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UNITED STATES BANKRUPTCY COURT
THE SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
JENNIFER CONVERTIBLES, INC.,[1]	Case No. 10-13779 (ALG)
Debtors.	(Jointly Administered)

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR JENNIFER CONVERTIBLES, INC. AND ITS AFFILIATED DEBTORS AND IN RESPONSE TO CERTAIN OBJECTIONS THERETO

Dated: January 24, 2011

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

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PRELIMINARY STATEMENT

1. Jennifer Convertibles, Inc. ("Jennifer Convertibles") and its affiliated debtors and debtors in possession (collectively, the "Debtors") respectfully submit this memorandum of law (the "Confirmation Brief") in support of confirmation of the Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and its Affiliated Debtors, dated December 21, 2010 (as may be modified and/or amended from time to time, the "Plan"), and in response to certain objections thereto.[2]

2. On July 18, 2010 (the "Petition Date"), Jennifer Convertibles and each of the other Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have continued in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. By order of this Court dated July 22, 2010, these chapter 11 cases were consolidated for procedural purposes only. On July 23, 2010, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors' Committee"). No trustee or examiner has been appointed in these cases.

4. Jennifer Convertibles, Inc. was organized as a Delaware corporation in 1986, and is currently the owner of (i) the largest group of sofabed specialty retail stores and leather specialty retail stores in the United States, with stores located throughout the Eastern seaboard and the West Coast, and (ii) six big box, full-line furniture stores operated under the Ashley Furniture HomeStore brand (the "Ashley Stores") under a license from Ashley Furniture

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan and Disclosure Statement, as applicable. Objections to confirmation of the Plan (the "**Objections**") were filed by the parties identified on Exhibit A hereto (the "**Objectors**").

Industries, Inc. As of the Petition Date, the Debtors' stores included 130 stores operated by the Jennifer segment. During fiscal 2007, the Debtors opened their first Ashley Store. As of the Petition Date, the Debtors operated seven Ashley Stores. Currently the Debtors have seventy-three stores in the Jennifer segment, and operate six Ashley Stores.

5. On December 22, 2010, the Bankruptcy Court entered an order (the "Disclosure Statement Order;" Docket No. 397) approving the disclosure statement related to the Plan (the "Disclosure Statement;" Docket No. 398) as containing "adequate information" in accordance with section 1125 of the Bankruptcy Code. Thereafter, the Debtors commenced the solicitation process, including, without limitation, providing notice of the Confirmation Hearing and transmitting solicitation materials to the Holders of Claims entitled to vote to accept or reject the Plan.

6. Having now successfully completed the solicitation process, the Debtors submit this Confirmation Brief in support of confirmation of the Plan and in response to the outstanding Objections. Section I of the Confirmation Brief details the Plan's compliance with the general confirmation requirements under section 1129(a) of the Bankruptcy Code. Section II addresses the Plan's satisfaction of the requirements for "cramdown" under 1129(b) of the Bankruptcy Code. Section III addresses the appropriateness of the releases contained in the Plan. Section IV addresses the issue of consolidation of the Debtors' estates for Plan purposes only. In further support of confirmation of the Plan, the Debtors have filed or will be filing the declarations of Rami Abada (the "Abada Declaration"), Robert C. Grien (the "Grien Declaration"), and Julia G. Osborne (the "Voting Certification").

7. As set forth in the Voting Certification, the Plan has been overwhelmingly accepted by Holders of Claims in the two Classes that were entitled to vote on the Plan — Class

2 (Mengnu Unsecured Claim) and Class 3 (General Unsecured Claims). As evidenced by the summary below, voting creditors' support for the Plan is both deep and broad:

Class	Acceptances	Rejections
Class 2 Mengnu Unsecured Claim	100% $35,034,089.08 in dollar 2 in number	0
Class 3 General Unsecured Claims	90.91% $6,056,922.99 in dollar 90 in number	9.09% $465,385.03 in dollar 9 in number

8. It is clear that the Holders of Claims that were entitled to vote on the Plan occupy common ground with the Debtors: these creditors overwhelmingly endorse confirmation of the Plan without delay. To this end, and as set forth below, the Plan satisfies each of the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and other applicable provisions of the Bankruptcy Code. In particular, the Plan has been proposed in good faith, is feasible, serves the best interests of the Debtors' creditors, and is fair and equitable. Furthermore, the Creditors' Committee and Mengnu have supported the Plan from its filing and approximately 90.91% in amount of the General Unsecured Creditors do as well. The solicitation results validate the Debtors' belief that the Plan represents the best reorganization path available. Accordingly, the Plan should be confirmed by the Bankruptcy Court.

ARGUMENT

I. THE PLAN COMPLIES WITH THE CONFIRMATION STANDARDS SET FORTH IN SECTION 1129(a) OF THE BANKRUPTCY CODE.

9. Section 1129 of the Bankruptcy Code governs confirmation of a plan of reorganization and sets forth the requirements that must be satisfied in order for a plan to be confirmed. Pursuant to section 1129(a) of the Bankruptcy Code, a bankruptcy court shall confirm a plan of reorganization only if all of the following requirements are met:

(a) The plan complies with the applicable provisions of title 11 (section 1129(a)(1));

(b) The proponent of the plan complies with the applicable provisions of title 11 (section 1129(a)(2));

(c) The plan has been proposed in good faith and not by any means forbidden by law (section 1129(a)(3));

(d) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable (section 1129(a)(4));

(e) The proponent of the plan has: (i)(A) disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan, and (B) the appointment to, or continuance in, such office of such individual is consistent with the interests of creditors and equity security holders and with public policy; and (ii) the proponent has disclosed the identity of any insider that will be employed or retained by the reorganized debtor and the nature of any compensation for such insider (section 1129(a)(5));

(f) To the extent that the debtor is subject to the jurisdiction of any regulatory commission, any rate change provided for in the plan has been approved by, or is subject to the approval of, such regulatory commission (section 1129(a)(6));

(g) With respect to each impaired class of claims or interests, each holder of a claim or interest of such class has either accepted the plan or 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 receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code on such date (section 1129(a)(7));

(h) Each class of claims or interests has either accepted the plan or is not impaired under the plan (section 1129(a)(8));

(i) The treatment of administrative expense and priority claims under the plan complies with the provisions of section 1129(a)(9);

(j) If a class of claims is impaired under the plan, at least one impaired class of claims has accepted the plan, determined without including the acceptances by any insiders holding claims in such class (section 1129(a)(10));

(k) 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, unless such liquidation or reorganization is proposed in the plan (section 1129(a)(11));

(l) The plan provides for payment on the effective date of all fees payable under 28 U.S.C. § 1930 (section 1129(a)(12)); and

(m) The plan provides, if applicable, for the continued payment of certain retiree benefits for the duration of the period that the debtor has obligated itself to provide such benefits (section 1129(a)(13)).

11 U.S.C. § 1129(a).

10. The Plan satisfies each of these requirements except for section 1129(a)(8). Claims in Class 1 are unimpaired. As a result, Holders of such Claims are deemed to have accepted the Plan. *See* 11 U.S.C. § 1126(f) and Plan § 3.04. Claims in Classes 2 and 3 are impaired and each of these Classes has voted to accept the Plan. *See* Voting Certification and Plan § 3.05. Holders of Claims in Classes 4 and 5 will receive no distributions nor retain any property under the Plan on account of such Claims. Accordingly, such Holders are deemed to have rejected the Plan. *See* 11 U.S.C. § 1126(g) and Plan § 3.05.

11. Notwithstanding the deemed rejection of the Plan by Holders of Claims in Classes 4 and 5, section 1129(b)(1) of the Bankruptcy Code provides that the Plan may be confirmed pursuant to the "cramdown" provisions thereof, if the Plan does not discriminate unfairly and is fair and equitable with respect to these Classes. *See* 11 U.S.C. § 1129(b)(1). No Holder of any Claim or Interest in a Class junior to Class 4 or Class 5 shall receive or retain anything on account of such Claim or Interest under the Plan. Further, the Plan does not unfairly discriminate against any holder of a Claim or Interest in Class 4 or Class 5. *See* 11. U.S.C. §

1129(b)(1). As the Plan satisfies the requirements of sections 1129(a) (other than subsection (8) thereof) and 1129(b) of the Bankruptcy Code, the Plan should be confirmed.

A. The Plan Satisfies The Requirements Of Section 1129(a)(1) Of The Bankruptcy Code.

12. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Although broadly drafted, the legislative history and the case law make clear that this provision is directed at compliance with sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and interests and the contents of a plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6368; *In re Texaco Inc.,* 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988) ("In determining whether a plan complies with section 1129(a)(1) [of the Bankruptcy Code], reference must be made to [Bankruptcy] Code §§ 1122 and 1123 with respect to the classification of claims and the contents of a plan of reorganization"), *appeal dismissed,* 92 B.R. 38 (S.D.N.Y. 1988).

i. The Plan Complies With Section 1122 Of The Bankruptcy Code.

13. The Plan's classification structure is proper and in accordance with section 1122(a) of the Bankruptcy Code. Specifically, the Plan divides Claims and Interests as follows:

Class	Type of Claim or Interest
Unclassified	Administrative Expense Claims
Unclassified	Mengnu DIP Claims
Unclassified	Mengnu 503(b)(9) Claim
Unclassified	Fee Claims
Unclassified	United States Trustee Fees
Unclassified	Priority Tax Claims
Class 1	Priority Non-Tax Claims
Class 2	Mengnu Unsecured Claim
Class 3	General Unsecured Claims
Class 4	Existing Preferred Stock Interests
Class 5	Existing Common Stock Interests

14. Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class if such claim or interest is substantially similar to the other claims or interests of such class. 11 U.S.C. § 1122(a). "Substantially similar" generally has been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests in a debtor. *See In re Drexel Burnham Lambert Group Inc.,* 138 B.R. 714, 715-716 (Bankr. S.D.N.Y. 1992), order aff 'd, 140 B.R. 347 (S.D.N.Y. 1992) ("*Drexel Burnham Lambert I*"); *In re MCorp Fin., Inc*., 137 B.R. 219, 226 (Bankr. S.D. Tex. 1992), appeal dismissed, 139 B.R. 820 (S.D. Tex. 1992).

15. Section 1122(a) of the Bankruptcy Code does "not require that similar classes be grouped together, but merely that any group be homogenous." *Drexel Burnham Lambert I*, 138 B.R. at 715. *See also In re Johnson,* 69 B.R. 726, 728 (Bankr. W.D.N.Y. 1987); *In re 11,111, Inc.,* 117 B.R. 471, 476 (Bankr. D. Minn. 1990) ("while § 1122(a) requires that a given class in a plan of reorganization consist of substantially similar claims, all substantially similar claims need not be included in the same class"); *In re AG Consultants Grain Div., Inc.,* 77 B.R. 665, 674 (Bankr. N.D. Ind. 1987) (same).

16. Importantly, a plan proponent is afforded significant flexibility in classifying claims under section 1122(a) so long as there is a reasonable basis for the classification structure. *See In re Jersey City Med. Ctr*., 817 F.2d 1055, 1060-61 (3d Cir. 1987); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986). Here, the Plan's classification structure is straightforward and complies with section 1122(a) of the Bankruptcy Code. The Claims and Interests in each Class described above are substantially similar in nature to the other Claims and Interests in such

Class. Accordingly, the classification structure embodied in the Plan complies with section 1122 of the Bankruptcy Code.

ii. The Plan Satisfies The Requirements Of Section 1123(a) Of The Bankruptcy Code.

17. To satisfy section 1129(a)(1) of the Bankruptcy Code, the Plan must comply with section 1123(a) of the Bankruptcy Code, which sets forth seven mandatory requirements for every chapter 11 plan. As set forth below, the Plan complies with each such requirement.

(a) The Plan Designates Classes Of Claims — 11 U.S.C. § 1123(a)(1).

18. Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and interests, other than claims of the kinds specified in sections 507(a)(1) (administrative expense claims), 507(a)(2) (claims arising during the "gap" period in an involuntary case), and 507(a)(8) of the Bankruptcy Code (unsecured tax claims). *See* 11 U.S.C. § 1123(a)(1). Article III of the Plan designates five (5) Classes of Claims and Interests, not including Claims of the kinds specified in sections 507(a)(1), (2) and (8) of the Bankruptcy Code. Thus, the Plan complies with the requirements of section 1123(a)(1) of the Bankruptcy Code.

(b) The Plan Specifies Unimpaired Classes — 11 U.S.C. § 1123(a)(2).

19. Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Section 3.04 of the Plan specifies the Classes of Claims that are unimpaired under the Plan—specifically, Class 1, consisting of all Priority Non-Tax Claims. Therefore, the Plan complies with the requirements of section 1123(a)(2) of the Bankruptcy Code.

(c) The Plan Adequately Specifies The Treatment Of Impaired Classes — 11 U.S.C. § 1123(a)(3).

20. Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article IV of the Plan specifies the treatment of Claims and Interests that are impaired under the Plan. Thus, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

(d) The Plan Provides The Same Treatment For Claims Or Interests Within Each Class — 11 U.S.C. § 1123(a)(4).

21. Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide the "same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). The Debtors submit that the Plan does so provide, and thus complies with section 1123(a)(4) of the Bankruptcy Code.

(e) The Plan Provides Adequate Means For Its Implementation — 11 U.S.C. § 1123(a)(5).

22. Section 1123(a)(5) of the Bankruptcy Code requires that a plan "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Article VI of the Plan sets forth the means for implementation of the Plan, which the Debtors submit are more than adequate. Certain of these implementation mechanisms include, for example, procedures for or respecting:

(a) Vesting of assets in the Reorganized Debtors and the Litigation Trust;[3]

(b) Cancellation of certain Existing Securities and Agreements;[4]

(c) Execution of the Plan Documents, including the exit loan agreement; the Tranche A, B, C, D, and E Notes; Amended

[3] *See* Plan, § 6.04.
[4] *See* Plan, § 6.06.

Certificate of Incorporation of the Reorganized Debtors; Amended Bylaws of Reorganized Debtors; Post-Effective Date Directors and Officers; Binding Term Sheet Related to Management Agreements; Litigation Trust Agreement; and Amendment to Merrick Merchant Agreement;[5] and

(d) Issuance and delivery of the New Common Stock.[6]

23. Further, the conditions precedent to confirmation have been satisfied and/or waived in accordance with Article XIV of the Plan, as applicable.

24. Based upon the foregoing, the Debtors respectfully submit that the Plan contains appropriate implementation provisions and complies with the requirements of section 1123(a)(5) of the Bankruptcy Code and no Objector has suggested otherwise.

(f) The Plan Does Not Provide For The Issuance Of Non-Voting Equity Securities — 11 U.S.C. § 1123(a)(6).

25. Section 1123(a)(6) of the Bankruptcy Code provides that a plan must:

> provide for the inclusion in the charter of the debtor, if the debtor is a corporation, . . . of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends.

11 U.S.C. § 1123(a)(6).[7] Accordingly, the holders of new stock issued under a plan of reorganization must have voting rights. *See Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352, 1361 (9th Cir. 1986).

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[5] *See* Plan Supplement.

[6] *See* Plan, § 6.02.

[7] The purpose of section 1123(a)(6) is to "assure that creditors who are forced to take stock in a reorganized company will be entitled to exercise full voting control and have a voice in the selection of management that will protect their interests." Ronald W. Goss, Chapter 11 of the Bankruptcy Code: An Overview for the General Practitioner, 4 Utah B.J. 6, 10 (1991).

(g) The Plan Contains Appropriate Provisions Respecting The Selection Of Postconfirmation Directors And Officers — 11 U.S.C. § 1123(a)(7).

26. 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." 11 U.S.C. § 1123(a)(7).

27. Pursuant to Section 6.05 of the Plan, on the Effective Date, the boards of directors and officers of the Reorganized Debtors shall consist of those individuals identified on Exhibit E to the Plan Supplement. Further, the members of the board of directors of each Debtor prior to the Effective Date, in their capacities as such, shall have no continuing obligations to the applicable Reorganized Debtor on or after the Effective Date.

28. Accordingly, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code, as it does all of the other requirements of section 1123(a) of the Bankruptcy Code.

iii. The Plan Complies With Section 1123(b) Of The Bankruptcy Code.

29. Section 1123(b) of the Bankruptcy Code specifies certain provisions that may be included in a plan of reorganization. The Plan contains certain of the provisions specifically contemplated by section 1123(b) of the Bankruptcy Code, including provisions regarding (a) the impairment and unimpairment of Classes of Claims and Interests as provided for in section 1123(b)(1) of the Bankruptcy Code (*see* Article III of the Plan), (b) the assumption or rejection of executory contracts and unexpired leases as provided for in section 1123(b)(2) of the Bankruptcy Code (*see* Article XI of the Plan), and (c) the distribution of the proceeds of

Estates' assets as provided for in section 1123(b)(4) of the Bankruptcy Code (*see* Article X of the Plan).

30. Other provisions of the Plan are permissible pursuant to the authority granted in section 1123(b)(6) of the Bankruptcy Code, which permits a plan to include other provisions not inconsistent with the applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(6). These include the Bankruptcy Court's retention of jurisdiction as to specified issues, as well as the Bankruptcy Court's power to enjoin actions against non-Debtor third parties when such injunction is integral to the confirmation of the Plan. No party in interest has objected to confirmation of the Plan on the basis that it does not comply with section 1123(b) of the Bankruptcy Code.

31. Because the Plan meets all of the requirements of sections 1122 and 1123 of the Bankruptcy Code, it complies with section 1129(a)(1) of the Bankruptcy Code.

B. The Debtors Have Complied With The Provisions Of Title 11 As Required By Section 1129(a)(2) Of The Bankruptcy Code.

32. Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent — the Debtors here — "compl[y] with the applicable provisions of [title 11]." 11 U.S.C. § 1129(a)(2). Generally, the inquiry under section 1129(a)(2) of the Bankruptcy Code focuses on whether the plan proponent has complied with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. *See In re WorldCom, Inc*., 2003 WL 23861928, at 25-26 (Bankr. S.D.N.Y. 2003); *In re Johns-Manville Corp*., 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986) ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code. These sections provide for the appropriate manner of disclosure and solicitation of plan votes.") (internal citations omitted), *aff'd in relevant part*, 78 B.R. 407 (S.D.N.Y. 1987), *aff 'd sub nom*.,

Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); H.R. Rep. No. 95-595, at 412 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; S. Rep. No. 95-989, at 126 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (section 1129(a)(2) of the Bankruptcy Code "requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure").

33. As required by section 1129(a)(2) of the Bankruptcy Code, the Debtors have complied fully with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code and the applicable Bankruptcy Rules. The Disclosure Statement Order approved, *inter alia*, the adequacy of information contained in the Disclosure Statement and the procedures to be used by the Debtors in soliciting and tabulating votes regarding the Plan.[8] In accordance with the Disclosure Statement Order, the Debtors served the Disclosure Statement, the Plan, appropriate ballots and notices, as applicable, on all required parties. On December 23, 2010, the Debtors' notice and claims agent commenced solicitation of votes with respect to the Plan.

34. Accordingly, the Debtors respectfully submit that they have complied with the provisions of the Bankruptcy Code and, in particular, the provisions of section 1125, and therefore have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code. No party in interest has objected to confirmation of the Plan on the basis that the Plan fails to meet the requirements of section 1125 of the Bankruptcy Code.

[8] The Solicitation Procedures Orders established January 18, 2011 at 4:00 p.m. (prevailing Eastern time) (the "Voting Deadline"), as the deadline for the submission of ballots to accept or reject the Plan, and January 18, 2011 at 4:00 p.m. (prevailing Eastern time) (the "Objection Deadline"), as the deadline by which objections to confirmation of the Plan were required to be filed with the Bankruptcy Court.

C. Section 1129(a)(3) Has Been Satisfied Because The Plan Has Been Proposed In Good Faith And Not By Any Means Forbidden By Law.

35. Section 1129(a)(3) of the Bankruptcy Code requires that the Plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the term "good faith" is not defined in the Bankruptcy Code, courts in the Second Circuit and elsewhere have interpreted this provision as requiring a showing "that the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that reorganization can be effected.'" *Kane*, 843 F.2d at 649 (citing *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (quoting *Manati Sugar Co. v. Mock*, 75 F.2d 284, 285 (2d Cir. 1935))); *In re Best Prods. Co.*, 168 B.R. 35, 72 (Bankr. S.D.N.Y. 1994), *appeal dismissed*, 177 B.R. 791 (S.D.N.Y.), *aff 'd*, 68 F 3d 26 (2d Cir. 1995) (same); *In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) ("a plan is proposed in good faith 'if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code'") (*citing In re Texaco*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988) (quotations omitted)); *Greer v. Gaston & Snow (In re Gaston & Snow)*, 1996 WL 694421, at *9 (S.D.N.Y. 1996) ("failure to propose a plan in good faith occurs when the Plan is not proposed with honesty, good intentions, and to effectuate the reorganization of the enterprise, but rather for some other motive") (*citing Kane*, 843 F.2d at 649); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992) ("*Drexel Burnham Lambert II*"). As set forth in the Abada Declaration, the Plan has been proposed in "good faith." Further, the Plan has not been proposed in any manner prohibited by law.

36. Throughout these cases, both the Debtors and their management have honored and upheld their fiduciary duties to all stakeholders. Prior to and throughout the Plan process, the Debtors continued to negotiate with parties in interest, including the Creditors'

Committee and Mengnu, to achieve a consensual plan of reorganization, that would maximize recoveries for all creditors. As a result, the Plan provides an enhanced recovery for the Holders of Allowed General Unsecured Claims.

37. The Debtors believe that the Plan maximizes the value of the estates for their creditors and all other stakeholders. Accordingly, the Plan has been proposed in "good faith" and not by any means forbidden by law, and satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Provides For Bankruptcy Court Approval Of Payment For Services And Expenses — 11 U.S.C. § 1129(a)(4).

38. Section 1129(a)(4) of the Bankruptcy Code requires that payments for services or costs and expenses incurred in or in connection with a chapter 11 case, or in connection with a plan and incident to the case, either be approved by or be subject to approval of the court as reasonable. *See* 11 U.S.C. § 1129(a)(4). This section requires that all payments of compensation and reimbursement of expenses to professionals retained in a debtor's case be subject to bankruptcy court review and approval as to the reasonableness of such payments.

39. Section 4.02 of the Plan provides for payment of Allowed Administrative Expense Claims in full. Section 4.02 of the Plan also sets forth procedures for filing Fee Claims and procedures for the payment of professional fees. Moreover, the proposed Confirmation Order contains additional provisions regarding applications of Professionals for final approval of fees and expenses in these cases. In addition, Article XIII of the Plan provides for the Bankruptcy Court's retention of jurisdiction to hear and determine all applications for compensation and reimbursement of expenses of Professional Persons in these cases.

E. The Debtors Have Complied With Section 1129(a)(5) By Disclosing All Necessary Information Regarding Directors And Officers Of The Reorganized Debtors.

40. Section 1129(a)(5)(A) of the Bankruptcy Code requires that the plan proponent disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor to the debtor under the plan," and requires a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(i) & (ii). Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B).

41. Pursuant to Section 6.05 of the Plan, on the Effective Date, the boards of directors and officers of the Reorganized Debtors shall consist of those individuals identified on Exhibit E to the Plan Supplement. Further, except as otherwise provided in the Plan, the members of the boards of directors of each Debtor, in their capacities as such, shall have no continuing obligation to the applicable Reorganized Debtor on or after the Effective Date. In accordance with section 1129(a)(5)(B) of the Bankruptcy Code, the compensation arrangement for any insider of the Debtors that shall be an officer of a Reorganized Debtor is set forth on Exhibit F to the Plan Supplement. The appointment to, or continuance in, office of such officers and directors is consistent with the interests of creditors and interest holders and with public policy, which is particularly underscored by the fact that such directors and officers were chosen by the Debtors' most significant creditors and the future equity holders — Mengnu. The directors and officers of the Reorganized Debtors are competent, have relevant and solid

business and industry expertise, and will give to the Reorganized Debtors their continuing insight into running the business.

42. The Plan discloses the compensation and other payments to be received by any insider (as such term is defined in section 101(31) of the Bankruptcy Code) and, accordingly, the Plan complies with the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. The Plan Does Not Contain Rate Changes Subject To The Jurisdiction Of Any Governmental Regulatory Commission — 11 U.S.C. § 1129(a)(6).

43. Section 1129(a)(6) of the Bankruptcy Code requires that any governmental regulatory commission having jurisdiction over the rates charged by the post-confirmation debtor in the operation of its business approve any rate change provided for in the plan. Because the Plan does not propose any such rate changes, the provisions of section 1129(a)(6) of the Bankruptcy Code have satisfied.

G. The Plan Is In The Best Interests Of Creditors — 11 U.S.C. § 1129(a)(7).

44. Section 1129(a)(7) of the Bankruptcy Code requires that:

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

11 U.S.C. § 1129(a)(7) (emphasis added).

45. This section is commonly known as the "best interests" test. By its terms, it applies only to those impaired classes that have not accepted a plan of reorganization. 11

U.S.C. § 1129(a)(7). Pursuant to section 1126(f) of the Bankruptcy Code, each Holder of a Claim in a Class that is not impaired is conclusively presumed to have accepted the Plan. Under the Plan, Class 1 is unimpaired under section 1124 of the Bankruptcy Code, and conclusively presumed to have accepted the Plan.

46. Impaired Classes 2 and 3 have overwhelmingly voted to accept the Plan. With respect to impaired Classes 4 and 5, the Disclosure Statement and Exhibit D thereto contain an appropriate liquidation analysis (the "Liquidation Analysis") that establishes that the best interests test is satisfied by the Plan. *See* Disclosure Statement, Exhibit D and Grien Dec. The Liquidation Analysis demonstrates that in a hypothetical chapter 7 liquidation, the following Classes of Claims and Interests would have a zero percent (0%) recovery on their Claims: Existing Preferred Stock Interests and Existing Common Stock Interests. In contrast, the holders of Administrative Claims, Priority Tax Claims and Priority Non-Tax Claims will receive 100% distribution under the Plan, the Holders of the General Unsecured Claims will receive an estimated 22.7% recovery under the Plan, and the Holders of the Mengnu Unsecured Claim will receive an estimated 87.7% recovery, based primarily upon the common stock that Mengnu will receive. The holders of Existing Preferred Stock Interests and Existing Common Stock Interests are not faring any worse by not receiving any distribution under the Plan than they would have in a liquidation. *See* Disclosure Statement, Exhibit D and Grien Dec.

47. Thus, the Plan satisfies the best interests test as to each impaired Class of Claims and Interests that have not accepted the Plan because, as the Liquidation Analysis demonstrates, the recovery under the Plan for each such Class of Claims and Interests is equal to or exceeds the estimated recovery that would be available to such Class of Claims and Interests in a chapter 7 liquidation. *See* Disclosure Statement, Exhibit D and Grien Dec.

H. The Plan Satisfies Section 1129(a)(8) With Respect To All Classes Except Classes 5 and 6.

48. Pursuant to section 1129(a)(8) of the Bankruptcy Code, each class of claims and interests under a plan must either (a) have accepted the plan, or (b) be rendered unimpaired under the plan. 11 U.S.C. § 1129(a)(8). Whether a class of claims is impaired under a plan is determined by section 1124 of the Bankruptcy Code.

49. Under the Plan, Class 1 is not impaired under the Plan and all Holders of Claims in such Class are conclusively presumed to have accepted the Plan. *See* 11 U.S.C. §§ 1124 and 1126(f); *Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply, Inc.)*, 850 F.2d 1338, 1340 n.3 (9th Cir. 1988). Moreover, Classes 2 and 3 have voted to accept the Plan by the majority required by the Bankruptcy Code for each such Class. Notwithstanding the fact that Classes 4 and 5 are deemed to reject the Plan, the Plan may be confirmed pursuant to section 1129(b) of the Bankruptcy Code as set forth in Section II *infra*.

I. The Plan Provides For Payment In Full Of All Allowed Priority Claims — 11 U.S.C. § 1129(a)(9).

50. Section 1129(a)(9) of the Bankruptcy Code requires that, except to the extent that the holder of a particular claim agrees to a different treatment of such claim, the plan provide that:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive . . . cash equal to the allowed amount of such claim;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of [the Bankruptcy Code], each holder . . . will receive -- (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if

> such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;
>
> (C) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive . . . regular installment payments in cash -- (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief . . . and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan . . . .

See 11 U.S.C. § 1129(a)(9).

51. Section 4.02 of the Plan provides that, unless the Holder of an Allowed Administrative Claim agrees to less favorable treatment, on, or as soon thereafter as is reasonably practicable, the later of (i) the Effective Date, and (ii) the first Business Day after the date that is thirty (30) calendar days after the date an Administrative Claim becomes an Allowed Administrative Claim, will receive Cash in an amount equal to such Allowed Claim.

52. Section 4.02 of the Plan provides that, except to the extent that a Holder of an Allowed Priority Tax Claim agrees to less favorable treatment, each Holder of an Allowed Priority Tax Claim shall receive, in full and complete satisfaction, settlement, and release of, and in exchange for such Allowed Priority Tax Claim, at the sole option of the Reorganized Debtors, (a) on, or as soon thereafter as is reasonably practicable, the later of the Effective Date and the first Business Day after the date that is thirty (30) calendar days after the date a Priority Tax Claim becomes an Allowed Claim, Cash in an amount equal to such Allowed Priority Tax Claim, or (b) deferred Cash payments following the Effective Date, over a period ending not later than five (5) years after the Petition Date, in an aggregate amount equal to the Allowed amount of such Priority Tax Claim (with any interest to which the holder of such Priority Tax Claim may be entitled to be calculated in accordance with section 511 of the Bankruptcy Code).

53. Section 4.02 of the Plan provides that on the Effective Date, the Mengnu DIP Claims will be indefeasibly paid and satisfied, in full, in Cash or other consideration, by the Debtors or the Reorganized Debtors.

54. Section 4.02 of the Plan provides that on the Effective Date, in full and complete satisfaction, settlement and release of the Mengnu 503(b)(9) Claim, the Debtors shall provide Mengnu, on account of the Mengnu 503(b)(9) Claim, with the Tranche B Note

55. Therefore, the Debtors respectfully submit that the Plan satisfies section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Has Been Accepted By At Least One Impaired Class Of Claims That Is Entitled To Vote — 11 U.S.C. § 1129(a)(10).

56. Section 1129(a)(10) of the Bankruptcy Code requires that, if a class of claims is impaired under a plan, at least one class of impaired claims must have voted to accept the plan, as determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10).

57. As set forth in the Voting Certification, each Class that was entitled to vote (i.e., Classes 2 and 3) voted to accept the Plan without including any acceptance by any insider. Accordingly, the requirements of section 1129(a)(10) of the Bankruptcy Code are satisfied. No party in interest has objected to the Plan on the basis that the Plan has not been accepted by at least one Impaired Class of Claims entitled to vote on the Plan.

K. The Plan Is Feasible — 11 U.S.C. § 1129(a)(11).

58. Section 1129(a)(11) of the Bankruptcy Code requires the Court to determine that:

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

11 U.S.C. § 1129(a)(11). This requirement, commonly known as the "feasibility" standard, requires that "the Plan is workable and has a reasonable likelihood of success." *Drexel Burnham Lambert II*, 138 B.R. at 762. "It is not necessary that success be guaranteed, but only that the plan present a workable scheme of organization and operation from which there may be a reasonable expectation of success." *Id*. (quoting 5 COLLIER ON BANKRUPTCY ¶ 1129.02[11], at 1129-54 (15th Ed. 1991)); *see also In re Cellular Info. Sys. Inc*., 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994) ("the plan proponent need only demonstrate that there exists the reasonable probability that the provisions of the Plan can be performed.") (internal citation omitted).

59. For the purposes of determining whether the Plan is feasible, the Debtors have, among other things, projected the future financial performance (the "Financial Projections") of the Reorganized Debtors. *See* Disclosure Statement, Exhibit B. As set forth in the Abada Declaration, based upon the assumptions underlying the Financial Projections and further analysis conducted by the Debtors with the assistance of their financial advisors, the Debtors believe that they will have sufficient cash and availability under their exit financing to meet their obligations under the Plan and that they will be able to emerge from bankruptcy protection as viable economic entities. *See* Disclosure Statement, Exhibit B and Abada Dec. Therefore, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Provides For Full Payment Of All Statutory Fees As Required By 11 U.S.C. § 1129(a)(12).

60. Section 1129(a)(12) of the Bankruptcy Code requires that fees payable under 28 U.S.C. § 1930, as determined by the court at a hearing on confirmation of a plan, have been paid or are provided under the plan to be paid on its effective date. Section 15.13 of the Plan provides that, on the Effective Date, and thereafter as required, the Reorganized Debtors

shall pay all fees payable pursuant to section 1930 of chapter 123 of title 28 of the United States Code. Thus, the Plan complies with the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. The Plan Provides For The Continuance Of Retiree Benefit Obligations As Required By 11 U.S.C. § 1129(a)(13).

61. Section 1129(a)(13) of the Bankruptcy Code requires a Plan to provide for the continuation of retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. The Debtors do not have retiree benefits to pay (within the meaning of section 1114 of the Bankruptcy Code). Accordingly, the Plan meets the requirements of section 1129(a)(13) of the Bankruptcy Code.

II. THE PLAN MEETS THE REQUIREMENTS FOR CRAMDOWN UNDER SECTION 1129 OF THE BANKRUPTCY CODE.

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

> Notwithstanding section 510(a) of [the Bankruptcy Code], if all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph *if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan*.

11 U.S.C. § 1129(b)(1) (emphasis added).

63. Section 1129(a)(8) of the Bankruptcy Code requires that each Class of Claims or Interests either (a) has accepted the Plan, or (b) is not impaired under the Plan. As set forth above, Classes 4 and 5 are impaired and are deemed to reject the Plan pursuant to section

1126(g) of the Bankruptcy Code. Accordingly, the Debtors request that the Court invoke the "cramdown" provisions of section 1129(b) of the Bankruptcy Code with respect to such Classes.

64. Under section 1129(b), a bankruptcy court may cramdown a plan over the dissenting vote of an impaired class or classes of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting class. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of reorganization, the court shall nonetheless confirm the plan if it 'does not discriminate unfairly and is fair and equitable'"); *see also In re Cajun Elec. Power Coop., Inc.*, 150 F.3d 503, 519 (5th Cir. 1998); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993).

A. The Plan Does Not Discriminate Unfairly With Respect To Classes 4 and 5.

65. Section 1129(b) of the Bankruptcy Code does not prohibit all discrimination between a dissenting class and other classes under a plan. To the contrary, the very premise of any chapter 11 plan with multiple impaired classes is to differentiate among such classes. Thus, the Bankruptcy Code permits discrimination in classification, but does not permit "unfair" discrimination with respect to a dissenting impaired class.

66. Consistent with the foregoing, applicable case law provides that the prohibition against unfair discrimination bars less favorable treatment of a dissenting class than that accorded to another class of similarly situated claims or interests. *See Johns-Manville Corp.*, 68 B.R. at 636 (the 'unfair discrimination' standard "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes"); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 151-52 (Bankr. S.D.N.Y. 1984) ("In a nutshell, if the plan protects the legal rights of a dissenting class in a manner consistent with the treatment of

other classes whose legal rights are intertwined with those of the dissenting class, then the plan does not discriminate unfairly with respect to the dissenting class."); *In re Jartran, Inc.*, 44 B.R. 331, 381-84 (Bankr. N.D. Ill. 1984) (holding that there is no unfair discrimination solely because separate classes contain different types of claims).

67. With respect to the Holders of Allowed Interests in Class Classes 4 and 5, there are no other Classes of Claims or Interests under the Plan that are similarly situated to Classes 4 and 5. Accordingly, there is no unfair discrimination.

B. The Plan Is Fair And Equitable With Respect To Classes 4 and 5.

68. For the Plan to be "fair and equitable" with respect to Classes 4 and 5, no Holder of a Claim or Interest junior to the Holders of Claims or Interests in such Classes may receive or retain any property under the Plan on account of such junior Claim or Interest, as the case may be. *See* 11 U.S.C. §§ 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii).[9] In addition, no Class of Claims or Interests senior to Classes 4 and 5 may receive more than the full value of its Claims or Interests under the Plan. *See* H.R. Rep. No. 95-595 at 414 (requirement for any cramdown is that "[n]o class may be paid more than in full").

69. Here, no Holder of a Claim or Interest junior in status to Class 3 claimants is entitled to, or will receive, any recovery under the Plan on account of their Claims and Interests because there is not sufficient value to provide for payment in full of the Allowed General Unsecured Claims, let alone Allowed Existing Preferred Stock Interests (Class 4) and

[9] The "fair and equitable" requirement may also be met: (a) with respect to a dissenting impaired class of unsecured claims if the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim, 11 U.S.C. § 1129(b)(2)(B)(i); and (b) with respect to a dissenting impaired class of interests, if the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, and fixed redemption price to which such holder is entitled, or the value of such interest. 11 U.S.C. § 1129(b)(2)(C)(i). However, such subsections need not be invoked in this instance because the Plan meets other applicable requirements of the "fair and equitable" standard.

Allowed Existing Common Stock Interests (Class 5). Therefore, because no senior Classes are being paid more than 100% on account of their Claims, and no Classes junior to Classes 4 and 5 are receiving a distribution on account of their Claims and Interests in such Classes, the Plan should be confirmed as to Classes 4 and 5, pursuant to section 1129(b) of the Bankruptcy Code.

III. THE PLAN PROVIDES FOR LIMITED SUBSTANTIVE CONSOLIDATION OF THE DEBTORS FOR PURPOSES OF VOTING, CONFIRMATION AND DISTRIBUTION ONLY.

70. The Plan provides for the limited substantive consolidation of the Debtors' Estates, but solely for purposes of voting, confirmation, and making distributions to the Holders of Allowed Claims under the Plan. As set forth in section 2.01 of the Plan, such substantive consolidation shall not affect (a) the legal and corporate structure of the Reorganized Debtors, or (b) any obligations under any leases or contracts assumed in the Plan or otherwise after the Petition Date. This relief has been granted in similar cases. See, e.g., *In re Journal Register Company*, No. 09-10769 (ALG) (Bankr. S.D.N.Y. July 7, 2009) (docket no. 532).

71. It is the intention of the Debtors that each Debtor entity will emerge from the bankruptcy process in form and function identical to that of the pre-bankruptcy entity. The overall corporate structure of the Debtors will not be affected by these Chapter 11 Cases. With respect to the Ashley Trademark Usage Agreements (the "TUAs"), Hartsdale Convertibles, Inc. ("Hartsdale") as licensee will be the entity assuming the TUAs, and Jennifer Convertibles, Inc., as the parent company, will continue to act as the guarantor, as it has from the inception of each TUA. There is no language in the TUAs providing that that a change of ownership or control is deemed to be an assignment or is in any way prohibited.

72. Moreover, the Terms of the Tranche A, B, C, D, and E Notes and related security agreements have been modified to reflect that (i) Hartsdale will no longer be an obligor or a grantor under the Tranche A Note, Tranche B Note, Tranche C Note, or Tranche D Note and

(ii) that Hartsdale, with the exception of certain inventory acquired from Ashley HomeStores, Ltd., will no longer be an obligor or grantor under the Tranche E Note and related security agreement.

73. Thus, the Debtors' Plan is clear that consolidation of the Debtors' Estates will occur only for plan distribution purposes, and will not effectuate a post-Effective Date substantive consolidation of the Debtors' estates and operations.

IV. THE POST-EFFECTIVE DATE PROTECTIONS AFFORDED TO THE DEBTORS AND CERTAIN THIRD PARTIES THAT MADE CONTRIBUTIONS TO THE CONFIRMATION PROCESS ARE APPROPRIATE AND CONSISTENT WITH ESTABLISHED PRECEDENT.

74. The Plan Releases[10] should be approved because (a) the Debtors and the affected creditors, as applicable, consented to the Plan Releases, (b) they are an integral part of the consideration to be received by certain parties in connection with the compromises and resolutions embodied in the Plan, (c) the Debtors have received substantial consideration in exchange for such releases, and (d) numerous Released Parties[11] share an identity of interest with the Debtors. *See Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005). More specifically, in *Metromedia*, the court recognized that non-debtor releases are appropriate when: (a) the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; (b) the enjoined claims were channeled to a settlement fund rather than extinguished; (c) the plan otherwise provided for the full payment of the enjoined claims; or (d) the estate received substantial consideration. *Id*. at 142. The Plan Releases satisfy the *Metromedia* standard.

[10] "Plan Releases" refers collectively to the release provisions set forth in Article XII of the Plan.
[11] The "Released Parties" are defined in Section 1.01(94) of the Plan.

A. The Plan Releases Are Integral To The Plan.

75. The Second Circuit has held that a court may "enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F. 2d 285, 293 (2d Cir. 1992) (recognizing that where a debtor's plan requires the settlement of numerous, complex issues, protection of third parties against legal exposure may be a key component of such settlement). *See also Clain v. Int'l Steel Group*, 2005 U.S. App. LEXIS 26368, at *5 (2d Cir. Dec. 1, 2005) (finding enforceable a nondebtor release that enjoined equity security interests from pursuing claims against purchaser of the majority of debtor's assets; the nondebtor release played an important role in consummating the debtor's chapter 11 liquidation and the bankruptcy court had held the sale was "a prerequisite to the Debtor's ability to confirm and consummate a chapter 11 plan."); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988) (affirming bankruptcy court's injunction of future asbestos-related lawsuits against non-debtor insurers finding that "the insurance settlement/injunction arrangement was essential . . . to a workable reorganization."); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497 (S.D.N.Y. 2005) (declining to remove exculpation clause relieving certain third parties of liability for any act taken in connection with and subsequent to commencement of chapter 11 cases because, among other things, such provision was negotiated by all parties and was found by bankruptcy court to have been necessary for negotiation of the plan and appropriate under the circumstances).

76. Many of the Released Parties and the Debtor-Released Parties[12] have expended considerable time, energy and expense in the process of negotiating the complex issues underlying these cases — a commitment that resulted in a largely consensual Plan. An important

[12] The "Debtor-Released Parties" are defined in section 1.01(34) of the Plan.

component of the settlements embodied in the Plan is Mengnu's protection from liability in connection with their pre- and postpetition involvement in these cases. Mengnu bargained for this protection prior to the Petition Date (indeed, at the inception of negotiation regarding the terms of the plan of reorganization that the Debtors filed on the Petition Date) and without such protection, the Plan would never have garnered such the support of Mengnu, making it impossible for the Debtors' near-term emergence from chapter 11.

B. The Released Parties and the Debtor-Released Parties Have Made Valuable Contributions To The Plan.

77. The Released Parties and the Debtor-Released Parties have made valuable monetary and non-monetary contributions to the Plan and the Plan process, a fact that underscores the propriety of the Plan Releases. *See Metromedia*, 416 F.3d at 142. Absent the tireless efforts of the various constituencies and the Debtors' management, who came together to negotiate the terms of a Plan that is now supported by the Creditors' Committee and approximately 90.91% in amount of the Class 3 General Unsecured Claims, the Debtors and their creditors would likely remain mired in complex and contentious litigation for a significant period of time, threatening to materially delay and potentially derail altogether the Debtors' reorganization.

C. The Debtors and the Affected Creditors Consented to the Plan Releases.

78. In addition, non-debtor releases may be permitted if the affected creditors consent. *See In re Specialty Equip. Co*., 3 F.3d 1043, 1047 (7th Cir. 1993) ("[C]ourts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code . . . a consensual release . . . binds only those creditors voting in favor of the plan of reorganization."). *See also Metromedia*, 416 F.3d at 142 (finding that nondebtor releases may be tolerated if the affected creditors consent); *In re Adelphia Commc'ns Corp*., 368 B.R.

140, 268 (S.D.N.Y. 2007) (finding that consent can be established by a vote in favor of a plan if the proposed release is appropriately disclosed); *In re Keck, Mahin & Cate*, 241 B.R. 583, 592 (Bankr. N.D.Ill. 1999) ("[I]n accordance with *Specialty Equipment*, creditors who affirmatively accept a plan are bound by its releases and injunctions.").

79. The Debtors' release of the Debtor-Released Parties, which is set forth in Section 12.08 of the Plan, is strictly consensual and therefore appropriate under the guidance of applicable case law. First, those who voted to reject the Plan are deemed not to have granted the Plan Releases. In addition, parties who voted to accept the Plan, but who did not wish to grant the Plan Releases, were given the option to opt out of the Plan Releases by checking a box on their ballot. Under the Plan, no parties are deemed to have released any claims against nondebtors pursuant to the Plan Releases without having had an opportunity to choose not to do so.

80. Among the Releasing Parties are members of the Creditors' Committee and Mengnu. This Court has accepted a similar arrangement for third-party releases. *See In re Oneida Ltd.*, 351 B.R. 79 (Bankr. S.D.N.Y. 2006) (finding consent where the plan provided for releases by creditors who affirmatively indicated their willingness to grant such releases by "checking a box" on their plan solicitation ballots). Under the plan in *Specialty Equipment*, all creditors voting in favor of it were deemed to accept the third-party releases. Creditors who abstained or voted against the plan, on the other hand, were deemed not to have granted the releases. *See Specialty Equipment*, 3 F.3d at 1045. Here, those who have voted to reject the Plan are deemed not to have granted the Plan Releases. Therefore, the Plan Releases are consensual and should be approved by this Court.

D. The Plan's Exculpation Provisions Are Appropriate.

81. Courts have held that provisions like the exculpation provision set forth in Section 12.09 of the Plan (the "Exculpation Provision") are appropriate when confined to postpetition activity. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 245-47 (3d Cir. 2000) (holding that release of, among others, creditors' committee was appropriate where it was limited to postpetition activity and excluded willful misconduct and gross negligence); *Western Mining & Inv., LLC v. Bankers Trust Co.*, 2003 WL 503403, at * 4 (D. Del. Feb. 19, 2003) (noting there is nothing inherently suspect about a plan provision releasing, among others, the DIP lenders, bank lenders, and the committee, from any liability for past, present, and future actions taken or omitted to be taken in connection with the sale and liquidation of the debtors' assets, other than because of gross negligence or willful misconduct); *In re Granite Broad. Corp.*, 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation clause that excludes gross negligence and intentional misconduct); *Oneida*, 351 B.R. at 94, n. 22; *see also Enron Corp.*, 326 B.R. at 504 (upholding exculpation provisions of plan that were "reasonable and customary, and in the best interests of the estates").

82. It is generally accepted that without protection from liability relating to postpetition activity in connection with the prosecution of a chapter 11 case, at least from direct claims that may be held by a debtor or from standard exculpatory safe harbors, key personnel might be unwilling or abandon efforts to restructure a debtor's affairs. The need to retain key personnel to support reorganization efforts has served as at least a partial basis for the approval of releases in similar cases. *See Enron Corp.*, 326 B.R. at 503 (noting that exculpation was appropriate because "parties participated in the creation of the Plan under the guarantee that they would receive some limited protection for participating in one of the largest and most complex bankruptcy filings"). Indeed, although inapplicable here, even a debtor's release of claims that

are "questionable" in value is permissible. *See Texaco Inc.*, 84 B.R. at 900. In these cases, the Debtors are not aware of any meritorious Claims that will be waived or released pursuant to the Plan Releases or the Exculpation Provision.

83. Section 12.09 of the Plan exculpates and limits, generally, the liability of, among others, the Debtors, the Reorganized Debtors, the Creditors' Committee and its members, Mengnu, the Disbursing Agent and any of their respective directors, officers, employees, members, attorneys, consultants, advisors, and agents (each in its capacity as such) for acts and omissions in connection with the Debtors' restructuring, the negotiation and execution of the Plan, the Chapter 11 Cases, the Disclosure Statement, the solicitation of votes for and the pursuit of the Plan, the consummation or the administration of the Plan, or the property to be distributed under the Plan. Section 12.09 of the Plan expressly excludes from the scope of the Exculpation Provision acts that constitute fraud, gross negligence, or willful misconduct as determined by a Final Order of the Bankruptcy Court. Furthermore, the Exculpation Provision will not provide releases that will contravene Rule 1.8(h)(1) of the New York Rules of Professional Conduct or similar applicable ethical rule.

84. As the Plan Releases and the Exculpation Provision serve an important purpose, are narrowly tailored, and are based on the unique circumstances of these cases, such provisions should be approved.

CONCLUSION

The Plan complies with all applicable provisions of the Bankruptcy Code, including those provisions of section 1129(a) and 1129(b). Moreover, the post-Effective Date provisions of the Plan, including, without limitation, the Plan Releases and Exculpation Provision are consistent with applicable law and essential to the Debtors' successful emergence from chapter 11. For all of the foregoing reasons, the Plan should be confirmed.

Dated: January 24, 2011
New York, New York

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