Paul N. Silverstein (admitted *pro hac vice*)
Jonathan I. Levine (admitted *pro hac vice*)
ANDREWS KURTH LLP
450 Lexington Avenue, 15th Floor
New York, New York 10017
Telephone: (212) 850-2800
Facsimile: (212) 850-2929

Michelle V. Larson
Texas State Bar No. 00796928
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401

Counsel to the Debtors

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

In re:	§	Chapter 11
	§	
FIBERTOWER NETWORK SERVICES CORP., *et al.*,	§	Case No. 12-44027-DML-11
	§	
	§	Jointly Administered
Debtors.	§	

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF DEBTORS' THIRD AMENDED JOINT CHAPTER 11 PLAN

TO: THE HONORABLE D. MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE

The above-captioned debtors and debtors in possession (collectively, the "Debtors"),[1] for their Memorandum of Law (the "Memorandum") in support of confirmation of the Debtors' Chapter 11 Plan, respectfully represent:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan under Section 1129 of Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") is a core proceeding pursuant to 28 U.S.C. §§ 157(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

[1] The Debtors in these Chapter 11 cases are: (i) FiberTower Network Services Corp.; (ii) FiberTower Corporation; (iii) FiberTower Licensing Corp.; and (iv) FiberTower Spectrum Holdings, LLC.

BACKGROUND

I. CHAPTER 11 CASES

2. On July 17, 2012 (the "Petition Date"), each of the Debtors filed a petition for relief under chapter 11 of the Bankruptcy Code with this Court.

3. An official committee of unsecured creditors (the "Committee") was appointed by the Office of the United States Trustee on July 26, 2012. No trustee or examiner has been appointed.

4. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

II. PLAN, DISCLOSURE STATEMENT AND STANDING MOTION

5. On September 16, 2013, the Debtors filed (i) Debtors' Joint Chapter 11 Plan [Docket No. 933] (as (i) amended on September 27, 2013 [Docket No. 944] (the "First Amended Plan"), (ii) amended on December 4, 2013 [Docket No. 1007] (the "Second Amended Plan"), (iii) amended on January 13, 2014 [Docket No. 1042] (the "Third Amended Plan"), and (iv) may be further amended, modified and/or supplemented, collectively, the "Plan").

6. The Plan provides for the classification and treatment of Claims against, and Equity Interests in, FiberTower, as follows:

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
Class 1A	Priority Non-Tax Claims	100%	No (deemed to accept)	A holder of an Allowed Priority Non-Tax Claim against FiberTower shall receive Cash in full on the later of (i) the Effective Date of the Plan or (ii) ten (10) days after the Bankruptcy Court enters an order

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
				allowing a Priority Non-Tax Claim.
Class 1B	2016 Claims	5.3% - 7.6%[2]	Yes	On the Effective Date, a holder of an Allowed 2016 Claim shall receive (i) its Pro Rata share of one hundred percent (100%) of the New FiberTower Common Stock and (ii) its Pro Rata share (together with the other Beneficiaries, but without duplication of the Allowed 2016 Guaranty Deficiency Claims) of the Litigation Trust Interests to the extent of its 2016 Deficiency Claim.
Class 1C	Other Secured Claims	100%	No (deemed to accept)	Unless the holder of an Allowed Other Secured Claim against FiberTower has agreed or agrees to a different treatment, each such holder shall, at the Debtors' option, either: (i) be reinstated or otherwise rendered unimpaired in accordance with Section 1124 of the Bankruptcy Code, notwithstanding any contractual provision or applicable non-bankruptcy law that entitles the holder of an Allowed Other Secured Claim against FiberTower to

[2] Such estimated recovery range does not take into account $33,750,000 paid by the Debtors and applied as payments of principal on the 2016 Claims from the Petition Date through the Effective Date. If such payments of principal are included, the estimated recovery range on account of 2016 Claims is approximately 30.9% - 33.2%.

As set forth herein and in the Scott Declaration (defined below), the recovery range is based on the estimated range of equity value of the Debtors as of the assumed Effective Date (which amount is estimated to be approximately $7 million - $10 million).

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
				demand or receive payment of such Claim prior to its stated maturity from and after the occurrence of an event of default, (ii) be paid in the ordinary course of business in accordance with the course of practice between the Debtors and such holder with respect to such Allowed Other Secured Claim against FiberTower, or (iii) receive the Collateral securing such Allowed Other Secured Claim against FiberTower.
Class 1D	2012 Claims	0%	No (deemed to reject)	On the Effective Date, each holder of an Allowed 2012 Claim against FiberTower Corporation shall be entitled to receive, in full satisfaction of such Claim, its Pro Rata share (together with the other Beneficiaries, but without duplication of the Allowed 2012 Guaranty Claims) of the Litigation Trust Interests.
Class 1E	General Unsecured Claims	0%	No (deemed to reject)	On the Effective Date, each holder of an Allowed General Unsecured Claim against FiberTower Corporation shall be entitled to receive, in full satisfaction of such Claim, its Pro Rata share (together with the other Beneficiaries) of the Litigation Trust Interests.
Class 1F	Intercompany Claims	0%	No (deemed to reject)	On the Effective Date, each Intercompany Claim against FiberTower shall be extinguished and holders of

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
				Intercompany Claims against FiberTower shall neither receive nor retain any property on account of such Claims under the Plan.
Class 1G	FiberTower Equity Interests	0%	No (deemed to reject)	On the Effective Date, all FiberTower Equity Interests shall be cancelled and extinguished, and holders of FiberTower Equity Interests shall neither receive nor retain any property on account of such FiberTower Equity Interests under the Plan.

7. In addition, the Plan provides for the classification and treatment of Claims against, and Equity Interests in, the Subsidiary Debtors are as follows:

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
Classes 2A - 4A	Priority Non-Tax Claims	100%	No (deemed to accept)	A holder of an Allowed Priority Non-Tax Claim against a Subsidiary Debtor shall receive Cash in full on the later of (i) the Effective Date of the Plan or (ii) ten (10) days after the Bankruptcy Court enters an order allowing a Priority Non-Tax Claim.

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
Classes 2B - 4B	2016 Guaranty Claims	5.3% - 7.6%[3]	Yes	On the Effective Date, a holder of an Allowed 2016 Guaranty Claim shall receive (i) its Pro Rata share of one hundred percent (100%) of the New FiberTower Common Stock and (ii) its Pro Rata share (together with the other Beneficiaries, but without duplication of the Allowed 2016 Deficiency Claims) of the Litigation Trust Interests to the extent of its 2016 Guaranty Deficiency Claim. On the Effective Date, Reorganized FiberTower shall receive one hundred percent (100%) of the New FiberTower Subsidiary Equity Interests in Reorganized FiberTower Network Services and Reorganized FiberTower Licensing, and Reorganized FiberTower Licensing shall receive one hundred percent (100%) of the New FiberTower Subsidiary Equity Interests in Reorganized FiberTower Spectrum.
Classes 2C - 4C	Other Secured Claims	100%	No (deemed to	Unless the holder of an Allowed Other Secured

[3] Such estimated recovery range does not take into account $33,750,000 paid by the Debtors and applied as payments of principal on the 2016 Guaranty Claims from the Petition Date through the Effective Date. If such payments of principal are included, the estimated recovery range on account of 2016 Guaranty Claims is approximately 30.9% - 33.2%.

As set forth herein and in the Scott Declaration, the recovery range is based on the estimated range of equity value of the Debtors as of the assumed Effective Date (which amount is estimated to be approximately $7 million to $10 million).

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
			accept)	Claim against a Subsidiary Debtor has agreed or agrees to a different treatment, each such holder shall, at the Debtors' option, either: (i) be reinstated or otherwise rendered unimpaired in accordance with Section 1124 of the Bankruptcy Code, notwithstanding any contractual provision or applicable non-bankruptcy law that entitles the holder of an Allowed Other Secured Claim against a Subsidiary Debtor to demand or receive payment of such Claim prior to its stated maturity from and after the occurrence of an event of default, (ii) be paid in the ordinary course of business in accordance with the course of practice between the Debtors and such holder with respect to such Allowed Other Secured Claim against a Subsidiary Debtor, or (iii) receive the Collateral securing such Allowed Other Secured Claim against a Subsidiary Debtor.
Classes 2D - 4D	2012 Guaranty Claims	0%	No (deemed to reject)	On the Effective Date, each holder of an Allowed 2012 Guaranty Claim shall be entitled to receive, in full satisfaction of such Claim, its Pro Rata share (together with the other Beneficiaries, but without duplication of the Allowed 2012 Claims) of the Litigation Trust Interests.

Class	Description	Estimated Recovery/ Treatment	Entitled to Vote	Distributions
Classes 2E - 4E	General Unsecured Claims	0%	No (deemed to reject)	On the Effective Date, each holder of an Allowed General Unsecured Claim against the Subsidiary Debtors shall be entitled to receive, in full satisfaction of such Claim, its Pro Rata share (together with the other Beneficiaries) of the Litigation Trust Interests.
Classes 2F - 4F	Intercompany Claims	0%	No (deemed to reject)	On the Effective Date, all Intercompany Claims against Subsidiary Debtors shall be extinguished, and holders of Intercompany Claims against Subsidiary Debtors shall neither receive nor retain any property on account of such Claims under the Plan.
Classes 2G - 4G	Equity Interests in Subsidiary Debtors	0%	No (deemed to reject)	On the Effective Date, all Other Equity Interests shall be cancelled and extinguished. On the Effective Date, Reorganized FiberTower shall receive one hundred percent (100%) of the New FiberTower Subsidiary Equity Interests in Reorganized FiberTower Network Services and Reorganized FiberTower Licensing, and Reorganized FiberTower Licensing shall receive one hundred percent (100%) of the New FiberTower Subsidiary Equity Interests in Reorganized FiberTower Spectrum.

8. In summary, the principal terms of the Plan are as follows: (i) the holders of the 2016 Claims and 2016 Guaranty Claims (which hold a first priority lien on substantially all of the Debtors' assets) will receive one hundred percent (100%) of the common equity in Reorganized FiberTower Corporation ("Reorganized FiberTower"); (ii) Reorganized FiberTower shall retain its direct and indirect interests in its subsidiaries (such that the Debtors' corporate structure shall remain in place following the Effective Date); and (iii) the holders of unsecured claims against the Debtors (including the unsecured deficiency claims with respect to the 2016 Claims, in the allowed amount of $89,529,772, and the full amount of the 2012 Claims, in the amount of approximately $30,057,243) will receive their pro rata share of interests in a Litigation Trust, which shall be formed on the Effective Date. Unsecured claims, excluding the 2016 Deficiency Claims and the 2012 Claims, are estimated at approximately $44 million. The Debtors, however, believe that such unsecured claims will be significantly reduced and could ultimately constitute less than half of such amount.

9. On the Effective Date, the Debtors shall transfer to the Litigation Trust, and thereafter the Litigation Trust shall hold and administer, (i) the Debtors' interests in avoidance action claims arising under Chapter 5 of the Bankruptcy Code and (ii) certain alleged claims for breach of the fiduciary duty of care resulting from the FCC's termination of certain of the Debtors' 24GHz and 39GHz spectrum licenses[4] that have been informally alleged by the Committee against the Debtors' current and former directors and officers (the "Estate D&O Claims"). (With respect to the Debtors' directors, however, the Debtors' charter documents contain provisions enacted in accordance with Section 102(b)(7) of the Delaware General

[4] Such decision by the FCC is presently subject to a pending appeal by the Debtors.

Corporations Law (the "DGCL"). Under controlling Delaware law, if a Delaware corporation's charter contains a Section 102(b)(7) exculpation provision, directors of such corporation cannot be held liable for breaches of the duty of care.)

10. As detailed in the Scott Declaration (which is being filed contemporaneously herewith), the amount of the 2016 Deficiency Claim was calculated as follows: (i) the aggregate allowed pre-petition amount of the 2016 Claims of $131,779,772, less (ii) cash distributions made throughout the Debtors' chapter 11 cases in the amount of $33,750,000 (which distributions were applied against, and reduced dollar-for-dollar, the principal amount of the 2016 Notes), less (iii) the mid-point of the range of the value of the 2016 Notes' collateral (i.e., the Reorganized Debtors' equity value) in the amount of $8,500,000. As detailed in the Scott Declaration, such calculation was based on the analysis of the Debtors' enterprise value prepared by the Debtors' management in good faith, based on reasonable, non-speculative assumptions regarding the Reorganized Debtors' anticipated operations following the Effective Date. Given the size of the 2016 Deficiency Claim, the 2016 Noteholders are the Debtors' largest unsecured creditor constituency.

11. As noted above, the Plan contemplates the formation of a Litigation Trust, and the entry into a Litigation Trust Agreement governing the Litigation Trust, on the Effective Date. The Litigation Trust Agreement provides for the appointment of a Trust Advisory Board that will oversee, review, and guide the activities and performance of the Litigation Trustee. The Trust Advisory Board will initially be composed of two (2) members designated by the Ad Hoc 2016 Committee and one (1) member selected by the Committee. Actions by the Litigation Trust will be subject to approval of a majority of the Trust Advisory Board, except in certain circumstances

that require unanimous approval.[5] The unanimous approval requirement was included to give the Committee (through its designee on the Trust Advisory Board) a meaningful "say" with respect to specific actions to be taken by the Litigation Trust.

12. On September 16, 2013, the Debtors filed their Disclosure Statement for Debtors' Joint Chapter 11 Plan [Docket No. 934] (as (i) amended on September 27, 2013 [Docket No. 946], (ii) amended on October 24, 2013 [Docket No. 973], and (iii) amended on December 4, 2013 [Docket No. 1008], the "Disclosure Statement"). On October 29, 2013, the court held a hearing (the "Disclosure Statement Hearing") with respect to (i) approval of the Disclosure Statement and the solicitation procedures with respect to the Plan and (ii) the Committee's *Motion of the Official Committee of Unsecured Creditors for Authority to Commence Certain Actions on Behalf of and for the Benefit of the Debtors' Estates* [Docket No. 875] (the "Standing Motion").[6] At the Disclosure Statement Hearing, among other things, the Court then denied the Standing Motion and held that the Committee was not entitled to pursue the Estate D&O Claims on behalf of the Debtors' estates.

13. On December 5, 2013, on consent of the Committee and the Ad Hoc 2016 Group, the Court entered the *Order (i) Approving Disclosure Statement; (ii) Approving Proposed Solicitation Procedures; (iii) Setting a Hearing and Establishing Notice and Objection Procedures for Confirmation of the Plan; and (iv) Granting Related Relief* [Docket No. 1013] (the "Disclosure Statement Order"). In the Disclosure Statement Order, among other things, the Court (i) approved the Disclosure Statement, finding that it contained "adequate information"

[5] For example, "any action taken by the Litigation Trustee in connection with the Estate D&O Claims" and any action "to borrow money or raise capital" require unanimous approval of the Trust Advisory Board. *See* Litigation Trust Agreement, at §§ 4.2(viii), 4.2(xiii).

[6] In the Standing Motion, the Committee sought authority from the Court to commence, prosecute, and/or settle the Estate D&O Claims on behalf of the Debtors' estates.

within the meaning of section 1125 of the Bankruptcy Code, (ii) authorized the Debtors to solicit acceptances of the Plan, (iii) approved the Debtors' proposed procedures with respect to such solicitation, (iv) established January 8, 2014 as the voting and objection deadline with respect to the Plan and (v) set the hearing to consider confirmation of the Plan for January 15, 2014 at 1:30 p.m. (prevailing Central Time) (the "Confirmation Hearing").

14. On December 20, 2013, in accordance with Section 6.7 of the Plan, the Debtors filed a *Notice of Non-Exhaustive List of Potential Causes of Action Pursuant to Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 1023]. On January 3, 2014, in accordance with Section 13.2 of the Plan, the Debtors filed a *Notice of Filing of Plan Supplement Documents* [Docket No. 1029] (the "Plan Supplement"), which included the following documents: (i) form of Certificate of Incorporation of Reorganized FiberTower; (ii) form of Bylaws of Reorganized FiberTower; (iii) form of Stockholders Agreement; (iv) Form of Litigation Trust Agreement;[7] and (v) Notice of Filing of Schedules 9.1(a) and 11.4(a) to the Plan. The Plan Supplement also included a list and description of the initial boards of directors and officers of the Reorganized Debtors.

15. The Debtors believe that the foregoing documents comply with the terms of the Plan, the Disclosure Statement and the Disclosure Statement Order and the filing and notice of such documents was proper and in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Texas (the "Local Rules").

16. In support of confirmation of the Plan, in addition to this Memorandum, on January 13, 2014, the Debtors filed (i) the Certification and Declaration of Claims, Noticing And

[7] On January 13, 2014, the Debtors filed a revised form of Litigation Trust Agreement [Docket No. 1045].

Tabulation Agent Regarding Solicitation and Tabulation of Votes in Connection with the Debtors' Plan of Reorganization (the "BMC Declaration") and (ii) the Declaration of Thomas Scott in Support of Confirmation of the Debtors' Joint Chapter 11 Plan (the "Scott Declaration").

III. SOLICITATION PROCESS AND VOTING

17. As set forth in the BMC Declaration, the solicitation materials approved by this Court in the Disclosure Statement Order (including the Disclosure Statement, the Plan, the Disclosure Statement Order, the Master Ballots, the Individual Ballots, the Confirmation Hearing Notice, and the Notices of Non-Voting Status (each, as defined in the Disclosure Statement Order and, collectively, the "Solicitation Materials")) were served in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and the Disclosure Statement Order. The service of the Solicitation Materials was proper and sufficient under the circumstances of these chapter 11 cases.

18. The Debtors solicited votes on the Plan after disclosure of "adequate information" as defined in section 1125 of the Bankruptcy Code. As evidenced by the BMC Declaration, votes to accept or reject the Plan have been solicited and tabulated fairly, in good faith, and in accordance with the Disclosure Statement Order, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. As set forth in the BMC Declaration, holders of claims in Classes 1B through 4B, the only impaired classes entitled to vote, voted overwhelmingly to accept the Plan. Specifically, all twenty-five (25) holders of 2016 Claims and 2016 Guaranty Claims that voted on the Plan voted to accept the Plan. Such holders hold an aggregate of $106,515,147.00 in original principal amount of 2016 Claims and 2016 Guaranty Claims.

ARGUMENT

19. Notwithstanding the overwhelming acceptance of the Plan by the parties entitled to vote thereon, on January 8, 2014, four (4) parties filed objections to confirmation of the Plan

(the "Objections"): (i) the Committee, (ii) the Agent for the 2012 Notes, and (iii) two separate groups of taxing jurisdictions. As described at length herein, such Objections are without merit and should be overruled.

20. For the Plan to be confirmed by this Court, the Plan must satisfy the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *Heartland Federal Savings & Loan Ass'n v. Briscoe Enter., Ltd. II (In re Briscoe Enter., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993). The Debtors will demonstrate at the Confirmation Hearing that the Plan satisfies all of the applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law, including all of the requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code.

21. This Memorandum initially addresses why the Objections should be overruled and then addresses why the Plan satisfies the requirements of the Bankruptcy Code and should be confirmed.

AUTHORITY

I. THE COMMITTEE'S OBJECTION SHOULD BE OVERRULED

22. On January 8, 2014, the Committee filed its *Objection of the Official Committee of Unsecured Creditors to the Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 1033] (the "Committee Objection"). In purported support of its Objection, the Committee also filed a declaration by Matthew Flynn of Goldin Associates, the Committee's financial advisor (the "Flynn Declaration"). Attached to the Flynn Declaration is a copy of the Master Spectrum Lease Agreement between FiberTower Spectrum Holdings LLC and Vivint Wireless, Inc. (the "Vivint Agreement"). According to the Flynn Declaration and the Committee Objection, the value of the Reorganized Debtors should be between approximately $9.9 million and $218 million.

23. The Committee objects to confirmation of the Plan on several purported grounds. The Committee asserts that: (i) the Debtors "impermissibly favored" the 2016 Noteholders; (ii) the Debtors' equity valuation range of between approximately $7 million and $10 million is too low and fails to take into account the potential value of the Debtors' FCC Advocacy (as defined in the Scott Declaration); (iii) the Plan must be amended to give general unsecured creditors a recovery in the event that the Debtors' appeal of the termination of the FCC Licenses is successful; (iv) the Litigation Trust Agreement should not provide for the holders of 2016 Deficiency Claims to appoint the majority of the Trust Advisory Board; (v) the Plan's release provisions are impermissible (notwithstanding that the alleged Estate D&O Claims against the Debtors' directors are subject to full exculpation under applicable Delaware law and the terms of the Debtors' charter documents); and (vi) certain minor miscellaneous terms of the Plan should be amended.

24. At no point in these cases, prior to the filing of its Objection, has the Committee ever asserted that the Debtors' enterprise value is anywhere near the amount necessary to provide any recovery to the Debtors' unsecured creditors. There is a reason why no such assertion has ever been made - - there is no support for such contention. In fact, such contention is patently absurd. The Debtors presently have more than $130 million in secured and priority claims that must be paid in full before unsecured creditors receive any distribution. The Committee now asserts, however, that the Reorganized Debtors' enterprise value could be as high as approximately $218 million. Such purported value, which exceeds twice the amount at which the Debtors were valued prior to the Petition Date, defies any kind of rational explanation.

25. Indeed, in order to reach its purported valuation, the Committee relies on calculations and assumptions related to the Reorganized Debtors' business that are so incredible

that they could only stem from either (i) a disingenuous charade or (ii) a fundamental misunderstanding of both the Reorganized Debtors' post-Effective Date business and industry and the terms of the Debtors' Vivint Agreement (which serves as the *sole* basis for the valuation numbers the Committee has asserted).

26. Although the Debtors remain cautiously optimistic about the success of the FCC Advocacy, the speculative nature of such litigation, particularly under the present circumstances, renders attribution of any net value to the success of such litigation inappropriate. Indeed, the present expected value of the FCC Advocacy, after application of established methods of valuation the prospect of successful litigation leads to a value to be attributed to the FCC Advocacy of only marginally great than $0. In any event, even if the Debtors' FCC Advocacy is successful, *the Reorganized Debtors' value would not exceed the amount of the 2016 Noteholders' Claim* (let alone approach $218 million).[8]

27. The Committee's valuation assertions should be considered in the appropriate context. As the Committee cannot plausibly believe that the Debtors' enterprise should be valued anywhere near the $218 million that they assert in its pleadings, the Committee Objection can really only "boil down" to one thing - - the Committee seeks control over the Litigation Trust. In connection with such desired control, one can safely assume that the Committee would abandon, or not pursue, chapter 5 avoidance actions that could constitute a valuable portion of the Litigation Trust Assets, as its constituents would be direct and primary targets of such actions. The Committee puts forward a "red herring" argument regarding valuation in what appears to be an attempt to sway this Court into "splitting the middle" or "compromising" and giving the

[8] It should be noted that, even if the Debtors succeed in the FCC Advocacy, the FCC Licenses are not "liquid" assets and the Debtors believe that there is no current available market to sell such assets. The Debtors would need to invest significant capital in order to build and create value around such FCC Licenses.

Committee control over the Litigation Trust (notwithstanding that the claims of the Debtors' unsecured creditors are dwarfed by the 2016 Deficiency Claim and the claims of the 2012 Notes). This Court should recognize the Committee's Objection for what it is and overrule it.

A. The Debtors' Valuation is Reasonable and Supported

28. The Committee objects to the Debtors' valuation of the Reorganized Debtors' business. As noted above, the Debtors are filing contemporaneously herewith the Scott Declaration. In the Scott Declaration, Thomas Scott, the acting chief executive officer of the Debtors, describes at length the detailed analyses the Debtors used in arriving at the valuation of the Reorganized Debtors' business (and the Spectrum Portfolio) that was incorporated into the Plan and the Disclosure Statement.

29. Among other things, the Debtors utilized and/or incorporated the following established valuation techniques: (i) analysis of comparable companies; (ii) analysis of comparable transactions; (iii) recent pre-petition valuations of the Debtors and/or the Spectrum Portfolio prepared by certain financial advisors to the Debtors; (iv) analysis of estimated future cash flows of the Reorganized Debtors discounted to a present value; and (v) analysis of Spectrum Portfolio leases as if they were capitalized leases. Moreover, in attempting to ascribe a value to the FCC Advocacy (i.e., the possibility that some or all of the Terminated Licenses (as defined in the Scott Declaration) will be reinstated), the Debtors applied a method known as "Expected Value" analysis, a well-established technique for assessing value to litigation in which the expected outcome or result of such litigation is applied against the likelihood of such outcome, less time-adjusted expenses and opportunity costs or "costs of capital."

30. Based on such extensive analysis, as set forth in the Scott Declaration and as the Debtors will show at the Confirmation Hearing, a reasonable and supportable valuation range for the Debtors' FCC Licenses is approximately $5.5 million to $7.5 million. Taking into account

the Debtors' other assets (including cash-on-hand) leads to an equity valuation of the Reorganized Debtors of approximately $7 million to $10 million (with a mid-point equity valuation of $8.5 million).

B. The Committee's Valuation Is Implausible and Unfounded

31. The Committee's Objection is predicated on the view that the Debtors' valuation for the Reorganized Debtors is significantly undervalued. The Committee's position is purportedly supported by (i) analyzing the Debtors' relationship with Vivint Wireless and the terms of the Vivint Agreement, (ii) applying discounted cash flow valuation techniques to a set of revised projections based on the Vivint Agreement to the Debtors' FCC Licenses and (iii) reviewing the impact if the Debtors are successful in their attempt to regain the full spectrum portfolio from the FCC. For the reasons set forth below (and in the Scott Declaration), the Committee's valuation is completely unsupportable.

1. <u>The Vivint Agreement</u>

32. The Committee's professionals fundamentally misunderstand the Vivint Agreement and the impact of the Vivint Agreement on the Reorganized Debtors' value.

2. Valuation of the Reorganized Debtors and the Current Licenses

37. In the Flynn Declaration, the Committee likewise misstates the value of the Debtors' existing or "partial portfolio." The Committee utilizes solely a discounted cash flow or "DCF" analysis to value the Debtors' current spectrum portfolio of forty-nine (49) licenses (the "Current Licenses"). For a DCF analysis to be an appropriate valuation technique, such analysis must be based on proper foundations and/or assumptions, which the Committee's is not, particularly given the illiquid nature of the assets being valued here. As set forth in the Scott Declaration (and herein), the Debtors utilized numerous available data points to assess and reach an appropriate value of the Debtors' Current Licenses (including discounted cash flow analyses, prior valuations of the Debtors' spectrum portfolio, and *bona fide* arms-length offers to acquire certain of the Debtors' Current Licenses).

38. The method by which the Committee performed its "DCF" valuation of the Debtors' existing portfolio is fundamentally flawed.

44. In summary, the Committee's valuation of the Debtors' Current Licenses is based on flawed assumptions and mistaken or inaccurate information, fails to utilize readily available valuation techniques and publicly available information with respect thereto, is completely inconsistent with industry benchmarks, and inflated and unreasonable when compared to how the spectrum portfolio has previously been valued.

3. Valuation of the Reorganized Debtors and the Terminated Licenses

45. The Committee argues that the Plan cannot be confirmed because the Debtors have not incorporated into their valuation the possibility that the Debtors will be successful in the FCC Advocacy. The Committee is mistaken. The Debtors *did* factor into their valuation the possibility that the Debtors would succeed in the FCC Advocacy. As described in the Scott Declaration, the Debtors utilized similar valuation techniques to value the Terminated Licenses as those used to value the Current Licenses.

The Debtors, however, also believe that it is necessary to account for the uncertain probability, timing and cost of success in the FCC Advocacy when ascribing a value for purposes of confirmation.

46. Specifically, the value of the "full" portfolio should take into account or utilize what is referred to as an "Expected Value" analysis. As described in the Scott Declaration, this method is frequently utilized to determine how litigation results should be factored in or considered for purposes of valuation. *See, e.g., In re Mcorp. Fin.*, 160 B.R. 941 (S.D. Tex. 1993). Application of this methodology requires that the potential value of the FCC Advocacy (i.e., the value of all of the Terminated Licenses should they be reinstated) must (i) take into account the probability and timing of success and then (ii) discount back from the expected date of success to the present date using the cost of capital percentage, less any cash expenditures that would be required to secure success.

47. As described in the Scott Declaration, notwithstanding that the Debtors believe that they *should* be successful in the FCC Advocacy, the Debtors have to be realistic when taking into account their chances of success. Taking into account all of the circumstances, including that (i) the FCC has already ruled against the Debtors twice (in November 2012 and May 2013) and (ii) the press has reported that the FCC has internally circulated an Order denying the pending Petition for Reconsideration, the Debtors believe that it is highly uncertain if and when a final successful result may be achieved in the FCC Advocacy. After applying the "Expected Value" analysis (i.e., applying the Debtors' valuation of the Terminated License against the uncertain cost, timing and probability of success), the Debtors believe that the net expected value for the Terminated Licenses is only marginally greater than $0.

48. In the Committee Objection, the Committee suggests that the fact that the Debtors are continuing to pursue (and the 2016 Holders are continuing to fund from their cash collateral) the FCC Advocacy establishes that there is a strong likelihood that the Debtors will be successful in that appeal. The Committee offers no support for that "leap" of logic (and it is simply

inaccurate). The Debtors are pursuing the FCC Advocacy because they believe that they *should* prevail in such litigation and, as a consequence, determined in their business judgment that pursuit of such appeal was in the best interests of the Debtors' estates. Although the Debtors cannot speak for the 2016 Holders, presumably such chance of success is also the basis for their willingness to fund the FCC Advocacy out of their cash collateral - - a relatively small portion of their cash collateral given that approximately $34 million has already been returned or repaid to the holders of 2016 Notes as reduction of principal.

50. In sum, although the Debtors continue to be optimistic about (and believe that they *should* prevail in) the FCC Advocacy, the Debtors realistically understand that the odds of prevailing in its FCC Advocacy do not favor the Debtors. The FCC has already ruled against the Debtors twice (in November 2012 and May 2013) and the press has reported that the FCC has internally circulated an Order denying the pending Petition for Reconsideration. The Debtors properly factored the uncertainty regarding probability, timing and cost of success into its valuation, notwithstanding that the Debtors believe it would be a gross injustice if they are not successful in the FCC Advocacy.

51. As set forth in the Scott Declaration, the Debtors believe that the significant infirmities in the Committee's valuation (i.e., the overly aggressive assumptions with respect to the Reorganized Debtors' anticipated spectrum leasing business and failure to properly value the FCC Advocacy and the Terminated Licenses) demonstrate that the Committee's valuation is unsupportable. The Debtors, however, also note that there are additional problems with the Committee's valuation, in addition to the foregoing, that further reduce the credibility of the Committee's objection.

54. The fallacy of the Committee's valuation becomes crystal clear when viewed in light of the Debtors' prior valuations. The Committee's "peak" valuation (i.e., $218 million) of the Spectrum Portfolio is more than *double* the valuation of the Spectrum Portfolio prior to commencement of the Debtors' chapter 11 cases. At the time of such valuation, the Debtors were operating a managed network and established business that was generating annual revenues of more than $50 million. The Committee has provided no basis whatsoever for its incredible conclusion that the value of the Debtors' "full" portfolio now, in the context of the Debtors' new business plan and stripped down operations, could be valued at anywhere near $218 million. Moreover, the Committee's valuation and analysis is completely inconsistent with numerous market data points and, as discussed above, neglects to factor in the uncertainty regarding the probability, timing and cost of success in the FCC Advocacy.

55. The Debtors submit that, based on the foregoing, and as set forth in the Scott Declaration, the Committee's valuation analysis is completely implausible and should be given no weight or credence. The Debtors' valuation, on the other hand, properly considers multiple established valuation metrics for both the Current Licenses and the Terminated Licenses and appropriately factors in or "values" the possibility of prevailing in the FCC Advocacy. The Committee's objection with respect to the Debtors' valuation should be overruled.

4. The Debtors' Plan Should Not Be Modified

56. The Committee also argues that the Plan should not be confirmed because the Debtors have not included in the Plan a mechanism for distributing "value" in the event that the Debtors are ultimately successful in the FCC Advocacy. Such argument is meritless and has no legal or factual support. As set forth in the Scott Declaration, based on the Debtors' valuation

(which appropriately values the Reorganized Debtors' business as of the anticipated Effective Date), even if the FCC Advocacy were successful, the Reorganized Debtors' value *would not exceed the amount of the 2016 Claims*. As a consequence, even if the Debtors succeed in their litigation with the FCC, the holders of 2016 Claims would be entitled to receive all of the equity in the Reorganized Debtors. The Committee's baseless claim that the 2016 holders would receive more than 100% on account of their claims is unsupportable.

57. In any event, even if there is a possibility that at some unknown and distant point in the future the Reorganized Debtors' value could increase, a debtor's valuation for purposes of confirmation of a plan should not be speculative. *See, e.g., In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) (The feasibility test of section 1129 is to protect against visionary or speculative plans). The valuation should be reasonable and supported as of the anticipated effective date of the plan. *See, e.g., In re* Mirant 334 B.R. 800 (Bankr. N.D. Tex. 2005).; *see also Kipperman v. Onex Corp.*, 411 B.R. 805, 876 (N.D. Ga. 2009); *see also MC Asset Recovery, LLC v. Southern Co.*, 2006 WL 5112612 at *6 & n.12 (N.D. Ga. Dec.11, 2006). As described at length herein and in the Scott Declaration, the Debtors' valuation is reasonable.

C. The Provisions of the Litigation Trust Agreement Are Appropriate

58. The Committee argues that the Plan should not be confirmed because the Debtors' valuation leads to a 2016 Deficiency Claim that is larger than the Committee would like (and which results in the 2016 holders being entitled to appoint two (2) of the three (3) members of the Trust Advisory Board). As demonstrated at length above and in the Scott Declaration, however, the calculation of the amount of the 2016 Deficiency Claim is supported by multiple established valuation techniques and is appropriate. Given that general unsecured claims constitute a (small) minority of the unsecured claims which shall receive interests in the

Litigation Trust, the Committee's attempt to gain control over the Litigation Trust is without merit.[9]

59. The Committee argues that the Debtors "impermissibly" favored the 2016 Noteholders. Although the Committee has not provided any grounds for such assertion (because none exist), it appears that the Committee believes that the Debtors prepared their valuation with the specific aim of providing the 2016 Holders control over the Litigation Trust. The Committee apparently believe believes that the 2016 Holders would not pursue the Estate D&O Claims. Such argument has no legal or factual support or basis.

60. There is no reason to believe that, if the 2016 Holders control the Litigation Trust, the 2016 Holders would not pursue the Estate D&O Claims. Presumably, that decision will be made at the appropriate time by the Trust Advisory Board in connection with and pursuant to its mandate under the Litigation Trust Agreement. Given that the Committee will have a designee on the Trust Advisory Board that will participate in such a decision, the Committee's apparent argument that the Debtors are trying to avoid pursuit of the Estate D&O Claims is groundless.[10]

61. The Estate D&O Claims allege causes of action against the Debtors' directors and officers arising under the fiduciary duty of care. Under controlling Delaware law, to prove a breach of the duty of care, a plaintiff must demonstrate that the defendant was grossly negligent

---

[9] Indeed, one wonders whether the Committee is "looking a gift horse in the mouth." There are approximately $130 million of secured and priority claims that stand ahead of general unsecured claims. That general unsecured claim holders will receive *anything* in these cases is remarkable (and something for which the Committee should presumably be grateful).

This is all the more true in light of the fact that a significant amount of the $44 million in general unsecured claims set forth in the Debtors' Disclosure Statement will likely be disallowed. Indeed, according to the Debtors' analysis, approximately half of such claim amount could be subject to disallowance during the claims objection process. Even if the 2016 Deficiency Claim were reduced, given the relatively small amount of general unsecured claims that the Debtors believe are valid, there is simply no basis for the Committee to control the Litigation Trust.

[10] What is not groundless, however, is that, if the Committee controls the Litigation Trust, it will not pursue potentially valuable avoidance actions for the Litigation Trust Beneficiaries.

(i.e., reckless and or without the bounds of reason). *See In re Walt Disney Co. Derivative Litigation*, 906 A. 2d 27, 53 (Del. 2006). With respect to the Estate D&O Claims, the Committee states, among other things, that:

> "[T]he majority of the Debtors' spectrum portfolio was terminated and general unsecured creditors are being presented with a plan that provides them with no distribution other than causes of action. Those are the facts and, accordingly, there are colorable claims against the defendants of the Estate D&O Claims for losing the FCC Licenses."

See Committee Objection, at ¶ 25.

62. The Committee has not alleged (nor can it) that the Debtors' directors and officers failed to act in good faith or avail themselves of reasonably available information relating to the FCC Licenses. As a consequence, the Committee's assertion that there are "colorable claims" against the Debtors' directors and officers because the FCC terminated the Terminated Licenses is simply incorrect. *See, e.g., Trenwick Am. Litig. Trust. V. Ernst & Young, L.L.P.*, 906 A.2d 168, (Del. Ch. 2006) (corporate fiduciaries making business decisions with due diligence and good faith are not guarantors that such decisions will be successful).

63. The Debtors' directors and officers unquestionably acted on an informed basis based on the difficult circumstances facing the Debtors at that time and taking into account prior FCC guidance. That the FCC Licenses were later terminated (subject, of course, to the ongoing FCC Advocacy) is unfortunate, but it does not give rise to a breach of fiduciary duty claim. The Estate D&O Claims do not have any merit whatsoever.

64. In addition, even if the Estate D&O Claims had merit (which the Debtors submit is not the case), the Debtors' directors are protected from any liability on account of the Estate D&O Claims under the Debtors' charter documents and section 102(b)(7) of the DGCL. FiberTower's certificate of incorporation provides, in relevant part, that:

> Except to the extent that the DGCL prohibits the elimination of or any limitation on, the liability of directors for breaches of fiduciary duty, no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty as a director, notwithstanding any provision of law imposing such liability. No amendment to, or repeal of, this Article shall apply to, or have any effect on, the liability or alleged liability of any director of the Corporation or with respect to any acts or omissions of such director occurring prior to such amendment or repeal.

See FiberTower Certificate of Incorporation, at Article VIII.

65. Section 102(b)(7) of the DGCL authorizes a Delaware corporation to enact provisions to such corporation's charter that exculpate its directors from monetary damage liability for a breach of the duty of care. *See, e.g., Disney*, 906 A. 2d at 65 (citing Del. C. § 102 (b)(7)). An exculpation provision enacted in accordance with section 102(b)(7) shields a Delaware corporation's directors from liability for any breach of care, including gross negligence. *McPadden v. Sidhu*, 964 A. 2d 1262, 1273-74 (Del. Ch. 2008) (grossly negligent conduct is exculpated under 102(b)(7)).

66. As a consequence, under well-established Delaware law, the Debtors' directors cannot be held liable on account of the Estate D&O Claims. *See, e.g., Id.*, at 65-67 (102(b)(7) exculpates directors for conduct amounting to lack of due care, or "gross negligence"); *Emerald Partners v. Berlin*, 787 A. 2d 85, 90 (Del. 2001) (102(b)(7) permits shareholders to adopt charter provisions exculpating directors from personal liability for payment of monetary damages for breaches of duty of care); *Malpiede v. Townson*, 780 A. 2d 1075, 1096 (Del. 2001) ("a Section 102(b)(7) charter provision bars a claim that is found to state only a due care violation") (citations omitted).

D. Releases

67. The Committee also objects to the Plan on the grounds that the releases provided for in the Plan are impermissible in this Circuit. The Debtors submit that, to the extent that the Court is not prepared to approve the releases provided for in the Plan, the Court can and will revise such releases as the Court deems appropriate consistent with this Court's views and presumably with Fifth Circuit precedent.

E. Definition of "Estate D&O Claims" Should Not Include the Debtors' Professionals

68. The Committee also objects to the Plan on the grounds that the definition of the term "Estate D&O Claims" included in the Plan and the Litigation Trust Agreement should include purported claims against the Debtors' pre-petition professionals. Tellingly, however, the Committee neither provides any explanation as to how the Debtors' pre-petition professionals could be liable nor provides any legal support requiring that such claims be transferred to the Litigation Trust. The Committee seems to argue that, because the Debtors have agreed to transfer certain purported claims to the Litigation Trust, the Debtors are required to transfer other purported claims to the Litigation Trust, as well. Needless to say, the Committee provides no legal or factual grounds for such argument. To the extent such claims are not released under the Plan, such claims are vested in the Reorganized Debtors.

II. THE 2012 AGENT'S OBJECTION SHOULD BE OVERRULED

69. On January 8, 2014, U.S. Bank National Association, as successor indenture trustee and collateral agent for holders of the 2012 Notes (the "2012 Agent"), filed its *Objection of U.S. Bank National Association, as Indenture Trustee and Collateral Agent, to Confirmation of Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 1031] (the "2012 Objection"). The 2012 Agent objects to Plan solely on the purported grounds that the Plan's third-party release and exculpation provisions are allegedly impermissible under Fifth Circuit law and

Section 524(e) of the Bankruptcy Code. Specifically, the 2012 Agent argues that the Plan cannot be confirmed because it provides for releases for the non-Debtor Subsidiaries from their guarantee obligations under the 2012 Notes.

70. The Debtors submit that the 2012 Objection is essentially irrelevant. As discussed above, to the extent that the Court is not prepared to approve the releases provided for in the Plan, the Court can and will revise such releases as the Court deems appropriate. Moreover, as the 2012 Agent acknowledges in the 2012 Objection, the Debtors' non-debtor subsidiaries have no assets (other than an intercompany receivable that will be canceled under the Plan) or liabilities (other than the guarantee obligations on the 2016 Notes and the 2012 Notes, respectively). Even if the guarantee obligations remained in place following the Effective Date, the 2016 Notes would have a first priority security interest that would stand ahead of the 2012 Notes. Simply put, it is unclear why the 2012 Agent cares whether the Debtors' non-debtor subsidiaries are released from their guarantee obligations under the 2012 Notes. Such non-debtor subsidiaries have no assets of any value to be seized.

III. THE TEXAS AD VALOREM TAXING JURISDICTION'S OBJECTION SHOULD BE OVERRULED

71. On January 8, 2014, Bexar County, Clear Brook City Mud, City of Coppell, Coppell ISD, Dallas County, Fort Bend County, Galveston County, Harris County WCID #21, Harris County, Hays CISD, Irving ISD, Kaufman County, McLennan County, Round Rock ISD, San Marcos CISD and Tarrant County (collectively, the "Ad Valorem Jurisdictions") filed their *Objection of Texas Ad Valorem Taxing Jurisdictions to Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 1032] (the "Ad Valorem Objection").

72. In the Ad Valorem Objection, the Ad Valorem Jurisdictions assert that they hold "administrative claims for personal property *ad valorem* taxes for tax years 2013 and 2014 on the

Debtors' business personal property located in the respective jurisdictions." *See* Ad Valorem Objection, § 2. The Ad Valorem Jurisdictions object to the Plan on three (3) purported grounds: (i) the Plan purportedly requires the Ad Valorem Jurisdictions to file administrative claims for alleged *ad valorem* taxes for tax year 2014; (ii) the Plan does not provide for the payment of post-petition penalties and interest on the *ad valorem* tax claims for 2013 (to the extent such taxes are not paid by January 31, 2014); and (iii) the Plan purportedly fails to provide for the retention of the Ad Valorem Jurisdictions' liens until such time as the claims are paid.

73. The Debtors submit that the Ad Valorem Jurisdictions' objections to the Plan are either meritless or will be resolved. As a threshold matter, the Ad Valorem Jurisdictions do not hold claims with respect to tax year 2014. Due to the shut-down of the Debtors' wireless backhaul operations in April 2013, the Debtors no longer have any personal property located in Texas (including the Ad Valorem Jurisdictions). As a consequence, the Debtors do not owe any *ad valorem* taxes for tax year 2014. With respect to the Ad Valorem Jurisdictions' objections regarding 2013 *ad valorem* taxes, the Debtors do not dispute the amount owed and shall pay such taxes prior to January 31, 2014. Based on the foregoing, the Ad Valorem Objection should be overruled.

IV. THE "TAXING UNIT" OBJECTION SHOULD BE OVERRULED

74. On January 8, 2014, the City Of Benbrook, Grapevine-Colleyville ISD, Eagle-Mountain Saginaw ISD, Carroll ISD, Castleberry ISD, Crowley ISD, City Of Pantego, Highland Park ISD, Valwood Improvement Authority, City Of Highland Village, Dripping Springs ISD, Kendall County, Boerne ISD, City Of Boerne, Cow Creek Groundwater Conservation District, Spring ISD, Harris County M.U.D. #189, Harris County U.D. #15, Pine Village P.U.D. , Klein ISD, Tomball ISD, Humble ISD, Brazoria County Tax Office, Fort Bend ISD, Fort Bend County M.U.D. #42, Dickinson ISD, Clear Creek ISD, City Of Friendswood, Friendswood ISD,

Galveston County M.U.D. #6, Magnolia ISD, Montgomery County M.U.D. #6, Woodlands Metro Center M.U.D., Woodlands R.U.D., Willis ISD, Splendora ISD, Montgomery County M.U.D. #47, Montgomery County M.U.D. #60, City Of Magnolia (collectively, the "Taxing Unit") filed their *Objection of the Taxing Unit's to the Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 1034] (the "Taxing Unit Objection").

75. The Taxing Unit Objection suffers from the same infirmity as the Ad Valorem Objection. The Taxing Unit asserts that it holds secured tax liens for administrative claims for personal property *ad* valorem taxes for 2013 and 2014. As stated above, however, the Debtors no longer have any personal property within the jurisdictions that make up the Taxing Unit and, as a consequence, the Debtors owe no *ad valorem* taxes to the Taxing Unit for 2014. With respect to the Taxing Unit's other objections to confirmation of the Plan, the Debtors shall pay the undisputed amount of *ad valorem* taxes claimed by the Taxing Unit for 2013 (including any necessary cure amount) within sixty (60) days of the Effective Date, as requested by the Taxing Unit. Moreover, the Debtors agree that any objections to the Taxing Unit's claim for 2013 *ad valorem* taxes shall be due no later than sixty (60) days following the Effective Date. Finally, the Debtors agree that the Taxing Unit shall retain its liens (if any) with respect to any valid *ad valorem* taxes for 2013 until the entire allowed amount of such claim is paid. Based on the foregoing, the Debtors submit that the Taxing Unit Objection should be overruled.

V. THE PLAN MEETS THE REQUIREMENTS OF SECTION 1129(A)(1) BECAUSE IT COMPLIES WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

76. In addition to the foregoing, under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [title 11]." This provision encompasses the requirements of sections 1122 and 1123, respectively, governing classification of claims and the contents of the plan. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No.

989, 95th Cong., 2nd Sess. 126 (1977); *see also In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984). As set forth herein, the Plan complies fully with the requirements of the Bankruptcy Code (including, without limitation, sections 1122 and 1123).

A. The Plan Satisfies the Classification Requirements of Sections 1122 and 1123(a)(1) of the Bankruptcy Code

77. Section 1123(a)(1) of the Bankruptcy Code provides that a plan must designate, "subject to section 1122 of this title," (i) classes of claims other than claims that qualify as allowed administrative expenses under section 503(b) of the Bankruptcy Code or priority tax claims under section 507(a)(8) of the Bankruptcy Code, and (ii) classes of interest." 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).

78. Section 1122(a) does not require that all similar claims be classified together. Rather, a plan satisfies section 1122(a) if the claims included in each class are "substantially similar" to one another. *See, e.g., In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996). Although the Bankruptcy Code does not define the term "substantially similar," it is generally accepted that a plan proponent is afforded significant flexibility in classifying claims under section 1122(a). *See In re Holywell Corp.*, 913 F.2d 873, 880 (11th Cir. 1990). A plan's classification scheme satisfies section 1122(a) if all claims within a particular class are "similar in legal character or effect as a claim against the debtor's assets or as an interest in the debtor." 7 COLLIER ON BANKRUPTCY ¶ 1122.03[3] at 1122-8 (16th ed. 2009); *see also In re LeBlanc*, 622 F.2d 872, 879 (5th Cir. 1980); *In re Boston Post Road Ltd. P'ship*, 21 F.3d 477, 481 (2d Cir.

1994); *In re Jersey City Medical Center*, 817 F.2d 1055, 1060-61 (3d Cir. 1987); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc.* (*In re U.S. Truck Co., Inc.*), 800 F.2d 581, 586 (6th Cir. 1986).

79. In addition to Administrative Expense Claims, Fee Claims and Priority Tax Claims, which do not need to be classified, the Plan provides for the following classes of claims against and interests in the Debtors:

Claims Against and Interests in FiberTower:

- Class 1A - Priority Non-Tax Claims Against FiberTower
- Class 1B - 2016 Claims Against FiberTower
- Class 1C - Other Secured Claims Against FiberTower
- Class 1D - 2012 Claims Against FiberTower
- Class 1E - General Unsecured Claims Against FiberTower
- Class 1F - Intercompany Claims Against FiberTower
- Class 1G - Equity Interests in FiberTower

Claims Against and Interests in the Subsidiary Debtors:

- Classes 2A-4A - Priority Non-Tax Claims Against the Subsidiary Debtors
- Classes 2B-4B - 2016 Guaranty Claims Against the Subsidiary Debtors
- Classes 2C-4C - Other Secured Claims Against the Subsidiary Debtors
- Classes 2D-4D - 2012 Guaranty Claims Against the Subsidiary Debtors
- Classes 2E - 4E - General Unsecured Claims Against the Subsidiary Debtors
- Classes 2F - 4F - Intercompany Claims Against the Subsidiary Debtors
- Classes 2G - 4G - Equity Interests in the Subsidiary Debtors

80. The Debtors submit that each class of Claims against and Equity Interests in the Debtors consists of Claims or Equity Interests which are "substantially similar" within the meaning of section 1122(a). As a consequence, the classification of Claims and Equity Interests under the Plan is appropriate and satisfies the requirements of section 1122(a).

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

81. Section 1123(a) of the Bankruptcy Code sets forth seven (7) requirements with which every chapter 11 plan must comply. The Plan fully complies with each such requirement as follows:

1. *Section 1123(a)(1): Designation of Classes*

82. Section 1123(a)(1) of the Bankruptcy Code requires a plan to designate classes of claims and interests in accordance with section 1122(a) of the Bankruptcy Code. As set forth above, the Plan satisfies section 1123(a)(1) of the Bankruptcy Code.

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

83. Section 1123(a)(2) of the Bankruptcy Code requires a plan to specify the classes of claims and/or interests that are not "impaired" under the plan. Articles III and IV of the Plan specify that Classes 1A-4A and 1C-4C are unimpaired. The Plan satisfies section 1123(a)(2) of the Bankruptcy Code.

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

84. Section 1123(a)(3) of the Bankruptcy Code requires a plan to specify the classes of claims and/or interests that are "impaired" under the plan. Articles III and IV of the Plan specify that Classes 1B-4B, 1D-4D, 1E-4E, 1F-4F and 1G-4G are impaired. The Plan satisfies section 1123(a)(3) of the Bankruptcy Code.

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

85. Section 1123(a)(4) of the Bankruptcy Code requires a plan to provide for the same treatment for each claim and/or interest in a particular class to be treated equally (unless a claim or interest holder agrees to disparate treatment). The Plan provides for all claim and interest holders within a particular Class to be treated the same as all other claim and interest holders within such respective Class. The Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

5. *Section 1123(a)(5): Means for Implementation of the Plan*

86. Section 1123(a)(5) of the Bankruptcy Code requires a plan to provide "adequate means for the plan's implementation." The Plan and the documents contained in the Plan Supplement provide for adequate and proper means for implementing the Plan, including, without limitation: (a) the continued corporate existence of the Reorganized Debtors; (b) the corporate governance documents relating to the Reorganized Debtors after the Effective Date; (c) the issuance of New FiberTower Common Stock and New FiberTower Equity Interests; (d) the creation of the Litigation Trust; (e) the issuance of Litigation Trust Interests to the Litigation Trust Beneficiaries; (f) the vesting of the assets of the Debtors' estates in the Reorganized Debtors and the Litigation Trust, as applicable; (g) the cancellation of certain existing agreements, obligations, instruments, and interests; and (h) the execution, delivery, filing, or recording of all contracts, instruments, releases, and other agreements or documents related to the foregoing. The Plan, therefore, provides adequate means for its implementation and satisfies section 1123(a)(5) of the Bankruptcy Code.

6. *Section 1123(a)(6): Prohibition on Issuance of Non-Voting Securities*

87. Section 1123(a)(6) of the Bankruptcy Code provides that a plan may not provide for the issuance of non-voting securities. The Plan and the New FiberTower Governing

Documents prohibit issuance of non-voting equity securities. As a consequence, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

7. *Section 1123(a)(7): Directors and Officers*

88. Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." The Reorganized Debtors' initial directors and officers are set forth in the Plan Supplement or will be disclosed at or prior to the Confirmation Hearing, and the New FiberTower Governing Documents set out procedures for the selection of subsequent directors and officers of each Reorganized Debtor. Such procedures are consistent with the interests of creditors and equity holders and public policy, thereby satisfying section 1123(a)(7) of the Bankruptcy Code.

C. The Plan Complies with Section 1123(b) of the Bankruptcy Code

89. Section 1123(b) of the Bankruptcy Code is permissive, and sets forth certain provisions that may be (but are not required to be) incorporated into a plan. *See, e.g., In re Parke Imperial Canton, Ltd.*, No. 93-61004, 1994 WL 842777 at *10 (Bankr. N.D. Ohio Nov. 14, 1994) (stating that "[s]ection 1123(b) contains permissible, not mandatory, provisions of reorganization plans"); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 450 (Bankr. D.N.J. 1990); *In re Texaco Inc.*, 84 B.R. 893, 906 (Bankr. S.D.N.Y. 1988). The Plan incorporates certain provisions that are permitted under section 1123(b). Each such provision is consistent with and complies with section 1123(b) of the Bankruptcy Code.

1. *Section 1123 (b)(1): Impairment/Unimpairment of Claims and Interests*

90. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." Claims in Classes

1A-4A and 1C-4C are unimpaired by the Plan. The remaining Classes are impaired. The Plan complies with section 1123(b)(1) of the Bankruptcy Code.

2. *Section 1123(b)(2): Assumption/Rejection of Executory Contracts and Leases*

91. Section 1123(b)(2) of the Bankruptcy Code permits a plan to provide for the assumption or rejection of executory contracts and unexpired leases under section 365 of the Bankruptcy Code. The Plan provides for the deemed rejection of the Debtors' remaining executory contracts and unexpired leases as of the Effective Date, unless any such contract or lease (i) was previously assumed, assumed and assigned or rejected by the Debtors, (ii) previously expired or terminated pursuant to its own terms, (iii) is the subject of a motion to assume, assume and assign, or reject filed by the Debtors on or before the Confirmation Date, or (iv) is set forth in Schedule 9.1(a) to the Plan as an executory contract or unexpired lease to be assumed. The Plan complies with section 1123(b)(2) of the Bankruptcy Code.

3. *Section 1123(b)(3): Settlement of Claims and Causes of Action*

92. Section 1123(b)(3) of the Bankruptcy Code permits a plan to provide for the "settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement by the debtor, the trustee, or by a representative of the estate appointed for such purpose, of any . . . claim or interest." The Plan also provides for the preservation of Causes of Action by, and vesting of Causes of Action in, the Reorganized Debtors or the Litigation Trust, as applicable.

93. Specifically, the Plan provides that, except for claims and Causes of Action that are specifically waived and/or released under the Plan and Causes of Action that are being transferred to the Litigation Trust, any Causes of Action accruing to the Debtors are reserved for and shall become assets of the Reorganized Debtors. The Plan further provides that (i) any

claims or Causes of Action arising under chapter 5 of the Bankruptcy Code (or the proceeds thereof), and (ii) the Estate D&O Claims (or the proceeds thereof) shall be reserved for the Litigation Trust and become Litigation Trust Assets. The Litigation Trustee shall be authorized under the Plan to pursue such retained Claims, rights or Causes of Action, suits, or proceedings as appropriate, in accordance with the terms of the Litigation Trust Agreement. These provisions of the Plan comply with section 1123(b)(3) of the Bankruptcy Code.

4. *Section 1123(b)(4): Sale of Substantially All Assets*

94. Section 1123(b)(4) of the Bankruptcy Code provides that a plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." As set forth in Section 11.1 of the Plan, except for the Litigation Trust Assets being transferred to the Litigation Trust, on the Effective Date, all property of the Debtors' Estates shall be revested in in the Reorganized Debtors free and clear of Liens, Claims, encumbrances, charges, interests of Holders of Claims and Equity Interests, and other interests. On and after the Effective Date, the Reorganized Debtors may operate their business and may use, acquire, or dispose of property and compromise or settle any Claims or Interests and certain Causes of Action without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules. This is consistent with section 1123(b)(4) of the Bankruptcy Code.

5. *Section 1123(b)(6): Other Appropriate Provisions*

95. Section 1123(b)(6) of the Bankruptcy Code is a "catchall" provision, which permits inclusion in a plan of any appropriate provision as long as such provision complies with applicable sections of the Bankruptcy Code. As described herein, the Plan includes certain exculpation, release and injunction provisions (as set forth in Article XI thereof). The Debtors believe that such provisions are appropriate in these cases because they are supported by the

facts and circumstances and are the product of extensive negotiations among the Debtors and the holders of the 2016 Notes (the Debtors' first lien secured creditors).

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

96. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." As set forth above, pursuant to Section 9.1 of the Plan, the Debtors filed and served the Assumption Notice on January 3, 2014. The Assumption Notice set forth the cure amount with respect to each executory contract or unexpired lease to be assumed under the Plan, and provided each contract counterparty an opportunity to object to and be heard by the Court with respect to such proposed cure amount. No counterparties to the executory contracts and unexpired leases to be assumed under the Plan objected to the proposed cure amounts set forth in the Assumption Notice. The Plan complies with section 1123(d) of the Bankruptcy Code.

VI. THE PLAN MEETS THE REQUIREMENTS OF SECTION 1129(A)(2) BECAUSE THE DEBTORS HAVE COMPLIED WITH APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

97. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent. *See* 7 COLLIER ON BANKRUPTCY [1 1129.03[1] (15th ed. rev. 2007). In determining whether a plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. *See, e.g., In re Johns-Manville*

Corp., 68 B.R. at 630; *In re Toy & Sports Warehouse, Inc.*, 37 B.R. at 149; *see also In re PWS Holding Corp.*, 228 F.3d at 224.

A. The Debtors Complied with Section 1125 of the Bankruptcy Code

Section 1125(b) of the Bankruptcy Code provides, in pertinent part:

> 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. . . .

98. On December 5, 2013, the Court entered the Disclosure Statement Order, pursuant to which, among other things, the Court approved (i) the Disclosure Statement as containing "adequate information" pursuant to section 1125(b) of the Bankruptcy Code and (ii) the Debtors' proposed solicitation procedures with respect to the Plan. On December 11, 2013, in accordance with the terms of the Disclosure Statement Order, the Debtors commenced their solicitation of votes to accept the Plan.

99. On January 13, 2014, the Debtors' voting and tabulation agent, BMC Group, Inc., filed the BMC Declaration. As set forth in the BMC Declaration, BMC solicited and tabulated votes in accordance with the Disclosure Statement Order. The Debtors did not solicit acceptances of the Plan by any holder of Claims or Equity Interests prior to the transmission of the Disclosure Statement or otherwise contrary to the terms of the Disclosure Statement Order or section 1125 of the Bankruptcy Code. In addition, the BMC Declaration describes the methodology for the tabulation and results of voting with respect to the Plan. The deadline for voting to accept or reject the Plan was January 8, 2014.

100. As set forth in the BMC Declaration, the Plan was accepted unanimously by holders of Claims in Classes 1B-4B that voted on the Plan. Specifically, all twenty-five (25) holders of 2016 Claims and 2016 Guaranty Claims that voted on the Plan voted to accept the Plan. Such holders hold an aggregate of $106,515,147.00 in original principal amount of 2016 Claims and 2016 Guaranty Claims.

B. The Debtors Complied with Section 1126 of the Bankruptcy Code

Section 1126 of the Bankruptcy Code provides, in pertinent part, as follows:

> (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.

101. As set forth in the Disclosure Statement and the BMC Declaration, in accordance with the terms of the Disclosure Statement Order, the Debtors solicited votes on the Plan from the holders of Claims in Classes 1B-4B, the only impaired Classes under the Plan that were not preclusively deemed to reject the Plan. As set forth herein, holders of such Claims overwhelmingly voted to accept the Plan. Under the Plan, all other impaired Classes were

preclusively deemed to reject the Plan.[11] Under the Plan, Classes 1A-4A and 1C-4C are unimpaired, and thus, are conclusively presumed to have accepted the Plan.

102. Section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired classes of claims entitled to vote to accept or reject a plan of reorganization:

> (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 such plan.

103. As set forth above and in the BMC Declaration, the Plan was accepted unanimously by holders of Claims in Classes 1B-4B that voted on the Plan. The Debtors submit that, based on the foregoing, the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

VII. THE PLAN MEETS THE REQUIREMENTS OF SECTION 1129(A)(3) BECAUSE THE PLAN HAS BEEN PROPOSED IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW

104. 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." The good-faith standard requires a showing

---

[11] Under the Plan, holders of Claims in Classes 1D-4D (2012 Claims and 2012 Guaranty Claims) and Claims in Classes 1E-4E (General Unsecured Claims) are entitled to receive their pro rata share of the Litigation Trust Interests (along with the holders of Claims in Classes 1B-4B (2016 Claims and 2016 guaranty Claims), to the extent of their unsecured deficiency claim). As set forth in the Disclosure Statement, the Debtors do not believe that the Litigation Trust Interests shall result in a material recovery to the Litigation Trust Beneficiaries. As a consequence, and in accordance with the terms of the Disclosure Statement Order, holders of Claims in Classes 1D-4D (2012 Claims and 2012 Guaranty Claims) and Claims in Classes 1E-4E (General Unsecured Claims) were preclusively deemed to reject the Plan and the Debtors did not solicit votes on the Plan from such Holders.

Moreover, under the Plan, Reorganized FiberTower shall receive one hundred percent (100%) of the New FiberTower Subsidiary Equity Interests in Reorganized FiberTower Network Services and Reorganized FiberTower Licensing, and Reorganized FiberTower Licensing shall receive one hundred percent (100%) of the New FiberTower Subsidiary Equity Interests in Reorganized FiberTower Spectrum. As a consequence, the Debtors' corporate structure shall remain in place following the Effective Date.

that "the plan was proposed with honesty and good intentions." *In re Johns-Manville Corp.*, 843 F.2d at 649. Court 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 Code." *In re WorldCom, Inc.*, 2003 Bankr. LEXIS 1401 at *151-152; *see also In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999).

105. 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); *see also In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Sun Country*, 764 F.2d at 408.

106. Notwithstanding the Committee's unfounded assertion that the Debtors impermissibly favored the 2016 Holders, the Debtors have satisfied their good faith obligation under section 1129(a)(3) of the Bankruptcy Code. The Plan provides for a distribution of the value of the Debtors' estates to creditors in accordance with the priorities and provisions of the Bankruptcy Code. The Plan also achieves the primary objectives underlying chapter 11 - - reorganization of the Debtors and distribution of value to creditors on account of their claims. *See, e.g., N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The Plan accomplishes these goals by providing the means through which the Reorganized Debtors may continue to operate as viable entities and effectuate prompt distributions to their creditors. In addition, the Plan is the culmination of significant arms-length negotiations between the Debtors and the holders of 2016 Notes. For all of the reasons set forth above and to be presented at the

Confirmation Hearing, the Plan was proposed in good faith and not by any means forbidden by law in accordance with section 1129(a)(3) of the Bankruptcy Code.

VIII. THE PLAN SATISFIES SECTION 1129(A)(4) BECAUSE PROFESSIONAL FEES AND EXPENSES ARE SUBJECT TO COURT APPROVAL

107. Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor "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," either be approved by the court as reasonable or subject to approval of the court as reasonable.

108. Pursuant to the Court's Order establishing interim compensation procedures in these cases, the Court has authorized and approved the payment of certain fees and expenses of retained professionals, subject to final review for reasonableness by the Court under section 330 of the Bankruptcy Code. Section 2.2 of the Plan provides that "every Professional Person holding a Fee Claim that has not previously been the subject of a final fee application and Bankruptcy Court order shall file a final application for payment of fees and reimbursement of expenses no later than the date that is forty-five (45) days after the Effective Date. Any such final fee application shall conform to and comply with all applicable rules and regulations contained in the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules."

109. Article XII(h) of the Plan further provides that the Court shall retain jurisdiction "to hear and determine all requests for payment of Fee Claims." All fees and expenses of Professionals accrued through the Confirmation Date thus remain subject to final review by the Court and the provisions of the Plan relating to payment of professionals comply with the terms of section 1129(a)(4) of the Bankruptcy Code.

IX. SECTION 1129(A)(5): THE DEBTORS HAVE DISCLOSED ALL NECESSARY INFORMATION REGARDING DIRECTORS, OFFICERS, AND INSIDERS

110. Section 1129(a)(5) of the Bankruptcy Code requires that (i) a proponent of a plan of reorganization disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor(s), (ii) the appointment (or continuation) of such officers and directors be consistent with the interests of creditors, equity security holders and public policy, and (iii) the plan proponent disclose the identity and compensation of any insiders to be retained or employed by the reorganized debtor(s).

111. The Debtors submit that they have satisfied the foregoing requirements. As disclosed in the Plan Supplement (or otherwise prior to or at the Confirmation Hearing), the Plan provides that, pursuant to the New Stockholders Agreement and the New FiberTower Governing Documents, on the Effective Date, the initial board of directors of Reorganized FiberTower will consist of three (3) members. Two (2) members of the board shall be designated by Solus Alternative Asset Management LP and (1) member of the board shall be designated by Broadbill Investment Partners, LP. From and after the Effective Date, the members of the boards of directors of the Reorganized Debtors shall be selected and determined in accordance with the terms of the New FiberTower Governing Documents and the New Stockholders Agreement, and applicable law. The Debtors included biographical information for the proposed directors in the Plan Supplement (or otherwise prior to the Confirmation Hearing) and will provide additional information about the additional proposed directors if such information if the Court deems it necessary at the Confirmation Hearing.

112. As set forth in the Plan Supplement, the initial senior executive officers of each of the Reorganized Debtors as of the Effective Date shall be Thomas Scott (as President) and Joseph Sandri (as Senior VP, Regulatory Affairs). It is anticipated that, on the Effective Date,

such senior executive officers shall receive compensation and benefits that are substantially similar to those received by such officers prior to the Effective Date. The initial senior executive officers of Reorganized FiberTower shall be subject to terminations and resignations in the ordinary course of business.

113. The Debtors submit that the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

X. THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1129(A)(7) OF THE BANKRUPTCY CODE

Section 1129(a)(7) of the Bankruptcy Code provides, in pertinent 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 . . . .

114. The requirement of section 1129(a)(7) is often referred to as the "best interests" test. The best interests test focuses on individual dissenting creditors rather than classes of claims. *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999). In order for a plan to comply with section 1129(a)(7), 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 440; *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228 (1996).

115. The Debtors submit that the "best interests" test is satisfied here. The best interests test is satisfied as to each holder of a Claim in an unimpaired Class of Claims, as they

are deemed to have accepted the Plan. The best interests test is also satisfied as to each holder of a Claim and Interest in an impaired Class. Specifically, Exhibit C to the Disclosure Statement sets forth the Debtors' liquidation analysis for the Reorganized Debtors. The Liquidation Analysis (i) is credible and reasonable, (ii) has not been controverted by other evidence, (iii) is based on sound assumptions, and (iv) provides a reasonable estimate of the liquidation values of the assets of the Debtors' estates upon conversion to a case under chapter 7 of the Bankruptcy Code. The Liquidation Analysis demonstrates that a holder of a Claim or Interest in an impaired Class will receive at least as much under the Plan than they would receive in a hypothetical liquidation under chapter 7 of the Bankruptcy Code. Based upon the foregoing, the Debtors submit the best interest test is satisfied.

XI. SECTION 1129(A)(8) IS NOT APPLICABLE

116. 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, holders of claims in Classes 1B-4B, the only impaired Classes entitled to vote, overwhelmingly voted to accept the Plan. Other than Classes 1A-4A and 1C-4C (which are unimpaired and preclusively deemed to accept the Plan), however, each of the other Classes under the Plan is impaired and preclusively deemed to reject the Plan. As a consequence, the Plan does not satisfy section 1129(a)(8) of the Bankruptcy Code. As described below, however, the Plan satisfies section 1129(b) of the Bankruptcy Code and, as a consequence, the failure to satisfy section 1129(a)(8) does not render the Plan unconfirmable.

XII. SECTION 1129(A)(10): THE PLAN HAS BEEN ACCEPTED BY A CLASS OF IMPAIRED CLAIMS

117. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any

acceptance of the plan by any insider." As noted above, holders of claims in Classes 1B-4B, the only impaired Classes entitled to vote, overwhelmingly voted to accept the Plan. The Plan clearly satisfies the requirement of section 1129(a)(10) of the Bankruptcy Code.

XIII. SECTION 1129(A)(11): THE PLAN IS FEASIBLE

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

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

119. As described below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

A. Legal Standard

120. Section 1129(a)(11) of the Bankruptcy Code requires the Court to determine whether the Plan is workable and has a reasonable likelihood of success. *See In re The Leslie Fay Cos.*, 207 B.R. at 788; *In re Woodmere Investors Ltd. Partnership*, 178 B.R. 346, 361 (Bankr. S.D.N.Y. 1995); *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992); *In re Johns-Manville Corp.*, 68 B.R. at 635.

121. The Second Circuit has stated that "the feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed." *In re Johns- Manville Corp.*, 843 F.2d at 649; *see also 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."); *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 presents a

workable scheme of reorganization and operation from which there may be a reasonable expectation of success.'"); *In re Texaco Inc.*, 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988) ("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).").

122. The principal issue with respect to feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. In short, the purpose of the feasibility test is to protect against visionary or speculative plans. *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985). Just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. *See In re Drexel Burnham*, 138 B.R. at 762 ("The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds."). Applying the foregoing standards of feasibility, courts have identified the following factors:

(1) 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;

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

(7) the adequacy of funds for equipment replacements;

(8) the provisions for adequate working capital; and

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

See, e.g., Leslie Fay, 207 B.R. at 789; *see also Texaco Inc.*, 84 B.R. at 910; *Prudential Energy*, 58 B.R. at 862-63. Courts may consider additional factors in addition to those referenced above. *See, e.g., In re Drexel Burnham*, 138 B.R. at 763; cf. In re U.S. Truck Co., 800 F.2d 581, 589 (6th Cir. 1986).

B. The Plan Satisfies the Feasibility Requirement

123. The Debtors submit that the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. For purposes of determining whether the Plan satisfies the above-described feasibility standards, the Debtors analyzed their ability to fulfill their obligations under the Plan. As part of this analysis, the Debtors prepared projections of their financial performance through 2015 (the "Projections"). *See* Disclosure Statement, Article V.

124. As set forth in the Disclosure Statement and the Scott Declaration, the Projections were prepared in good faith, based on reasonable, non-speculative assumptions. The Projections reflect that the Debtors will have sufficient resources to meet all of their obligations under the Plan. The Debtors have factored appropriate flexibility into the Projections so that, in the event that economic or other conditions are less favorable than expected, the Debtors will be able to maintain appropriate liquidity and operational cash flow following the Effective Date. Based upon the foregoing, the Plan has a more than a reasonable likelihood of success and satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

XIV. SECTION 1129(A)(12): ALL STATUTORY FEES HAVE BEEN OR WILL BE PAID

125. 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." 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. In accordance with sections 507 and 1129(a)(12) of

the Bankruptcy Code, Section 13.1 of the Plan provides that the Debtors shall pay all fees payable pursuant to section 1930 of chapter 123 of title 28 of the United States Code on the Effective Date and thereafter as may be required.

XV. SECTION 1129(B): THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS

126. While Classes 1B - 4B are impaired and have voted unanimously to accept the Plan, for the Plan to be confirmed, the Debtors must satisfy the Bankruptcy Code's "cram down" requirements as to the rejecting impaired classes - - *i.e.*, Classes 9, 10 and 11–pursuant to section 1129(b) of the Bankruptcy Code. Section 1129(b) of the Bankruptcy Code provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims of interests that is impaired under, and has not accepted, the plan.

127. Thus, if a plan satisfies all applicable requirements of section 1129(a) other than section 1129(a)(8), a court may confirm the plan provided that it does not "discriminate unfairly" and is "fair and equitable" with respect to each class of claims and interests that is impaired and has not accepted the plan. As discussed below, the Debtors meet the requirements in section 1129(b) of the Bankruptcy Code to "cram down" the Plan on all impaired Classes that are deemed to have rejected the Plan.

A. The Plan Does Not Unfairly Discriminate With Respect to the Rejecting Classes.

128. The Plan does not discriminate with respect to any impaired rejecting Class. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. *See In re 203 North LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the

treatment of classes under a chapter 11 plan" and that "the limits of fairness in this context have not been established"). Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists. *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis"); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

129. At a minimum, however, the unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so. *See In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 655 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *Johns-Manville*, 68 B.R. at 636. Here, each holder of a Claim or Interest in an impaired rejecting Class is receiving the same treatment as all other holders of Claims or Interests in such Class. As a consequence, the Plan does not discriminate with respect to any impaired rejecting Classes.

B. The Plan is Fair and Equitable With Respect to the Rejecting Classes

130. Section 1129(b)(2)(B) of the Bankruptcy Code provide that a plan is "fair and equitable" with respect to a class of impaired claims interests if the plan provides that the holder of any claim or interest that is junior to the claims of such class that will not receive or retain any property under the plan on account of such claim or interest. In short, this central tenet of bankruptcy law - - the "absolute priority rule" - - prohibits junior holders from receiving any property "on account of" their equity interests (unless all creditors are paid in full or otherwise vote to accept less favorable treatment). *See, e.g., In re Coltex Loop Cent. Three Partners, L.P.*, 138 F.3d 39, 42 (2d Cir. 1998). The corollary of the absolute priority rule is that senior classes

cannot receive more than 100% recovery on their claims. *See In re Exide Techs.*, et. al,. 303 B.R. 48, 61 (Bankr. D. Del. 2003).

131. The Plan is "fair and equitable" with respect to all impaired rejecting Classes. No holder of any claim or interest junior to any impaired rejecting Class will receive or retain any property under the Plan. In addition, as described at length above, based on the Debtors' valuation of the Reorganized Debtors as of the Effective Date (and even if the Debtors' FCC Advocacy is ultimately successful), no "senior" class will be receiving more than 100% recovery on account of their claims under the Plan. Accordingly, the Plan satisfies the requirements of section 1129(b)(2)(C)(ii) of the Bankruptcy Code for all classes of claims and interests and, therefore is "fair and equitable."

XVI. THE PLAN MODIFICATIONS ARE NON-MATERIAL AND DO NOT REQUIRE ADDITIONAL DISCLOSURE OR SOLICITATION.

132. The modifications to the Plan filed on January 13, 2014 (and any further modifications to be made at the Confirmation Hearing) after the solicitation of the Plan do not materially and adversely affect or change the treatment of any holder of a Claim or Equity Interest. Accordingly, pursuant to Bankruptcy Rule 3019, such modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or re-solicitation of acceptances or rejections under section 1126 of the Bankruptcy Code. Likewise, such modifications do not require that holders of Claims be afforded an opportunity to change previously cast votes on the Plan. *In re G-1 Holdings, Inc.*, 420 B.R. 216, 255 (D. N.J. 2009) (citing *In re New Power Co.*, 438 F.3d 1113, 1118 (11th Cir. 2006)). The filing of the modifications and disclosure of same (either at or before the Confirmation Hearing) should constitute due and sufficient notice thereof under the circumstances of these chapter 11 cases, and no other or further notice should be required.

CONCLUSION

The Plan complies with and satisfies all of the requirements of the Bankruptcy Code. The Objections should, therefore, be overruled and the Plan confirmed.

WHEREFORE, the Debtors respectfully request the entry of an Order confirming the Plan and granting such other and further relief as is just and proper.

Dated: January 13, 2014
Fort Worth, Texas

ANDREWS KURTH LLP

By: /s/ Paul N. Silverstein
Paul N. Silverstein (admitted *pro hac vice*)
Jonathan I. Levine (admitted *pro hac vice*)
450 Lexington Avenue, 15th Floor
New York, New York 10017
Telephone: (212) 850-2800
Facsimile: (212) 850-2929
Email: paulsilverstein@andrewskurth.com
Email: jonathanlevine@andrewskurth.com

-and-

Michelle V. Larson
Texas State Bar No. 00796928
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401
Email: michellelarson@andrewskurth.com

Counsel to the Debtors