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UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

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| In re<br><br>VINEYARD NATIONAL BANCORP,<br><br>Debtor and<br>Debtor-in-Possession. | Bk. No.: 2:10-bk-21661-RN<br><br>Chapter 11<br><br>**MEMORANDUM IN SUPPORT OF CONFIRMATION OF JOINT PLAN OF LIQUIDATION OF DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AS OF FEBRUARY 4, 2010; DECLARATION OF DONALD PELGRIM IN SUPPORT THEREOF**<br><br>**Confirmation Hearing**<br><br>Date: May 27, 2010<br>Time: 2:00 p.m.<br>Place: Courtroom 1645<br>255 East Temple Street<br>Los Angeles, CA 90012 |

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# I.

# OVERVIEW

Vineyard National Bancorp, debtor and debtor-in-possession ("VNB" or "Debtor") in the captioned case under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* ("Bankruptcy Code"), respectfully submits this Memorandum of Points and Authorities ("Memorandum") in support of confirmation of the *Joint Plan of Liquidation of Debtor and the Official Committee of Unsecured Creditors as of February 4, 2010* ("Joint Plan"). The Debtor and the Official Committee of Unsecured Creditors appointed in this case ("Committee") are co-proponents of the Joint Plan.

The Memorandum is supported by these moving papers; the attached *Declaration of Donald Pelgrim*; the *Debtor's Reply to the FDIC's Objection to Confirmation of the Joint Plan*, filed concurrently herewith ("Reply"); the Joint Plan; the disclosure statement describing the Joint Plan ("Disclosure Statement"); the ballots and other solicitation materials approved by the Court and served on parties entitled to vote to accept or reject the Joint Plan; the various declarations regarding service of solicitation materials filed with the Court; the *Joint Plan Ballot Summary* and supporting declaration of Natalie Cereseto submitted to the Court concurrently with this Memorandum; any other oral or documentary evidence that may be presented in support of the Joint Plan; the arguments and representations of counsel at the hearing regarding confirmation of the Joint Plan; and the record in this case.[1]

The Court initially scheduled a hearing to take place on April 8, 2010 at 2:00 p.m. to consider confirmation of the Joint Plan ("Confirmation Hearing"). On March 25, 2010, the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as receiver for the Debtor's wholly-owned bank subsidiary, Vineyard National Bank ("Bank") filed an objection to confirmation of the Joint Plan (the "FDIC Objection"). The Debtor, with the agreement of the Committee and the FDIC, decided to seek a continuance of the Confirmation Hearing to May 12, 2010 at 2:00 p.m., in order to allow time for the Debtor to file the Debtor's objection to the proof of claim of the FDIC filed herein. Accordingly, on

[1] The Debtor respectfully requests that the Court take judicial notice of the record in this case, including all documents previously filed with the Court, pursuant to Fed. R. Evid. 201.

March 31, 2010, the Debtor, the Committee and the FDIC executed, and the Debtor filed, a *Stipulation to Continue Hearing on Confirmation of Joint Plan* [Docket # 148] ("Stipulation for Continuance"), seeking such a continuance. On April 1, 2010, the Court entered its *Order Approving Stipulation to Continue Hearing on Confirmation of Joint Plan* [Docket # 151] ("Continuance Order"), which continued the hearing to May 12, 2010. The Debtor subsequently filed and served notice of entry of the Continuance Order [Docket # 155].

On May 4, 2010, the Court further continued the hearing on confirmation of the Joint Plan from May 12, 2010 to May 27, 2010 (the "Confirmation Hearing"), and the Debtor served notice of the continued hearing date [Docket # 165]. On May 5, 2010, the Debtor filed its *Complaint: (1) Objecting to FDIC Claim; (2) for Subordination of FDIC Claim; and (3) Counterclaim for Declaratory Relief* [Docket # 166] ("Claim Objection").

The Debtor submits that the Court should confirm the Joint Plan. The Debtor commenced its bankruptcy case by filing its voluntary petition herein on July 21, 2009 ("Petition Date"). Since that time, the Debtor has worked diligently to preserve and to prepare its principal assets – cash, certain causes of action against third parties and a claim to a substantial refund of its federal income taxes – for distribution, promptly through a liquidating chapter 11 plan, to a trust to be administered for the benefit of creditors. This is what the Joint Plan achieves. It is proposed promptly, with the Confirmation Hearing set to take place less than nine (9) months after the Petition Date. It provides for the establishment of a Liquidating Trust, to be administered by the Liquidating Trustee, in which the Debtor's assets will vest, including the Debtor's interest in a substantial anticipated federal tax refund and the causes of action against former directors and officers of the Debtor and the Debtor's directors' and officers' liability insurers that are the subject of an adversary proceeding commenced herein by the Committee.

The Joint Plan is, moreover, the result of good faith negotiations between the Debtor and the Committee, which includes among its members (i) First Tennessee Bank N.A. ("FTBNA"), which holds an unsecured claim in an amount in excess of $55,300,000.00 comprising by far the lion's share of claims in Class 3, one of two impaired classes entitled to vote to accept or reject the Joint Plan; and (ii) U.S. Bank National Association ("US Bank"), The Bank of New York Mellon Trust Company,

N.A. ("BNY/Mellon") and Wilmington Trust Company ("Wilmington Trust") (Committee Chair), each in their respective capacities as Trustees or Indenture Trustees for the bulk of the Debtor's subordinated unsecured indebtedness in Class 4 (defined in the Joint Plan as the "Indenture Trustee Claims"[2]), the second impaired class entitled to vote. As such, the Committee has joined with the Debtor as co-proponent of the Joint Plan.

Following solicitation of votes to accept or reject the Joint Plan in accordance with the Bankruptcy Code and the procedures approved by this Court's *Order Authorizing and Approving (A) the Adequacy of the Disclosure Statement in Support of the Joint Plan of Liquidation of the Debtor and the Official Committee of Unsecured Creditors, Dated as of February 4, 2010; (B) the Form, Scope and Nature of Solicitation, Balloting, Tabulation and Notices With Respect Thereto; and (C) Related Confirmation Procedures, Deadlines and Notices* [Docket #137] ("Solicitation Order"), all of the creditors who voted in Class 3 (including FTBN) voted to accept the Joint Plan thereby establishing at least one accepting, impaired class.

The second impaired class, Class 4, which was made up of the Indenture Trustee Claims, represented on the Committee by US Bank, BNY/Mellon and Wilmington Trust, failed to cast any timely ballots, notwithstanding the Committee's endorsement of the Joint Plan. As such, Class 4 has not accepted the Joint Plan and the Joint Plan does not meet the requirement of 11 U.S.C. § 1129(a)(8) that all impaired classes vote to accept the Joint Plan. *See, In re M. Long Arabians*, 103 B.R. 211 (B.A.P. 9th Cir. 1989) (failure to vote is not the equivalent of acceptance); Fed. R. Bankr. P. 3018(c) (acceptance must be in writing).

On May 12, 2010, the Committee filed its *Motion to Extend Deadline for Returning Ballots for the Joint Plan of Liquidation of the Debtor and the Official Committee of Unsecured Creditors, Dated as of February 4, 2010* [Docket #171] ("Balloting Motion"), requesting that the Court enter its order extending the deadline for casting ballots to accept or reject the Joint Plan through May 26, 2010, together with an application that the Balloting Motion be heard of shortened time. The Court subsequently set the Balloting Motion for a hearing on May 27, 2010, concurrently with the

[2] All capitalized terms used herein will bear the same meaning ascribed to them in the Joint Plan, unless otherwise indicated.

Confirmation Hearing. On May 18, 2010, the Debtor filed the *Debtor's Statement in Response to the Official Committee of Unsecured Creditors' Motion to Extend Deadline for Returning Ballots for Joint Plan* [Docket # 179] ("Debtor's Statement"). In the Debtor's Statement, the Debtor indicated that it did not oppose the relief sought in the Balloting Motion, but that it believed that a short continuance of the Confirmation Hearing was warranted in the event that the Court granted the Balloting Motion, in order to ensure that any additional ballots were counted, and the appropriate pleadings and evidence filed with the Court, in the event that ballots were cast in Class 4.

While the Debtor is hopeful that creditors holding Claims in Class 4 will cast their votes in favor of confirmation of the Joint Plan in the event that the Court grants the Committee the relief it has sought in the Balloting Motion, the Debtor nonetheless believes, for reasons set forth more fully below, that the Joint Plan already complies with all of the requirements for confirmation set forth in 11 U.S.C. § 1129(a), other than 11 U.S.C. § 1129(a)(8), and thus qualifies for confirmation under the "cram down" provisions of 11 U.S.C. § 1129(b). Accordingly, in the event that the Court does not extend the balloting deadline, the Debtor will (and hereby does) seek entry of an Order of the Court confirming the Joint Plan on this basis.

As noted, the FDIC has filed the FDIC Objection to confirmation of the Joint Plan, arguing, *inter alia*, that the Joint Plan cannot be confirmed because it fails to satisfy 11 U.S.C. §§ 1129(a)(8), 1129(a)(10) (requiring acceptance of the Joint Plan by at least one impaired class) and 1129(a)(11) (confirmation of the Joint Plan must not be "likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor of the debtor" under the Joint Plan). As noted, the Debtor agrees that the requirements of 11 U.S.C. § 1129(a)(8) have not been met, at least at present, pending the Court's ruling on the Balloting Motion. Nonetheless, as set out more fully below, in the *Debtor's Reply to Objection of FDIC to Confirmation of the Joint Plan of Liquidation of Debtor and the Official Committee of Unsecured Creditors, Dated as of February 4, 2010* (the "Debtor's Response") and the Committee's response to the FDIC Objection, both filed concurrently herewith, and in the Claim Objection, the objections of the FDIC are without merit. Among other reasons:

(i) The FDIC's proof of claim filed herein ("FDIC POC")[3] is itself without merit.

[3] A copy of the FDIC POC is attached hereto as Exhibit "A," for the convenience of the Court.

(ii) Although the FDIC purported to file a ballot rejecting the Joint Plan in Class 3 ("FDIC Ballot"),[4] that ballot and the FDIC POC each, on their face, are for an unstated amount, and the FDIC POC is subject to the Claim Objection. Hence, the FDIC Ballot cannot be counted as a vote – of any size – against the Joint Plan.

(iii) The FDIC argues that it is improperly classified in the Joint Plan. While the Debtor believes this assertion to be without merit, nonetheless, the Committee has filed its *Notice of Modification to Joint Plan of Liquidation of the Debtor and the Official Committee of Unsecured Creditors, Dated as of February 4, 2010* ("Plan Modification") pursuant to Section II.C.1. of the Joint Plan, which, *inter alia,* places the FDIC's Section 507(a)(9) claim (if any) in a new Class 1(a), where it is treated as unimpaired and deemed to accept the Joint Plan under 11 U.S.C. § 1126(f). Even if the FDIC were entitled to a vote to reject the Joint Plan in that class (notwithstanding that the FDIC has no stated amount for its claim and has not requested estimation thereof for voting purposes pursuant to Fed. R. Bankr. P. 3018(a)), the acceptance of the Joint Plan by Class 3 would still provide an accepting impaired class allowing confirmation under 11 U.S.C. § 1129(b).

(iv) While the FDIC claims that the Joint Plan is not feasible within the meaning of 11 U.S.C. § 1129(a)(11), the Joint Plan is a plan of liquidation, with the Debtor being succeeded by the Liquidating Trustee, who will administer the assets of the Liquidating Trust without need for further "liquidation" or "reorganization," no matter what the ultimate outcome of the disputes with the FDIC may be. Even in the unlikely event that the FDIC POC is allowed as a priority claim under 11 U.S.C. § 507(a)(9) in an amount large enough that it cannot be satisfied in full, the Joint Plan will, nonetheless, satisfy 11 U.S.C. § 1129(a)(9) for the simple reason that Section 1129(a)(9), on its face, does not require payment in full of a Section 507(a)(9) priority claim as a condition to confirmation.

On a more fundamental level, confirmation of the Joint Plan will not in any manner prejudice

[4] A copy of the FDIC Ballot is attached hereto as Exhibit "B," for the convenience of the Court.

the FDIC. It is a straightforward, liquidating plan that would establish a post-confirmation Liquidating Trust to be administered by a Liquidating Agent, who will pursue estate assets, causes of action and objections to claims, and will make distributions to creditors, including the FDIC, in accordance with their respective Allowed Claims and the Joint Plan. Or, put somewhat differently, there is nothing in the Joint Plan that will affect the amount or priority of the FDIC's claim – appropriately, those issues will be resolved though the Claim Objection, not the Joint Plan – and the FDIC's claim will be what it will be, and will be treated accordingly under the Joint Plan. Accordingly, the Debtor respectfully requests that the Court enter its Order confirming the Joint Plan.

If, however, the Court were to determine that confirmation of the Joint Plan is not appropriate, the Debtor further requests that the Court at this time not deny confirmation, but rather continue this hearing to a later date (perhaps by ninety (90) days) to permit the Debtor to prosecute the Claim Objection to resolution. While, for all the reasons set forth above and herein, the Debtor does not believe either that such a resolution of the objections to the FDIC POC is necessary for confirmation of the Joint Plan, or that the Debtor bears any responsibility for the diaphanous lack of specificity in the FDIC POC, the Debtor nonetheless recognizes that the Court may prefer to have the issues relating to the FDIC POC clarified before revisiting the issue of plan confirmation.

## II.

## ACCEPTANCE OF JOINT PLAN:

## BALLOTING RESULTS

By the Solicitation Order, the Court found that the Disclosure Statement contained "adequate information" within the meaning of Section 1125 of the Bankruptcy Code and authorized the Debtor to solicit acceptances with respect to the Joint Plan pursuant to procedures specified in the Solicitation Order. The Debtor thereafter caused the Joint Plan, Disclosure Statement and related solicitation materials to be served on parties in accordance with the Solicitation Order. The deadline fixed by the Solicitation Order for the receipt of Ballots accepting or rejecting the Joint Plan was March 25, 2010 at 12 noon, Pacific Time.

As modified by the Plan Modification, there are five (5) classes of claims (designated as Classes 1, 1(a), 2, 3 and 4) and two classes of interests (designated as Class 5 and Class 6) in the Joint

Plan. Classes 1, 1(a) and 2 are unimpaired and are thus deemed to accept the Joint Plan. *See* 11 U.S.C. § 1126(f). Classes 3 and 4 are impaired and were entitled to vote. All of the ballots cast in Class 3 voted to accept the Joint Plan. No timely ballots were received in Class 4. The ballot results are summarized in the *Declaration of Natalie Cereseto* ("Cereseto Declaration"), filed concurrently herewith.

Class 5 and Class 6 will receive nothing under the Joint Plan and each is thus deemed to reject the Joint Plan. *See* 11 U.S.C. § 1126(g).

## III.

## PLAN CONFIRMATION

### A. The Joint Plan Complies With the Requirements of All Applicable Subsections of 11 U.S.C. § 1129(a), Except 11 U.S.C. § 1129(a)(8).

Of the sixteen subsections in 11 U.S.C. § 1129(a), the last four – Sections 1129(a)(13), (14), (15) and (16) – do not apply to the Debtor because it has no retiree benefits within the meaning of Section 1129(a)(13), is not an individual (Sections 1129(a)(14) and (15)) and is not a non-profit entity (Section 1129(a)(16)). As described below, the Joint Plan satisfies all of the remaining, applicable, requirements, except Section 1129(a)(8), and should therefore be confirmed by the Court under the cramdown procedures of 1129(b).

#### 1. The Joint Plan Complies With Applicable Provisions of the Bankruptcy Code (11 U.S.C. § 1129(a)(1)).

Pursuant to 11 U.S.C. §1129(a)(1), a plan must "compl[y] with the applicable provisions of this title." The legislative history relating to this subsection makes plain that it incorporates Bankruptcy Code sections 1122 and 1123, which govern the classification of claims and interests and the mandatory contents of a plan. As shown below, the Joint Plan complies with Bankruptcy Code sections 1122 and 1124, as well as all other applicable requirements of the Bankruptcy Code. Accordingly, the Joint Plan satisfies the requirements of 11 U.S.C. § 1129(a)(1).

##### a) The Joint Plan Satisfies the Requirements of Bankruptcy Code Section 1122.

Section 1122 of the Bankruptcy Code provides that "a plan may place a claim or interest in a

particular class only if such claim or interest is substantially similar to other claims or interests of such class." 11 U.S.C. § 1122(a). On its face, the statute only prohibits placing dissimilar claims in the same class. *See, Class 5 Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 661 (6th Cir 2002). Courts thus have broad discretion in considering whether a classification scheme is permissible, based on the peculiar facts of the case before them. *See Steelcase Inc. v. Johnston (In re Johnston)*, 21 F.3d 323, 327 (9th Cir 1994) ("bankruptcy court judges must have discretionary power in classifying claims under § 1122(a)").

As modified by the Plan Modification. the Joint Plan provides for five (5) classes of claims (Classes 1, 1(a), 2, 3 and 4) and two(2) classes of interests (Classes 5 and 6). The claims or interests in each of the classes are substantially similar to the other claims or interests in that class, thus satisfying the requirement of 11 U.S.C. § 1122(a). Moreover, although not required by the statute, each of class contains claims or interests that are dissimilar to claims or interests in other classes. Thus, Class 1 contains claims entitled to priority in right of payment under section 507(a) of the Bankruptcy Code, except Priority Tax Claims and Administrative Expenses. Class 1(a) consists of any claim that the FDIC may have that is entitled to priority under 11 U.S.C. § 507(a)(9). Class 2 consists of Secured Claims, if any. Class 3 consists of General Unsecured Claims, while Class 4 consists of Indenture Trustee Claims that may be contractually or otherwise subordinate to the Allowed FTBN Claim and/or other Class 4 Claims and Indenture Trustee Fees accrued prior to the Petition Date. Class 5 consists of the Preferred Equity Interests in the Debtor, and Class 5 of the VNBC Common Stock Interests in the Debtor.

The FDIC has objected to the classification of its claim in Class 1, arguing that it should be separately classified, and citing cases dealing with improper classification and "gerrymandering." *See* FDIC Objection, Section II.C. This objection is without merit, as set forth more fully in the Reply. In the first place, pursuant to the Plan Modification, any claim that the FDIC may have that is entitled to priority treatment 11 U.S.C. § 507(a)(9) FDIC claim <u>is</u> separately classified, in Class 1(a). That Class is treated as unimpaired because the Debtor believes, in good faith, that the FDIC does not have a valid priority claim, or that, if it does, the Joint Plan "leaves unaltered the legal, equitable, and contractual rights" of the FDIC with respect to such claim, within the meaning of 11 U.S.C. § 1124(1). However,

even if the FDIC were to be treated as impaired and entitled to vote, and even if the FDIC then voted to reject the Joint Plan, the Joint Plan still could be confirmed because Class 3 has accepted the Joint Plan and the Joint Plan satisfies the "cramdown" requirements of 11 U.S.C. § 1129(b). As such, there can be no issue of gerrymandering: The separate classification of the FDIC's priority claim, if any, quite simply makes no difference to the outcome, even if the FDIC were somehow to be able to vote to reject the Joint Plan in Class 1(a).

**b) The Joint Plan Satisfies Bankruptcy Code Section 1123(a).**

There are eight requirements for the contents of a chapter 11 plan set forth in 11 U.S.C. § 1123(a). Of these, one – Section 1123(a)(8) – does not apply here, because the Debtor is not an individual. Two others – Sections 1123(a)(6), governing corporate charters of a reorganized debtor, and Section 1123(a)(7), relating to the selection of the officers and directors of a reorganized debtor – also do not apply, because the Joint Plan is a plan of liquidation, and no reorganized debtor will survive.

Bankruptcy Code Section 1123(b) lists various provisions that may, but need not be, included in a plan. 11 U.S.C. § 1123(b). As set forth below, the Joint Plan satisfies all the applicable requirements of Section 1123.

**(1) The Joint Plan Designates Classes of Claims and Interests in Accordance With Bankruptcy Code Section 1123(a)(1).**

Section 1123(a)(1) of the Bankruptcy Code mandates that a chapter 11 plan designate classes of claims and interests other than those specified in Bankruptcy Code Sections 507(a)(2) (administrative expense claims), 507(a)(3) ("gap" period claims in involuntary cases; not applicable in this case, where a voluntary petition for relief was filed), and Section 507(a)(8) (priority tax claims). The Joint Plan complies with this requirement by expressly classifying all claims <u>other</u> than Administrative Expenses and Priority Tax Claims. *See* Joint Plan, Section II.C.1 and 2.

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**(2) The Joint Plan Identifies Unimpaired Classes of Claims and Interests in Accordance with Bankruptcy Code 1123(a)(2).**

Section 1123(a)(2) of the Bankruptcy Code requires that a chapter 11 plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). As modified by the Plan Modification, the Joint Plan satisfies this requirement by specifying that Classes 1, 1(a) and 2 are unimpaired.

**(3) The Joint Plan Specifies the Treatment of Impaired Classes in Accordance with Bankruptcy Code Section 1123(a)(3).**

Under 11 U.S.C. § 1123(a)(3), a chapter 11 plan must "specify the treatment of any class of claims or interests that is impaired under the plan." Section II.A of the Joint Plan specifies that Classes 3 through 6 are impaired, and Sections II.C. 3, 4, 5 and 6 specify the treatment to be accorded to such impaired classes. Accordingly, the Joint Plan satisfies the requirements of 11 U.S.C. § 1123(a)(3).

**(4) The Joint Plan Provides for the Same Treatment of Claims within Each Class in Accordance with Bankruptcy Code Section 1123(a)(4).**

Section 1123(a)(4) of the Bankruptcy Code requires that a plan treat each claim within a given class alike. 11 U.S.C. § 1123(a)(4). Section II.C of the Joint Plan satisfies this requirement by providing for the same treatment of all claims in each class under the Joint Plan.

**(5) The Joint Plan Provides Adequate Means for its Implementation in Accordance with Bankruptcy Code Section 1123(a)(5).**

Section 1123(a)(5) of the Bankruptcy Code requires that a plan "provide adequate means for the plan's implementation," and provides a non-exclusive list of examples of such means. 11 U.S.C. § 1123(a)(5). Section V. of the Joint Plan satisfies this requirement by setting forth how the Joint Plan will be implemented. Among other things, Section V. provides for the vesting of the Debtor's assets with a Liquidating Trust, free and clear of all claims, liens, encumbrances, charges and other interests, subject to the provisions of the Plan, and the appointment of a Liquidating Trustee. The Joint Plan further describes the means for the Liquidating Trustee to discharge his duties, make distributions to the creditors that are the beneficiaries of the Liquidating Trust, become vested with and pursue the

Estate Causes of Action and otherwise provides a comprehensive description of how the Joint Plan is to be implemented, as well as providing for the dissolution of the Debtor and termination of the Debtor's officers and directors. *See, generally,* Joint Plan, Section V.

Section VI of the Joint Plan provides for the establishment of a Post-Confirmation Committee that will exercise oversight of the Liquidating Trustee in accordance with the Joint Plan. Furthermore, Section VII of the Joint Plan provides the means by which distributions are to be made by the Liquidating Trustee and Section IX provides the means for determining when the Joint Plan will become effective. Accordingly, the Joint Plan contains ample provisions for its implementation, and satisfies the requirements of 11 U.S.C. § 1123(a)(5).

**c) The Joint Plan Includes Appropriate Permissive Provisions under Bankruptcy Code 1123(b).**

Section 1123(b)(6) of the Bankruptcy Code provides a non-exclusive list of other provisions that a chapter 11 plan "may" contain, including "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). This allows the court broad discretion regarding what may be included in a plan. *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990) ("The Code . . . grants the bankruptcy courts residual authority to approve reorganization plans including any appropriate provision not inconsistent with the applicable provisions of this title.") (quotations omitted).

The Joint Plan contains provisions relating to the assumption or rejection of executory contracts. *See* Joint Plan, Section VIII. This is consistent with 11 U.S.C. § 1123(b)(2), which allows inclusion of provisions for the assumption, rejection, or assignment of executory contracts and unexpired leases.

The Joint Plan further provides for the establishment of a Liquidating Trust and vests the Liquidating Trustee with the authority to pursue claims of the Debtor's estate. *See* Joint Plan, Section V. This is consistent with 11 U.S.C. § 1123(b)(3)(B).

The Joint Plan also includes appropriate provisions establishing the standards for liability for actions undertaken (1) in connection with the Liquidating Trust, and (2) in connection with the Joint Plan. Section V.B.5 of the Joint Plan sets forth the standard with respect to the Liquidating Trustee's

and Post-Confirmation Committee's administration of the Liquidating Trust and provides, in relevant part:

> 5. No Liability of Liquidating Trustee or Post-Confirmation Committee.
>
> To the maximum extent permitted by law, the Liquidating Trustee, its employees, officers, directors, agents, members, or representatives, or professionals employed or retained by the Liquidating Trustee (the "Liquidating Trustee's Agents"), the members of the Post-Confirmation Committee (as defined below), and their employees, officers, directors, agents, members, or representatives, or professionals employed or retained, will not have or incur liability to any Person for an act taken or omission made in good faith in connection with or related to the administration of the Liquidating Trust Assets, the implementation of the Plan and the Distributions made thereunder or Distributions made under the Liquidating Trust Agreement.

Joint Plan, Section V.B.5.

Section XI.A of the Joint Plan provides the standard with respect to the Chapter 11 Case, and provides, in relevant part:

> Except as otherwise provided by the Plan or the Confirmation Order, on the Effective Date, the Debtor, the Committee, each of the members of the Committee, the Indenture Trustees and their respective officers, directors, employees, representatives, counsel, financial advisors or other agents and their successors or assigns shall be deemed released by each of them against the other, and by all Holders of Claims or Equity Interests, of and from any Claims, obligations, rights, causes of action and liabilities for any act or omission in connection with, or arising out of, the Chapter 11 Case, including, without limiting the generality of the foregoing, all sales of assets of the Debtor's Estate, the Disclosure Statement, the pursuit of approval of the Disclosure Statement, the pursuit of confirmation of the Plan, the consummation of the Plan or the administration of the Plan or the property to be distributed under the Plan, except for acts or omissions which constitute willful misconduct or gross

negligence, and all such Persons, in all respects shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under the Plan and under the Bankruptcy Code.

Joint Plan, Section XI.A.

Each of these provisions provides a standard that is appropriate. Section V.B.5 is, the Debtor submits, customary in its scope and is necessary to the implementation of the Joint Plan. Similarly, Section XI.A provides appropriate and customary exculpatory provisions in connection with the Chapter 11 Case, the Joint Plan and the solicitation of acceptances and rejections of the Joint Plan. Inclusion of these provisions falls within the authority conferred on the courts by Bankruptcy Code Section 1123(b)(6). *See Energy Resources,* 495 U.S. at 549.

In addition, the exculpatory provisions contained in Section XI.A of the Joint Plan are consistent with the liability standard already contained in 11 U.S.C. § 1125(e) relating to plan solicitation and the sale of securities pursuant to a plan. Accordingly, these provisions are reasonable and permissible for inclusion in the Joint Plan under 11 U.S.C. § 1123(b)(6).

**2. The Debtor Has Complied with All Applicable Provisions of the Bankruptcy Code (Bankruptcy Code Section 1129(a)(2)).**

Under 11 U.S.C. § 1129(a)(2), a plan proponent must "compl[y] with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). The principal purpose of the section is to ensure that the proponent complies with the Bankruptcy Code's requirements relating to the solicitation of acceptances of a plan. *See, In re Texaco, Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988). The Court found in the Solicitation Order that the Disclosure Statement contained "adequate information" within the meaning of 11 U.S.C. § 1125(b) and authorized the Debtor to disseminate the Joint Plan, the Disclosure Statement and related materials in accordance with procedures specified in the Solicitation Order. As evidenced by declarations and certificates of service filed with the Court, the Debtor complied with these procedures and with all applicable provisions of the Bankruptcy Code. Thus, the Joint Plan complies with the requirements of 11 U.S.C. § 1129(a)(2).

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**3. The Debtor Has Proposed the Joint Plan in Good Faith in Accordance with the Requirements of Bankruptcy Code Section 1129(a)(3).**

Bankruptcy Code Section 1129(a)(3) mandates that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Bankruptcy Rule 3020(b)(2) supplements this, providing that "[i]f no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues." Fed. R. Bankr. P. 3020(b)(2).

While the FDIC has filed the FDIC Objection, that objection contains no allegation – or even suggestion -- that the Joint Plan was not filed in good faith. Accordingly, the Court should, in accordance with Bankruptcy Rule 3020(b)(2), find that 11 U.S.C. § 1129(a)(3) is satisfied, without further inquiry.

Even without the presumption of good faith established under Bankruptcy Rule 3020(b)(2), the Debtor's good faith is not in doubt. While the Joint Plan does not provide for reorganization of the Debtor, liquidating plans, such as the Joint Plan, are acceptable in Chapter 11 cases. *See,* 11 U.S.C. § 1121(a)(11) (a chapter 11 plan may still be feasible if it provides for liquidation). Certainly, the fact that the Joint Plan provides for the liquidation of the Debtor does not suggest that the Joint Plan is not proposed in good faith. In any case, the Joint Plan is the result of substantial, arms-length and good faith negotiations between the Debtor and the Committee, and is, indeed, supported by the Committee, as co-proponent of the Joint Plan. This alone strongly supports the conclusion that the Joint Plan has been proposed in good faith. Thus, the Joint Plan satisfies the requirements of 11 U.S.C § 1129(a)(3).

**4. The Joint Plan Provides for Court Approval of Payments for Services in Connection with this Case in Accordance with Bankruptcy Code Section 1129(a)(4).**

Pursuant to Section 1129(a)(4), payments "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" must be approved by the Court as reasonable. 11 U.S.C. § 1129(a)(4). *See also, In re Resort International, Inc.*, 145 B.R. 412, 475-76 (Bankr. D.N.J. 1988); *In re Elsinore Shore Associates*, 91 B.R. 238, 268 (Bankr. D.N.Y. 1988) (plan provision that "allowed" administrative expenses will be paid satisfies 11 U.S.C. § 1129(a)(4); *In re Future Energy Corp.,* 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) ("Court approval of

payments for services and expenses are governed by various Bankruptcy Code provisions – e.g. §§ 328, 329, 330, 331, and 503(b) – and need not be explicitly provided for in a chapter 11 plan.").

Sections II.B.1(a) and (b) of the Joint Plan set forth the procedures for filing and allowance of non-ordinary course administrative claims asserted against the Debtor and complies with the requirements of 11 U.S.C § 1129(a)(4).

**5. Bankruptcy Code Section 1129(a)(5): Disclosures Relating to Officers and Directors.**

Section 1129(a)(5) of the Bankruptcy Code sets forth specific disclosure and other requirements relating to the identity and appointment of any officers and directors serving in a reorganized debtor, as well as the compensation of insiders employed post-confirmation. 11 U.S.C. § 1129(a)(5). In this case, the Joint Plan provides for the liquidation of the Debtor and its dissolution, including the termination of all employees, officers and directors of the Debtor. Joint Plan, Section V.F.

**6. The Joint Plan Does Not Effect Any Change in Publicly Regulated Rates (Bankruptcy Code Section 1129(a)(6)).**

Under 11 U.S.C § 1129(a)(6), any regulatory commission with jurisdiction over the rates of a debtor must approve any changes in rate regulations in a plan. 11 U.S.C. § 1129(a)(6). The Debtor is not subject to any such regulation and the Joint Plan does not propose any rate changes. Thus, the Section is not applicable, and no regulatory agency's consent is required.

**7. The Joint Plan is in the "Best Interests" of Creditors in Accordance with Bankruptcy Code Section 1129(a)(7).**

Section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each class of impaired claims or interests under a plan, every holder of a claim or interest in such impaired class either (i) has accepted the plan, or (ii) will receive or retain property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7). This is commonly referred to as the "best interests" test.

Under the Joint Plan, claims in Classes 3 and 4 and interests in Classes 5 and 6 are impaired,

with the latter classes of interest holders deemed to receive nothing under the Joint Plan and to have not accepted the Joint Plan, pursuant to 11 U.S.C. § 1126(g). The vast majority of claims in Class 3 have voted to accept the Joint Plan, thus satisfying the first leg of the test under 11 U.S.C. § 1129(a)(7) with respect to that Class. In addition, as discussed at length in the Disclosure Statement, the Joint Plan, as a liquidating plan, satisfies the best interests test with respect to all impaired creditors, whether or not they have voted to accept the Joint Plan. The distribution that holders of Allowed unsecured Claims will receive under the Joint Plan is greater than such claimants would receive under a chapter 7 liquidation. Confirmation of the Joint Plan will mean that the Debtor's estate will not be burdened by the additional costs of a chapter 7 trustee and the fees and expenses of such a trustee's new advisors. Accordingly, the Joint Plan meets the "best interests" test and satisfies 11 U.S.C. § 1129(a)(7).

**8. The Joint Plan's Treatment of Administrative Claims and Priority Claims Complies with Bankruptcy Code Section 1129(a)(9).**

Section 1129(a)(9) of the Bankruptcy Code requires that, unless the holder of a claim agrees otherwise:

(i) The holder of a claim entitled to priority under section 507(a)(2) or (3) must receive cash equal to the allowed amount of its claim on the effective date of the plan;

(ii) the holder of a claim entitled to priority under section 507(a)(1), (4), (5), (6), or (7) must receive either cash in the allowed amount of such claim on the effective date of the plan or deferred cash payments of a value, as of the effective date, equal to the allowed amounts of such claim; and

(iii) the holder of a tax claim entitled to priority under section 507(a)(8) must receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of a plan, equal to the allowed amount of such claim.

11 U.S.C. § 1129(a)(9).

As an initial matter, Section 507(a)(9) of the Bankruptcy Code, under which the FDIC claims

priority for its claim, is not among those enumerated in 11 U.S.C. § 1129(a)(9). Accordingly, there is no requirement that the FDIC's claim under Section 507(a)(9), if any, be paid in full as a condition to confirmation of the Joint Plan.

The Joint Plan complies with the requirements of Section 1129(a)(9). Section II.B.1(a) of the Joint Plan provides that Allowed Administrative Expense Claims will be paid Cash equal to the amount of such Allowed Administrative Expense, unless the holder agrees to other treatment, (i) in the case of an Administrative Claim that is an Allowed Claim as of the Effective Date, at the later of the Effective Date or the date upon which such payment would be due in the ordinary course, and (ii) in the case of an Administrative Claim that is not an Allowed Claim on the Effective Date, on or before thirty (30) days after the date on which such Administrative Claim becomes an Allowed Claim or the Final Distribution date, whichever is earlier.

Section II.B.1(b)(i) of the Joint Plan provides a procedure and deadlines for the filing and allowance of Administrative Expenses incurred before the Effective Date pursuant to Bankruptcy Code sections 327, 328, 330, 331, 503(b), 507(a)(1) or 1103.

The Joint Plan also provides for payment in full, on the Effective Date of any Allowed Priority Tax Claims, rather than for payment of such claims in installments in accordance with Bankruptcy Code Section 1129(a)(9)(C). Joint Plan, Section II.B.2. This is a more favorable treatment than is mandated under Section 1129(a)(9)(C) and is appropriate given the liquidating nature of the Joint Plan..

Thus, the Joint Plan meets the requirements of 11 U.S.C. § 1129(a)(9).

**9. At Least One Impaired Class of Claims Has Voted to Accept the Joint Plan, After Excluding Votes of Insiders, in Accordance With Bankruptcy Code Section 1129(a)(10).**

Under Section 1129(a)(10) of the Bankruptcy Code, at least one class of impaired claims must have voted to accept the plan, without counting the votes of insiders, as a condition to confirmation of the plan. 11 U.S.C. § 1129(a)(10). Here, all the ballots cast in Class 3 accepted the Joint Plan, without counting insider ballots. The Joint Plan therefore satisfies 11 U.S.C. § 1129(a)(10).

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**10. The Joint Plan is Feasible and Satisfies the Requirements of Bankruptcy Code Section 1129(a)(11).**

Section 1129(a)(11) of the Bankruptcy Code requires the Court to find that "[c]onfirmation 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).

As noted, the FDIC has, in the FDIC Objection, alleged that the Joint Plan is not feasible and cannot satisfy this section. The objection is without merit. The authorities cited in the FDIC Objection are inapposite, since they do not deal with a liquidating Chapter 11 plan, such as the Joint Plan. *See In re The Heritage Organization, LLC,* 375 B.R. 230, 311, n.100 (N.D. Tx. 2007) (distinguishing between feasibility standard for reorganizing plans and liquidating plans). Thus, factors such as "the prospective earnings of the business or its earning power, income projections offered in support of reorganization plans, post-petition working capital, ability to meet capital expenditures" and the like, cited in the FDIC Objection, page 10, lines 21 – 25, are simply not relevant. Rather, the test is whether the Joint Plan's execution is contingent on some future, unresolved event. *Heritage Organization,* 375 B.R. at 311.

This is clearly not the case: the Joint Plan is a plan of liquidation, with the Debtor being succeeded by the Liquidating Trustee, who will administer the assets of the Liquidating Trust without need for further "liquidation" or "reorganization" no matter what the ultimate outcome of the disputes with the FDIC may be. Even in the unlikely event that the FDIC POC is allowed as a priority claim under 11 U.S.C. § 507(a)(9) in an amount large enough that it cannot be satisfied in full, the Joint Plan will, nonetheless, satisfy 11 U.S.C. § 1129(a)(9) for the simple reason that Section 1129(a)(9), on its face, does not require payment in full of a Section 507(a)(9) priority claim as a condition to confirmation.

**11. The Joint Plan Provides for the Payment of All Statutory Fees in Accordance with Bankruptcy Code Section 1129(a)(12).**

Section 1129(a)(12) of the Bankruptcy Code requires that a chapter 11 plan provide for the payment of all fees payable under 28 U.S.C. § 1930 (primarily fees payable to the United States

Trustee) on or before the effective date of the plan. The Joint Plan meets this requirement. Section II.B.1(a) of the Joint provides for the payment, on the Effective Date, of Administrative Claims that are Allowed before the Effective Date. "Administrative Claims" are defined to include fees payable under 28 U.S.C. § 1930. *See* Joint Plan, Section 1.A.2.

**B. The Joint Plan Satisfies the Requirements for "Cramdown" Confirmation Under Bankruptcy Code Section 1129(b).**

Section 1129(b) of the Bankruptcy Code lays out the requirements for so-called "cramdown" confirmation of a chapter 11 plan. It provides as follows:

> (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

**1. The Joint Plan is "Fair and Equitable."**

With respect to what is "fair and equitable" for plan confirmation purposes, Section 1129(b)(2) provides, in relevant part:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides –
>
> ...
>
> (i)(II) that each holder of a claim of such class receive on account of such claim deferred cash payment totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property.

11 U.S.C. § 1129(b)(2)(A)(i)(II).

The Debtor does not believe that there are any secured claims or claimants in its case. Nonetheless, to the extent that any should become known, the Joint Plan provides for payment, in full, of any Allowed secured claims in full, on the Effective Date. Joint Plan, Section II.C.2(b). Accordingly, the treatment that would be afforded any secured claims under the Joint Plan will be "fair and equitable" within the meaning of 11 U.S.C. § 1129(b)(2)(A)(i)(II).

With respect to the treatment of unsecured claims, 11 U.S.C. § 1129(b)(2)(B) provides:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property . . .

11 U.S.C. § 1129(b)(2)(B).

This is the so-called "absolute priority rule," which "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan." *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988).

As a liquidating plan, the Joint Plan accords with the absolute priority rule and is "fair and equitable" within the meaning of 11 U.S.C. § 1129(b)(2)(B). The Joint Plan provides for payment of Priority Claims in Class 1 and Secured Claims in Class 2 (if any) in full. General Unsecured Claims in Class 3 will receive their "pro-rata" share of "Available Cash." Joint Plan, Section II.C.3.(b). "Available Cash," in turn, is defined as: "

> the Cash in the Liquidating Trust that is not otherwise designated by the Liquidating Trustee as Cash to be used to satisfy Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Secured Claims, Allowed Priority Non-Tax Claims, and expenses of the Liquidating Trust or otherwise subject to a reserve established by the Liquidating Trustee.

Joint Plan, Section I.A.6.

Thus, Class 3 will be paid only after payment of "Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Secured Claims, Allowed Priority Non-Tax Claims," in accordance with the absolute priority rule. Similarly, the treatment of Allowed Claims in Class 4 enforces the contractual subordination of those claims to the claims of FTBN in Class 3 in accordance with 11 U.S.C. § 510(a), providing, in essence, that Allowed Class 4 Claims will share pro rata with Allowed Class 3 Claims, but will "give back" to FTBN until such time as FTBN is paid in full. Joint Plan, Section II.C.4(b).

Finally, the Joint Plan abides by the absolute priority rule with respect to interests in Class 5 and Class 6, by providing that the holders of such interests, which are junior in priority to Allowed Class 3 and Class 4 Claims, will receive nothing under the Joint Plan. Joint Plan, Section II.C.5 and II.C.6.

Accordingly, the Joint Plan is "fair and equitable" within the meaning of 11 U.S.C. § 1129(b)(2).

**2. The Joint Plan Does not "Discriminate Unfairly" Within the Meaning of Bankruptcy Code Section 1129(b).**

While Section 1129(b) makes it a condition to confirmation that a plan not "discriminate unfairly" against an impaired class that has not accepted the plan, the Bankruptcy Code does not define the term. However, the bankruptcy court in *In re Dow Corning, Inc.* formulated the following test, which has been broadly followed:

> [A] rebuttable presumption that a plan is unfairly discriminatory will arise when there is: (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class . . . , or (b) regardless of the percentage recovery, an allocation under the plan of a materially greater risk to the dissenting class in connection with its proposed distribution.

*In re Dow Corning, Inc.*, 244 B.R. 705, 710-11 (Bankr. E.D. Mich. 1999), *aff'd in relevant part,* 255 B.R. 445 (E.D. Mich. 2000), *aff'd in relevant part and remanded, Class five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, *cert. denied,* 537 U.S. 816 (2002).

Examination of the *Dow Corning* test quoted above mandates the conclusion that the Joint Plan does not "discriminate unfairly." As a liquidating plan, the Joint Plan provides for treatment of all classes in accordance with their rank in priority. Thus, there simply are no classes of similar rank that will receive disparate treatment under the Joint Plan. Thus, the Joint Plan does not "discriminate unfairly" within the meaning of 11 U.S.C. 1129(b).

## IV.

## CONCLUSION

Accordingly, and for all the reasons set forth above, the Debtor requests that the Court enter its Order confirming the Joint Plan pursuant to the "cramdown" provisions of 11 U.S.C. § 1129(b) or, in the alternate, continue this hearing on confirmation of the Joint Plan for a period of approximately ninety (90) days to allow the Debtor to prosecute the objection to the FDIC POC in the Claim Objection to resolution.

Respectfully submitted,

Dated: May 20, 2010

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