained based on the 6801 West 107th loan commitment). Accordingly, the Plan satisfies the requirements of section 1129(b)(2)(B) and, therefore, is fair and equitable with respect to Class 7b. The Plan therefore satisfies the requirements of section 1129(b)(2)(C) and, therefore, is fair and equitable with respect to the non-accepting Class of Interests.

XIX. MARICOPA COUNTY OBJECTION

If the Plan is confirmed and the Effective Date is December 31, 2012, as currently proposed, then the only claim by Maricopa County in this case will be for approximately $15,569.58. Rather than dispute the objection, or amend the Plan, Debtor hereby commits to pay the Maricopa County claim in the amount of $15,569.58 on the Effective Date.

XX. SPIRIT OBJECTION

Spirit has filed an objection asserting (a) maintaining the appeal while assuming the Master Lease violates Section 365(d)(4), (b) creating a Class 7b "subclass" potentially violates Section 1122, (c) asserting Spirit's contingent Class 7b claim "would be at least $934,585.51, (d) asserting "Debtor is currently in default under the Master Lease due to certain substantial deferred maintenance items" which must be "cured" under Section 365(b)(1), (e) Spirit is entitled to recover attorneys fees and costs "estimated to be at least $100,000" which must be paid on or before the Effective Date and while the appeal is pending, (f) Debtor must pay unspecified attorneys fees and expenses "collecting or attempting to collect" the Promissory Note in Class 7a, and (g) "the Plan needs to clearly reflect that Spirit's rights with respect to the Note are not in any way affected by the Plan, as does any order confirming the Plan."

Debtor's arguments and evidence in response to the Spirit objection will be fully set forth at the confirmation hearing. This Memorandum will be limited to certain legal arguments. As to Spirit's first argument that maintaining the appeal while assuming the Master Lease violates Section 365(d)(4), Debtor first notes that Debtor is doing exactly what Section 365(d)(4) requires – assuming the Master Lease. See Plan, Article VIII. The only issue is Debtor's preservation of its appeal of this Court's Order denying Debtor's motion to reject that portion of the Master Lease relating to the Palm Valley location (the "Appeal"). See Plan, Exhibit A To be clear, Debtor intends to observe and perform the Master Lease, including the provisions relating to the Palm Valley location, unless and until the relief requested in the appeal is granted.

Spirit has not cited, and Debtor has not found, anything in Section 365 that prohibits Debtor from maintaining the Appeal. Section 365(b)(1) regarding cure and other rights only applies "[i]f there has been a default" and the Master Lease does not make the filing of the Appeal a default. *Compare Hill v. Schilling*, 2012 WL 5278914 (5th Cir. 2012)(in relevant part, dismissed appeal due to appeal waiver agreement). Moreover, the Ninth Circuit Court of Appeals has indicated that the main, if not only, issue a bankruptcy court must consider in the context of an appeal pending when a plan is confirmed is "feasibility" under Section 1129(a)(11). *In the Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985); *In re Harbin*, 486 F.3d 510 (9th Cir. 2007). This approach has been followed by other courts as well. *E.g., In re All American Hardwood Inc.*, 2012 U.S. Dist. LEXIS 47908 (C.D. Cal. April 4, 2012); *In re Pawlowski*, 428 B.R. 545 (E.D.N.Y. 2009).

As to Spirit's second argument, counsel for Debtor has confirmed to counsel for Spirit that Class 7b is a separate class from Class 7a under the Plan, so no violation of Section 1122 exists. The numbering of "7a" and "7b" for the Classes is only intended to keep the Spirit

provisions of the Plan together. If this Court believes Debtor should further separate the Classes, Debtor will do so in the confirmation order.

As to Spirit's third argument that its potential Class 7b claim "would be at least $934,585.51," Debtor disputes this calculation, asserts Spirit's potential Class 7b claim is no more than $736,998.72, and reserves all rights to have this Court determine the Allowed Amount of Spirit's Class 7b claim if and when a further ruling is issued in the Appeal. For now, Debtor submits that the Plan is "feasible" within the meaning of Section 1129(a)(11) even if this Court determines that Spirit's Class 7b claim is the $934,585.51 asserted by Spirit. See Horton Declaration.

As to Spirit's third and fourth arguments about "deferred maintenance" and attorney's fees, Debtor respectfully submits that this Court does not need to make a final decision about these matters at the confirmation hearing. *See, In re UAL Corp.*, 635 F.3d 312 (7th Cir. 2010). Instead, Debtor submits that this Court can estimate these claims to the extent necessary to determine whether the Plan is "feasible" within the meaning of Section 1129(a)(11), and schedule a separate hearing at a later date to determine any alleged "cure" claims by Spirit. This is expressly contemplated by the Plan. *See* Plan, Section 8.3.

Either way, Debtor notes the following about these claims. First, Spirit has acknowledged that it is holding $172,854.97 in cash payable to Debtor based on Spirit's receipt of an insurance claim check for $398,902.97 to pay for Eastglen roof repairs in the aggregate amount of $224,050. Accordingly, this cash is available to Spirit to satisfy any alleged "default maintenance" and attorneys fees claims. Second, Debtor has already completed, or is in the process of completing, many of the "deferred maintenance" items identified by Spirit to date. And third, Debtor is getting estimates on doing the remaining "deferred maintenance" items

identified by Spirit to date, and Ron Horton will testify that he does not anticipate any issues with being able to pay for any appropriate "deferred maintenance" items.

This Court has the power to "estimate" Spirit's potential "deferred maintenance" and attorneys fees claims for the purpose of confirmation, even if this Court does not otherwise have jurisdiction to finally determine any such claim. *In re Tristar Fire Protection, Inc.*, 466 B.R. 392, 405-407 (Bankr. E.D. Mich. 2012). This estimation can be made even in the face of a pending appeal. *In re ELL 11, LLC*, 2008 Wl 916695 (Bankr. M.D. Ga. 2008).

As to Spirit's fifth argument about recovering attorneys fees on the promissory note in Class 7a, Debtor notes that there has never been any default under the promissory note. In fact, Spirit has timely drawn by ACH the payments due on the promissory note each and every month since the Petition Date in violation of the automatic stay of Section 362. Accordingly, Debtor respectfully submits that Spirit has no attorneys fees payable to it under the promissory note in Class 7a and Debtor reserves all rights to recover all claims against Spirit for violation of the automatic stay after the Petition Date.

Spirit's final argument is unclear. The Plan has identified the promissory note in Class 7a as "unimpaired" within the meaning of Section 1124. If Spirit only wants what Section 1124 requires, then Debtor has done it. If Spirit wants more than what Section 1124 requires, then Debtor has no legal obligation to do it and hereby respectfully declines to do so.

CONCLUSION

The Plan complies with and satisfies all of the requirements of section 1129 of the Bankruptcy Code. Accordingly, Debtor respectfully requests entry of an order, in substantially the form of the proposed Confirmation Order filed with the Bankruptcy Court, confirming the Plan.

Dated: November 28, 2012.

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