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IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:	)	
VIRGINIA UNITED METHODIST HOMES OF WILLIAMSBURG, INC.,	)	Case No. 13-31098
Debtor.	)	Chapter 11

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF ITS SECOND AMENDED PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

INTRODUCTION

1. Virginia United Methodist Homes of Williamsburg, Inc. ("VUMHW" or the "Debtor"), the above-captioned debtor and debtor in possession, respectfully submits this memorandum of law (this "Memorandum") in support of confirmation of the Debtor's *Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code*, dated April 9, 2013 [Docket No. 142] (as amended from time to time, the "Plan").[1] The Plan is the product of substantial discussions and negotiations among the Debtor and its primary constituents, the 2007

[1] Unless otherwise noted, capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan. The rules of interpretation set forth in Section 1.B of the Plan shall apply to this Memorandum.

Master Trustee, the 2007 Bond Trustee, holders of a majority of the Debtor's secured bonds, Virginia United Methodist Homes, Inc. ("VUMH") and representatives of the residents of VUMHW (the "Residents"). As evidence of the Debtor's emphasis on a consensual resolution, the Plan was accepted by all impaired classes entitled to vote on the Plan by an overwhelming majority.

BACKGROUND

2. On March 1, 2013 (the "Petition Date"), the Debtor filed a voluntary petition with this Court for relief under Chapter 11 of the Bankruptcy Code. The Debtor is continuing to operate its business and manage its property as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. No statutory committee, trustee, or examiner has been appointed in the Debtor's Chapter 11 case.

4. On March 1, 2013, the Debtor filed its proposed *Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 21] (as amended, the "Plan") and its proposed *Disclosure Statement for Debtor's Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 22] (as amended, the "Disclosure Statement").

5. On March 6, 2013, the Court granted the *Motion of Debtor: (A) to Shorten Notice Period with Respect to Hearing on Confirmation of Plan of Reorganization; (B) for Order Setting Expedited Hearing Thereon; and (C) for Related Relief* [Docket No. 29], providing for a hearing to consider confirmation of the Plan to be held on May 14, 2013 at 10:00 a.m. (the "Confirmation Hearing").

6. On March 21, 2013, the Debtor filed its *Motion for an Order (I) Approving Disclosure Statement, (II) Establishing Procedures for the Solicitation and Tabulation of Votes*

to Accept or Reject the Plan of Reorganization, (III) Scheduling a Confirmation Hearing, and (IV) Approving Related Notice Procedures [Docket No. 104].

7. On March 15, 2012, the Debtor filed its *First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 85].

8. On April 9, 2013, the Debtor filed its *Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 142], and the *Disclosure Statement for Debtor's Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 144].

9. On April 11, 2013, the Bankruptcy Court entered the *Order (I) Approving Disclosure Statement, (II) Establishing Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan of Reorganization, (III) Scheduling a Confirmation Hearing, and (IV) Approving Related Notice Procedures* [Docket No. 149] (the "Disclosure Statement Order"), approving the Disclosure Statement and, among other things, the solicitation procedures (the "Solicitation Procedures") and certain solicitation materials including notices and ballots (collectively, the "Solicitation Package") for soliciting votes with respect to the Plan. The Solicitation Procedures Order also fixed (a) April 1, 2013 as the Record Date; (b) May 7, 2013 at 4:00 p.m. (Eastern) as the Objection Deadline; (c) May 9, 2013 at 5:00 p.m. (Eastern) as the Voting Deadline; and (d) May 14, 2013 at 10:00 a.m. (Eastern) as the date and time for the commencement of the Confirmation Hearing.

10. On April 15, 2013, the Debtor's claims and noticing agent distributed the Solicitation Packages consistent with the Bankruptcy Code, the Bankruptcy Rules and the Disclosure Statement Order, as evidenced by the Certificate of Service of Solicitation Materials, filed on April 22, 2013 [Docket No. 154] (the "BMC Affidavit").

11. On May 10, 2013, substantially contemporaneously herewith, the Debtor filed the *Declaration of Brad Daniel on Behalf of BMC Group, Inc., Regarding Solicitation and Tabulation of Ballots Accepting and Rejecting the Debtor's Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code*, detailing the Plan voting results with respect to all Classes of Claims (the "Voting Report").

12. On May 10, 2013, substantially contemporaneously with the filing of this Memorandum and in further support of confirmation of the Plan, the Debtor filed the *Declaration of Christopher P. Henderson in Support of Confirmation of the Debtor's Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (the "Henderson Declaration"), which is incorporated herein by reference.[2]

13. On May 10, 2013, substantially contemporaneously with the filing of this Memorandum, the Debtor filed its proposed *Findings of Fact, Conclusions of Law, and Order Confirming Debtor's Second Amended Plan Reorganization Under Chapter 11 of the Bankruptcy Code*.

ARGUMENT

I. THE PLAN SATISFIES EACH CONFIRMATION REQUIREMENT

14. To confirm the Plan, this Court must find that the Debtor has satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd. II), 994 F.2d 1160, 1165 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that

[2] Mr. Henderson, the Debtor's President, will be available at the Confirmation Hearing to testify, as may be needed, in support of confirmation of the Plan.

preponderance of the evidence is the debtor's appropriate standard of proof both under 11 U.S.C. § 1129(a) and in a cramdown."); see also In re Byrd Foods, Inc., 253 B.R. 196, 199 (E.D. Va. 2000); In re 203 N. LaSalle St. L.P., 190 B.R. 567, 576 (Bankr. N.D. Ill. 1995), aff'd, 195 B.R. 692 (N.D. Ill. 1996), aff'd, 126 F.3d 955 (7th Cir. 1997), rev'd on other grounds, 526 U.S. 434 (1999) ("Although the matter has been debated, it now appears fairly well established that the burden of proof is by a preponderance of the evidence."). Section 1129 of the Bankruptcy Code provides the requirements for plan confirmation. See 11 U.S.C. § 1129. The Plan complies with all relevant sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and applicable non bankruptcy law. In particular, the Plan fully complies with all of the requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code. This Memorandum addresses each such requirement individually.

A. The Plan Complies with the Applicable Provisions of the Bankruptcy Code

15. Section 1129(a)(1) of the Bankruptcy Code requires that a chapter 11 plan comply with the applicable provisions of chapter 11 of the Bankruptcy Code. See 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) states that this provision was enacted, in part, to ensure that a plan contains all necessary provisions and complies with the Bankruptcy Code's requirements governing classification of claims and interests. See S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); H.R. Rep. No. 595, 95th Cong., lst Sess. 412 (1977); see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 648-49 (2d Cir. 1988) (suggesting that Congress intended to phrase "'applicable provisions' in this subsection to mean provisions of chapter 11 … such as section 1122 and 1123 governing classification and contents of a plan."); In re S&W Enter., 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [Section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was more directly aimed at were Sections 1122 and 1123."). Accordingly, a

determination of whether the Plan complies with section 1129(a)(1) of the Bankruptcy Code requires an analysis of sections 1122 and 1123 of the Bankruptcy Code. As explained below, the Plan complies with section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code, in all respects.

1. The Plan Satisfies Section 1122's Classification Requirements

16. The Plan satisfies the classification requirements in section 1122 of the Bankruptcy Code, which provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience. 11 U.S.C. § 1122.

17. Courts in this and other circuits have recognized that under section 1122 of the Bankruptcy Code a debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan. See Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII), 961 F.2d 496, 502 (4th Cir. 1992); In re Wabash Valley Power Ass'n, Inc., 72 F.3d 1305, 1321 (7th Cir. 1996). For a classification structure to satisfy section 1122 of the Bankruptcy Code, it is not necessary that all substantially similar claims or interests be designated to the same class, but only that all claims or interests designated to a particular class be substantially similar to each other. In re Armstrong World Indus., Inc., 348 B.R. 136, 159 (Bankr. D. Del. 2006).

18. The Plan provides for the separate classification of Claims, except Administrative Claims, Professional Compensation Claims, Priority Tax Claims, U.S. Trustee Fees and DIP Claims, against and Interests in the Debtor based upon differences in the legal nature and/or priority of such Claims and Interests into individual classes (each, a "Class").

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

2. The Plan Satisfies the Seven Mandatory Plan Requirements of Section 1123(a)(1)-(7) of the Bankruptcy Code

20. The Plan meets the seven mandatory requirements of section 1123(a) of the Bankruptcy Code.

- First, Section 3 of the Plan designates Classes of Claims and Interests as required by section 1123(a)(1) of the Bankruptcy Code.
- Second, Section 3 of the Plan specifies each Unimpaired Class of Claims (Classes 1, 4 and 5) as required by Bankruptcy Code section 1123(a)(2).
- Third, Section 3 of the Plan specifies the treatment of each Class of Claims and Interests that is impaired (Classes 2, 3, 6, and 7) in accordance with section 1123(a)(3) of the Bankruptcy Code.
- Fourth, as required by section 1123(a)(4) of the Bankruptcy Code, the Plan provides the same treatment for each Claim or Interest, as the case may be, within a given Class.
- Fifth, Section 4 and various other provisions of the Plan provide adequate means for the implementation of the Plan, including, among other things,

cancellation of the 2007 Bonds, issuance of the 2013 Bonds, entry into the Revolving Loan Facility, transfer of the Facility Site to the Reorganized Debtor, purchase of the Series 2013C Senior Bonds by VUMH, and the additional capital contribution by VUMH to the Reorganized Debtor set forth in section 4.7 of the Plan. Accordingly, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

- Sixth, section 1123(a)(6) of the Bankruptcy Code, which requires that the Plan provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities, is inapplicable to this case because, among other things, the Reorganized Debtor will be a non-stock corporation whose sole member will be VUMH. The Reorganized Debtor will be a not-for-profit entity and, thus, VUMH will have no equity interest therein.

- Finally, section 1123(a)(7) of the Bankruptcy Code requires that the Plan contain only provisions that are consistent with the interests of creditors, equity security holders, and with public policy with respect to the manner of selection of any officer, director or trustee under the Plan. Here, the Plan provides that the existing members of the Board of Directors of VUMHW will continue to be members of the Board of Directors of the Reorganized Debtor and the existing officers of VUMHW will continue to be officers of the Reorganized Debtor serving in accordance with non-bankruptcy law. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

B. The Debtor has Complied Fully with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2))

21. Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent comply with all applicable provisions of the Bankruptcy Code. The legislative history and cases discussing section 1129(a)(2) indicate that Congress enacted the provision to ensure that a plan proponent complies with the applicable provisions of chapter 11, including the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. See, e.g., In re PWS Holding Corp., 228 F.3d 224, 248 (3d Cir. 2000); S. Rep. No. 989, 95th Cong., 2d Sess. 126; H.R. Rep. No. 595, 95th Cong., 1st Sess. 412. The Debtor has complied with the applicable provisions of the Bankruptcy Code, including sections 1125 and 1126 of the Bankruptcy Code, as well as Bankruptcy Rules 3017 and 3018.

1. The Plan Complies with the Procedures for Solicitation Under Section 1125 of the Bankruptcy Code

22. Section 1125 of the Bankruptcy Code prohibits the solicitation from a holder of a claim or interest of acceptances or rejections of a plan of reorganization "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." 11 U.S.C. § 1125(b). On April 11, 2013, the Bankruptcy Court entered the Disclosure Statement Order approving, among other things, the Disclosure Statement and the Solicitation Procedures and materials related thereto and found them to be in compliance with the Bankruptcy Code. As set forth in the Voting Report and the BMC Affidavit, the Debtor distributed the Disclosure Statement and the Plan and solicited acceptance of the Plan in accordance with the Disclosure Statement Order. Therefore, the Debtor has complied with section 1125 of the Bankruptcy Code.

2. The Plan Complies with the Requirements for Acceptance of a Plan Under Section 1126 of the Bankruptcy Code

23. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and interests in impaired classes that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject a plan. See 11 U.S.C. § 1126. As set forth in the Plan, the Disclosure Statement and the Voting Report, in accordance with section 1126 of the Bankruptcy Code, the Debtor solicited acceptances and rejections of the Plan from the Holders of all Allowed Claims and Interests in each Impaired Class that are entitled to receive distributions under the Plan (Classes 2, 3, 6 and 7) (the "Voting Classes"). Classes 1, 4 and 5 are Unimpaired under the Plan. Thus, pursuant to section 1126(f) of the Bankruptcy Code, Holders of Claims in Classes 1, 2 and 5 are not entitled to vote on the Plan and are conclusively deemed to have accepted the Plan.

24. With respect to the Voting Classes, section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan. Section 1126(c) provides as follows:

> 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 [section 1126], 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 [section 1126], that have accepted or rejected the plan.

11 U.S.C. § 1126(c). Section 1126(d) 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 holds at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(d). The Voting Report details the results of the voting process in accordance with section 1126 of the Bankruptcy Code as summarized below:

Class	Claim/Interest	Status	Voting Right	% of Voting Creditors Accepting	% of Claim Amount Accepting
2	Series 2007A/B Bond Claims	Impaired	Entitled to Vote	**90.54%**	**98.32%**
3	Series 2007C Bond Claims and L/C Claims	Impaired	Entitled to Vote	**100%**	**100%**
6	Manager Claims	Impaired	Entitled to Vote	**100%**	**100%**
7	Interests in VUMHW	Impaired	Entitled to Vote	**100%**	**100%**

As set forth in the Voting Report, the Plan has been accepted by an overwhelming majority of all creditors and interest holders, voting well in excess of the required two-thirds in amount and one-half in number of the Allowed Claims and two-thirds in amount of the Allowed Interests.

C. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law (Section 1129(a)(3))

25. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Good faith "is

generally interpreted to mean that there exists a 'reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" In re Madison Hotel Assocs., 749 F.2d 410, 424-25 (7th Cir. 1984) (internal citations omitted); In re Sentinel Mgmt. Grp., Inc., 398 B.R. 281, 315-16 (Bankr. N.D. Ill. 2008); see also PWS Holding Corp., 228 F.3d at 242 ("[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.") (internal citations omitted). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the proposal of a chapter 11 plan. See Madison Hotel Assocs., 749 F.2d at 425 (in determining the "good faith" of a plan, the court must view the plan "in light of the totality of the circumstances surrounding confection of the plan . . . .") (internal citations omitted).

26. The Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtor's estate and effectuating a successful reorganization of the Debtor. The Plan was developed and negotiated in good faith and at arms'-length among representatives of the Debtor, the 2007 Bond Trustee, the 2007 Master Trustee, the Manager, and the Consenting Holders. Thus, the Plan achieves the primary objectives underlying a chapter 11 bankruptcy: the reorganization and continuation of the Debtor as a viable business and the distribution of value to creditors for amounts owed. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."); Pereira v. Foong (In re Ngan Gung Rest.), 254 B.R. 566, 570 (Bankr. S.D.N.Y. 2000) (stressing the importance of payment of creditors in chapter 11 cases). Inasmuch as the Plan promotes the rehabilitative

objectives and purposes of the Bankruptcy Code and has garnered the overwhelming support of the parties voting on the Plan, the Plan and the related documents have been filed in good faith and the Debtor has satisfied its obligations under section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments (Section 1129(a)(4))

27. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, the debtor, or a person receiving distributions of property under the plan, be subject to approval by the Bankruptcy Court as reasonable. 11 U.S.C. § 1129(a)(4).

28. Pursuant to the Order Under 11 U.S.C. §§ 105(a) And 331 Establishing Procedures For Interim Compensation And Reimbursement Of Expenses Of Professionals, dated March 26, 2013 [Docket No. 123], this Court approved certain procedures for the compensation of professionals retained by the Debtor (the "Interim Compensation Procedures").

29. Except as permitted pursuant to the Interim Compensation Procedures, all payments to the Debtor's retained professionals will be made only after Court approval of the professionals' final applications for allowance of compensation for services rendered and reimbursement of expenses. Pursuant to Section 2.2 of the Plan, the professionals' claims for payment of postpetition fees and expenses are subject to resolution of any objection that may be raised and to approval of the Court.

E. The Identity of Certain Individuals Who Will Hold Positions Post Confirmation Has Been Disclosed (Section 1129(a)(5))

30. Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the officers and directors of a debtor after confirmation of the plan; that the appointment of such successor be consistent with the interests of creditors and

equity security holders and with public policy; and that there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtor.

31. As stated, the Debtor has satisfied the foregoing requirements. The identity and affiliations of the individuals proposed to serve as directors and officers of the Reorganized Debtor after confirmation of the Plan have been fully disclosed and the appointment of such individuals is consistent with the interests of Holders of Claims against and Interests in the Debtor and with public policy.

F. The Plan Does Not Require Governmental Regulatory Approval (Section 1129(a)(6))

32. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the plan. See 11 U.S.C. § 1129(a)(6). The foregoing provision is inapplicable in this chapter 11 case. No regulatory commission has any jurisdiction over rate changes by the Debtor. Further, the Plan does not provide for rate changes by the Debtor. Therefore, the Plan satisfies the requirements of section 1129(a)(6) of the Bankruptcy Code.

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

33. Section 1129(a)(7) of the Bankruptcy Code — the "best interests of creditors test" —requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class:

(a) has accepted the plan; or

(b) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1129(a)(7)(A). The best interests test focuses on individual dissenting creditors rather than classes of claims. See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 n.13 (1999). Under the best interests test, "a reorganization plan may not be confirmed unless all the debtor's creditors accept the plan or will receive not less than they would receive under a Chapter 7 liquidation." Toibb v. Radloff, 501 U.S. 157, 164 (1991). As section 1129(a)(7) of the Bankruptcy Code makes clear, the liquidation analysis applies only to non-accepting impaired claims or interests.

34. Here, the Plan satisfies the best interests test. First, the best interests test is satisfied with respect to Classes 1, 4 and 5, as these Classes are Unimpaired under the Plan and are conclusively deemed to have accepted the Plan. All creditors or interest holders in Classes 3, 6 and 7 voted to accept the Plan. With respect to each creditor in Class 2 who either abstained from voting on the Plan or voted to reject the Plan, the best interests test is satisfied because the Plan provides such parties with recoveries no less than they would receive in a hypothetical chapter 7 liquidation. Notably, all impaired creditor constituencies are projected to receive a higher recovery under the Plan proposed by the Debtor than they would otherwise receive in a liquidation.

35. To assist the Court in making the findings required under section 1129(a)(7), the Debtor's management, together with the Debtor's financial advisors, prepared the liquidation analysis attached to the Disclosure Statement as Exhibit 2 (the "Liquidation Analysis"). As made clear by the Liquidation Analysis and as set forth in the Declarations, the holders of allowed claims in every Class will receive as much or more under the Plan than they would in a chapter 7 liquidation.

36. For the reasons set forth above, the Plan satisfies the requirements of the best interest of creditors test set forth in section 1129(a)(7).

H. Acceptance of Impaired Classes (Section 1129(a)(8))

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

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

39. In sum, if this case was converted to a case under chapter 7 of the Bankruptcy Code, the value that creditors would recover would drop precipitously. Due to the value destruction, delay, and uncertainties inherent in a conversion to chapter 7, the Debtor submits that the best interests test established pursuant to section 1129(a)(7) of the Bankruptcy Code is satisfied.

I. The Plan Provides for Payment in Full of All Allowed Priority Claims (Section 1129(a)(9))

40. Unless the Holder of a claim entitled to priority under section 507(a) of the Bankruptcy Code agrees to different treatment with respect to such claim, section 1129(a)(9) of the Bankruptcy Code requires a plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive:
>
> if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;
>
> (C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—
>
> of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
>
> over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and
>
> in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)).

11 U.S.C. § 1129(a)(9).

41. As required by section 1129(a)(9), Section 2 of the Plan provides that each Holder of an Allowed Administrative Claim will be paid the full unpaid amount of such Allowed Administrative Claim in Cash (a) on the Effective Date or as soon thereafter as is reasonably practicable or, if not then due, when such Allowed Administrative Claim is due or as soon

thereafter as is reasonably practicable, (b) if an Administrative Claim is Allowed after the Effective Date, on the date such Administrative Claim is Allowed or as soon thereafter as is reasonably practicable or, if not then due, when such Allowed Administrative Claim is due, (c) at such time and upon such terms as may be agreed upon by such Holder and the Debtor or the Reorganized Debtor, as the case may be, or (d) at such time and upon such terms as set forth in an order of the Bankruptcy Court.

42. Moreover, Section 2 of the Plan provides that each Holder of an Allowed Professional Compensation Claim shall be paid in full in such amounts as are allowed by the Bankruptcy Court. The Debtor is authorized to pay compensation for services rendered or reimbursement of expenses incurred after the Effective Date in the ordinary course and without the need for Bankruptcy Court approval.

43. In addition, Section 2 of the Plan provides that unless otherwise agreed by the Holder of an Allowed Priority Tax Claim, any Person holding a Priority Tax Claim will receive, as determined by the Reorganized Debtor in its sole discretion and in full satisfaction of such Claim: (a) payment in Cash in full on the later of the Effective Date or the date such Claim becomes an Allowed Claim; or (b) Cash over a period not exceeding five (5) years after date of assessment of such Claim, with interest at a rate equal to the applicable statutory rate, payable monthly, in periodic payments, having the value of such Claim as of the Effective Date.

44. Finally, Section 2 of the Plan provides that each Holder of an Allowed DIP Claim shall be paid in full in Cash on the Effective Date or as soon as practicable thereafter from the proceeds of the Revolving Loan Facility or operating cash available to the Reorganized Debtor.

45. Therefore, the Debtor submits that the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders (Section 1129(a)(10))

46. Section 1129(a)(10) of the Bankruptcy Code provides that at least one impaired class of claims must accept the plan, excluding acceptance by any insider. See 11 U.S.C. § 1129(a)(10). As described above and as set forth in the Voting Report, all of the four Impaired Classes entitled to vote have voted to accept the Plan. Although Classes 3, 6 and 7 consist solely of Claims held by VUMH, Class 2 voted to accept the Plan excluding any acceptances by insiders. Therefore, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

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

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

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

11 U.S.C. § 1129(a)(11).

48. The Debtor has analyzed the ability of the Reorganized Debtor to meet its obligations under the Plan and retain sufficient liquidity and capital resources to conduct its business. The Debtor prepared financial projections, attached to the Disclosure Statement as Exhibit 3, that show that, after the Effective Date, the Reorganized Debtor will have sufficient liquidity to operate its business and no liquidation or further financial reorganization will be necessary. On the Effective Date, the Reorganized Debtor will have access to funds in the amount of approximately $1,150,000 after making distributions pursuant to the Plan, which the Debtor believes will provide the Reorganized Debtor with adequate liquidity in the short term,

and increased occupancy and entrance fees will provide adequate liquidity in the long term. Accordingly, the requirements of section 1129(a)(11) of the Bankruptcy Code are satisfied.

L. The Plan Provides for the Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12))

49. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. See 11 U.S.C. § 1129(a)(12). Section 2.4 of the Plan provides that all fees payable pursuant to section 1930(a) of the United States Code shall be paid as they become due and owing until the chapter 11 case is converted, dismissed, or closed, whichever occurs first. The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

M. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code

50. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. See 11 U.S.C. § 1129(a)(13). The Debtor does not have any such retiree benefit programs. The Plan therefore satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

N. The Principal Purpose of the Plan Is Not Avoidance of Taxes (Section 1129(d))

51. Section 1129(d) of the Bankruptcy Code states that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. § 1129(d). The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no party that is a governmental unit, or any other entity, has requested that the Court decline to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

O. 1146(a) Transfer Tax Exemption

52. Pursuant to section 4.17 of the Plan and in accordance with section 1146(a) of the Bankruptcy Code, any transfers of property in contemplation of, in connection with, or pursuant to the Plan, including the transfer of the Facility Site from VUMH to the Reorganized Debtor pursuant to section 4.5 of the Plan and the recording of the 2013 Deed of Trust and any related document, shall not be subject to any stamp tax or other similar tax or governmental assessment in the United States. The transfers of real property pursuant to the Plan are transactions to be consummated "under a plan confirmed" and are therefore entitled to the tax exemption provided by 11 U.S.C. § 1146(a). Section 1146(a) provides that "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(a). The Second Circuit has summarized the common characteristics of a stamp tax, stating as follows:

> [W]e believe that all stamp or similar taxes as stated in 11 U.S.C. § 1146(c) share the following common elements: (1) they are imposed only at the time of transfer or sale of the item at issue; (2) the amount due is determined by the consideration for, par value of, or value of the item being transferred; (3) the tax rate is relatively small percentage of the consideration, par value or value of the property; (4) the tax is imposed irrespective of whether the transferor enjoyed again or suffered a loss on the underlying sale or transfer; and (5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording.

995 Fifth Ave. Assocs., L.P. v. New York State Dep't of Taxation & Fin. (In re 995 Fifth Ave. Assocs., L.P.), 963, F.2d 503, 512 (2d Cir. 1992). Each of these characteristics is applicable to the Virginia State and James City County real property transfer and recordation taxes such that the section 1146(a) tax exemption applies. See, e.g., NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel Cnty, Md. (In re NVR, LP), 189 F.3d 442, 455 (4th Cir, 1999) (finding that real estate transfer and recordation taxes are included in the definition of "stamp tax or

similar tax" and thus exempt from taxation under section 1146(a)); City of New York v. Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.), 758 F.2d 840, 841-42 (2d Cir. 1985) (same). Therefore, the transfers consummated by confirmation of the Plan are exempt from taxation by the state of Virginia and James City County under section 1146(a). Accordingly, section 4.7 of the Plan is appropriate pursuant to section 1146(a) of the Bankruptcy Code and should be approved.

P. Discretionary Contents of the Plan – Third Party Releases, Exculpation and Injunction

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

54. The Plan provides for certain third party releases and injunctions against claims in Section 8.3. Except as otherwise specifically provided in the Plan, (i) the Debtor and its member or members, (ii) the Reorganized Debtor and its member or members, (iii) the Manager in any capacity, (iv) each Consenting Holder in any capacity, (v) the Issuer, (vi) the 2007 Bond Trustee in any capacity, (vii) the 2007 Master Trustee in any capacity, (viii) the DIP Lender and (ix) the current and former officers, directors, members, managers, employees, attorneys and advisors, each in their respective capacities as such, of each of the foregoing. (collectively, the "Plan Releasees"), are released and discharged from any and all claims, obligations, rights, causes of action and liabilities relating to the Debtor, this chapter 11 case, the formulation, negotiation, preparation, confirmation, implementation and administration of the Plan or any consent, action, omission, transaction or business dealing from and after the Petition Date and prior to the

Effective Date; provided, however, that the Plan Releasees shall not be released from claims arising under (a) the Internal Revenue Code, or any state, city or municipal tax code; (b) the environmental laws of the United States, any state, city or municipality; (c) any criminal laws of the United States, any state, city or municipality; (d) the Plan; or (e) actions related to willful misconduct, gross negligence, misuse of confidential information that causes damages and ultra vires acts. Any of the foregoing parties in all respects shall be entitled to rely on the advice of counsel with respect to any of the foregoing. With respect to Plan Releasees that are attorney Professionals, such Professionals shall not be released from any violations of the Code of Professional Responsibility. From and after the Effective Date, except as otherwise provided under this section, all holders of Claims or membership and other interests in the Debtors shall be permanently enjoined from commencing or continuing in any manner any suit, action or other proceeding, on account of or respecting, any Claim or membership or other interest in the Debtor.

55. The releases in the Plan are the product of negotiations among the key parties in interest and were necessary to reach consensus on the Plan. The releases were critical to the Debtor's successful reorganization and should be approved. See Gillman v. Cont'l Airlines (In re Cont'l Airlines), 203 F.3d 203, 214 (3d Cir. 2000) (holding that hallmarks of permissible non-consensual releases are fairness, necessity to the reorganization, and specific factual findings to support such conclusions); see also In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994) (finding that courts have allowed third-party releases where, among other things, impacted classes vote overwhelmingly to accept the plan or all or substantially all of the claims affected by the releases are paid under the plan). The great importance placed on the releases by parties whose cooperation was necessary to the reorganization, coupled with

overwhelming support by holders in the Voting Classes, demonstrate that the releases are fair to the parties giving them.

56. With respect to the third party releases, the Fourth Circuit has found instructive the factors in Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002) and Hoge v. Moore (In re Railworks Corp.), 345 B.R. 529, 536 (Bankr. D. Md. 2006). See In re National Heritage Foundation, Inc., 478 B.R. 216, 226 (Bankr. E.D. Va. 2012).

57. In Dow Corning, the Sixth Circuit identified seven factors to determine whether third party releases are appropriate: (1) there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) the non-debtor has contributed substantial assets to the reorganization; (3) the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against the parties who would have indemnity or contribution claims against the debtor; (4) the impacted class, or classes, has overwhelmingly voted to accept the plan; (5) the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and (7) the bankruptcy court made a record of specific factual findings that support its conclusions. See In re National Heritage Foundation, 478 B.R. at 226. Each of the factors do not have to be present to approve a non-consensual, non-debtor release, rather, a court should balance the factors looking at the specific facts in each case.

58. The third-party releases are appropriate in this case because the released third parties provided a substantial contribution to reorganization, the release and injunction are

necessary to the reorganization, the plan provides a mechanism to pay for substantially all of the classes affected by the injunction. Moreover, all four classes that voted on the Plan voted overwhelmingly to accept the Plan. The Plan is the result of extensive negotiation between the major parties and without the inclusion of any part of the consensual Plan, including the third-party releases, reorganization on the terms set forth in the Plan would simply not be possible.

59. In the final analysis, the releases are procedurally fair. The creditors voting on the Plan have expressed their support for the release provisions by voting to accept the Plan. The Solicitation Packages delivered to creditors in the Voting Classes included a description of the releases in the Disclosure Statement. Moreover, each notice accompanying each Ballot included the complete language from the Plan relating to the releases and cross-referenced the section of the Plan containing the releases. No objections to the release provisions (or any other provision of the Plan) have been received.

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

II. RESERVATION OF RIGHTS

61. Any objections to the Plan that have not been resolved by the Debtor are without merit and the Debtor expressly reserves its rights to respond to such objections at any time prior to or at the Confirmation Hearing.

CONCLUSION

For the reasons set forth herein, and as will be further demonstrated as necessary at the Confirmation Hearing, the Debtor submits that the Plan satisfies all of the applicable requirements of the Bankruptcy Code and the Bankruptcy Rules. Accordingly, the Debtor respectfully requests that this Court overrule any unresolved objections and enter an order confirming the Plan.

Dated: May 10, 2013 By: /s/ Sheila deLa Cruz
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