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

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| In re: | § | Chapter 11 |
| | § | |
| ROCKIES REGION 2006 LIMITED | § | |
| PARTNERSHIP and ROCKIES REGION | § | Case No. 18-33513-sgj-11 |
| 2007 LIMITED PARTNERSHIP, | § | |
| | § | |
| Debtors. | § | Jointly Administered |

**MEMORANDUM OF LAW (I) IN SUPPORT OF CONFIRMATION OF THE DEBTORS' AMENDED JOINT CHAPTER 11 PLAN AND (II) IN RESPONSE TO OBJECTION THERETO**

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Other Authorities**

Rockies Region 2006 Limited Partnership and Rockies Region 2007 Limited Partnership, the above-captioned debtors and debtors in possession (the "Debtors"), submit this Memorandum of Law (i) in support of confirmation of the *Amended Joint Chapter 11 Plan* [Docket No. 226, with the final solicitation version appearing at Docket No. 251 and a technical correction to same appearing at Docket No. 252] (as modified, amended or supplemented from time to time, the "Plan")[1] and (ii) in response to the objection filed to same, and respectfully represent as follows:

## PRELIMINARY STATEMENT

1. The Plan, which has been accepted by each Class of voting creditors, should be confirmed. The Plan and the transactions contemplated therein represent the product of extensive negotiations between the Debtors and their two major stakeholders, (i) PDC Energy, Inc. ("PDC") and (ii) the LP Plaintiffs.[2]

2. The Plan contemplates the sale of all assets of the Debtors and the subsequent liquidation of the Debtors by distributing all cash held or to be received by the Debtors to each Debtor's Equity Interest holders. The Plan also provides for a global settlement and compromise among the Debtors, PDC and the LP Plaintiffs resolving all issues among them in these Chapter 11 Cases and the Colorado Action (the "Global Settlement"). Pursuant to the Global Settlement, PDC will pay the Debtors the aggregate amount of $11,130,000 for a general release of any causes of action held by the Debtors or their Equity Interest holders.[3] In addition, on the

[1] Unless otherwise noted, capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan.

[2] The LP Plaintiffs are Robert R. Dufresne, as Trustee of the Dufresne Family Trust; Michael A. Gaffey, as Trustee of the Michael A. Gaffey and JoAnne M. Gaffey Living Trust dated March 2000; Ronald Glickman, as Trustee of the Glickman Family Trust established August 29, 1994; Jeffrey R. Schulein, as Trustee of the Schulein Family Trust established March 29, 1989; and William J. McDonald, as Trustee of the William J. McDonald and Judith A. McDonald Living Trust dated April 16, 1991.

[3] Equity Interest holders were provided the opportunity to opt-out of this release on the Ballot, although no Equity Interest holders that voted on the Plan elected to opt-out.

Effective Date of the Plan, PDC will place $3,000,000 in an Administrative Reserve to pay Allowed Administrative Expense Claims. These transactions – which will net over $14 million, inclusive of costs of administration which will not have to be borne by Equity Interest holders – are necessary and appropriate to allow the Debtors to efficiently and expeditiously exit chapter 11 while making distributions on a fair and equitable basis in accordance with the priorities established by the Bankruptcy Code.

3. The Plan enjoys full support from the Debtors' primary constituencies and has been accepted overwhelmingly by voting Equity Interest holders. All Classes entitled to vote under the Plan voted to accept the Plan. The overwhelming support for the Plan demonstrates its fairness and the good faith efforts that culminated in its filing. As described herein, the Plan satisfies each of the confirmation requirements under section 1129 of the Bankruptcy Code and achieves the objectives of chapter 11.

4. The Debtors received one formal objection to the Plan [Docket No. 261] (the "Objection"), which was filed by the Securities and Exchange Commission (the "SEC"). For the reasons discussed below, the Objection should be overruled and the Plan confirmed so that the Debtors can promptly consummate the transactions contemplated by the Plan.

5. A proposed order confirming the Plan has been filed contemporaneously herewith (the "Proposed Confirmation Order").

## BACKGROUND

6. The *Disclosure Statement for Amended Joint Chapter 11 Plan* [Docket No. 227, with the final solicitation version appearing at Docket No. 251 and a technical correction to same appearing at Docket No. 252] (the "Disclosure Statement") sets forth at length the Debtors'

history, the circumstances surrounding the filing of these chapter 11 cases, and events that have transpired while these chapter 11 cases have been pending.

**THE PLAN**

7. The Plan (and the transactions contemplated therein) represents the product of many hours of litigation, planning, negotiation, mediation and drafting among the three major constituencies in these cases (*i.e.*, the Debtors, PDC and the LP Plaintiffs), and contains and effectuates the global resolution that has been reached. The Plan represents what the Debtors believe is the most value-maximizing plan for the Debtors' Equity Interest holders, affording them the greatest recovery with the lowest risk under the circumstances. As such, and for the reasons set forth herein, and in all of the prior pleadings and proceedings in these Chapter 11 Cases (of which the Debtors request the Court take judicial notice), as well as the evidence to be presented at the Confirmation Hearing, the Debtors respectfully submit that the Plan complies with the relevant provisions of the Bankruptcy Code and should be confirmed.

8. The Plan contemplates the sale of all assets of the Debtors and the subsequent liquidation of the Debtors by distributing all cash held or to be received by the Debtors to each Debtor's Equity Interest holders. The Plan also effectuates the Global Settlement, whereby PDC will pay the Debtors the aggregate amount of $11,130,000 for a general release of any causes of action of the limited partners; *provided, however*, any limited partner may refuse to give PDC a release and thereby forego its share of this $11,130,000 payment. The $11,130,000 payment is comprised of a $5,191,220 payment to RR 2006 and a $5,911,780 payment to RR 2007.

9. In addition, on the Effective Date of the Plan, PDC will place $3,000,000 in an Administrative Reserve to pay Allowed Administrative Expense Claims. Any remaining funds in the Administrative Reserve shall be used to pay the LP Plaintiffs' Fee Award, and once the funds in the Administrative Reserve have been exhausted, the balance of the LP Plaintiffs' Fee

Award shall be paid from the $11,130,000 general release payment. A distribution of all remaining cash on hand will be made to the holders of Allowed Equity Interests.

**SOLICITATION PROCESS AND VOTING RESULTS**

10. On August 30, 2019, and as more fully described in the Solicitation Motion,[4] the Debtors caused their tabulation agent, BMC Group, Inc. (the "Tabulation Agent") to distribute solicitation packages (the "Solicitation Packages") each containing a copy of the Plan and the Disclosure Statement (with all exhibits and attachments to each), the Disclosure Statement Order,[5] the Confirmation Hearing Notice, and a Ballot with voting instructions,[6] and a return envelope for such Ballot to all holders of Equity Interests entitled to vote on the Plan as of the record date of August 26, 2019.[7] The holders of Equity Interests entitled to vote on the Plan include Class 4A (Rockies Region 2006) and Class 4B (Rockies Region 2007) (collectively, the "Voting Parties"), in accordance with sections 1125 and 1126 of the Bankruptcy Code. The Tabulation Agent transmitted the Solicitation Packages to the Voting Parties via U.S. First-Class Mail, postage pre-paid.

11. The Solicitation Motion and the Disclosure Statement Order established, among other things, (a) August 30, 2019 as the date by which the Debtors were required to serve the Confirmation Hearing Notice, (b) September 27, 2019 as the deadline by which all ballots accepting or rejecting the Plan must be received by the Tabulation Agent, and (c) September 17,

[4] *See Amended Motion for Order (I) Approving Disclosure Statement, (II) Approving Form of Ballots and Solicitation Procedures, (III) Scheduling Certain Dates in Connection with Confirmation, and (IV) Granting Related Relief* [Docket No. 233] (the "Solicitation Motion").

[5] *See Order Approving Disclosure Statement, the Form of Ballots and Solicitation Procedures, Scheduling Certain Dates in Connection with Confirmation, and Granting Related Relief* [Docket No. 246] (the "Disclosure Statement Order").

[6] The form of the Ballot was attached as Exhibit C to the Solicitation Motion and was approved by the Court in its Disclosure Statement Order.

[7] *See Certificate of Service*, Docket No. 253.

2019 as the date by which all Rule 3018 Motions were required to be filed and served on the Debtors, PDC and the LP Plaintiffs.

12. The Voting Parties to whom the Solicitation Packages were transmitted were directed in the Disclosure Statement and Ballot to follow the instructions contained in the Ballot regarding how to complete and submit their Ballot to cast a vote to accept or reject the Plan. The Disclosure Statement and the Ballot expressly provided that such Voting Party needed to submit its Ballot so that it would be received by the Tabulation Agent on or before September 27, 2019 at 5:00 p.m. (prevailing Central Time). Holders of Claims and Equity Interests were not provided ballots if such holders were unimpaired — and thus, conclusively presumed to accept the Plan under section 1126(f) of the Bankruptcy Code.

13. A creditor or alleged creditor was not provided a Solicitation Package if (a) its claim was either (i) not scheduled or allowed pursuant to the Plan or (ii) scheduled as disputed, contingent, or unliquidated and the bar date applicable to such creditor for filing a proof of claim had passed without such creditor timely filing a proof of claim; (b) such creditor filed a proof of claim that was subsequently disallowed and all appeals had been exhausted; (c) such creditor alleged it was the transferee of a Claim but had not filed a notice of transfer of Claim, to the extent required by Rule 3001(e) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); or (d) such creditor filed a proof of claim after the claims bar date. Parties in interest were also informed that copies of the Plan and Disclosure Statement were available at no charge by contacting counsel to the Debtors, or on the Tabulation Agent's website: www.bmcgroup.com\rockiesregion.

14. On September 30, 2019, the Tabulation Agent filed its tabulation report following a complete review and audit of all Ballots received.[8] All Classes entitled to vote under the Plan voted to accept the Plan.

**PLAN OBJECTION**

15. The Debtors received one formal Objection [Docket No. 261], which was filed by the SEC. The SEC objects to the third-party release contained in section 11.4 of the Plan because it does not contain a carve-out for actual fraud, willful misconduct and gross negligence. The SEC also contends the Debtors have failed to establish the adequacy of the opt-out provision, which requires a showing that (i) the Global Settlement meets the legal standard for the approval of a class action settlement and (ii) the class claims asserted in the Colorado Action are derivative claims. Finally, the SEC objects to the injunction and stay provision contained in section 11.5 as effectively discharging the Debtors in contravention of section 1141(d)(3) of the Bankruptcy Code. The Debtors respond to the Objection herein and submit that the Objection should be overruled.

16. In addition, the Debtors were able to resolve informal objections by the SEC by (i) revising section 11.2 of the Plan to narrow the scope of the exculpation provision, as reflected in paragraph 21(a) of the Proposed Confirmation Order, and (ii) adding paragraph 22 to the Proposed Confirmation Order, which incorporates a carve-out for police and regulatory actions by Governmental Units.

[8] *See Declaration of Balloting Agent Regarding Solicitation and Tabulation of Votes in Connection with the Debtors' Amended Joint Chapter 11 Plan* [Docket No. 264] (the "BMC Declaration").

## ARGUMENT

17. The Debtors contend and respectfully submit that (i) parties in interest received sufficient and adequate notice of the Confirmation Hearing and (ii) the Plan meets the requirement of section 1129 of the Bankruptcy Code and should be confirmed.

## I. THE PLAN MEETS EACH OF THE REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129 OF THE BANKRUPTCY CODE AND SHOULD BE CONFIRMED

18. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[9] The Debtors submit that the Plan satisfies all applicable requirements for confirmation. Specifically, as set forth herein, the Plan complies with the requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code.

19. As shown in the BMC Declaration, holders of Equity Interests have overwhelmingly voted in favor of the Plan. Class 4A voted 98.86% in amount to accept the Plan. Class 4B voted 99.07% in amount to accept the Plan.

### A. THE PLAN COMPLIES WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE AS REQUIRED BY SECTION 1129(A)(1)

20. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [title 11]."[10] The legislative history and case law addressing section 1129(a)(1) explain that this provision embodies the requirements of sections 1122 and 1123,

[9] *See Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993); *In re Armstrong World Indus., Inc.,* 348 B.R. 111, 120 (D. Del. 2006); *In re Idearc Inc.*, 423 B.R. 138, 159 (Bankr. N.D. Tex. 2009) *aff'd sub nom., Equity Comm. v. Idearc, Inc. (In re Idearc, Inc.)*, 662 F.3d 315 (5th Cir. 2011).

[10] 11 U.S.C. § 1129(a)(1).

respectively, governing classification of claims and the contents of the plan.[11] As described below, the Plan complies with all applicable provisions of the Bankruptcy Code (as required by section 1129(a)(1)), including sections 1122 and 1123 of the Bankruptcy Code.

### *i.* ***The Plan Satisfies the Classification Requirements of Section 1122 Because the Claims and Interests of Each Class Are Substantially Similar to the Other Claims and Interests of that Class***

21. The Plan's classification of Claims and Equity Interests complies with section 1122(a) of the Bankruptcy Code, which provides that "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."[12] Substantial similarity, however, does not require that claims or interests in a particular class be identical, or that all similarly situated claims must receive the same plan treatment.[13] Indeed, courts afford a plan proponent with "significant flexibility" in classifying claims under section 1122(a), provided that there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar.[14]

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[11] *See* H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5912. *See also In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009) ("The Amended Plan complies with the applicable provisions of the Bankruptcy Code, including the requirements of §§ 1122 and 1123(a) and (b), thereby satisfying § 1129(a)(1)"); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003) ("The Plan complies with the applicable provisions of the Bankruptcy Code, including the requirements of Sections 1122 and 1123(a) and (b) of the Bankruptcy Code, thereby satisfying Section 1129(a)(1) of the Bankruptcy Code").

[12] 11 U.S.C. § 1122(a).

[13] *See In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 860 (Bankr. S.D. Tex. 2001) (recognizing that "[section] 1122 is permissive of any classification scheme that is not proscribed, and that substantially similar claims may be ***separately*** classified") (emphasis in original); *see also In re Vitro Asset Corp.*, No. 11-32600, 2013 WL 6044453, at *5 (Bankr. N.D. Tex. Nov. 14, 2013) ("[A] plan may provide for multiple classes of claims or interests so long as each claim or interest within a class is substantially similar to other claims or interests in that class").

[14] *In re Mirant Corp. (Mirant I)*, No. 03-46590, 2005 WL 6443614, at *19 (Bankr. N.D. Tex. Dec. 9, 2005); *In re Pisces Energy LLC*, No. 09-36591, 2009 WL 7227880, at *8 (Bankr. S.D. Tex. Dec. 21, 2009); *see also In re Eagle Bus Mfg., Inc.*, 134 B.R. 584, 596 (Bankr. S.D. Tex. 1991) ("A classification scheme satisfies section 1122(a) of the Bankruptcy Code when a reasonable basis exists for the choices made and all claims within a particular class are substantially similar").

22. Gerrymandering an affirmative vote on the plan is the only express prohibition on separate classification.[15] In contrast, where members of a class possess different legal rights,[16] or the debtors have a valid business reason,[17] separate classification is justified.

23. The Plan's classification scheme, as set forth in a chart contained in both the Plan and the Disclosure Statement, is reasonable and necessary to implement the Plan, and the Plan thus satisfies the requirements of section 1122(a) of the Bankruptcy Code.[18] Each class of Claims against and Equity Interests in the Debtors, as specified in the Plan, consists of Claims or Equity Interests which are substantially similar in nature.

24. The Plan classifies Claims and Equity Interests into four (4) classes per Debtor, for a total of eight (8) classes. The Plan's classification scheme adheres to the Bankruptcy Code's statutory priorities for distributions. In addition, Claims and Equity Interests within a Class have the same or similar rights against the Debtors. Furthermore, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Equity Interests into the Classes created under the Plan, and no unfair discrimination exists between or among holders of Claims and Equity Interests. For example: Claims are classified separately from Equity

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[15] *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991) ("thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan"); *see also In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("the only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan").

[16] *See e.g., In re Kaiser Aluminum Corp.,* No. 02-10429 (JFK), 2006 WL 616243, at *5 (Bankr. D. Del. Feb 6, 2006) (permitting classification scheme after consideration of creditors' legal rights); *see also Heritage Org.,* 375 B.R. at 298, n. 86 (finding that if creditors had different legal rights under equitable subordination, then separate classes would be appropriate).

[17] *See Briscoe Enters.*, 994 F.2d at 1166-67 (recognizing that "there may be good business reasons to support separate classification"); *see also In re Couture Hotel Corp.*, 536 B.R. 712, 733 (Bankr. N.D. Tex. 2015) ("The Fifth Circuit has recognized that, under § 1122, a plan proponent has broad discretion to place similar claims into different classes, provided there is a good business reason to do so other than the motivation to secure the vote of an impaired, assenting class of claims").

[18] In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Expense Claims, Fee Claims, and Priority Tax Claims are not classified.

Interests; Secured Claims are, in turn, classified separately from General Unsecured Claims (because the Debtors' obligations with respect to the former are secured by collateral). Claims are further grouped into Classes based on the relative priority of such Claims and the governing credit documents (if any) under which each Claim arises.

25. As a result, the Debtors respectfully submit that the Plan's classification scheme is reasonable and appropriate, and satisfies the requirements of section 1122(a) of the Bankruptcy Code.

*ii.* ***The Plan Satisfies the Requirements of Section 1123 of the Bankruptcy Code.***

26. Section 1123 of the Bankruptcy Code sets forth both mandatory and optional provisions that a chapter 11 plan must and may include. The Plan (a) satisfies each of the mandatory requirements of section 1123(a) of the Bankruptcy Code; (b) includes several of the optional provisions permitted under section 1123(b) of the Bankruptcy Code; and (c) includes other provisions not inconsistent with other applicable provisions of the Bankruptcy Code, consistent with section 1123(b)(6).

a) <u>The Plan Satisfies the Seven Mandatory Provisions of Section 1123(a)</u>

27. The Mandatory provisions of section 1123(a) require that a plan: (a) designate classes of claims and interests; (b) specify unimpaired classes of claims and interests; (c) specify treatment of impaired classes of claims and interests; (d) provide for equality of treatment within each class; (e) provide adequate means for the plan's implementation; (f) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and (g) contain only provisions that are consistent with

the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.[19]

28. The Plan satisfies the seven mandatory requirements of section 1123(a) as follows:

> *i.* *Designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests.*

29. Article III of the Plan designates classes of Claims and Equity Interests as required by section 1123(a)(1) and, as set forth above, each class of Claims or Equity Interests contains substantially similar Claims or Equity Interests as required by section 1122(a). Only Administrative Expense Claims, Fee Claims, Claims for U.S. Trustee Fees, and Priority Tax Claims remain unclassified under the Plan.

> *ii.* *Specify any class of claims or interests that is not impaired under the plan.*

30. Article III and section 5.1 of the Plan specify, as required by section 1123(a)(2) of the Bankruptcy Code, that holders of Claims in Classes 1A and 1B, 2A and 2B and 3A and 3B are unimpaired under the Plan and are presumed to have accepted the Plan.

> *iii.* *Specify the treatment of any class of claims or interests that is impaired under the plan.*

31. Article IV of the Plan specifies the treatment accorded to all impaired classes, *i.e.*, Classes 4A and 4B, as required by section 1123(a)(3) of the Bankruptcy Code.

[19] *See* 11 U.S.C. § 1123(a)(1)-(7).

> *iv.* *Provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.*

32. Article IV of the Plan provides, as required by section 1123(a)(4) of the Bankruptcy Code, for the same treatment for each Claim or Equity Interest in each respective Class unless the holder of a particular Claim or Equity Interest has agreed to a less favorable treatment in respect of such Claim or Equity Interest.

> *v.* *Provide adequate means for the plan's implementation.*

33. Article VI sets out the manner in which the Plan will be implemented and provides adequate means therefor. Specifically, Article VI of the Plan provides for, among other things, (a) sources of consideration for Plan distributions, (b) consummation of the Global Settlement, (c) the cancellation of all Equity Interests in the Debtors and their ultimate dissolution, (d) the cancellation of certain existing agreements, obligations, instruments, and interests, (e) the vesting of the assets of the Debtors' estates in the Post-Confirmation Debtors, and (f) the execution, delivery, filing, or recording of all contracts, instruments, releases, and other agreements or documents related to the foregoing.

34. Additionally, Article VII of the Plan governs distributions pursuant to the Plan, including, but not limited to, the record date, recipients, method of delivery, and sources of cash for distributions; the disbursing agent; means of payment; and the date of any distribution.

35. The Plan thus provides adequate means for its implementation, in accordance with section 1123(a)(5)(A)-(J) of the Bankruptcy Code.

> *vi.* *Provide for the inclusion in the charter of the debtor . . . 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.*

36. Because the Debtors are liquidating, the prohibition on the issuance of nonvoting equity securities required by section 1123(a)(6) of the Bankruptcy Code is not applicable.

> *vii. 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.*

37. The Responsible Party will continue in her capacity as such following confirmation of the Plan, until the Chapter 11 Cases are wound down and concluded. The Responsible Party's continuance in such role is consistent with the interests of holders of Claims and Equity Interests and public policy, in accordance with section 1123(a)(7) of the Bankruptcy Code.

38. In light of the foregoing, the Plan satisfies all of the requirements of section 1123(a) of the Bankruptcy Code.

b) The Plan Complies With Section 1123(b).

39. Section 1123(b) of the Bankruptcy Code is permissive, and does not set forth any mandatory provisions or requirements for chapter 11 plans.[20] Consequently, absent any requirements to which the Plan must conform, the Plan inherently complies with section 1123(b).

40. However, the Plan contains the following permissive items set forth in section 1123(b):

[20] *In re Statepark Bldg. Grp.*, No. 04-33916-HDH-11, 2005 WL 6443615, at *6 (Bankr. N.D. Tex. May 19, 2005) ("Section 1123(b) of the Bankruptcy Code suggests certain permissive plan provisions"); *In re Cole*, 189 B.R. 40, 46 (Bankr. S.D.N.Y. 1995) (recognizing that section 1123(b) is permissive); *In re Parke Imperial Canton, Ltd.*, No. 93-61004, 1994 WL 842777, at *10 (Bankr. N.D. Ohio Nov. 14, 1994) ("[s]ection 1123(b) contains permissible, not mandatory, provisions of reorganization plans"). Indeed, the provision states that "[s]ubject to [section 1123(a))], a plan *may* . . . . " 11 U.S.C. § 1123(b)) (emphasis added).

i. as permitted under section 1123(b)(1) of the Bankruptcy Code, Article III classifies and describes the treatment for Claims and Equity Interests under the Plan, and identifies which Claims and Equity Interests are impaired or unimpaired;

ii. as permitted under section 1123(b)(2), Article IX of the Plan provides for the rejection of executory contracts and unexpired leases, pursuant to section 365 of the Bankruptcy Code;

iii. as permitted under section 1123(b)(3), the Plan contains a global compromise, which includes a settlement of estate claims;

iv. as permitted by section 1123(b)(5), Article III modifies the rights of holders of Claims in various Classes; and

v. the Plan also includes other appropriate provisions not inconsistent with the other portions of the Bankruptcy Code, pursuant to section 1123(b)(6).

41. The "other appropriate provisions" included in the Plan are certain exculpation, release and injunction provisions set forth in Article XI. The Debtors believe that such provisions are appropriate in these chapter 11 cases because they are supported by the facts and circumstances of the case, are the product of extensive negotiations among the Debtors, PDC and the LP Plaintiffs, and are an integral component of the Global Settlement. The Plan releases/exculpates the parties that have participated in good-faith negotiations and helped implement the Global Settlement contemplated by the Plan.

*i. The Releases by the Debtors Are Appropriate Pursuant to 11 U.S.C. § 1123(b)(3)(A)*

42. Section 11.3 of the Plan provides for releases (collectively, the "Debtor Releases") *granted by the Debtors* of any and all claims, obligations, suits, judgments, damages, rights, remedies, causes of action and liabilities of any nature, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, matured or unmatured, contingent or non-contingent, existing or hereafter arising, in law, equity or otherwise, including any claims or causes of action under Chapter 5 of the Bankruptcy Code or other applicable law which they have or may have

against any of their respective members, managers, officers, directors, employees, general partners, limited partners who have not opted out of the release in section 11.4 of the Plan, affiliates, funds, advisors, attorneys or agents, the Responsible Party, PDC, the LP Plaintiffs, and each of their respective present or former members, managers, officers, directors, employees, partners, principals, predecessors, successors and assigns, affiliates, funds, advisors, attorneys, agents and representatives and their respective property.

43. Pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, a chapter 11 plan may include "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[21] Furthermore, in the Fifth Circuit, settlements under section 1123(b) can serve as a basis for the release, injunction, and exculpation of claims held by debtors against non-debtors where the attendant requirements for a settlement have been met. As stated succinctly in *In re Bigler*:

> *Pacific Lumber* is not explicit as to boundaries between the restriction of non-debtor releases under § 524(e) and the settlement of claims under § 1123(b)(3)(A). The Fifth Circuit's language restricting non-debtor releases is strong, and, with the exception of a provision for limited releases for committees, does not hedge on its limitation of nondebtor releases. But, as it is only directly addressing releases available under § 524, this court concludes that it cannot be interpreted to restrict the availability of settlements of claims under § 1123(b)(3)(A). To interpret the language of *Pacific Lumber* otherwise would more or less nullify § 1123(b)(3)(A), and, in this Court's view, run counter to Congress's intent to allow parties to agree to settle claims between them. The recognition that *Pacific Lumber* does not restrict the availability of settlements of claim under § 1123(b)(3)(A) thus provides an avenue for a Chapter 11 plan to provide for releases of liability for non-debtors. But, such releases

[21] *See* 11 U.S.C. § 1123(b)(3)(A); *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (holding plan release provision "constitutes an acceptable settlement under § 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan").

> must satisfy the requirements of a valid settlement of claims under the Code.[22]

44. Under this standard, a settlement releasing claims held by the Debtors constitutes an appropriate settlement where it is "fair and equitable"—that is, complying with the absolute priority rule—and "in the best interests of the estate"—*i.e.*, merited in light of: (i) the probability of success in litigation of the released claims given uncertainty in fact and law with respect to the claims; (ii) the complexity and likely duration and expense of litigating the released claims; and (iii) other factors bearing on the wisdom of such settlement such as the views of creditors and the extent to which such settlement is truly the product of arms-length bargaining.[23]

45. The Debtor Releases are fair and equitable because they are part and parcel of the Global Settlement. As explained in further detail below, the Global Settlement, including the Debtor Releases, satisfies the requirements of Bankruptcy Rule 9019.[24] All key constituencies support the Plan. Because the Debtor Releases will not work to benefit any junior class of creditors at the expense of more senior classes, the Debtor Releases satisfy the absolute priority rule,[25] and the 'fair and equitable' prong of the *Jackson Brewing* standard is satisfied.[26]

46. Moreover, the Debtor Releases are in the best interests of the Estates, as the probability of success on the merits of the litigation in the Colorado Action is questionable. The Debtors and LP Plaintiffs face a serious, substantial risk that they would recover nothing at the

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[22] 442 B.R. at 543; *see also Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.*), 584 F.3d 229 (5th Cir. 2009), *In re Ondova Ltd. Co.*, No. 09-34784-SGJ-11, 2012 WL 5879147, at *13 (Bankr. N.D. Tex. Nov. 21, 2012) ("The court determines that these are not the type of impermissible plan releases or exculpation described by the Fifth Circuit in [*Pacific Lumber*] . . . many of them to be more in the nature of compromises and settlements that may occur in a plan pursuant to Section 1123(b)(3)(A)").

[23] *See Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 355-56 (citing *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980).

[24] *See* Fed. R. Bankr. P. 9019.

[25] *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999).

[26] *See Cajun Elec. Power Coop*., 119 F.3d at 355–56 (citing *Jackson Brewing Co*., 624 F.2d at 602).

end of the litigation. The District Court in the Colorado Action has already issued an opinion (held in abeyance pending the outcome of this bankruptcy case) dismissing key claims asserted by the LP Plaintiffs on behalf of the Equity Interest holders and the Debtors. As indicated in that opinion, there is a potentially dispositive statute of limitations defense even for the claims that survived the motion to dismiss. There is no guarantee that, at the end of protracted litigation, the Debtors or Equity Interest holders would receive an amount any greater than the $11 million Settlement Payment provided under the Plan pursuant to the Global Settlement.

*ii.* *The Third Party Release Is Not Prohibited by Section 524(e) of the Bankruptcy Code*

47. Section 11.4 of the Plan provides for third-party releases (the "Third Party Release") by all Persons who are entitled, directly or indirectly, to receive a distribution under the Plan, and who have not specifically opted out of this release on the Ballot by submitting the Ballot prior to the Voting Deadline in the manner set forth in the Ballot itself (the "Releasing Parties"), of the Debtors, the Responsible Party, PDC, the LP Plaintiffs and each of their respective constituents, principals, officers, directors, employees, members, managers, partners, affiliates, agents, representatives, attorneys, professionals, advisors, affiliates, funds, successors, predecessors, and assigns (the "Released Parties"). The claims subject to the Third Party Release are claims that arise out of, relate to or are connected with (i) the subject matter, allegations, or claims in the Colorado Action, and any allegations or claims that could have been raised in the Colorado Action, (ii) the Debtors, (iii) the Chapter 11 Cases, or (iv) affecting property of the Debtors' Estates. The Debtors respectfully submit that the opt-out mechanism is permissible, and the Third Party Release is consistent with applicable law because the Releasing Parties are receiving consideration in exchange for the releases given.

48. As the Court noted numerous times at the Disclosure Statement Hearing (defined below), "facts matter" both generally and with respect to the approval of third-party releases. Moreover, despite *Pacific Lumber*, the Fifth Circuit has not precluded bankruptcy courts from approving a "consensual non-debtor release."[27] If a party votes in favor of a plan and receives consideration in exchange for a third-party release that is integral to the plan, that act is treated as consenting to the bankruptcy court's jurisdiction to approve the third-party release.[28] Here, the Plan contains consensual third-party releases – being given for consideration – which are an integral part of the Debtors' reorganization.

*1. The Third Party Release Is Supported by Adequate Consideration*

49. First, PDC is providing meaningful consideration (the $11,300,000 Settlement Payment) *specifically* in exchange for the Third Party Release.

50. Second, the Third Party Release is supported by adequate consideration because the release is not a one-way street. Rather, the Third Party Release is reciprocal in that every party approving the Third Party Release and receiving a portion of the Settlement Payment *is also receiving a release* from the Debtors and PDC.[29] The terms of the parties' global settlement is set forth in section 6.2 of the Plan. Section 6.2(k) contains the reciprocal release, and provides as follows:

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[27] *In re CJ Holding Co.*, 597 B.R. 597, 608 (Bankr. S.D. Tex. 2019); *see also In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775–76 (Bankr. N.D. Tex. 2007) ("Consensual nondebtor releases that are specific in language, integral to the plan, a condition of the settlement, and given for consideration do not violate section 524(e)"); *In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701–02 (Bankr. W.D. Tex. 2011) (holding that "the Fifth Circuit does allow permanent injunctions so long as there is consent," and "[w]ithout an objection, [the bankruptcy court] was entitled to rely on [the creditor's] silence to infer consent at the confirmation hearing").

[28] *CJ Holding Co.*, 597 B.R. at 609 (finding consideration for third-party release where plan provided release was given "in consideration for the obligations of the debtors and the liquidating trust under this plan and the cash to be delivered in connection with this plan").

[29] *See* Plan at sections 6.2(k), 11.3 and 11.4.

> Mutual Releases. The Debtors, PDC, the LP Plaintiffs, all limited partners in the Debtors who do not timely and validly opt-out of the releases, the Responsible Party, and each of their respective present and former members, managers, officers, directors, employees, partners, affiliates, funds, advisors, attorneys, auditors and agents shall release each other from any and all liability from the beginning of time through the Effective Date, arising out of, relating to, or connected with the subject matter of the Colorado Action and the Chapter 11 Cases.[30]

This mutual release provision is implemented by section 11.3 (the Debtor Releases and identical releases by PDC) and section 11.4 (the Third Party Release) of the Plan.

51. The reciprocal releases serve as mutual consideration—this is true even with respect to parties releasing claims of minimal value. The *Cobalt* case is particularly instructive on this point. In *Cobalt*, the SEC objected to the debtors' equity holders granting third-party releases on the same grounds of insufficient consideration and questioned the value of the releases the equity holders received in exchange for releasing their potential claims.[31] Despite multiple opportunities, however, the SEC did not present evidence of any bona fide claims shareholders were releasing.[32] Considering this complete absence of evidence, Judge Isgur found that a "proverbial peppercorn-for-peppercorn" mutual exchange of releases of unknown claims constituted adequate consideration to support the mutual releases: "I simply find that this is, in effect, the proverbial peppercorn-for-peppercorn and that is adequate consideration for the release, given its mutuality." In questioning the SEC's counsel on the issue of adequacy of the

[30] Plan section 6.2(k).

[31] *In re Cobalt Int'l Energy, Inc.*, No. 17-36709 (MI) (Bankr. S.D. Tex.), Apr. 4, 2018 Hr'g Tr. 209 ("And whether or not the Debtors are giving a release to equity holders, whether or not that's material consideration, I don't think that that's worth the release they're giving back"). Excerpts from the *Cobalt* confirmation hearing are attached to the *Debtors' Omnibus Reply to Objections to Disclosure Statement* [Docket No. 242] as **Exhibit "A"**.

[32] *Id.* at 244 ("The evidence before me is that the public shareholders have no claims that they can assert. I have allowed every party to introduce every piece of evidence that they wanted to in that regard. No one chose to introduce any evidence that the public shareholders had any bonafide [sic] claims").

consideration, the *Cobalt* court highlighted the precise value of a mutual release: "Let's assume that no one needs a release because of anything they've done wrong; we need the release because of stopping the fight and just all we're going to do is save both sides legal fees. Why isn't that equivalent?"[33] The answer, as the court recognized in its ruling, is that it *is* equivalent.[34]

52. The sufficiency of mutual releases as consideration has been recognized by the Texas Supreme Court, as well as the Fifth Circuit and its lower courts.[35] The ultimate effect of the Third Party Release is to "end the fight"—all parties settle their respective claims as part of the chapter 11 cases, allowing all parties to focus on one common goal with the knowledge that the recoveries obtained through the chapter 11 cases will settle all potential causes of action relating to the Debtors, the Plan or these chapter 11 cases. The Third Party Release, therefore, easily meets the standards for third-party releases in the Fifth Circuit because it is consensual, sufficiently specific, supported by consideration (in the form of the Settlement Payment and the mutual releases), and integral to the Plan. Accordingly, the Third Party Release should be approved.

*2. The Third Party Release Is Consensual*

53. A party is only bound by the Third Party Release if such party either (1) abstains from voting or (2) does not opt out of the voluntary release by checking the "opt-out" box on the Ballot. Parties who abstain from voting can nonetheless be bound by the Third Party Release

[33] *Id.* at 210.

[34] *Id.* at 244.

[35] *Texas Gas Utilities Co. v. Barrett*, 460 S.W.2d 409, 414 (Tex. 1970) ("The mutual release of the rights of the parties is regarded as a sufficient consideration for the agreement"); *Jaff v. Cal-Maine Foods, Inc.*, 774 F.2d 1314, 1317 (5th Cir. 1985) ("Each parties' promised forebearance from asserting any claim against the other constituted sufficient consideration to support the release"); *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jan. 22, 2019) (approving third-party releases over SEC objection that they were unsupported by consideration); *In re Cobalt In'l Energy, Inc.*, No. 17-36709 (MI) (Bankr. S.D. Tex. Apr. 5, 2018) (same).

because a plan constitutes a contract and binds all parties, regardless of whether a ballot was submitted and regardless of whether the party otherwise participated in the chapter 11 case.[36]

54. The opt-out ballot mechanism "is in line with what [this Court] has seen used in other cases in this jurisdiction."[37] In fact, the opt-out provision in the Plan is more akin to a class action settlement, wherein all members of a class are deemed to consent to the settlement unless they affirmatively opt out. Granted, here, no class was certified in the Colorado Action. However, bankruptcy is "collective proceeding" designed to centralize disputes, and maximize distributions to constituents.[38]

[36] *See, e.g., In re U.S. Brass Corp.*, 301 F.3d 296, 307 (5th Cir. 2002) (recognizing that after confirmation, the plan essentially functions as a contract between the debtor and the other entities affected by the plan); *U.S. v. Ramirez,* 291 B.R. 386, 392 (N.D. Tex. 2002) (stating that a "confirmed Chapter 11 plan constitute[s] a binding contract"). *See also In re Westmoreland Coal Co.*, No. 18-35672 (Bankr. S.D. Tex. Dec. 20, 2018) [Docket No. 868, Hr'g Tr. at 104:22-106:7] (rejecting argument by the SEC that parties who abstain from voting cannot be bound by a third-party release because the requisite consent to acceptance of a contract will be lacking).

[37] *See In re 4 West Holdings, Inc.*, Case No. 18-30777-hdh-11 (Bankr. N.D. Tex. June 6, 2018), Hr'g Tr. at 5; *see also In re Erickson Inc.*, No. 16-34393-hdh-11, 2017 WL 1091877, at *7 (Bankr. N.D. Tex. Mar. 22, 2017) (finding third-party releases consensual "because they were conspicuously disclosed in boldface type in the Plan, the Disclosure Statement, and on the Ballots, which provided parties in interest with sufficient notice of the releases, and holders of Claims or Interests entitled to vote on the Plan were given the option to opt-out of the Releases"); *In re CHC Group Ltd.*, No. 16-31854-bjh-11 (Bankr. N.D. Tex. Mar. 3, 2017), Confirmation Order at Docket No. 1794, ¶ UU (confirming the Debtors' plan and approving the opt-out mechanism to establish consensual releases).

[38] *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203 (9th Cir. 2005) ("Bankruptcy law accomplishes equitable distribution through a distinctive form of collective proceeding. This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors"); *In re Am. Res. Corp.*, 840 F.2d 487, 489 (7th Cir. 1988) ("The principal function of bankruptcy law is to determine and implement in a single collective proceeding the entitlements of all concerned") (citing, *inter alia*, *Butner v. United States*, 440 U.S. 48 (1979)); *In re Poage*, 92 BR 659, 662 (Bankr. N.D. Tex. 1988) ("Bankruptcy is basically a procedural forum designed to provide a collective proceeding for the sorting out of nonbankrutpcy entitlements") (quoting *In re McClain Airlines, Inc.*, 80 B.R. 175, 179 (Bankr. D. Ariz. 1987)).

55. This is consistent with the goals of, and policy considerations behind, opt-out class action settlements.[39] The public policy in favor of settlements is so strong that it even favors mandatory class actions (with no opt-outs) as opposed to opt-in classes.[40] Because the same policies pervade both kinds of proceedings, the same "opt-out" policy favored in class actions should be applicable here.

56. Moreover, one could argue that the Debtors' limited partners have more rights in this chapter 11 proceeding than they would without this case and if the Colorado Action were to continue. That is because not only do the limited partners have an opportunity to object to the Plan and an opportunity to opt out of the releases, but they also have an opportunity vote on the Plan (which, could result in the Plan not being confirmed at all). In a class action, however, class members do not "vote" on anything. They can object to the settlement, or opt out of the settlement, but that's it.

57. Thus, the third-party releases are consensual and do not implicate section 524(e) of the Bankruptcy Code.

[39] *See Reed v. Gen. Motors Corp.,* 703 F.2d 170, 172 (5th Cir. 1983) (recognizing that class litigation aids the courts by its coagulation of numerous claims and that opt-out settlements reduce the burdens placed on the judicial system because class members are bound by the settlement); *In re Painewebber Ltd. Partnerships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998) (recognizing that opt-out procedures foster the strong judicial policy of settlements, particularly in the class action context; "[o]pt-out deadlines ensure that parties to a class action can rely on the membership of a class becoming fixed by a specified date and that such members will be bound by the resulting outcome of the legal proceedings. In this manner, these procedures conclusively define, with reasonable certainty, two requisite factors for settlement: the scope of the class and the amount of the claims").

[40] *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 650 (N.D. Tex. 2010), as modified (June 14, 2010), judgment entered (June 18, 2010), enforcement denied, 7:03-CV-102-D, 2011 WL 2413318 (N.D. Tex. June 15, 2011) ("Moreover, the public interest in settlement is best served when a settlement binds all parties without allowing for individual opt outs"); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (holding that opt-out procedures under state law adequately protected class members and rejecting argument that opt-in procedure was required to satisfy due process clause of the Fourteenth Amendment).

*iii. The Exculpation Provision in the Plan is Appropriate and Complies with the Bankruptcy Code*

58. The exculpation provision in section 11.2 of the Plan (the "Exculpation") is appropriate under the circumstances of these chapter 11 cases because it provides protection to those interested parties who were essential to the Global Settlement and who exercised good faith in negotiating and implementing the Global Settlement and the Plan.[41]

59. An exculpation provision represents a legal determination that naturally flows from several different findings a bankruptcy court must reach in confirming a plan, as well as the statutory exculpation in section 1125(e) of the Bankruptcy Code. Once the court makes a good faith finding, it is appropriate to set the standard of care of the parties involved in the formulation of that chapter 11 plan.[42] Exculpation provisions, therefore, properly prevent future collateral attacks against estate fiduciaries and others that participate actively in the Debtors' bankruptcy case and have worked to maximize the Debtors' estates. Here, the Exculpation is appropriate and vital because it provides protection to those parties who served as fiduciaries or made substantial and critical contributions to the bankruptcy cases and the Global Settlement, was proposed in good faith, and is appropriately limited in scope. Accordingly, the Exculpation complies with the Bankruptcy Code and falls within the spirit of *Pacific Lumber* and its progeny.

[41] As discussed above, the Debtors agreed to modify the scope of the Exculpation to resolve an informal objection by the SEC. The revised language, appearing at paragraph 21(a) of the Proposed Confirmation Order, eliminates PDC and the LP Plaintiffs as exculpated parties. In addition, the Debtors agreed to eliminate their respective "present or former members, managers, officers, directors, employees, equity holders, partners, affiliates, and funds" as exculpated parties because other than PDC and the limited partners – all of whom are receiving and giving releases – the Debtors do not actually have any such parties that were involved in the administration of these Chapter 11 Cases or the negotiation, preparation, solicitation, or consummation of the Plan.

[42] *See In re PWS Holding Corp*., 228 F.3d 224, 246-247 (3d Cir. 2000) (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . .").

*iv.* *The Injunction Is Appropriate and Complies with the Bankruptcy Code*

60. Section 11.5 of the Plan provides that certain parties are permanently enjoined from pursuing any claim or liability or otherwise commencing or continuing any cause of action that has been released or exculpated.[43] As this injunction provision simply implements the Debtor Release, the Third Party Release and the Exculpation, to the extent the Court finds the Debtor Release, the Third Party Release and Exculpation are appropriate, the Debtors respectfully submit that the injunction provision is also appropriate. The injunction is necessary to preserve and enforce the Plan's releases and exculpations and is narrowly tailored to achieve this purpose.

c) The Plan Complies with Sections 1123(c) and (d).

61. The requirements of sections 1123(c) and (d) of the Bankruptcy Code are inapplicable to this proceeding because the Debtors are not individuals and the Plan does not propose to cure any defaults.[44]

62. For the reasons set forth above, the Plan satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code. As a result, the Plan complies with section 1129(a)(1) of the Bankruptcy Code and should be confirmed.

[43] The Debtors agreed to modify the language of section 11.5 of the Plan in an attempt to address the SEC's objection that sections 11.2, 11.4, and 11.5 constitutes an impermissible discharge of a liquidating debtor. These revisions are reflected in paragraph 21(b) of the Proposed Confirmation Order. As discussed more fully below, the Debtors submit that revised section 11.5 complies with section 1141(d)(3) of the Bankruptcy Code.

[44] *See* 11 U.S.C. §§ 1123(c), (d).

### B. THE DEBTORS HAVE COMPLIED WITH THE REMAINING PROVISIONS OF SECTION 1129(a).

#### *i. The Plan Satisfies Section 1129(a)(2) of the Bankruptcy Code*

63. Section 1129(a)(2) of the Bankruptcy Code requires compliance with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code, respectively.[45] The Debtors have complied with both of these provisions.

a) The Debtors Provided Adequate Information About the Plan to Stakeholders as Required Under Section 1125 of the Bankruptcy Code

64. Section 1125(b) of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan "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."[46] This section ensures that parties in interest have sufficient information regarding the debtor and the plan to allow them to make an informed decision whether to approve or reject the plan.[47]

65. In these cases, the Disclosure Statement was filed on July 24, 2019 and was served on the parties listed in Bankruptcy Rule 3017(a). On July 25, 2019, all of the parties in

[45] *See* H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Star Ambulance Serv., LLC*, 540 B.R. 251, 262 (Bankr. S.D. Tex. 2015) ("Courts interpret [section 1129(a)(2)] to require that the plan proponent comply with the disclosure and solicitation requirements set forth in Bankruptcy Code §§ 1125 and 1126"); *Idearc*, 423 B.R. at 163 (section 1129(a)(2) requires compliance with sections 1125 and 1126 of the Bankruptcy Code).

[46] 11 U.S.C. § 1125(b).

[47] *See Cajun Elec. Power*, 150 F.3d at 518 ("Section 1125(a)(1) defines 'adequate information' as that term is used in [§ 1125(b)] to include 'information of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.'"); *see also In re Applegate Prop., Ltd.*, 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991) ("A court's legitimate concern under Section 1125 is assuring that hypothetical reasonable investors receive such information as will enable them to evaluate for ***themselves*** what impact the information might have on their claims and on the outcome of the case") (emphasis in original).

interest were served with proper notice of the hearing on the adequacy of the Disclosure Statement, which was held on August 26, 2019 (the "Disclosure Statement Hearing").[48]

66. The Court approved the Disclosure Statement by Order dated August 27, 2019.[49] In addition, the Court considered and approved (a) all materials to be transmitted to those creditors entitled to vote on the Plan (collectively, the "Solicitation Materials"), (b) the timing and method of delivery of the Solicitation Materials, (c) the rules for tabulating votes to accept or reject the Plan, and (d) the timing and method of notice of the Confirmation Hearing.

67. As discussed above and in accordance with the Disclosure Statement Order, the solicitation version of the Disclosure Statement was served by the Tabulation Agent on August 30, 2019, along with the Plan and the Confirmation Hearing Notice, as a part of the Solicitation Packages.[50] Parties in interest had 28 days to vote on, and file objections to, confirmation of the Plan and 33 days' notice of the Confirmation Hearing. As a result, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018, and the Plan meets the requirements of section 1129(a)(2) of the Bankruptcy Code.

b) Solicitation of the Plan Complied with the Bankruptcy Code and Was in Good Faith

68. Section 1125(e) of the Bankruptcy Code provides that "[a] person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan.[51]

[48] *See* Docket Nos. 227 and 231.

[49] *See* Docket No. 246.

[50] *See* Docket No. 253.

[51] 11 U.S.C. § 1125(e).

69. Before solicitation, the Debtors, the Responsible Party, and their respective advisors, attorneys, and agents, each in their capacity as fiduciary to the Debtors, engaged in good faith and arms'-length negotiations that culminated in the Global Settlement and the Plan and took appropriate actions in connection with all of their respective activities relating to the support and consummation of the Plan – including the solicitation of acceptances of the Plan in compliance with section 1125(e) of the Bankruptcy Code. Thus, the Debtors respectfully request that the Court grant the parties the protections provided under section 1125(e) of the Bankruptcy Code.

c) The Debtors Only Solicited Parties Entitled to Vote Under Section 1126 of the Bankruptcy Code.

70. Section 1126 provides, in pertinent part, that:

> (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.[52]

71. As set forth above, the Debtors solicited acceptances of the Plan from the holders of Equity Interests in Class 4A (Rockies Region 2006) and Class 4B (Rockies Region 2007). These are the only Classes under the Plan that are entitled to vote. The Debtors did not solicit votes to accept or reject the Plan from the other Classes because they are unimpaired and thus deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code.

[52] 11 U.S.C. §§ 1126(a), (f), (g).

72. Section 1126(c) of the Bankruptcy Code governs the acceptance or rejection of a plan by voting classes of creditors:

> 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.[53]

73. Section 1126(d) similarly governs the acceptance or rejection of a plan by classes of equity interests, and provides as follows:

> A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.[54]

74. As evidenced in the BMC Declaration, holders of Allowed Claims in each of the voting classes voted in favor of the Plan.

75. Based upon the foregoing, the requirements of section 1129(a)(2) of the Bankruptcy Code have been met.

*ii.* ***The Plan has been Proposed in Good Faith and not by any Means Forbidden by Law in Satisfaction of Section 1129(a)(3)***

76. 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."[55] In other words, a plan must be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with

[53] 11 U.S.C. § 1126(c).

[54] 11 U.S.C. § 1126(d).

[55] 11 U.S.C. § 1129(a)(3).

results consistent with the objectives and purposes of the Bankruptcy Code."[56] Hard and inflexible rules should not be applied when determining good faith; instead, each case should be evaluated on its own merits.[57]

77. In these chapter 11 cases, the Debtors have made all efforts to ensure fairness of treatment among creditors and equity holders, and to effect confirmation of a chapter 11 plan consistent with the Bankruptcy Code. The Plan is the culmination of both lengthy and significant litigation and arm's-length negotiations among the Debtors, PDC and the LP Plaintiffs. The Plan was, therefore, proposed in good faith and not by any means forbidden by law, in accordance with section 1129(a)(3) of the Bankruptcy Code.

*iii.* ***The Plan Complies with Section 1129(a)(4) of the Bankruptcy Code***

78. Section 1129(a)(4) of the Bankruptcy Code requires that "[a]ny payment made or to be made by the proponent . . . 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."[58] Section 1129(a)(4) has been construed to require that all payments of professional fees that are made from estate assets be subject to

[56] *In re Coram Health Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) (citations omitted); *Statepark Bldg. Group*, 2005 WL 6443615, at *6.

[57] *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985) ("The requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code to give debtors a reasonable opportunity to make a fresh start. Where 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") (internal citations omitted).

[58] 11 U.S.C. § 1129(a)(4).

review and approval as to their reasonableness by the court.[59] The Fifth Circuit has explained that this is a "relatively open-ended standard" that involves a case-by-case inquiry.[60]

79. In accordance with section 1129(a)(4) of the Bankruptcy Code, all fees to which parties may be entitled in connection with these cases, including Fee Claims, are subject to Court approval. Retention orders have been entered by the Court for the professionals engaged by the Debtors. The retained professionals will be compensated in accordance with such orders and, as appropriate, will follow the procedures set forth in the Bankruptcy Code, the Bankruptcy Rules, and the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules") and orders of the Court with respect to filing applications for compensation and reimbursement of expenses.[61] Any other fees to be incurred in connection with confirmation will be disclosed at or prior to the Confirmation Hearing and a showing of reasonableness will be made. Additionally, Article XII of the Plan provides that the Court will retain jurisdiction after the Effective Date to hear and determine all requests for payment of Fee Claims.

80. The Plan therefore complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

### *iv.* ***The Debtors Have Complied with Section 1129(a)(5) of the Bankruptcy Code***

81. Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized

[59] *See Cajun Elec. Power*, 150 F.3d at 518 ("Section 1129(a)(4) by its terms requires court approval of '*[a]ny payment* made or to be made by the proponent . . . for services or for costs and expenses in or *in connection with the case*'") (emphasis in the original) (internal citations omitted); *see also In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan can be confirmed, "there must be a provision for review by the Court of any professional compensation").

[60] *See Cajun Elec. Power*, 150 F.3d at 517.

[61] Plan § 2.2 (fee applications due within 14 days of the Effective Date).

debtors; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and, to the extent there are any insiders that will be retained or employed by the debtors, that there be disclosure of the identity and nature of any compensation of any such insiders.[62] Courts have interpreted this section to ensure that the post-confirmation governance of the post-confirmation debtors is in "good hands," meaning that the officer has experience in the reorganized debtors' business and industry,[63] experience in financial and management matters,[64] that the debtors and creditors believe control of the entity by the proposed individuals will be beneficial,[65] and that the appointment does not "perpetuate[] incompetence, lack of discretion, inexperience or affiliations with groups inimical to the best interests of the debtor."[66]

82. The Debtors have complied with section 1129(a)(5) of the Bankruptcy Code. It has been disclosed in the Plan and in the Disclosure Statement that the Responsible Party will continue in that capacity after confirmation of the Plan, and the continuance in such office by the Responsible Party is consistent with the interests of holders of Claims against and Equity Interests in the Debtors and with public policy. No other insiders will be employed or retained by the Post-Confirmation Debtors. The Court should find the Debtors and the Plan both comply with section 1129(a)(5) of the Bankruptcy Code.

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[62] *See* 11 U.S.C. § 1129(a)(5).

[63] *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992); *see In re Rusty Jones, Inc.*, 110 B.R. 362, 373 (Bankr. N.D. Ill. 1990).

[64] *In re Stratford Assoc. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992).

[65] *In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990).

[66] *In re Digerati Techs., Inc.*, No. 13-33264, 2014 WL 2203895, at *3 (Bankr. S.D. Tex. May 27, 2014) (quoting *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003)).

### *v. The Plan Does Not Provide for Any Rate Change Subject to Regulatory Approval*

83. As the Plan does not contain any rate changes subject to regulatory approval, section 1129(a)(6) of the Bankruptcy Code is inapplicable.

### *vi. The Plan is in the Best Interests of Creditors and Interest Holders in Accordance with Section 1129(a)(7) of the Bankruptcy Code*

84. Section 1129(a)(7), known as the "best interests test," focuses on individual dissenting creditors rather than classes of claims,[67] and requires that each holder of a claim or interest either accept the plan or receive or retain property having a present value, as of the effective date of the plan, of not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code.[68]

85. Thus, under the best interests test, the court "must find that each [non-accepting] creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated."[69] As section 1129(a)(7) makes clear, the liquidation analysis applies only to holders of non-accepting impaired claims or interests. Pursuant to section 1126(f) of the Bankruptcy Code, a class that is not impaired under the Plan is deemed to have accepted the Plan. Under the Plan, Classes 1A, 1B, 2A, 2B, 3A and 3B are unimpaired and are deemed to have accepted the Plan. The Plan thus satisfies the "best interests" test as to Classes 1A, 1B, 2A, 2B, 3A and 3B.

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[67] *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 150 (Bankr. S.D.N.Y. 1984).

[68] *See* 11 U.S.C. § 1129(a)(7).

[69] *See 203 N. LaSalle*, 526 U.S. 434, 441 n.13 (1999); *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 228 (1996); *see also Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988), (stating that under section 1129(a)(7) of the Bankruptcy Code, a bankruptcy court is required to determine whether impaired claims would receive no less under a reorganization than through a liquidation).

86. The vast majority of amount of Equity Interests voting in Class 4A and 4B voted to accept the Plan: 98.86% and 99.07%, respectively.[70] The Debtors submit that the distributions to dissenting claimants in Classes 4A and 4B will be at least as much as such claimants would receive in a chapter 7 case. Under chapter 7, a trustee would be appointed to administer the estates, to resolve pending controversies including disputed claims, to liquidate the Debtors' remaining assets, and to make distributions to creditors and equity interest holders. The costs and expense of the chapter 7 trustee and her professionals would be paid before equity interest holders are paid. In addition, there is no guarantee that the Global Settlement would remain intact and enforceable were the chapter 11 cases to be converted to chapter 7.

87. Accordingly, the Plan satisfies the best interests of creditors test under section 1129(a)(7) of the Bankruptcy Code.

*vii.* ***The Requisite Impaired Classes of Equity Interests Have Accepted the Plan as Required by Section 1129(a)(8) of the Bankruptcy Code.***

88. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept, or be unimpaired under, a plan.[71] If an impaired class rejects the plan, the "cram down" requirements must be satisfied with respect to the claims or interests in that class.[72]

89. Pursuant to section 1126(c) of the Bankruptcy Code, a class of impaired claims accepts a plan if the holders of at least two-thirds (⅔) in amount and more than one-half (½) in number of the allowed claims in such class actually voting vote to accept the plan. Pursuant to section 1126(d) of the Bankruptcy Code, a plan is accepted by an impaired class of equity

[70] *See* Docket No. 264.

[71] *See* 11 U.S.C. § 1129(a)(8).

[72] *Id.*; 11 U.S.C. § 1129(b).

interests if holders of at least two-thirds (⅔) in amount of allowed equity interests in such class actually voting vote to accept the plan. Pursuant to section 1126(f) of the Bankruptcy Code, a class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan. On the other hand, pursuant to section 1126(g) of the Bankruptcy Code, a class is deemed to have rejected a plan if the plan provides that the claims or interests in that class will not receive or retain any property under the plan on account of such claim or interest.

90. As set forth above and in the BMC Declaration, each of the impaired classes of interests entitled to vote on the Plan — Classes 4A and 4B — have voted to accept the Plan. Classes 1A, 1B, 2A, 2B, 3A and 3B are unimpaired by the Plan and, therefore, deemed to accept the Plan. No class has rejected the Plan, and thus, cram down is not required.

*viii.* ***The Plan Treats Administrative and Priority Tax Claims in Accordance with Section 1129(a)(9) of the Bankruptcy Code***

91. Section 1129(a)(9) of the Bankruptcy Code requires that Claims entitled to priority under section 507(a) of the Bankruptcy Code be paid in full in Cash unless the holders thereof agree to a different treatment.[73]

92. The Plan complies with section 1129(a)(9) as, specifically, Articles II and III of the Plan provide that Allowed Administrative Claims, Fee Claims, U.S. Trustee Fees, and Priority Tax Claims will be paid in full in Cash on or as soon as reasonably practicable after the Effective Date or, if not then due or Allowed, on or as soon as reasonably practicable after the date such Claim is due or becomes Allowed, consistent with sections 1129(a)(9)(A)-(C) of the Bankruptcy Code. Accordingly, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

[73] *See* 11 U.S.C. § 1129(a)(9).

*ix.* ***Section 1129(a)(10) of the Bankruptcy Code Is Inapplicable***

93. Section 1129(a)(10) of the Bankruptcy Code provides that if a class of claims is impaired under a plan, at least one class of impaired claims must have accepted the plan before the Bankruptcy Court can confirm it.[74] As described above, the Plan leaves all classes of claims unimpaired. As a result, section 1129(a)(10) does not apply.[75]

*x.* ***The Plan is Feasible Within the Meaning of Section 1129(a)(11) of the Bankruptcy Code***

94. In essence, section 1129(a)(11) of the Bankruptcy Code requires the Bankruptcy Court to find that the Plan is feasible as a condition precedent to confirmation.[76] To pass the "feasibility test" of section 1129(a)(11), the Court must determine that confirmation is not likely to be followed by the liquidation, or need for further financial reorganization of the debtor, unless liquidation is contemplated by the Plan.[77]

95. However, the Debtors are liquidating. By implication, then, the Plan is feasible and passes the test contained in section 1129(a)(11) of the Bankruptcy Code.

*xi.* ***The Plan Complies with Section 1129(a)(12) of the Bankruptcy Code***

96. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan[.]"[78] Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930] of title 28" are afforded priority as administrative

[74] 11 U.S.C. § 1129(a)(10).

[75] *In re Texaco Inc.,* 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988) (holding that section 1129(a)(10) was inapplicable because the plan left all classes of claims unimpaired).

[76] *See* 11 U.S.C. § 1129(a)(11).

[77] *Id.*

[78] 11 U.S.C. § 1129(a)(12).

expenses.[79] Section 13.1 of the Plan explicitly provides that all fees payable pursuant to 28 U.S.C. § 1930 will be paid on the Effective Date of the Plan and thereafter, as appropriate. The Plan therefore complies with section 1129(a)(12) of the Bankruptcy Code.

*xii.* ***The Remaining Sections of 1129(a) of the Bankruptcy Code are Inapplicable to the Plan***

97. Section 1129(a)(13) of the Bankruptcy Code is inapplicable as the Debtors do not have any retirement programs in place. Similarly, the Debtors are not non-profit corporations or trusts or individuals and the Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Thus, Sections 1129(a)(13), (14), (15), and (16) of the Bankruptcy Code are inapplicable in these chapter 11 cases.

**C. THE PLAN IS THE ONLY PLAN FOR PURPOSES OF SECTION 1129(C) OF THE BANKRUPTCY CODE**

98. The Plan is the only plan filed in these chapter 11 cases and, accordingly, section 1129(c) of the Bankruptcy Code is satisfied.

**D. THE PLAN'S PRINCIPAL PURPOSE IS NOT TAX OR SECURITIES LAW AVOIDANCE AS PROHIBITED BY SECTION 1129(D) OF THE BANKRUPTCY CODE**

99. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933, and no governmental unit has objected to confirmation of the Plan on such grounds. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

**E. SECTION 1129(E) DOES NOT APPLY TO THE PLAN**

100. The provisions of section 1129(e) of the Bankruptcy Code apply only to a "small business case." These chapter 11 cases are not "small business cases" as defined in the

[79] 11 U.S.C. § 507(a)(2).

Bankruptcy Code. Accordingly, section 1129(e) of the Bankruptcy Code is inapplicable to the Plan.

## II. THE OBJECTION SHOULD BE OVERRULED

### A. THE INCLUSION OF ACTUAL FRAUD, WILLFUL MISCONDUCT AND GROSS NEGLIGENCE IN THE THIRD PARTY RELEASE IS APPROPRIATE

101. First, the SEC objects to the third-party release contained in section 11.4 of the Plan as not containing a carve-out for actual fraud, willful misconduct and gross negligence. Without citing any authority, the SEC contends that while some release provisions are permissible in the Fifth Circuit, releases that grant immunity for "scienter-based" behavior "go too far."[80] However, bankruptcy courts have approved third-party releases for fraud and willful misconduct, so long as the releases otherwise satisfy the standard for third-party releases in chapter 11 plans.[81] Here, as set forth at length above, the Third-Party Releases are consistent with Fifth Circuit case law because they are consensual, being given for consideration, and are an integral part of the Debtors' reorganization. The inclusion of actual fraud, willful misconduct and gross negligence in the Third Party Release was requested by PDC as part of its bargained-for exchange of contributing over $11 million to the Estates. Holders of Equity Interests were provided with the language of section 11.4 on the Ballot in ***bolded italic font***, given the opportunity to opt-out of the release, and none elected to do so. PDC should not be denied the benefit of its bargain and its opportunity to obtain finality with respect to these Chapter 11 Cases and the Colorado Action.

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[80] The SEC also alleges that "scienter-based claims may be released *by limited partners who have not even received the solicitation materials* and thus are not afforded a meaningful opportunity to opt out." Objection p. 4 (emphasis added). The SEC's *bald assumption* that limited partners did not receive solicitation materials has zero basis in fact, as all limited partners of the Debtors are known and, as reflected in the BMC Declaration and Certificate of Service regarding the Solicitation Materials, received a Ballot and the opportunity to opt-out.

[81] *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 543 B.R. 703, 711 (Bankr. D. Del. 2016).

102. The SEC also recycles its already-rejected arguments from the Disclosure Statement Hearing that the Third Party Release is not supported by consideration from each Released Party, and "[t]he Debtors' argument that the Released Parties are providing consideration in exchange for the Releases by giving mutual releases to all other Released Parties is also not persuasive."[82] Regardless of whether the SEC is persuaded, *the Court* was persuaded at the Disclosure Statement Hearing and found that the mutual releases in the Plan constituted adequate consideration, even if they are a "peppercorn for peppercorn."[83] In any event, the Settlement Payment by PDC of over $11 million for the benefit of the Equity Interest holders can hardly be called a "peppercorn;" that amount is significant and constitutes real value that the Equity Interest holders voted overwhelmingly that they wanted to receive.

103. The SEC also contends that the inclusion of actual fraud, willful misconduct and gross negligence in the Third Party Release violates public policy because "investors may be precluded from bringing suits against these non-debtors for violations of the federal securities laws and other fraud-based claims."[84] This ignores that fact that all holders of Equity Interests were on notice of the release of claims for actual fraud, willful misconduct and gross negligence against the Released Parties and not a single investor (out of more than 1,200 Ballots cast) executed the opt-out election. Because all holders of Equity Interest had adequate notice of the language of the Third Party Release, it does not violate public policy.

104. For all these reasons, the Court should overrule the Objection and approve the language of the Third Party Release as drafted.

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[82] Objection p. 5.

[83] Aug. 26, 2019 Hr'g Tr. at 35:22-25. *See also* authorities cited in Section I.A.ii.b.ii.1 above.

[84] Objection p. 5.

### B. THE OPT-OUT MECHANISM SHOULD BE APPROVED

105. The SEC also contends the Debtors have failed to establish the adequacy of the opt-out provision, which requires a showing that (i) the Global Settlement meets the legal standard for the approval of a class action settlement and (ii) the class claims asserted in the Colorado Action are derivative claims. As an initial matter, although the Plan, the Global Settlement and its releases and exculpations are analogous to a class action settlement, it does not actually constitute a class action settlement and thus, is not explicitly bound to the requirements of Federal Rule of Civil Procedure 23. Rather, the Debtors must show that the Global Settlement satisfies the standard of Federal Rule of Bankruptcy Procedure 9019, which provides that a settlement should be approved if it is "fair and equitable and in the best interest of the estate."[85] The Rule 9019 standard is fairly subsumed within the requirements for approval of a shareholder derivative action, and as set forth below, the Debtors can meet both standards.

#### *i. The Global Settlement Meets the Applicable Legal Standards for Approval*

106. In considering whether the settlement of a derivative action is fair, reasonable, and adequate, courts in the Fifth Circuit look to six factors: (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to plaintiffs prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of plaintiff's counsel, the derivative plaintiff, and absent shareholders.[86] The Global Settlement meets each of these factors.

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[85] *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980); *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d 349, 356 (5th Cir. 1997) (quoting *In re Foster Mortg. Corp.*, 68 F.3d 914, 917-18 (5th Cir. 1995)).

[86] *See, e.g., Newby v. Enron Corp.,* 394 F.3d 296, 301 (5th Cir.2004); *Ayers v. Thompson,* 358 F.3d 356, 369 (5th Cir.2004); *Reed v. General Motors Corp.,* 703 F.2d 170, 172 (5th Cir.1983); *Parker v. Anderson,* 667 F.2d 1204, 1209 (5th Cir. 1982); *Sved v. Chadwick*, 783 F. Supp. 2d 851, 860 (N.D. Tex. 2009).

107. First, there is no evidence of collusion or fraud. The Debtors, PDC and the LP Plaintiffs fairly and honestly negotiated the Global Settlement in good faith and at arm's length, including attending a two-day mediation presided over by former Bankruptcy Judge Leif Clark, and further negotiations conducted among the parties thereafter. No party or objector has suggested otherwise. Each party was separately represented in the mediation and the settlement negotiations by experienced and sophisticated counsel, who have represented that this settlement is in the best interest of the Debtors and the Equity Interest holders.

108. Second, the complexity, expense and likely duration of the Colorado Action favor settlement. In general, shareholder derivative actions are "notoriously difficult and unpredictable."[87] The disputes between the Debtors, the LP Plaintiffs and PDC are highly complex and involve the interpretation of lengthy partnership agreements, oil and gas drilling technology and practices over the past ten or more years, and West Virginia limited partnership law. No trial date has been set on the Colorado Action, and it would likely be many months (or years) before the case would be tried. Absent the Global Settlement, the Debtors, PDC and the LP Plaintiffs would face a long and expensive litigation.

109. Third, the stage of the proceedings favors settlement. Courts evaluating shareholder derivative settlements consider whether the parties have gleaned sufficient information "to evaluate the merits of the competing positions."[88] They look not to the amount of discovery, but rather to ""whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it."[89] Here, the

[87] *Sved*, 783 F. Supp. 2d at 861 (internal citations omitted).

[88] *Id.* (internal citations omitted).

[89] *Id.* (internal citations omitted).

Colorado Action was filed in December 2017 but was stayed pending these Chapter 11 Cases. PDC prevailed, in part, on a motion to dismiss certain claims. In these Chapter 11 Cases, the LP Plaintiffs submitted an expert report setting forth their estimated recovery in the Colorado Action, were they to prevail on the merits. The LP Plaintiffs have also taken the depositions of a representative of PDC and the Debtors' Responsible Party in connection with their *Amended Motion for Dismissal of Chapter 11 Case* [Docket No. 140], and all parties have exchanged considerable document discovery. Although the Colorado Action is still far from being ready for trial, these Chapter 11 Cases, and the discovery conducted in connection therewith, have advanced to a point where the Debtors, LP Plaintiffs and PDC can reasonably assess the settlement value of the disputed claims.

110. Fourth, the Debtors and the LP Plaintiffs face many factual and legal obstacles to prevailing on the merits of the Colorado Action. The probability of success on the merits of the litigation in the Colorado Action is questionable. The Debtors and LP Plaintiffs face a serious, substantial risk that they would recover nothing at the end of the litigation. The District Court in the Colorado Action has already issued an opinion (held in abeyance pending the outcome of this bankruptcy case) dismissing key claims asserted by the LP Plaintiffs on behalf of the Equity Interest holders and the Debtors. As indicated in that opinion, there is a potentially dispositive statute of limitations defense even for the claims that survived the motion to dismiss. In addition, the Debtors have filed a motion seeking a Court determination that all the claims asserted in the Colorado Action belong to the Debtors, which is being granted simultaneously with the Confirmation Order pursuant to separate order, foreclosing the putative class claims. These factors weigh in favor of approval of the Global Settlement.

111. Fifth, the range of possible recoveries in the Colorado Action and the certainty of the consideration provided in the Global Settlement favors settlement. Unlike a class action, "a derivative suit is being brought on behalf of the corporation, [so] the recovery, if any, must go to the corporation."[90] The Global Settlement results in a settlement payment by PDC to the Debtors' Estates of over $11 million in consideration for a release of all claims held by the Debtors and Equity Interest holders that do not elect to opt-out of the releases set forth in section 11.4 of the Plan, arising out of, relating to, or connected with the subject matter of the Colorado Action and the Chapter 11 Cases. For the reasons set forth in the preceding paragraph, there is no guarantee that, at the end of protracted litigation, the Debtors or Equity Interest holders would receive an amount any greater than this, and there is a very real possibility that they could receive nothing. No party in interest has suggested that it would be in the Debtors' or Equity Interest holders' best interests to fully litigate the claims rather than take advantage of the guaranteed recovery provided under the Plan pursuant to the Global Settlement.

112. Sixth, the opinions of the Debtors' professionals, the LP Plaintiffs' counsel and the holders of Equity Interests favor settlement. The Responsible Party for the Debtors and counsel for the LP Plaintiffs have represented that the Global Settlement is in the best interest of the Debtors and the Equity Interest holders. As evidenced in the BMC Declaration, the holders of Equity Interests have overwhelmingly voted in favor of the Plan, including the Global Settlement and the releases therein, and no Equity Interest holder has opted out of the release in section 11.4 of the Plan. This evidence shows that the Equity Interest holders believe the Global Settlement is fair and reasonable, which weighs in favor of approval. Moreover, the Debtors received no objections to the Plan or the Determination Motion from holders of Equity Interests.

[90] *Id.*. at 863 (internal citations omitted).

The lack of objections from the putative class members "can be viewed as indicative of the adequacy of the settlement."[91]

113. Based on the foregoing, the Court should find that the Global Settlement is fair and equitable and in the best interest of the estate. The Global Settlement is the product of arm's-length negotiations between the Debtors, PDC and the LP Plaintiffs, and has been proposed in good faith, for legitimate business purposes, is supported by reasonably equivalent value and fair consideration and reflects the Debtors' exercise of reasonable business judgment. The Debtors have provided all interested parties with sufficient and adequate notice of, and an opportunity to be heard with respect to, the Global Settlement, including, but not limited to, the releases set forth in section 11.3 and 11.4 of the Plan. The terms and provisions of the Global Settlement, including, but not limited to, the releases set forth in section 11.3 and 11.4 of the Plan, meet the requirements of Bankruptcy Rule 9019 and should be approved.

*ii.* ***The Class Claims Asserted in the Colorado Action Are Derivative Claims***

114. The SEC contends that the Debtors have not made a showing that the claims asserted in the Colorado Action are derivative claims.[92] The SEC makes no effort to rebut the Debtors' arguments made in the Determination Motion, nor did the SEC file an objection to the Determination Motion. The Debtors hereby incorporate the arguments set forth in the Determination Motion as if set forth at length herein.

**C. THE PLAN DOES NOT VIOLATE SECTION 1141(D)(3)**

115. Finally, the SEC objects to the injunction and stay provision contained in section 11.5 as effectively discharging the Debtors in contravention of section 1141(d)(3) of the

[91] *Id.* at 864 (citing *Quintanilla v. A & R Demolition Inc.,* Civil Action No. H–04–1965, 2007 WL 5166849, at *5 (S.D.Tex. May 7, 2007) (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 118 (2d Cir. 2005)).

[92] Objection p. 2.

Bankruptcy Code. The language of section 11.5 of the Plan, as modified by paragraph 21(a) of the Proposed Confirmation Order, provides that certain parties are permanently enjoined from pursuing any claim or liability or otherwise commencing or continuing any cause of action that has been released or exculpated. As this injunction provision simply implements the Debtor Release, the Third Party Release and the Exculpation, to the extent the Court finds the Debtor Release, the Third Party Release and Exculpation are appropriate, the Debtors respectfully submit that the injunction provision is also appropriate. The injunction is necessary to preserve and enforce the Plan's releases and exculpations and is narrowly tailored to achieve this purpose. As a result, section 11.5 does not run afoul of section 1141(d)(3) of the Bankruptcy Code.

116. For all of the above reasons, the Objection should be overruled.

## CONCLUSION

WHEREFORE, based upon the foregoing, as well as the evidence and argument to be presented at the Confirmation Hearing, the Debtors respectfully submit that the Plan complies with and satisfies all applicable requirements of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules. As such, the Debtors respectfully request that the Court enter an order confirming the Plan, and grant such other and further relief as may be just and proper.

Respectfully submitted this 30th day of September, 2019.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 30th day of September, 2019, he caused a true and correct copy of the foregoing pleading to be served via the Court's CM-ECF Notification System on all parties who have subscribed for electronic notice in these cases.

*/s/ Jason S. Brookner*
Jason S. Brookner