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ATTORNEYS FOR THE DEBTORS
AND DEBTORS IN POSSESSION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Case No. 09-37010 (SGJ)**
	§	
ERICKSON RETIREMENT COMMUNITIES, LLC, *et al.*[1]	§	**Chapter 11**
	§	
	§	**(Jointly Administered)**
Debtors.	§	
	§	

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF THEIR REQUEST FOR AN ORDER CONFIRMING THE DEBTORS' FOURTH AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

[1] The Debtors in these chapter 11 cases are Erickson Retirement Communities, LLC, Ashburn Campus, LLC, Columbus Campus, LLC, Concord Campus GP, LLC, Concord Campus, LP, Dallas Campus GP, LLC, Dallas Campus, LP, Erickson Construction, LLC, Erickson Group, LLC, Houston Campus, LP, Kansas Campus, LLC, Littleton Campus, LLC, Novi Campus, LLC, Senior Campus Services, LLC, Warminster Campus GP, LLC, Warminster Campus, LP.

PRELIMINARY STATEMENT

Erickson Retirement Communities, LLC and its affiliated debtors in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors"), hereby submit this memorandum of law in support of their request for an order confirming the Debtors' Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code,[2] dated March 8, 2010 (including all exhibits thereto and as the same may be further amended, modified or supplemented from time to time, the "Plan") [Dkt. No. 1005].

For the reasons stated herein, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code. Accordingly, the Debtors respectfully submit that the Plan should be confirmed.

The Plan represents the culmination of extensive, arms'-length negotiations taking place over several months' time. The Plan presents the best opportunity for the Debtors' Business to remain viable.

I. STATEMENT OF FACTS

A. General Background

The Debtors respectfully refer this Court to the Disclosure Statement [Docket No. 1001], the Affidavit of Service and Vote Certification of BMC Group, Inc, ("BMC"), sworn to on April 13, 2010, the Declaration of Paul Rundell in Support of First Day Motions [Dkt. No. 15], which is incorporated by reference herein, and the record of these chapter 11 cases for an overview of the Debtors' business and all other relevant facts that may bear on confirmation of the Plan.

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[2] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

B. The Plan and Solicitation of Votes Thereon

The Debtors request that the Court approve the Solicitation Procedures, including balloting, tabulation, and related activities undertaken in connection with the Plan. On March 12, 2010, the Debtors commenced the Solicitation; the Debtors caused BMC (the "Voting Agent") to distribute copies of the appropriate ballots the Disclosure Statement, and the Plan (collectively, the "Solicitation Package") by either hand-delivery or electronic mail to each person or entity entitled to vote on the Plan as of the Voting Record Date (defined below), or to their respective nominees. The Debtors caused the Voting Agent to serve the Solicitation Package to creditors in the following Voting Classes: **Erickson Group, LLC**: Erickson Group Guaranty Claims (Class 4); **Erickson Retirement Communities, LLC**: Corporate Revolver Claims (Class 3), Interest Rate Swap Claims (Class 4), UMBC Construction Loan Claims (Class 6), Management Agreement Claims (Class 7), General Unsecured Claims (Class 8); **Erickson Construction, LLC:** Corporate Revolver Claims (Class 4), UMBC Building Construction Loan Claims (Class 5), General Unsecured Claims (Class 7); **Senior Campus Services, LLC:** UMBC Building Construction Loan Claims (Class 3), General Unsecured Claims (Class 5); **Ashburn Campus, LLC**: Ashburn Construction Loan Claims (Class 4), Ashburn Community Loan Claims (Class 5), General Unsecured Claims (Class 8); **Columbus Campus, LLC:** Columbus Improvement Bond Claims (Class 3), Mechanic's Lien Claims (Class 4), Columbus Construction Loan Claims (Class 5), Columbus Community Loan Claims (Class 6), Columbus Junior Loan Claims (Class 7), General Unsecured Claims (Class 8); **Concord Campus, LP:** Mechanic's Lien Claims (Class 3), Concord Construction Loan Claims (Class 4), Concord Community Loan Claims (Class 5), Other Secured Claims (Class 7), General Unsecured Claims (Class 9); **Concord Campus GP, LLC:** General Unsecured Claims (Class 4); **Dallas Campus, LP**: Mechanic's Lien Claims (Class 3), Dallas Construction Loan Claims (Class 4), Texas A&M

Note Claims (Class 5), Dallas Community Loan Claims (Class 6), General Unsecured Claims (Class 9); **Dallas Campus GP, LLC**: General Unsecured Claims (Class 4); **Houston Campus, LP**: Mechanic's Lien Claims (Class 3), Houston Construction Loan Claims (Class 4), Houston Community Loan Claims (Class 5), General Unsecured Claims (Class 8); **Kansas Campus, LLC**: Mechanic's Lien Claims (Class 3), Kansas Construction Loan Claims (Class 5), Kansas Community Loan Claims (Class 6), General Unsecured Claims (Class 9); **Littleton Campus, LLC**: Mechanic's Lien Claims (Class 3), Littleton Construction Loan Claims (Class 4), Littleton Community Loan Claims (Class 5), Littleton Junior Loan Claims (Class 6), Other Secured Claims (Class 7), General Unsecured Claims (Class 9); **Novi Campus, LLC**: Mechanic's Lien Claims (Class 3), Novi Construction Loan Claims (Class 4), Novi Community Loan Claims (Class 5), Other Secured Claims (Class 7), General Unsecured Claims (Class 9); **Warminster Campus, LP**: Mechanic's Lien Claims (Class 3), Warminster Community Loan Claims (Class 4), Warminster Purchase Option Deposit Refund Agreement Claims (Class 5), Warminster Junior Loan Claims (Class 6), Other Secured Claims (Class 7), General Unsecured Claims (Class 9); **Warminster Campus GP, LLC**: General Unsecured Claims (Class 4).

The Debtors established March 5, 2010 as the record date (the "Record Date") for determining which creditors were entitled to vote on the Plan. As set forth in the Ballots, the Solicitation was made only to those creditors who were "accredited investors" as defined in Regulation D under the Securities Act of 1933 (as amended from time to time and including the rules and regulations promulgated thereunder, the "Securities Act"). A large number of the voting creditors had been involved in negotiating the Restructuring Transactions and that certain Second Amended and Restated Master Purchase and Sale Agreement, effective as of February 16, 2010, among Redwood, ManagementCo, DevCo, PropCo, Redwood Kansas, Redwood

Concord, Redwood Dallas, Redwood Houston, Redwood Ashburn, Redwood Littleton, Redwood Novi, Redwood-ERC Tinton Falls II, LLC, Redwood-ERC Senior Care, LLC and ERC, Erickson Group, LLC, a Maryland limited liability company, Concord, Dallas, Houston, Ashburn, Littleton, Novi, Kansas, Tinton Falls Campus II, LLC, a Maryland limited liability company, Senior Campus Care, LLC, a Maryland limited liability company, and Erickson Construction, LLC, a Maryland limited liability company, including any amendments (the "Definitive Agreement"). The Court approved a shortened solicitation period. The voting period ended at 4:00 p.m. (prevailing Central time) on April 8, 2010 (the "Voting Deadline").

Because the Holders of Claims in each of the following Classes (collectively, the "Deemed Accepting Classes") are unimpaired by the Plan the Holders of Claims in each of these Classes are conclusively presumed to have accepted the Plan and are not entitled to vote to accept or reject the Plan: **Erickson Group, LLC**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Erickson Retirement Communities, LLC**: Other Priority Claims (Class 1), Secured Tax Claims (Class 2), and Other Secured Claims (Class 5); **Erickson Construction, LLC**: Other Priority Claims (Class 1), Secured Tax Claims (Class 2), Mechanic's Lien Claims (Class 3), Erickson Construction Letters of Credit Claims (Class 6); **Senior Campus Services, LLC:** Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Ashburn Campus, LLC**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2), Mechanic's Lien Claims (Class 3); **Columbus Campus, LLC:** Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Concord Campus, LP:** Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Concord Campus GP, LLC:** Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Dallas Campus, LP**: Other Priority Claims (Class 1); Secured Tax Claims (Class 2); **Dallas Campus GP, LLC**: Other Priority Claims (Class 1) and Secured Tax

Claims (Class 2); **Houston Campus, LP**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Kansas Campus, LLC**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2), Kansas Special Assessment Bond Claims (Class 4); **Littleton Campus, LLC**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Novi Campus, LLC**: Other Priority Claims (Class 1); Secured Tax Claims (Class 2); **Warminster Campus GP, LLC**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2); **Warminster Campus, LP**: Other Priority Claims (Class 1) and Secured Tax Claims (Class 2).

Moreover, because each of the Holders of Claims and Interests in the following Classes (the "Deemed Rejecting Classes") are not entitled to any distribution or to retain any property pursuant to the Plan, the Holders of Claims in such Classes are presumed to have rejected the Plan and are not entitled to vote to accept or reject the Plan: **Erickson Group, LLC**: Corporate Revolver Guaranty Claims (Class 3), Interests in Erickson Group (Class 5); **Erickson Retirement Communities, LLC**: Interests in ERC (Class 9); **Erickson Construction, LLC:** Interests in Erickson Construction (Class 8); **Senior Campus Services, LLC:** Corporate Revolver Guaranty Claims (Class 4)**,** Interests in Senior Campus (Class 6); **Ashburn Campus, LLC**: Ashburn Junior Loan Claims (Class 6), NFP Claims (Class 7), Interests in Ashburn (Class 9); **Columbus Campus, LLC:** Interests in Columbus (Class 9); **Concord Campus, LP:** Concord Junior Loan Claims (Class 6), NFP Claims (Class 8), Interests in Concord (Class 10); **Concord Campus GP, LLC:** Corporate Revolver Guaranty Claims (Class 3), Interests in Concord GP (Class 5); **Dallas Campus, LP**: Dallas Junior Loan Claims (Class 7), NFP Claims (Class 8), Interests in Dallas (Class 10); **Dallas Campus GP, LLC**: Corproate Revolver Guaranty Claims (Class 3), Interests in Dallas GP (Class 4); **Houston Campus, LP**: Houston Junior Loan Claims (Class 6), NFP Claims (Class 7), Interests in Houston (Class 9); **Kansas**

Campus, LLC: Kansas Junior Loan Claims (Class 7), NFP Claims (Class 8), Interest in Kansas (Class 10); **Littleton Campus, LLC**: NFP Claims (Class 8), Interests in Littleton (Class 10); **Novi Campus, LLC**: Novi Junior Loan Claims (Class 6), NFP Claims (Class 8), Interest in Novi (Class 10); **Warminster Campus, LP**: NFP Claims (Class 8), Interests in Warminster (Class 10); **Warminster Campus GP, LLC**: Interests in Warminster GP (Class 5).

Therefore, the Debtors did not direct the Voting Agent to serve the Solicitation Package on creditors in the Deemed Accepting Classes or the Deemed Rejecting Classes.

After the Voting Deadline, the Ballots were tabulated by the Voting Agent. No voting class that voted, voted to reject the Plan. These acceptances are sufficient to confirm the Plan under sections 1125(g), 1126(b), (c) and (d) and 1129 of the Bankruptcy Code.

On March 8, 2010 the Court entered an Order (I) Scheduling Hearing on Confirmation of Plan; (II) Approving the Disclosure Statement; (III) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, Including (A) Approving Form and Manner of Solicitation Procedures, (B) Approving the Form and Notice of the Plan Confirmation Hearing, (C) Establishing Voting Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots, and (F) Approving Procedures for Vote Tabulation and; (IV) Establishing Deadline and Procedures for Filing Objections to (A) Confirmation for the Plan and (B) Proposed Cure Amounts Related to the Assumed Contracts; and (V) Granting Related Relief (the "Scheduling Order") [Dkt. No. 1007]. Pursuant to the Scheduling Order, this Court established (i) 4:00 p.m. (prevailing Central time) on April 9, 2010, as the deadline by which objections to the Plan were to be filed (the "Objection Deadline"); and (ii) 2:30 p.m. (prevailing

Central time) on April 15, 2010, as the time and date for the hearing to consider confirmation of the Plan (the "Plan Confirmation Hearing").

In addition, pursuant to the Scheduling Order, the Debtors duly served upon all of the Debtors' known creditors (or their nominees), equity interest holders, the Office of the United States Trustee for the Northern District of Texas (the "U.S. Trustee"), and all parties in interest requesting notice, substantially in the form approved as Exhibit A to the Scheduling Order (the "Plan Confirmation Notice"), of, among other things, (i) approval of the disclosure statement (ii) the date, time, and place of the Plan Confirmation Hearing, (iii) the deadline and procedures for filing objections to confirmation of the Plan, (iv) deadline for voting on the Plan, and (v) instructions for obtaining copies of the Disclosure Statement and the Plan.[3] The Debtors also caused the Plan Confirmation Notice to be published in the national edition of *The Wall Street Journal* on March 16, 2010, in accordance with the Scheduling Order.[4]

II. THE DEBTORS' SOLICITATION, NOTICE AND VOTING PROCEDURES SHOULD BE APPROVED

A. The Solicitation Procedures

To determine whether a solicitation of votes to accept or reject a plan should be approved, this Court must determine whether the solicitation complied with sections 1125(g) and 1126(b) of the Bankruptcy Code and Bankruptcy Rules 3017(d) and (e) and 3018(b) and (c).

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[3] See Certificate of Supplemental Service, dated March 16, 2010 [Dkt. No.1028], (2) the Certificate of Mailing, dated March 24, 2010 [Dkt. No. 1069], (3) Certificate of Supplemental Service, dated March 18, 2010 [Dkt. No. 1070], (4) Certificate of Supplemental Service, dated March 29, 2010 [Dkt. No. 1194], (5) Certificate of Supplemental Service, dated March 29, 2010 [Dkt. No. 1195].

[4] See Affidavit of Publication of Notice of (I) Approval of Disclosure Statement; (II) Hearing to Consider Confirmation of the Plan; (III) Deadline for Filing Objections to Confirmation of the Plan; and (IV) Deadline for Voting on the Plan [Dkt. No. 1202].

B. The Solicitation Complied with Applicable Provisions of the Bankruptcy Code

1. Exempt from Federal and State Securities Registration Requirements and Rules

Sections 1125(b) and 1126 of the Bankruptcy Code govern the acceptance of a plan of reorganization by a holder of a claim or interest Section 1125(b) provides:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title 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. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

11 U.S.C. 1125 (b).

Section 1126(c) of the Bankruptcy Code provides that a holder of a claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected such plan if:

> 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. § 1126(c).

Section 1126(e) requires that solicitation be made in good faith:

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

The Debtors have complied with these requirements.

Because the Solicitation Procedures complied with applicable nonbankruptcy law, creditors were solicited in a manner complying with applicable nonbankruptcy law and appropriate under the circumstances of these cases, and the solicitation was in compliance with all applicable nonbankruptcy laws, rules and regulations governing the adequacy of disclosure, the Debtors have satisfied sections 1125 and 1126 of the Bankruptcy Code.

C. The Solicitation of the Deemed Accepting Classes and the Deemed Rejecting Classes

The Holders of Claims or Interests in each of the Deemed Accepting Classes are conclusively presumed to have accepted the Plan and are not entitled to vote to accept or reject the Plan. The Bankruptcy Code does not require the solicitation of votes from such Holders. Specifically, section 1126(f) of the Bankruptcy Code provides:

> 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.

11 U.S.C. § 1126(f). Accordingly, the Holders of Claims or Interests in each of the Deemed Accepting Classes are conclusively presumed to accept the Plan and have not been solicited.

The Holders of Claims or Interests in the Deemed Rejecting Classes are not entitled to any distribution or to retain any property pursuant to the Plan, and as such, the Holders of claims in the Deemed Rejecting Classes are presumed to have rejected the Plan and are not entitled to vote to accept or reject the Plan. The Bankruptcy Code does not require the solicitation of votes from such Holders. Specifically, section 1126(g) of the Bankruptcy Code provides:

> 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(g). Accordingly, the Holders of Claims or Interests in each of the Deemed Rejecting Classes are conclusively deemed to reject the Plan and have not been solicited.

The Debtors submit that, with respect to the specific classes of claims against the Debtors that were presumed to accept or deemed to reject the Plan, the determination not to solicit those classes was appropriate and consistent with the requirements of the Bankruptcy Code.

D. The Solicitation Package, Ballots, and Solicitation Procedures Are in Compliance with the Bankruptcy Rules

Bankruptcy Rule 3017(d) sets forth the materials that must be provided to holders of claims and equity interests for the purpose of soliciting their votes and providing adequate notice of the hearing on confirmation of a plan of reorganization: "(1) the plan or a court-approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of the plan may be filed; and (4) any other information as the court may direct . . ." Fed. R. Bankr. P. 3017(d). Bankruptcy Rule 3017(d) also requires the Debtors to mail to all creditors and equity holders "notice of the time fixed for filing objections and the hearing on confirmation . . . in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan." Id.

Bankruptcy Rule 3017(d) also provides, in relevant part, as follows:

> If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be mailed

> to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation.

Id. In addition, Bankruptcy Rule 2002(l) permits a court to "order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice."

Finally, Bankruptcy Rule 3018(c) provides that "[a]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent and confirm to the appropriate Official Form." Fed. R. Bankr. P. 3018(c).

(a) *Solicitation Packages*

As required by Bankruptcy Rule 3017(d), the Solicitation Packages included the Disclosure Statement (to which the Plan was attached as an exhibit, as well as notice of the deadline to submit Ballots to accept or reject the Plan). The Solicitation Packages were mailed to all creditors in the Voting Classes.

(b) *Plan Confirmation Notice*

In addition, pursuant to the Scheduling Order, the Debtors mailed the Plan Confirmation Notice to all creditors and equity holders and published the same in the *Wall Street Journal*- National Edition. The Plan Confirmation Notice provided that copies of the Plan and the Disclosure Statement could be obtained upon request of the Debtors' counsel and are on file with the Clerk of the Bankruptcy Court, as well as available at the Bankruptcy Court's internet site at http://www.txnb.uscourts.gov and BMC's internet site at http://www.bmcgroup.com/ERC. The Plan Confirmation Notice also described the procedures and deadline for submitting an objection to approval of the Disclosure Statement or confirmation of the Plan.

The Solicitation Procedures, including publication of the Plan Confirmation Notice, afforded parties in interest ample notice of these proceedings. Based on the foregoing, the Debtors request that the Solicitation Procedures be approved and that the Court find that the Debtors were not required to distribute copies of the Plan or the Disclosure Statement to any holder of a Claim against or Interest in the Debtors within a class under the Plan that is deemed to accept or reject the Plan, unless such party made a specific request in writing for the same in accordance with the Plan Confirmation Notice. As noted above, pursuant to sections 1126(f) and 1126(g) of the Bankruptcy Code, solicitation of creditors in such a class is not required. Accordingly, the Debtors submit that their service of the Plan Confirmation Notice satisfies the requirements of Bankruptcy Rule 3017(d) and should be approved.

(c) *Ballots*

Bankruptcy Rules 3017(d) and 3018(c) require a form of ballot substantially conforming to Official Form No. 14. The Ballots are based on Official Form No. 14, but were modified to address the particular aspects of these chapter 11 cases and to be relevant and appropriate for each class of impaired Claims entitled to vote on the Plan. To be counted as votes to accept or reject the Plan, the Ballots stated that all Ballots must be properly executed, completed, and delivered to the Voting Agent so as to be received no later than the Voting Deadline. In addition, each of the Ballots was specifically designed to conform to the Plan. Accordingly, the Debtors submit that the Ballots satisfy the requirements of Bankruptcy Rules 3017(d) and 3018(c) and should be approved.

E. The Solicitation Period Was Reasonable and Complied with Applicable Law

Bankruptcy Rule 3018(b) provides, in relevant part, that (i) the plan must have been transmitted to substantially all creditors and equity security holders of the same class, (ii) the period of time prescribed for such creditors and equity security holders to accept or reject the

plan must not have been unreasonably short, and (iii) the solicitation must have been in compliance with section 1126(b) of the Bankruptcy Code.

In this instance, Debtors transmitted the Plan to each creditor entitled to vote thereon. In addition, the Debtors' solicitation period ran from March 12, 2010 through April 8, 2010 for all creditors entitled to vote and March 12, 2010 through April 13, 2010 for STAMPS holders (collectively, the "Solicitation Period"). Moreover, given that the Lenders, Agents, and Creditors Committee participated in extensive negotiations with the Debtors during the months leading up to the solicitation and participated in the preparation of the Plan and the Disclosure Statement, the Solicitation Period was adequate, not unreasonably short, and appropriate under the circumstances of these Chapter 11 Cases. Although abbreviated, the solicitation period, together with the months of negotiations leading to execution of the Definitive Agreement and commencement of these chapter 11 cases, provided voting creditors with ample notice of critical components of the Plan and an opportunity for the voting creditors to make an informed decision whether to accept or reject the Plan. This is further supported by the acceptance of the Plan by every class which voted. In light of the foregoing, the Debtors submit that the Solicitation Period in this case complies with applicable nonbankruptcy law and satisfies the requirements of section 1125(g) of the Bankruptcy Code and Bankruptcy Rule 3018.

F. The Modifications to the Plan Do Not Require Additional Disclosure or Additional Solicitation

The modifications to the Plan constitute changes with respect to certain Claims by agreement with the Holders of such Claims, and do not adversely change the treatment of any other Claims or Interests. Accordingly, pursuant to Bankruptcy Rule 3019(a), these modifications do not require additional disclosure under section 1125 of the Bankruptcy Code, nor do they require additional solicitation of the Plan.

G. The Debtors' Solicitation Procedures Should Be Approved Under Bankruptcy Rules 3017(e)

Bankruptcy Rule 3017(e) requires the Court to "consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to the beneficial holders of stock, bonds, debentures, notes and other securities and determine the adequacy of such procedures and enter any orders the court deems appropriate." Here, the Debtors caused the Solicitation Package, including the Disclosure Statement, to be distributed to the Voting Classes to solicit votes to accept or reject the Plan. The Debtors respectfully submit that the Solicitation Procedures were appropriate, and that the Court should enter an order approving such procedures.

Accordingly, based on the facts contained in Section I of this Memorandum and the Scheduling Motion, as well as the Voting Certification and the Plan Confirmation Declarations, the Debtors submit that the Solicitation Package and Solicitation Procedures should be approved by this Court, as they satisfy the requirements of sections 1125 and 1126(b) of the Bankruptcy Code and Bankruptcy Rules 3017(d) and (e) and 3018(b) and (c).

III. THE PLAN SHOULD BE CONFIRMED

To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. As set forth by the United States Court of Appeals for the Fifth Circuit in Heartland Federal Savings & Loan Association v. Briscoe Enterprises., Ltd. II (In re Briscoe Enterprises., Ltd. II),

> 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 both § 1129(a) and in a cramdown.

994 F.2d 1160, 1165 (5th Cir. 1993). Through filings with the Court, the Plan Confirmation Declarations, and the testimonial evidence which may be adduced at the Plan Confirmation Hearing, the Debtors will demonstrate, by a preponderance of the evidence, that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan.

A. The Plan Satisfies the Requirements for Confirmation Under Bankruptcy Code Section 1129(a)

As addressed in detail below, the Plan satisfies all of the applicable requirements of section 1129(a) of the Bankruptcy Code, other than section 1129(a)(8), but as described more fully below, the Plan may be confirmed notwithstanding the fact that not all classes of Claims or Interests have accepted the Plan.

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

Section 1129(a)(1) of the Bankruptcy Code provides that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) informs 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); see also In re Nutritional Sourcing Corp., No. 07-11038, 2008 WL 5396491, at *5 (Bankr. D. Del. Dec. 23, 2008); 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 sub nom., Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636 (2d Cir. 1988); In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

As demonstrated below, the Plan fully complies with the requirements of sections 1122 and 1123 and all other applicable provisions of the Bankruptcy Code.

(a) *The Plan Complies with Section 1122(a) of the Bankruptcy Code*[5]

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

> 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). For a classification structure to satisfy section 1122, it is not necessary that all substantially similar claims or interests be designated to the same class, but only that all claims or interests designated to a particular class be substantially similar to each other. In re Armstrong World Indus., Inc., 348 B.R. 136, 159 (Bankr. D. Del. 2006).

The Plan provides for the separate classification of Claims against and Interests in the Debtors based upon differences in the legal nature and/or priority of such Claims and Interests into individual classes (each, a "Class").

Each of the Claims or Interests in each Class is substantially similar to the other Claims or Interests in such Class. Accordingly, the Debtor's classification of Claims and Interests does not prejudice the rights of Holders of such Claims and Interests, is consistent with the requirements of the Bankruptcy Code and, thus, is appropriate. See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 159 (3d Cir. 1993) (explaining that the determination of whether a classification scheme is reasonable "must be informed by the two purposes that classification serves under the Code: voting to determine whether a plan can be confirmed and treatment of claims under the plan") (internal citation omitted); Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.), 913 F.2d 873, 880 (11th Cir. 1990) (plan proponent allowed considerable discretion to classify claims and interests according

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[5] Section 1122(b) of the Bankruptcy Code is inapplicable to the instant case, as the Plan does not include

to facts and circumstances of case so long as classification scheme does not violate basic priority rights or manipulate voting).

(b) *Section 1123(a): The Plan Complies with All Requirements of Section 1123(a) of the Bankruptcy Code*

Section 1123(a) of the Bankruptcy Code sets forth seven requirements with which every chapter 11 plan must comply. See 11 U.S.C. § 1123(a). As demonstrated herein, the Plan fully complies with each enumerated requirement.

(1) *Section 1123(a)(1): Designation of Classes of Claims and Interests*

Section 1123(a)(1) requires that a plan must designate classes of claims and classes of equity interests subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates classes of Claims and Interests subject to section 1122. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

(2) *Section 1123(a)(2): Classes That Are Not Impaired by the Plan*

(a) Section 1123(a)(2) requires a plan to specify which classes of claims or interests are unimpaired by the Plan. Section 3 of the Plan specifies that the Deemed Accepting Classes are unimpaired. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

(3) *Section 1123(a)(3): Treatment of Classes That Are Impaired by the Plan*

Section 1123(a)(3) requires a plan to specify how classes of claims or interests that are impaired by the plan will be treated. Section 4 of the Plan sets forth the treatment of the Classes of impaired Claims.

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a convenience class.

(4) *Section 1123(a)(4): Equal Treatment Within Each Class*

Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Interest in a Debtor, in each respective class, is the same as the treatment of each other Claim or Equity Interest in such class. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

(5) *Section 1123(a)(5): Adequate Means for Implementation*

Section 1123(a)(5) requires that a plan provide "adequate means for the plan's implementation." Section 6 of the Plan, the related Definitive Agreement, and Plan Supplements provide adequate and proper means for the implementation of the Plan, including the (i) purchase of substantially all of the Debtors' assets by the Acquisition Companies, (ii) termination of the DIP Facility, (iii) assumption of certain obligations by the Acquisition Companies; and (iv) settlements among the Debtors, HCP Entities, Morgan Stanley, Michigan Retirement, Sovereign Bank, PPF MF 3900 Gracefield Road, LLC, and the Creditors Committee, Lenders, and Agents.

The transactions contemplated by the Plan and the Definitive Agreement are designed to maximize the value of the Debtors' business and assets. Accordingly, the Plan, together with the documents and agreements contemplated thereby, provide the means for implementation of the Plan as required by section 1123(a)(5) of the Bankruptcy Code.

(6) *Section 1123(a)(6): Amendment of the Reorganized Debtors' Charters*

(a) Section 1123(a)(6) prohibits the issuance of nonvoting equity securities, and requires amendment of the debtors' charters to so provide. The Plan does not provide for the issuance of nonvoting equity securities.

(7) *Section 1123(a)(7): Provisions Regarding Directors and Officers*

Section 1123(a)(7) of the Bankruptcy Court requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." See 11 U.S.C. § 1123(a)(7). Section 7.1 of the Plan provides that the members of the initial board of directors or managers (if any) of the Reorganized Debtors will be disclosed in the Plan Supplement and pursuant to the terms of the Definitive Agreement. In accordance with Section 7.2 of the Plan, the officers of the Debtors immediately prior to the Effective Date will serve as the initial officers of the Reorganized Debtors on and after the Effective Date and in accordance with any employment and severance agreements with the Reorganized Debtors and applicable non bankruptcy law, unless Redwood designates replacement officers. On and after the Effective Date, the officers of the respective Reorganized Debtors will be determined by the Reorganized Debtors' respective boards of directors or managers. The initial officers of the Acquisition Companies will be disclosed in the Plan Supplement. The selection of officers and directors is consistent with the interests of creditors and equity security holders and public policy in accordance with section 1123(a)(7). Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

(c) *Section 1123(b): The Plan Incorporates Certain Permissible Provisions*

Section 1123(b) of the Bankruptcy Code sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. The contents of the Plan are consistent with these provisions.

Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). Certain Classes

and are impaired and other Classes are left unimpaired under the Plan. Accordingly, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

Section 1123(b)(2) allows a plan to provide for assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Section 10 of the Plan provides that, all executory contracts and unexpired leases to which any of the Debtors are parties are hereby rejected as of the Effective Date except for an executory contract or unexpired lease that (i) previously has been assumed pursuant to Final Order of the Bankruptcy Court, (ii) is specifically designated as an executory contract or unexpired lease to be assumed in the Plan or in any Plan Supplement, or (iii) is the subject of a separate assumption motion filed by the Debtors under section 365 of the Bankruptcy Code prior to the Effective Date. Assumption of any executory contract or unexpired lease pursuant to the Plan or otherwise shall result in the full, final, and complete release and satisfaction of any Claims or defaults, whether monetary or nonmonetary, including defaults or provisions restricting the change in control of ownership interest composition or other bankruptcy-related defaults, arising under any assumed executory contract or unexpired lease at any time prior to the effective date of assumption. Anything in the Schedules and any Proofs of Claim filed with respect to any executory contract or unexpired lease that has been assumed shall be deemed disallowed and expunged, without further notice to or action, order, or approval of the Bankruptcy Court or any other entity. These provisions of the Plan are permitted by section 1123(b)(2) of the Bankruptcy Code.

Section 1123(b)(3)(B) provides that a plan may "provide for the retention and enforcement by the debtor" of certain claims or interests. The Plan preserves the Reorganized Debtors' rights to enforce any claims, rights or causes of action that the Debtors may hold

against any entity, except those causes of action that have been waived transferred to the Acquisition.

Section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan contains certain injunction, release, exculpation, and securities laws exemption provisions that are consistent with the applicable provisions of the Bankruptcy Code and conform to the requirements of Fifth Circuit case law. The Court should approve them because they are fair and reasonable, supported by consideration, and essential to the Debtors' Plan.

1. Injunction and Releases.

The Plan provides for certain third party releases and injunctions against claims in Section 12.2. The Plan Confirmation Order will enjoin any prosecution of any Claim, debt, right, cause of action or liability which was or could have been asserted against the Debtors, Reorganized Debtors, or Third Party Releasees on or after the Effective Date; provided, however, that neither the immediately preceding portion of this sentence nor the provisions of the first sentence of this Section 12.5 will operate as a waiver or release of any Reserved Claim or any causes of action arising out of the willful misconduct, intentional fraud, or criminal liability of the Debtors, the Reorganized Debtors, or Third Party Releasees. The provisions of the Plan shall not operate as a release of any of the Debtors', the Reorganized Debtors', or Third Party Releasees' obligations under the Plan (including as to claim number 265 or claim number 266 against the Debtors; and also including as to any claim arising on account of the interest set forth in financing statement no. 000000001812388268 filed with the Maryland Secretary of State on July 29, 2005 (as amended)) and the rights of the Debtors, the Reorganized Debtors, Redwood, or the Acquisition Companies and their affiliates, employees, advisors, officers and

directors, successors, and assigns to enforce the Plan and the contracts, instruments, indentures and other agreements or documents delivered or assumed hereunder, including, without limitation, the Definitive Agreement (including as to claim number 265 or claim number 266 against the Debtors; and also including as to any claim arising on account of the interest set forth in financing statement no. 000000001812388268 filed with the Maryland Secretary of State on July 29, 2005 (as amended)). Notwithstanding the above, neither the foregoing terms nor any other provision of the Disclosure Statement, the Plan or any order on the Disclosure Statement and/or Plan shall release or in any manner limit (i) the obligations of any NSC-NFP or other party not a Debtor in these cases under any Bond Documents; (ii) any rights or claims by any Bond Trustee or beneficial bondholder against any NSC-NFP or other party not a Debtor based on obligations under any Bond Documents; or (iii) any rights or claims by any NSC-NFP against any party not a Debtor in these cases based on obligations under any Bond Documents. All persons and entities reserve all defenses to claims excepted from the release provided under Section 12.5 of the Plan.

Subject to the right of each creditor to opt-out with respect to the Third Party Releasees, as of the Effective Date, the Debtors, the Reorganized Debtors, and Third Party Releasees shall be released from all claims (other than the rights of the Debtors and the Reorganized Debtors to enforce the Plan and the contracts, instruments, indentures and other agreements or documents delivered or assumed thereunder, including, without limitation, the Definitive Agreement) that may be asserted against them by each Holder of a Claim or Interest that votes in favor of the Plan (or is deemed to accept the Plan); provided, however, that the foregoing will not operate as a waiver or release of any Reserved Claim or from any causes of action arising out of the willful misconduct, intentional fraud, or criminal liability of any such person or entity. Notwithstanding

the above, neither the foregoing terms nor any other provision of the Disclosure Statement, the Plan or any order on the Disclosure Statement and/or Plan shall release or in any manner limit (i) the obligations of any NSC-NFP or other party not a Debtor in these cases under any Bond Documents; (ii) any rights or claims by any Bond Trustee or beneficial bondholder against any NSC-NFP or other party not a Debtor based on obligations under any Bond Documents; or (iii) any rights or claims by any NSC-NFP against any party not a Debtor in these cases based on obligations under any Bond Documents. All persons and entities reserve all defenses to claims excepted from the release provided under this Section 12.6.

The releases in the Plan are the product of negotiations among the key parties in interest and were necessary to reach consensus on the Definitive Agreement and Plan. Without this consensus, the Debtors could not have achieved the Restructuring Transactions to be effectuated by the Plan. The Restructuring Transactions provide for significant secured lender recoveries. See id. The releases were critical to the Debtors' successful reorganization and should be approved. See Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d. 203 (3d. Cir. 2000) (holding that the hallmarks of permissible releases are fairness and necessity to the reorganization); see also In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994) (finding that courts have allowed third-party releases where, among other things, impacted classes vote overwhelmingly to accept the plan or all or substantially all of the claims affected by the releases are paid under the plan). The great importance placed on the releases by parties whose cooperation was necessary to the reorganization, coupled with unanimous consent by Voting Classes, and the dramatic increase in value available to creditors as a result of the Plan demonstrate that the releases are fair to the parties giving them.

With respect to the third party releases, this Court employs a five factor test in order to determine whether to grant a release where the release was not consented to by the debtor's creditors. See In re Wool Growers Cent. Storage Co., 371 B.R. 768, 777 (Bankr. N.D. Tex. 2007) (Under the test the court considered (1) the identity of the interest between the debtor and the third-party, (2) the substantial contribution of the assets to reorganization, (3) whether the release is necessary to the reorganization, (4) whether the majority of affected creditors have overwhelmingly accepted plan treatment (which a majority of courts have held to be satisfied when over ninety percent of impacted creditors approve the plan), and (5) whether the plan provides payment of all, or substantially all, of affected classes' claims.) Each of the factors do not all have to be present to approve a non-consensual non-debtor release, rather, the court would balance the factors looking at the specific facts in each case. Id. The third-party releases are appropriate in these cases because the released third parties provided a substantial contribution of the assets to reorganization and the release is necessary to the reorganization. Further, a majority of the affected creditors in the Voting Classes, voted to accept the Plan. The Third Party Releasees contributed cash, gave up money or agreed to enter into long term management agreements. The Plan is the result of heavy negotiation between the major parties and without the inclusion of any part of the consensual Plan, including the third-party releases, reorganization will not be possible.

In the final analysis, the releases are procedurally fair. The creditors voting on the Plan have overwhelmingly expressed their support for the release provisions by voting to accept the Plan. The Solicitation Packages delivered to creditors in the Voting Classes included a description of the releases in the Disclosure Statement. Moreover, on each notice accompanying each Ballot the Debtors described the releases, cross-referenced the section of the Plan

containing the releases, and referred the voting creditors to the Disclosure Statement for a complete description of the releases. No objections to the release provisions have been received.

Accordingly, the release provisions contained in the Plan are appropriate and may be approved pursuant to section 1123(b)(6) of the Bankruptcy Code.

2. Exculpation

Notwithstanding anything provided in the Plan, as of the Effective Date, none of the Debtors, the Reorganized Debtors, or Third Party Releasees shall have or incur (including but not limited to claims or Causes of Action by any Lenders or participants) any liability for any claim, cause of action, or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of, the Chapter 11 Cases, the formulation, negotiation, dissemination, confirmation, consummation, or administration of the Plan, or property to be distributed under the Plan, or any other act or omission in connection with the Chapter 11 Cases, the Plan, or any contract, instrument, indenture, or other agreement or document related to the Plan or delivered thereunder, including, without limitation, the Definitive Agreement; provided, however, that the foregoing shall not affect the liability of any person that otherwise would result from any such act or omission to the extent that such act or omission is determined by a Final Order of a court of competent jurisdiction to have constituted willful misconduct, intentional fraud, or criminal conduct or the liability of any person on account of a Reserved Claim. The foregoing shall not release or in any manner limit (i) the obligations of any NSC-NFP or other party not a Debtor in these cases under any Bond Documents; (ii) any rights or claims by any Bond Trustee or beneficial bondholder against any NSC-NFP or other party not a Debtor based on obligations under any Bond Documents; or (iii) any rights or claims by any NSC-NFP against any party not a Debtor in these cases based on obligations under any Bond Documents. All

persons and entities reserve all defenses to claims excepted from the exculpation provided under Section 12.7 of the Plan.

The exculpation provision in Section 12.7 of the Plan limits liability arising out of the Chapter 11 Cases, the formulation, dissemination, confirmation, consummation, or administration of the Plan, or property to be distributed under the Plan, or any other act or omission in connection with the Chapter 11 Cases, the Plan, or any contract, instrument, indenture, or other agreement or document related thereto or delivered thereunder. It contains an express carve-out for willful misconduct, intentional fraud, and criminal conduct. These types of provisions are standard. See In re PWS Holding Corp., 228 F.3d. 224, 247 (3d Cir. 2000) (approving exculpation clause containing a carve-out for willful misconduct and gross negligence).

3. Securities Laws Exemption

In addition, Section 12.12 of the Plan addresses the securities laws exemptions for the securities to be issued under and in accordance with the Plan. Section 1145(a)(1) of the Bankruptcy Code provides:

> Except with respect to an entity that is an underwriter as defined in subsection (b) of this section, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker dealer in, a security do not apply to . . . the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan . . . in exchange for a claim against, interest in, or a claim for an administrative expense in the case concerning, the debtor or such affiliate.

Pursuant to the Securities Act, the issuance of any new security interests under the Plan shall be exempt from the registration requirements of the Securities Act, and state and local securities laws.

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

2. Section 1129(a)(2): The Debtors, as the Plan's Proponents, Have Complied with Applicable 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) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. 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."); see also In re Johns-Manville Corp., 68 B.R. at 630; In re Toy & Sports Warehouse, Inc., 37 B.R. at 149. The Debtors' compliance with these sections is discussed above, and the Debtors respectfully submit that they have satisfied section 1129(a)(2) of the Bankruptcy Code.

3. Section 1129(a)(3): 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). Good-faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11. See In re SGL Carbon Corp., 200 F.3d 154, 165 (3d Cir. 1999). See also In re Johns-Manville Corp., 843 F.2d at 649 (citing Koelbl v. Glessing (In re Koelbl), 751 F.2d 137, 139 (2d Cir. 1984) (interpreting the standard as requiring a showing that "the plan was proposed with honesty and good intentions."). Moreover, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith

requirement of section 1129(a)(3) is satisfied." In re Sun Country Dev., Inc., 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. Id.

The Debtors, as plan proponents, have met their good faith obligation under the Bankruptcy Code. The Plan, which was developed after many months of analysis and negotiations involving numerous proposals, including proposals solicited by the Debtors from other potentially interested parties, was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates and effectuating a successful reorganization of the Debtors. The Plan (including the Definitive Agreement and all documents necessary to effectuate the Plan) was developed and negotiated in good faith and at arms'-length among representatives of the Debtors, the Lenders, Agents, the Creditors Committee, and Redwood. Thus, the Plan achieves the primary objectives underlying a chapter 11 bankruptcy: the reorganization and continuation of the Debtors as viable businesses and the distribution of value to creditors for amounts owing. See N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The 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."); Pereira v. Foong (In re Ngan Gung Rest.), 254 B.R. 566, 570 (Bankr. S.D.N.Y. 2000) (stressing the importance of payment of creditors in chapter 11 cases). Inasmuch as the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code and has garnered the overwhelming support of the parties voting on the Plan, the Plan and the related documents have been filed in good faith and the Debtors have satisfied their obligations under section 1129(a)(3).

4. Section 1129(a)(4): The Payment for Certain Services and Expenses Is Subject to Court Approval

Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, the debtor, or a person receiving distributions of property under the plan, be subject to approval by the Bankruptcy Court as reasonable. 11 U.S.C. § 1129(a)(4). As of the date hereof, no such payments have been made to the Debtors' retained professionals for services rendered after the Petition Date, and all payments to such professionals will be made only after Court approval of the professionals' final applications for allowance of compensation for services rendered and reimbursement of expenses. All payments of compensation for services rendered or reimbursement of expenses incurred after the Plan Confirmation Date until the Effective Date will be paid in the ordinary course. Pursuant to Section 2 of the Plan, the professionals' claims for payment of postpetition fees and expenses are included in the Plan as Allowed Administrative Expense Claims and are thus subject to objection and to approval of the Court. Furthermore, Section 13 of the Plan provides that the Court shall retain jurisdiction to "hear and determine all applications of retained professionals under sections 330, 331 and 503(b) of the Bankruptcy Code for awards of compensation for services rendered and reimbursement of expenses incurred prior to the Plan Confirmation Date."

5. Section 1129(a)(5): Necessary Information Regarding Directors and Officers of the Debtors Under the Plan Will Be Disclosed

Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and that there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtor.

As stated, the Debtors have satisfied the foregoing requirements. The Plan provides that the board of directors of the Reorganized Debtors shall consist of those individuals listed in the Plan Supplement. The proposed officers' knowledge of the Debtors' operations, business, accounts, finances, and business relationships are critical to maximizing the value of the Debtors' estates in these cases. Their particular business knowledge will also facilitate prompt distribution to creditors pursuant to the Plan. As such, the appointment of such individuals is consistent with the interests of the Debtors' creditors and with public policy.

6. Bankruptcy Code Section 1129(a)(6) Is Not Applicable

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). Section 1129(a)(6) is inapplicable because after confirmation of the Plan, the Debtors' business will not involve rates established or approved by, or otherwise subject to, any governmental regulatory commission.

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

Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test" or the "liquidation test," and provides, in relevant part:

> With respect to each impaired class of claims or interests –
>
> (A) each holder of a claim or interest of such class –
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date . . . .

11 U.S.C. § 1129(a)(7). The best interests test focuses on individual dissenting creditors rather than classes of claims. See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999). Under the best interests test, the court "must find that each [non-accepting] creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated [under chapter 7 of the Bankruptcy Code]." Id. at 442; United States v. Reorganized CF&I Fabricators, Inc., 518 U.S. 213, 228 (1996). As section 1129(a)(7) makes clear, the liquidation analysis applies only to non-accepting impaired claims or equity interests.

In the instant case, the best interests test is satisfied as to each Holder of a Claim in an unimpaired class of Claims that is deemed to reject the Plan. As to those parties the Disclosure Statement sets forth the Debtors' liquidation analysis (the "Liquidation Analysis"). The Liquidation Analysis demonstrates that the values that could be realized by the non-accepting holders of Claims and Interests upon disposition of the Debtor's assets pursuant to a chapter 7 liquidation would be less than the value of the recoveries available to such holders under the Plan.

In these cases, as described in more detail in the Disclosure Statement and in the Rundell Declaration, the cash available for distribution to creditors in a chapter 7 case would consist of the proceeds from sale of the Debtors' business and collection of the Debtor's accounts receivable and the sale of property, equipment and other assets. The available cash would also be reduced by the costs and expenses of the liquidation and by such additional administrative and priority claims that may result from the termination of the Debtor's businesses and the use of chapter 7 for purposes of liquidation. The Liquidation Analysis assumes an orderly and expedited wind-down of the Debtors' business.

The Liquidation Analysis concludes that creditors with administrative and priority claims, as well as prepetition unsecured creditors, will recover substantially more value from confirmation of the proposed Plan than through an orderly liquidation and sale process. Subject to the qualifications specified, the Liquidation Analysis estimates that a range of gross proceeds, net of wind-down costs, trustee fees and professional fees, will not be adequate to make full payment on secured claims under either the high end or low end of the range. Further, in a chapter 7 liquidation, the Debtors estimate that there would be materially less or no distribution to Holders of Claims and Interests.

In sum, if these cases were converted to cases under chapter 7 of the Bankruptcy Code, and the value that creditors would recover would drop precipitously. Due to the value destruction, delay, and uncertainties inherent in a conversion to chapter 7, the Debtors submit that the best interests test established pursuant to section 1129(a)(7) of the Bankruptcy Code is satisfied.

8. Section 1129(a)(8): Acceptance by All Impaired Classes

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by the plan. As set forth above, each class of impaired claims has accepted the Plan except for the Deemed Rejecting Classes. The Plan, therefore, does not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to the Deemed Rejected Claims. Nevertheless, the Plan is confirmable because, as discussed below, the Plan satisfies section 1129(b)(2) of the Bankruptcy Code with respect to such Classes.

9. Section 1129(a)(9): The Plan Provides for Payment in Full of Allowed 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 the Plan.

With respect to Administrative Expense Claims, in accordance with 1129(a)(9)(A) of the Bankruptcy Code, the Plan provides that each holder of an Allowed Administrative Expense Claim will receive payment in full in Cash of the unpaid portion of such Allowed Administrative Expense Claim (a) on the Effective Date or as soon as thereafter as is reasonably practicable, or (b) in case of liabilities incurred in the ordinary course of business or in accordance with the Budget to the DIP Facility, in the ordinary course of business consistent to past practice or in accordance with the terms and subject to the conditions of any applicable agreements governing, instruments evidencing, or other documents relating to such transactions. See Plan § 2. Thus, the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code.

Coastwood Fee

Section 503(b)(1)(A) of the Bankruptcy Code provides that "actual, necessary costs and expenses of preserving the estate" are to be afforded administrative priority status. 11 U.S.C. § 503(b)(1)(A). Administrative priority is not reserved exclusively for typical trade creditors that provide goods and perform services for debtors in possession; any postpetition transaction intended to benefit a debtor's estate may qualify. After all, "[s]ection 503(b)(1)(A)'s underlying purpose is to encourage post-petition conduct that will assist the debtor's efforts to rehabilitate the estate or organize the estate's assets in an orderly fashion to ensure an efficient sale." In re Am. Coastal Energy, Inc., 399 B.R. 805, 815 (Bankr. S.D. Tex. 2009); see also Pennsylvania Dept. of Envtl. Res. v. Tri-State Clinical Labs., Inc., 178 F.3d 685, 689-90 (3d Cir.

1999) (noting that the statutory language and purpose of section 503(b) "suggest[] a quid pro quo pursuant to which the estate accrues a debt in exchange for some consideration necessary to the . . . rehabilitation of the estate").

In this Circuit, an expense is entitled to administrative priority status if it satisfies two requirements. See NL Industries, Inc. v. GHR Energy Corp., 940 F.2d 957, 966 (5th Cir. 1991) (citing In re White Motor Corp., 831 F.2d 106, 110 (6th Cir. 1987)).

- ***First***, the expense must arise from a transaction with the debtor in possession, as opposed to a prepetition transaction with the debtor. See Lasky v. Phones For All, Inc. (In re Phones For All, Inc.), 288 F.3d 730, 732 (5th Cir. 2002); Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.), 258 F.3d 385, 387 (5th Cir. 2001).

- ***Second***, the expense for which administrative priority status is sought "must have been of benefit to the estate and its creditors." Tex. v. Lowe (In re H.L.S. Energy Co., Inc.), 151 F.3d 434, 437 (5th Cir. 1998); Am Coastal, 399 B.R. at 808-09 (holding that "actual and necessary" requirement is satisfied if payment of the expense provides a benefit to the estate and its stakeholders).

The Fee negotiated between Coastwood and the Debtors—and approved by all of the Debtors' significant constituencies and Redwood—easily satisfies both of these requirements.

First, the Fee was the result of a postpetition agreement reached between the Debtors and Coastwood at the Auction and, thus, clearly arises from a transaction with a debtor in possession. The Debtors induced Coastwood to submit a cash bid in the amount of $305 million and to continue participating in the Auction in exchange for the Debtors' agreement to the Fee. This type of inducement plainly satisfies the first requirement under section 503(b)(1)(A). See In re Gasel Transportation Lines, Inc., 326 B.R. 683, 687-88 (6th Cir. 2005) ("In determining whether there was a 'transaction with the bankruptcy estate', 'the proper focus [is] on the inducement involved in causing the creditor to part with its goods or services'…if the inducement came from the debtor-in-possession, then the claims of the creditor are given priority.") (quoting In re

United Trucking Serv. Inc., 851 F. 2d 159, 162 (6th Cir. 1988)); In re Jartran, Inc., 732 F.2d 584, 586 (7th Cir. 1984) (citing In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976)); see also In re Drexel Burnham Lambert Group Inc., 134 B.R. 482, 489 (Bankr. S.D.N.Y. 1991) ("A creditor provides consideration to the bankrupt estate only when the debtor-in-possession induces the creditor's performance and performance is then rendered to the estate . . . [I]f the inducement came from the debtor-in-possession, then the claims of the creditor are given priority.").

Second, the Debtors' agreement to pay the Fee provided a clear and substantial benefit to the Debtors' estates and their stakeholders. Had the Debtors not agreed to pay the Fee, Coastwood would have discontinued its participation in the bidding process. The Fee was structured in a manner so as to guarantee that any amounts bid in excess of $275 million would result in an immediate savings to the Debtors of either $1.5 million or $2 million (respectively, the breakup fee for Redwood and the previously agreed-upon fee for Coastwood) plus additional proceeds of 90% of any incremental bid exceeding $275 million to the Debtors' estates for distribution to creditors. Accordingly, the Debtors and their constituencies recognized that Coastwood's continued participation would result in a higher sale price for the estate, and that the way in which the Fee was structured was a no-lose proposition for the Debtors' estates. By inducing Coastwood's continued participation in the Auction, the Debtors ultimately obtained an additional $81 million in cash that will now be available for distribution to creditors (90% of the $90 million difference between Redwood's prevailing bid of $365 million and Coastwood's earlier $275 million bid). To characterize the Debtors' agreement to pay the Fee as conferring an actual benefit upon the Debtors' estates is an understatement. See, e.g., In re Fortunoff Fine Jewelry and Silverware, LLC, 2008 WL 618983 (Bankr. S.D.N.Y. 2008) (holding that a similar

fee was actual and necessary because the fee was a component of what induced the potential buyer to submit its bid, which increased the likelihood of obtaining the best possible price for the assets to be distributed to creditors).

With respect to the payment of Compensation and Reimbursement Claims, in accordance with section 1129(a)(9)(A) of the Bankruptcy Code, Section 2.2 of the Plan provides that, unless the holder and Debtors otherwise agree, Holders of Allowed Compensation and Reimbursement Claims shall be paid in full for all Allowed compensation and reimbursement of expenses claims no later than (i) the Effective Date, (ii) the date upon which the order relating to any such Allowed Claim is entered, or (iii) or upon such terms as is mutually agreed upon between the holder of such Allowed claim and the Debtors.

With respect to the payment of Priority Tax Claims, in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, the Plan provides that, except to the extent that a holder of an Allowed Priority Tax Claim agrees to a different treatment, each holder of an Allowed Priority Tax Claim shall receive, at the sole option of the Debtors or the Reorganized Debtors, (i) Cash in an amount equal to such Allowed Priority Tax Claim on, or as soon thereafter as is reasonably practicable, the later of the Effective Date and the first Business Day after the date that is thirty (30) calendar days after the date such Priority Tax Claim becomes an Allowed Priority Tax Claim, or (ii) equal annual Cash payments in an aggregate amount equal to such Allowed Priority Tax Claim, together with interest at the applicable rate under section 511 of the Bankruptcy Code, over a period not exceeding five (5) years after the date of assessment of such Allowed Priority Tax Claim. The Debtors reserve the right to prepay at any time under this option. All Allowed Priority Tax Claims that are not due and payable on or before the Effective Date shall be paid in the ordinary course of business as such obligations become due.

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

10. Section 1129(a)(10): The Plan Has Been Accepted by at Least One Impaired Class That Is Entitled to Vote

Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance 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 the Plan. 11 U.S.C. § 1129(a)(10). The Debtors have met this standard, as all classes which voted have accepted the Plan, without including the acceptance of the Plan by insiders in such classes. See Vote Certification.

11. Section 1129(a)(11): The Plan Is Feasible

Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the Bankruptcy Court determine that a plan is feasible. Specifically, the Bankruptcy 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). The statute requires the Court to determine whether a plan is workable and has a reasonable likelihood of success. See In re Armstrong World Indus., Inc., 348 B.R. 136, 167 (D. Del. 2006); In re NII Holdings, 288 B.R. 356, 364 (Bankr. D. Del. 2002); In re The Leslie Fay Cos., 207 B.R. 764, 788 (Bankr. S.D.N.Y. 1997).

"The feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed." Kane v. Johns-Manville Corp., 843 F.2d at 649; see also In re Congoleum Corp., 362 B.R. 198, 203 (Bankr. D.N.J. 2007) ("It is generally recognized that the purpose of the feasibility requirement in § 1129(a)(11) is to prevent the confirmation of visionary plans, but it does not demand irrefutable proof of success."); 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.'"); In re U.S. Truck Co., Inc., 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).

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. See Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985). However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. See In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992) ("The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds.") (citing In re U.S. Truck, 47 B.R. at 944).

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

(a) the adequacy of the capital structure;

(b) the earning power of the business;

(c) economic conditions;

(d) the ability of management;

(e) the probability of the continuation of the same management;

(f) the availability of prospective credit, both capital and trade;

(g) the adequacy of funds for equipment replacements;

(h) the provisions for adequate working capital; and

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

Leslie Fay, 207 B.R. at 789; see also In re Machne Menachem, Inc., 371 B.R. 63, 71 (Bankr. M.D. Pa. 2006). The foregoing list is neither exhaustive nor exclusive. In re Drexel Burnham, 138 B.R. at 763.

Applying the foregoing legal standards, the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. In this regard, the Debtors have analyzed their ability to fulfill their obligations under the Plan. The Debtors prepared projected financial projections for fiscal years 2010-2014 (the "Financial Projections"). These Financial Projections indicate that the Acquisition Companies will have sufficient resources to meet all of their obligations under the Plan. Based upon the foregoing, the Plan satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

12. Section 1129(a)(12): The Plan Provides for Full Payment of Statutory Fees

Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 [of title 28 of the United States Code], as determined by the court at the hearing on confirmation of the plan." 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)(1). In accordance with these provisions, the Plan provides that all such fees and charges, to the extent not previously paid, will be paid on the Effective Date or thereafter as may be required.

13. Section 1129(a)(13): The Plan Provides for the Continuance of Retiree Obligations

Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. The Debtors have no such retiree benefits. Accordingly, the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

14. Sections 1129(a)(14) through 1129(a)(16) Do Not Apply

Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations, and, as such, this section of the Bankruptcy Code does not apply. Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). None of the Debtors is an "individual." Finally, section 1129(a)(16) of the Bankruptcy Code provides that property transfers by a corporation or trust that is not a moneyed, business or commercial corporation or trust be made in accordance with applicable provisions of nonbankruptcy law; however, as each of the Debtors is a moneyed, business, or commercial corporation, this section is not applicable.

B. Section 1129(b): Confirmation of the Plan Over Nonacceptance of Impaired Classes

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

> [I]f 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 45 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), the 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. See, e.g., In re Johns-Manville Corp., 843 F.2d at 650.

The Plan be confirmed over rejecting classes pursuant to section 1129(b) of the Bankruptcy Code because the Plan does not discriminate unfairly and is fair and equitable with respect to all classes.

1. The Plan Does Not Discriminate Unfairly with Respect to the Rejecting Classes

The unfair discrimination standard of section 1129(b) of the Bankruptcy Code ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes. In re Armstrong World Indus., Inc., 348 B.R. 111, 121 (D. Del. 2006); In re Barney and Carey Co., 170 B.R. 17, 25 (Bankr. D. Mass 1994). Section 1129(b)(1) does not prohibit discrimination between classes; it prohibits only discrimination that is unfair. 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 (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 Corp., 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).

With respect to each separate Debtor Estate in these Chapter 11 Cases, each Debtor does not unfairly discriminate against a dissenting class with respect to the value it will receive under the Plan when compared to the value given to all other similarly situated classes. Accordingly, no unfair discrimination exists with respect to dissenting Classes.

2. The Plan Is Fair and Equitable with Respect to the Deemed Rejecting Classes

Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" as follows:

> (B) With respect to a class of unsecured claims—
>
> > (i) the plan provides that each holder of a claim of such class receive or retains on account of such claim property of a value . . . equal to the allowed amount of such claim; or
> >
> > (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property . . .
>
> (C) With respect to a class of interests—
>
> > . . . (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

11 U.S.C. § 1129(b)(2).

Allocation of Secured Creditors' Recoveries

On March 23, 2010, the Court determined that the Lender Allocation is fair and reasonable. Because the Lenders are gifting a portion of their recovery to junior creditors, the gifting passes an "no unfair discrimination" analysis. In Official Unsecured Creditors'

Committee v. Stern (In re SPM Manufacturing Co.), 984 F.2d 1305 (1st Cir. 1993), the court allowed the secured lender in a chapter 7 case to carve out funds for general unsecured creditors. The court noted that "creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including share them with other creditors." See also In re Journal Register Co., et al., 407 B.R. 520, 529-34 (Bankr. S.D.N.Y. 2009); In re Genesis Health Ventures, Inc., 266 B.R. 591 (Bankr. D. Del. 2001) (approving gifting in plan over objections because the unsecured creditors' distribution was "a permissible allocation by the secured creditors of a portion of the distribution to which they would otherwise be entitled, rather than unfair discrimination against [the class that received no distribution]."; In re MCorp Financial, Inc., 160 B.R. 941 (S.D. Tex. 1993) (allowing gifting from senior lender). Accordingly, the Lender Allocation is persmissible under applicable bankrutpcy law.

Liquidating Creditor Trust Participation

The the provision in the Plan that requires an affirmative vote before participation in the Liquidating Creditor Trust is in line with applicable authority. In re Drexel Burnham Lambert Group, Inc., 138 B.R. 714 (Bankr. S.D.N.Y.), aff'd, 140 B.R. 347 (S.D.N.Y. 1992) (court approved plan which provided that distribution to class was dependent upon whether such class accepted the plan). The Drexel court reasoned that the only class affected by a negative vote was the dissenting class and not any junior classes, and the court concluded that it had "no conceptual problem with senior interests offering to junior interests an inducement to consent to the Plan and waive whatever rights they have." Further, if unsecured creditors would receive nothing in liquidation, providing them with unequal treatment under a plan does not constitute unfair discrimination. See also In re Adelphia Commc'ns Corp., 368 B.R. 140 (Bankr. S.D.N.Y. 2007) (confirming plan that contained death plan provision); In re Zenith Elecs. Corp., 241 B.R. 92

(Bankr. D. Del. 1999) (approving death trap provision at disclosure statement hearing because "if the class accepts, the Plan proponent is saved the expense and uncertainty of a cramdown fight. This is in keeping with the Bankruptcy Code's overall policy of fostering consensual plans of reorganization and does not violate the fair and equitable requirement of section 1129(b)."). In re Western Real Estate Fund, Inc., 75 B.R. 580 (Bankr. W.D. Okla. 1987) (fact that some classes of creditors had reached a settlement with debtors, and thus were treated differently than those who had not, does not constitute unfair discrimination since only non-accepting classes are examined for purpose of determining whether there is discrimination between classes). Accordingly, the "fair and equitable" rule is satisfied as to the rejecting Classes.

IV. CONCLUSION

For the foregoing reasons, the Debtors respectfully request that this Court enter an order (i) confirming the Debtors' Plan, and (ii) granting the Debtors such other and further relief as is just and proper.

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