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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHA CHA ENTERPRISES, LLC, Debtor,	CASE NO. 13-53894-ASW CHAPTER NUMBER: 11 **Confirmation Hearing** Date: May 14, 2014 Time: 2:30 p.m. Courtroom: 3020 280 South First Street San Jose, CA 95113 Judge: Hon. Arthur S. Weissbrodt

MEMORANDUM OF POINTS AND AUTHORITIES AND OMNIBUS REPLY IN SUPPORT OF CONFIRMATION OF DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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Cha Cha Enterprises, LLC ("Cha Cha" or the "Debtor"), hereby submits this Memorandum of Points and Authorities and Omnibus Reply in Support of Confirmation of the First Amended Plan of Reorganization (the "Cha Cha Plan" or the "Plan"), pursuant to section 1129.[1] The Cha Cha Plan is submitted in conjunction with the Debtor's First Amended Plan of Reorganization filed by Mi Pueblo San Jose, Inc. in case no. 13-53893 pending before this Court ("Mi Pueblo" and the "Mi Pueblo Plan").

The evidentiary support for the facts supporting confirmation is provided in the Declaration of Juvenal Chavez in Support of Confirmation of the Plan ("Chavez Decl.") filed herewith, the Declaration of Teri Stratton in Support of Confirmation of the Plan ("Stratton Decl.") filed herewith, the Amended Declaration of Teri Stratton filed in support of the DIP financing motion (Dkt. No. 221) ("Stratton DIP Decl."), the Declaration of Juvenal Chavez filed in support of the opposition to NUCP Turlock's motion to designate votes (Dkt. No. 286-1) ("Chavez Designation Opp. Decl."), the Declaration of Jason E. Rios ("Rios Declaration") filed herewith, the Declaration of Karen L. Widder Regarding Tabulation of Ballots in Support of Confirmation of the Plan ("Ballot Decl.") and the Ballots filed herewith, as well as such further evidence and argument as may be submitted at the confirmation hearing.

I. INTRODUCTION

A. Plan Overview

On the Petition Date,[2] the Debtor filed its voluntary petition under Chapter 11 of the Code. Dkt. No. 1. The Cha Cha Plan is a plan of reorganization by which, in conjunction with the Mi Pueblo Plan, Cha Cha will make a substantial contribution of money, collateral, forgiveness of over $14 million of debt, Cha Cha's check cashing business and restructuring of real property leases to Mi Pueblo (Cha Cha's primary source of income) in exchange for a 50% equity interest in Reorganized Mi Pueblo and other consideration provided in the plans. Cha Cha's substantial contribution to Reorganized Mi Pueblo will result in Mi Pueblo's ability to borrow sufficient

[1] Statutory citations, unless otherwise noted, are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

[2] Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Plan.

funds to continue operating, successfully reorganize, and preserve over 3,000 jobs.

In turn, Cha Cha is able to reorganize with a financially healthy primary tenant in its owned real properties. Cha Cha also obtains a 50% equity interest in Mi Pueblo, pursuant to which it has the opportunity to participate in the improvement of Mi Pueblo's rehabilitation. Cha Cha avoids roughly $3.7 million of lease rejection damages and the likely scenario of no recovery for unsecured creditors under a chapter 7 liquidation.

Under the Plan, all Administrative Claims and Priority Claims will be paid in full on the Effective Date of the Plan or as soon thereafter as such Claim becomes an Allowed Claim. Class 4 Convenience Claims ($10,000 or less) will be paid in full on account of such claims 180 days after the Effective Date without interest. Class 3 General Unsecured Claims is comprised of two insider claims and the claim of NUCP Turlock, LLC ("NUCP") that relies on claimant proving its unsupported disputed alter ego theory and a creditor Cha Cha asserts has improper motives and no legitimate claim against Cha Cha. Class 3 General Unsecured Claims will receive a pro rata portion of the GUC Note in the amount of $5,975,000 (estimated distribution range if allowed 35% to 82% depending on allowed amount, if any), which is expected to be paid approximately three years after the Effective Date.

The alternative to confirmation of Cha Cha's Plan and Mi Pueblo's Plan is a sale process or foreclosure by Victory Park Capital Advisors, LLC ("Victory Park"). Under that scenario, Victory Park is likely to have a secured and super-priority claim against Cha Cha in an estimated amount of $25 million, including the secured deficiency claim based on Cha Cha's guaranty of the DIP Facility to Mi Pueblo previously approved by this Court. Cha Cha also calculates that liquidation will result in over $3.7 million in additional lease rejection damage claims. Cha Cha believes it is very likely that in a chapter 7 liquidation there would be no distribution to Cha Cha's creditors other than Victory Park. Confirmation of both the Cha Cha Plan and the Mi Pueblo Plan is in the best interests of all parties in interest.

B. Plan Voting

The Cha Cha Plan provides for three classes of impaired claims: Class 1 (DIP Facility Claims), Class 3 (General Unsecured Claims), and Class 4 (Convenience Claims). Cha Cha Plan,

Art. III. The ballots and other filings the Debtor has received demonstrate acceptances of the Plan by impaired Classes 1, 3 and 4. Ballot Decl. ¶ 4. Classes 1 and 4 have voted unanimously to accept the Plan. NUCP, the holder of a disputed claim, voted to reject the Cha Cha Plan. However, Class 3 has still voted to accept the Cha Cha Plan by 67% in number and 99% in dollar amount, with NUCP's disputed claim filed in the amount of $11,527,189 valued at $1 for voting purposes pursuant to the Order Approving Disclosure Statement.[3]

NUCP has filed a motion to designate the insider claims of Class 3 and 4 ("Motion to Designate"). As set forth in Cha Cha's opposition to the Motion to Designate, that motion should be denied and the insider claim votes allowed. NUCP also has filed a motion for provisional allowance of its claim for voting purposes ("Motion to Allow"). While NUCP reduces that request to $7,727,189 in its reply to the Motion to Allow, for the reasons set forth in Cha Cha's opposition to the Motion to Allow, that motion should be denied and NUCP's claim should be counted at $1 for voting purposes (or at most its capped claim amount of $1,355,925).[4]

C. Objections to the Plan

The Court fixed May 5, 2014, as the deadline to file objections to final approval of the Disclosure Statement or confirmation of the Plan. Order Approving Disclosure Statement at ¶ 20. As of that deadline, the Office of the United States Trustee ("US Trustee") and NUCP each filed objections to the Plan ("UST Objection" and "NUCP Objection," respectively). Dkt. Nos. 295 and 296. Wells Fargo Bank, N.A. ("Bank") filed a limited objection and request for clarification

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[3] Order: (I) Provisionally Approving the Debtor's Disclosure Statement; (II) Establishing Voting Record Date; (III) Approving Solicitation Packages And Distribution Procedures; (IV) Approving Forms of Ballots and Establishing Procedures for Voting on Chapter 11 Plan; (V) Approving Forms of Notices to Non-Voting Classes Under Plan; (VI) Establishing Voting Deadline to Accept or Reject Plan; (VII) Approving Procedures for Vote Tabulations; and (VIII) Establishing Confirmation Hearing Date and Notice and Objection Procedures Thereof (Dkt. No. 273) ("Order Approving Disclosure Statement").

[4] Unless NUCP's claim is allowed for voting purposes at or in excess of $2,906,000, NUCP's vote will not cause Class 3 to be a rejecting class and the Plan can still be confirmed. As set forth in Cha Cha's opposition to the Motion to Allow, if the Court determines the Claim should be provisionally allowed at all, any such allowance should be capped at $1,355,925 – the highest possible amount of the Claim under section 502(b)(6) of the Bankruptcy Code – and should be further reduced due to the remote possibility that NUCP will prevail on the merits of its Claim. NUCP does not address the section 502(b)(6) cap in its Motion, likely because application of the cap would limit its claim in Class 3 of the Cha Cha Plan such that a rejecting vote by NUCP would not affect Cha Cha's ability to obtain an accepting Class 3.

("Bank Limited Objection"). Dkt. No. 297.

The Debtor believes the issues raised by the Bank in the Bank Limited Objection with respect to Exhibit M of the Plan Supplement to the Plan (Dkt. No. 288) ("Plan Supplement") will be able to be addressed and clarified. The Debtor does not object to the Bank's reservation of rights with respect to Exhibit K of the Plan Supplement. Accordingly, the Debtor believes the Bank Limited Objection will be resolved.

The US Trustee objects to the proposed release and exculpation provided in the Plan. For the reasons discussed in section II.A. (iii) below and the reasons discussed in Mi Pueblo's confirmation brief (which are incorporated herein by this reference), the Debtor asserts that the UST Objection should be overruled and the Plan confirmed. The Third Party Releases are consensual and comply with Ninth Circuit law. The Debtor Releases are proper under section 1123(b)(3)(A), as fair, equitable, reasonable, and in the best interests of the estate.

NUCP filed a two-page opposition incorporating by reference its objection filed in the Mi Pueblo case. NUCP's objection in the Mi Pueblo case mentions objections to the Cha Cha Plan in 10 lines on page 17. Although difficult to decipher what is applicable to Cha Cha, NUCP appears to be objecting to the Plans solely on the good faith requirement of section 1129(a)(3) based on (i) NUCP's treatment under the structure of the Plans, (ii) the Debtor releases, and (iii) the third party releases (that do not apply to NUCP because NUCP voted to reject both plans). NUCP also objects based on the absolute priority rule, but it acknowledges that is not an issue, unless the Court provisionally allows the unsupported NUCP claim at more than $2.9 million.

NUCP's good faith argument is misplaced for the following reasons:

- NUCP's treatment under the Cha Cha Plan is very fair. NUCP is not disenfranchised from recovery in the unlikely event it can prove it has a claim against Cha Cha. NUCP asserts an alter ego claim against Cha Cha for over $11 million based on a dispute over the termination of a lease between Mi Pueblo and NUCP.[5] NUCP is the only creditor of Mi Pueblo asserting a claim against Cha Cha and, should NUCP's claim be allowed against Cha Cha (which

[5] The alter ego claim was first asserted in November 2013 by NUCP filing a proof of claim in Cha Cha's bankruptcy case, despite litigation against Mi Pueblo in state court since October 2011. Cha Cha was not a party to the lease or the state court litigation.

Cha Cha does not believe will be the case), NUCP will share pro rata in a $5.975 million note and receive a distribution under Cha Cha's Plan. Notwithstanding this potential additional source of recovery, NUCP objects to the Debtors' Plans. NUCP's objection is consistent with its ulterior motives in this plan confirmation process, namely to ensure Mr. Chavez does not receive a recovery under the Plan, despite his substantial contributions to the reorganization of both Mi Pueblo and Cha Cha.[6]

- Cha Cha's releases are integral to the successful implementation of the Plan, are fair, equitable, reasonable and in the bests interests of the Cha Cha estate, and should be approved under section 1123(b)(3)(A). Cha Cha, in its business judgment, has made a determination that the value granting the Debtor Release provides to the overall reorganization far exceeds the value of any claims against the Released Parties (if any claims have any value at all). As set forth in the opposition to the Motion to Designate, the issue of a Cha Cha release of Mr. Chavez was a requirement of Victory Park to avoid the potential for interference with Mr. Chavez's management responsibilities with Reorganized Cha Cha. Moreover, with respect to Mi Pueblo's release of the Chavez family, following negotiations with the Official Committee of Unsecured Creditors in the Mi Pueblo case (the "Mi Pueblo Committee"), specific provisions including, but not limited to, a three (3) year tolling provision for Chavez family members' Chapter 5 and related claims and the provision of collateralization of the 503(b)(9) A Notes, were agreed to as part of the negotiated plan provisions relating to the Chavez Family Release under the Mi Pueblo Plan. Neither release was the result of some undue influence, as speculated by NUCP.

- The releases Cha Cha receives from Mi Pueblo are supported by substantial consideration and also are fair, equitable, reasonable and in the best interests of the Cha Cha estate. The Mi Pueblo Committee supports the release of Cha Cha under the Plan. Cha Cha's substantial contributions to the reorganization of Mi Pueblo provide more than adequate consideration in exchange for the release of any claims against Cha Cha. It is quite unremarkable

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[6] Cha Cha is informed and believes that the NUCP representative that attended the April 24, 2014 hearing to approve the Debtors' disclosure statements stated on that day to counsel for the Mi Pueblo Committee words to the effect that if NUCP is not getting anything under the plans, NUCP will do everything in its power to make sure Mr. Chavez gets nothing.

for Cha Cha to obtain a release of claims from Mi Pueblo considering the significant contributions Cha Cha has made and is making to Mi Pueblo's reorganization. Contrary to NUCP's speculation, Cha Cha has supported Mi Pueblo financially for years, thus resulting in Cha Cha having the largest unsecured claim against Mi Pueblo in the amount of approximately $14 million (which is waived under the Plans).

- Class 1 and Class 4 are legitimately impaired under the Plan, such that the Plan structure, as argued by NUCP, does not violate the good faith requirement. The classification of Claims under the Plan was the result of negotiations with Victory Park and other parties in interest considering available liquidity on the Effective Date, the fair and reasonable treatment of Claims, whether creditors were trade creditors with which the Debtor must continue to do business post-Confirmation, whether Claims were disputed and the likely timing of adjudication, and other factors.

Cha Cha's response to NUCP's objections is discussed further in the appropriate sections below.

D. Discovery Status

The deadlines have passed for NUCP to submit evidence relating to NUCP's (a) motions to provisionally allow its claims for voting purposes only in both cases, (b) Motion to Designate, and (c) objections to confirmation. The evidentiary record is closed. Despite appearing in Cha Cha's and Mi Pueblo's bankruptcy cases last November, NUCP has waited to the last minute to raise issues the Court already ruled upon in connection with the DIP Facility motions (i.e., questioning the process involving the search for investments and financing that resulted in the DIP Facility and Exit Facility with Victory Park). Not deterred by the Court's prior findings in final orders, NUCP propounded over 260 requests for production to each Debtor the day before the disclosure statement hearing. NUCP's motions to provisionally allow its claim for voting and to designate votes were practically devoid of evidence, essentially admitting that NUCP did not have any facts to support its allegations. NUCP's tactic instead is to rely on claims of lack of discovery responses to justify its conjecture-based allegations. NUCP's conduct should not be allowed to succeed in derailing two chapter 11 debtors' efforts to reorganize and save jobs.

Cha Cha files herewith the Rios Declaration regarding Cha Cha's efforts to handle the

discovery issues with NUCP's counsel. As shown therein, Cha Cha has produced much more than a "few documents" (see NUCP Mi Pueblo Objection at 17:22) that are responsive to NUCP's requests, many of which were produced before NUCP's deadline to file the objections to confirmation.

II. ARGUMENT

Section 1129 sets forth the requirements for confirmation of a plan. As the proponent of the Plan, the Debtor bears the burden of establishing each of the elements under section 1129 by a preponderance of the evidence. *In re Arnold*, 177 B.R. 648, 654-55 (9th Cir. BAP 1994). For reasons set forth below, the Plan satisfies the requirements of section 1129, the UST and NUCP Objections should be overruled, and the Court should confirm the Plan.

A. The Plan Complies with Section 1129 (a)(1)

Pursuant to section 1129(a)(1), a plan must comply with "the applicable provisions of" the Code. The applicable provisions are section 1122, which sets guidelines for permissible classification of claims or interests in a plan, and section 1123, which sets forth the required and permissible contents of a plan. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see In re Michelson*, 141 B.R. 715, 721 (Bankr. E.D. Cal. 1992) (noting that the court will review classification and contents of a plan *sua sponte*); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (holding that a plan must comply with the requirements of Chapter 11, even absent objections to confirmation). Here, the Plan complies with sections 1122 and 1123, and other provisions of the Code.

(i) The Plan Complies with Section 1122

Under section 1122(a), with the exception of administrative convenience classes covered under section 1122(b), "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." Although section 1122 provides that dissimilar claims may not be classified together, there is no express prohibition of separate classification of similar claims. *Bakarat v. Life Ins. Co. of Va. (In re Bakarat)*, 99 F.3d 1520, 1524-25 (9th Cir. 1996); *Travelers Ins. Co. v. Bryson Properties XVIII (In re Bryson Properties XVIII)*, 961 F.2d 496, 502 (4th Cir. 1992) (acknowledging that section

1122 "grants some flexibility in classification of unsecured claims"). Nevertheless, most courts will only allow separate classification of similar claims where such classification does not represent gerrymandering. *Id.*; *In re Corcoran Hospital District*, 233 B.R. 449, 455 (Bankr. E.D. Cal. 1999) (affirming that the Ninth Circuit requires a business or economic justification for the separate classification of unsecured claims).

The Plan classifies claims as follows:

1. Class 1 consists of the secured DIP Facility Claim.

2. Class 2 consists of the other secured claims.

3. Class 3 consists of general unsecured claims.

4. Class 4 consists of convenience class claims.

5. Class 5 consists of allowed interests of the Debtor's Members.

These classifications are rationally based on the legal nature and/or priority of the claims and interests. Chavez Decl. ¶ 4-6. NUCP's argument that the Plan classification constitutes artificial impairment such that the Plan does not meet the good faith requirement will be addressed below in the discussion of the good faith requirement of section 1129(a)(3).

(ii) The Plan Complies with Section 1123

Section 1123(a) sets forth mandatory requirements, and section 1123(b) sets forth permissive requirements, for the contents of a plan. The Plan complies with the requirements of section 1123.

1. In accordance with subsection (1) of section 1123(a), the Plan designates classes of claims and interests. *See* Plan, Art. III.

2. In accordance with subsection (2) of section 1123(a), the Plan specifies any classes of claims or interests that are not impaired. *See* Plan, Art. III.

In accordance with subsection (3) of section 1123(a), the Plan specifies the treatment of any class of claims or interests that is impaired under the Plan. *See* Plan, Art. III.

3. In accordance with subsection (4) of section 1123(a), the Plan provides the same treatment of each class or interest as the treatment of other claims or interests in such class, unless the holder of a particular claim or interest agrees to a less favorable treatment. *See* Plan, Art. III.

4. Subsection (5) of section 1123(a) requires that a plan provide adequate means for its implementation. Article IV of the Plan sets forth the provisions for implementation of the Plan. The Plan provides for, among other things, use of proceeds from the Exit Facility (Plan at Article IV.A), the general settlement of claims and interests (Plan at Article IV.D), the vesting of all of the Debtor's Causes of Action and any property acquired by the Debtor pursuant to the Plan in the Reorganized Debtor (Plan at Article IV.E), the exemption from mortgage recording taxes and other taxes of any transfers of property pursuant to the Plan under section 1146(a) (Plan at Article IV.I), the preservation of certain Causes of Action (Plan at Article IV.L), and the authorization for the Reorganized Debtor to undertake certain Restructuring Transactions, including those contemplated by or necessary to effectuate the Plan (Plan at Article IV.N). The Debtor submits that the foregoing constitutes adequate means for implementation of the Plan.

5. Subsection (6) of section 1123(a) requires that a plan provide for the inclusion in a corporate debtor's charter a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the classes of securities possessing voting power, an appropriate distribution of such power among such classes. 11 U.S.C. § 1123(a)(6). This provision is not applicable as the Debtor is a limited liability company and not a corporation. *In re Univ. Shoppes, LLC*, 2010 Bankr. LEXIS 4814, *13 (Bankr. S.D. Fla. Sept. 17, 2010) (finding section 1123(a)(6) not applicable because the debtor was a limited liability company).

6. Subsection (7) of section 1123(a) requires that a plan contain only provisions that are consistent with the interests of creditors, equity security holders, and public policy with respect to the manner of selection of any officer, director or trustee under the plan and any successor thereto. Here, Reorganized Cha Cha will continue to operate under its operating agreement consistent with California law for limited liability companies. There is no objection that Cha Cha's corporate structure is inconsistent with the interests of creditors, equity security holders, and public policy, and the requisites of section 1123(a)(7) are satisfied.

7. Subsection (8) of section 1123(a) is not applicable because the Debtor is not an individual.

8. Pursuant to the permissible provisions of section 1123(b), the Plan renders Classes

1, 3 and 4 impaired. *See* Plan, Art. III; 11 U.S.C. § 1123(b)(1). The Plan provides that all executory contracts and unexpired leases of the Debtor entered into prior to the Petition Date which are not assumed or rejected pursuant to section 365 prior to the Confirmation Date shall be deemed rejected upon the Effective Date. *See* Plan, Art. V; 11 U.S.C. § 1123(b)(2). Each non-debtor party to an executory contract or unexpired lease rejected under the Plan shall have thirty (30) days subsequent to the Effective Date to file a proof of claim with the Court asserting damages arising from such rejection. *Id.* The Plan provides for the retention of all claims or interests held by the Estate, except those expressly released by the Plan. *See* Plan, Art. IV and Art. VIII.D; 11 U.S.C. § 1123(b)(3)(B). The Plan will be executed by the vesting of all property of the Debtor's Estate, all of the Debtor's Causes of Action, and any property acquired by the Debtor pursuant to the Plan shall vest in Reorganized Cha Cha. *See* Plan, Art. IV, 11 U.S.C. § 1123(b)(4). The rights of holders of secured claims are modified, but not in a manner that is prohibited by section 1123(b)(5). *See* Plan, Art. III; 11 U.S.C. § 1123(b)(5).

(iii) Objections Based on Release Language and Exculpation Clause

The UST objects to the Plan on the basis that the Third Party Release provided in Article VIII.E violates Ninth Circuit law. It is unclear whether NUCP objects on this basis as well, but it has voted to reject the Plan such that it is not giving a Third Party Release. The Third Party Release is consensual and should be approved.

(1) The Third Party Release is Consensual and Should Be Approved.

Article VIII.E of the Plan provides for the release of certain non-Debtor third parties by certain Holders of Claims and Interests. The third party releases are consensual, as they apply only to creditors voting to accept the Plan and to creditors that abstain from voting and elect not to opt out of the release. Specifically, pursuant to the Third Party Release, the Holders of Claims release the Reorganized Debtor and the Released Parties from any claims or causes of action the Holder would have been entitled to bring against such parties.

Courts in the Ninth Circuit consistently have acknowledged that plans containing consensual third party releases are permissible. In *In re Pacific Gas & Elec. Co.*, the bankruptcy court confirmed a plan that included a governmental agency's release of non-debtors because the

agency had consented to the release. *See In re Pacific Gas & Elec. Co.*, 304 B.R. 395, 416-18 (Bankr. N.D. Cal. 2004). The court reconciled its decision with *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir.1995), a Ninth Circuit decision often cited for the legal principle that section 524(e) of the Bankruptcy Code precludes bankruptcy courts from discharging the liabilities of non-debtors. The court in *In re Pacific Gas & Elec. Co.* concluded that this legal principle was inapplicable because the plan did not release non-debtors from claims that belong to others, except the agency, which had consented to the release. *See In re Pacific Gas & Elec. Co.*, 304 B.R. at n.26. Where the plan in *In re Lowenschuss* included a non-consensual release of third parties, the plan in *In re Pacific Gas & Elec. Co.* specifically included a consensual release of third parties, which the court found was permissible under the Bankruptcy Code and Ninth Circuit precedent.

Similarly, other courts in the Ninth Circuit have distinguished non-consensual third party releases from consensual releases, finding that "[a]ny third-party release in connection with a plan of reorganization, at a minimum, must be fully disclosed and purely voluntary on the part of the releasing parties and cannot unfairly discriminate against others. In the Ninth Circuit and other jurisdictions that prohibit compelled third-party releases, any third-party release associated with a plan of reorganization draws its vitality from its status as a voluntary contractual agreement …." *In re Hotel Mt. Lassen, Inc.*, 207 B.R. 935, 941 (Bankr. E.D. Cal. 1997) (noting that, while the Ninth Circuit in *Lowenschuss* "did not discuss the permissibility of purely consensual third party releases, the logic of [that] decision[] does not preclude them. Moreover, such consensual arrangements are commonly proposed in Ninth Circuit bankruptcy courts in connection with plans that are confirmed and … are rarely appealed.").

Cha Cha incorporates by this reference the further arguments and authorities in Mi Pueblo's Memorandum of Law in Support of Confirmation its Plan. The Third Party Release is consistent with Ninth Circuit law and should be approved.

(2) The Debtor Release of Released Parties, including Insiders and Affiliates Should Be Approved.

The Debtor's releases provided in the Plan are integral to the successful implementation of

the Plan, are consistent with the applicable provisions of the Bankruptcy Code, conform to the requirements of precedent in the Ninth Circuit, and accordingly, should be approved. Section 1123(b)(3)(A) of the Bankruptcy Code specifically permits a Chapter 11 plan to "settle or adjust any claim belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). The Debtor Release is set forth in Plan Article VIII.D.

The court may approve a debtor release if the release is "fair, equitable, reasonable, and in the best interests of the estate." *In re Lighthouse Lodge, LLC*, 09-52610-SLJ, 2010 WL 5156263 *11 (Bankr. N.D. Cal. Dec. 14, 2010) (citing *In re A & C Props.*, 784 F.2d 1377, 1381–82 (9th Cir.1986)). In evaluating debtor releases in the Ninth Circuit, bankruptcy courts examine several issues much like the court does in evaluating whether to approve a settlement under Fed. R. Bankr. Proc. 9019, including whether: the debtors exercised their sound business judgment in entering into the releases; the releases are fair and equitable, reasonable, and in the best interests of the debtors' estate; and the releases are essential and integral to the Plan, and clearly fall above the lowest range of reasonableness. See *In re South Bay Expressway*, L.P., 2011 WL 2751181 ¶ HH (Bankr. S.D. Cal. Apr. 14, 2011) (trial order); *In re Ing*, 12-02358, 2013 WL 6074166 *5 (Bankr. D. Haw. Nov. 18, 2013) (finding Plan's releases were essential to Plan, conferred substantial benefits on Debtor's estate, were fair, reasonable, and in the best interests of the Debtor, its estate, and parties in interest); see also *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (debtors may release claims under Section 1123(b)(3)(A) "if the release is a valid exercise of the Debtors' business judgment, is fair, reasonable, and in the best interests of the estate"). Moreover, the court may also consider whether the releases were negotiated in good faith and at arm's length, and were supported by the parties. See *In re South Bay Expressway, L.P.*, 2011 WL 2751181 at ¶ HH.

Cha Cha Release of Victory Park is Integral to the Plan. First, there is no question that a release in favor of Victory Park in exchange for the Exit Facility is fair, equitable, reasonable and integral to the Plan. Not surprisingly, Victory Park will not provide the Exit Facility without a release. Without the Exit Facility, there is no reorganization. Victory Park has supported the Debtors by providing the DIP Facility enabling the Debtor to take out Wells Fargo

Bank at a substantial discount and work towards a successful reorganization.

Cha Cha Release of Insiders is Integral to the Plan. Cha Cha, in its business judgment, has made a determination that the value of any claims against the Released Parties (if any claims have any value at all) is far exceeded by the value granting the Debtor Release provides to the overall reorganization. As set forth in the opposition to the Motion to Designate, the issue of a Cha Cha release of Mr. Chavez was a requirement of Victory Park to avoid the potential for interference with Mr. Chavez's management responsibilities with Reorganized Cha Cha. *See* Chavez Designation Opp. Decl. Victory Park does not want to invest in Cha Cha if the manager of Cha Cha will be embroiled in litigation post-Confirmation. As shown below and in Cha Cha's opposition to the Motion to Designate, the insiders already have made significant contributions that benefit both Cha Cha and Mi Pueblo. Thus, rather than being the result of imagined undue influence as suggested by NUCP, the Debtor Release is the result of good business sense by an investor of over $50 million into the Debtors' reorganization.[7]

Moreover, contrary to NUCP's unsupported speculation, Mr. Chavez has been and remains the key to the success of the Cha Cha and Mi Pueblo reorganizations through his significant contributions already made and his continued involvement post-Confirmation. Mr. Chavez's contributions to Mi Pueblo have benefitted Cha Cha by ensuring Cha Cha's primary tenant can pay rent so that Cha Cha can pay rent to third party landlords and otherwise meet its obligations.[8] Mr. Chavez also has not collected any salary for acting as Cha Cha's Manager

[7] Under the Mi Pueblo Plan, the Chavez Releases are subject to the Chavez Tolling Agreement, pursuant to which all statutes of limitation with respect to Avoidance Actions and other Causes of Action of Mi Pueblo against such persons for a period extending for three (3) years and one (1) month after the Effective Date; provided that if Reorganized Mi Pueblo does not pay the Special B Note Payment before the expiration of the Chavez Tolling Agreements, the terms of such Chavez Tolling Agreements shall extend for an additional three (3) years.

[8] As the case records reflect, Mr. Chavez loaned Mi Pueblo $1.9 million in post-petition financing, which was necessary to bridge Mi Pueblo's operations to get to the later and much needed debtor-in-possession financing. Mi Pueblo Dkt. No. 409. Mr. Chavez's post-petition financing was junior to the then existing Wells Fargo Bank secured debt. Moreover, Mr. Chavez agreed to subordinate $950,000 of the loan such that it would be paid *pari passu* with allowed 503(b)(9) claims. Later, in connection with the approval of the DIP Facility, Mr. Chavez agreed to further modify the repayment of his post-petition loan by subordinating an additional $475,000 of the loan such that it would be paid *pari passu* with allowed 503(b)(9) claims. Mi Pueblo Dkt. No. 650 at ¶ 47.

during the bankruptcy case and no salary is currently budgeted for him post-Confirmation.

Mr. Chavez also has voted to accept the Cha Cha Plan, which contributes significant value (over $19.2 million in cash) to Mi Pueblo and thus ensures Cha Cha's and Mi Pueblo's operations continue and preserves over 3,000 jobs in local communities. *See* Ballots filed herewith.

Mr. Chavez also has contributed to the operations of Cha Cha and Mi Pueblo to the benefit of their creditors before the bankruptcy filings. Cha Cha helped fund Mi Pueblo's expansion from February 2010 to the bankruptcy filing in the amount of almost $14 million. *See* Mi Pueblo Claims Register Claim No. 50-1 filed October 29, 2013. The Cha Cha claim against Mi Pueblo is being released as a contribution to Reorganized Mi Pueblo under the Plan. Further, Mr. Chavez personally contributed over $5.6 million in funding to Cha Cha. *See* Cha Cha Schedule F at page 17 of 25 (Dkt. No. 55). Mr. Chavez has agreed that his claim against Cha Cha will be subordinated to the Exit Facility and can be paid in three years after the Effective Date.

Cha Cha's Release from Mi Pueblo is Supported by Consideration. Cha Cha's substantial contributions to the reorganization of Mi Pueblo, that in turn benefit Cha Cha, provide more than adequate consideration in exchange for the release of any claims by Mi Pueblo against Cha Cha and the Cha Cha equity interest in Mi Pueblo. Cha Cha benefits from the support it gives to Reorganized Mi Pueblo by having a primary tenant in the Cha Cha owned properties that can pay rent. Cha Cha also shares in the potential of an improved Mi Pueblo by obtaining an equity interest in Reorganized Mi Pueblo.

Further, Cha Cha is informed and believes that the Mi Pueblo Committee supports the Mi Pueblo release of Cha Cha, after having conducted sufficient investigations of Mi Pueblo's claims against insiders and affiliates. Contrary to NUCP's allegations, the independent Mi Pueblo Committee has vetted the release of Cha Cha and supports it.

Thus, the Debtor Releases are fair, equitable, reasonable, and in the best interests of the estate. The Plan complies with section 1129(a)(1).

B. The Plan Complies with Section 1129(a)(2)

Section 1129(a)(2) requires that the proponents of a plan comply with the "applicable provisions" of Title 11. The applicable provisions include the disclosure requirements under

section 1125. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see, e.g.*, *In re Sierra-Cal*, 210 B.R. 168, 176 (Bankr. E.D. Cal. 1997) (stating that section 1125 is an example of what section 1129(a)(2) is intended to cover); *Michelson*, 141 B.R. at 719 (explaining that "[c]ompliance with the disclosure and solicitation requirements is the paradigmatic example of what Congress had in mind when it enacted section 1129(a)(2).").

Section 1125 requires disclosure prior to the solicitation of acceptances of a proposed plan. That is, plan acceptances or rejections may not be solicited 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 approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). The same disclosure statement shall be transmitted to all class members, but differing disclosure statements may be transmitted among the classes. 11 U.S.C. § 1126(c).

On April 25, 2014, after notice and a hearing, the Court entered its Order Approving Disclosure Statement. On April 28, 2014, the Debtor served the solicitation package regarding the proposed confirmation of the Plan. Dkt. No. 275. On April 29, 2014, the Debtor served the Notice of Filing of Complete Exhibit 4 to Disclosure Statement. On May 1, 2014, the Debtor filed its Plan Supplement. On May 1 and May 2, 2014, the Debtor served the Plan Supplement and notice of the Plan Supplement. Dkt. No 288.

The Court provisionally determined that the Disclosure Statement contained adequate information, as defined by section 1125(a)(1), to enable a hypothetical investor typical of the holders of claims or interests in the case to make an informed judgment about the Plan. Order Approving Disclosure Statement at ¶ 3. NUCP objects to confirmation of the Mi Pueblo Plan on the basis that the Disclosure Statement should have disclosed information regarding (a) pre-petition sale and financing efforts; (b) competing proposals to the Victory Park DIP proposal; and (c) conflict of interest as among the interests of Mi Pueblo stakeholders, Cha Cha stakeholders and the Chavez family (and remedial measures taken to address those conflicts). The Disclosure Statement adequately disclosed this information.

First, NUCP's claimed lack of information regarding the DIP financing process is

irrelevant given NUCP cannot collaterally attack the final order of this Court approving the DIP financing, which resulted from Mi Pueblo's marketing process and included Cha Cha information. As discussed in more detail in its Opposition to NUCP's Motion to Designate Votes (Dkt. No. 286), Cha Cha provided details about Mi Pueblo's marketing process in connection with the DIP motion. Finally, NUCP's last minute conjecture about conflicts of interest of Mr. Chavez are unfounded speculation that is negated by the fact that Mi Pueblo, Cha Cha and Mr. Chavez all were represented by separate counsel, and the fact that the Mi Pueblo Committee has been intimately involved in every aspect of the cases.[9]

In accordance with the Order Approving Disclosure Statement the Debtor mailed copies of the Disclosure Statement and Plan, in addition to a ballot form or notice of unimpaired non-voting status, as applicable, to all creditors, equity security holders, other parties in interest, and the UST, as evidenced by the Proofs of Service filed with the Court on April 28 and April 29, 2014 (Dkt. Nos. 275 and 282). The Debtor did not solicit Plan acceptances before providing the required adequate information in the Disclosure Statement. Chavez Decl. ¶ 9.

C. <u>The Plan Complies with Section 1129(a)(3)</u>

Section 1129(a)(3) requires that the Plan have been proposed "in good faith and not by any means forbidden by law." "A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code." *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1074 (9th Cir. 2002) (citing to *Ryan v. Loui (In re Corey)*, 892 F.2d 829, 835 (9th Cir. 1989)). The "purposes of the Bankruptcy Code include facilitating the successful rehabilitation of the debtor, and maximizing the value of the bankruptcy estate." *In re Gen. Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d. 869, 877 (9th Cir. 2001). The bankruptcy court, in evaluating whether a plan is proposed in good faith, will look to the totality of the circumstances. *In re Leslie Fay Cos., Inc.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997). *See In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986) ("Good faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process.").

[9] NUCP does not explain why it did not object to the DIP financing or otherwise participate in these cases over the last 9 months, until its last minute efforts to derail both Debtors' efforts to reorganize and preserve jobs in the local community.

Here, the Debtor has proposed the Plan with honesty, good intentions, and a desire to effectuate a full, fair, and feasible restructuring of its liabilities while maximizing value for the benefit of all parties in interest. The objection of recalcitrant unlikely creditor, NUCP, is that the Cha Cha Plan and the Mi Pueblo Plan are not proposed in good faith. However, the totality of the circumstances show that the Plans are proposed in good faith and the NUCP Objection on this ground should be overruled.

(i) The Cha Cha Plan and the Mi Pueblo Plan Are the Best Alternatives Available

The Plan is the result of a concerted effort to preserve the going concern value of both Mi Pueblo and Cha Cha to the fullest extent possible for the benefit of creditors, employees and the local community. Pursuant to the Plan and the Mi Pueblo Plan, Victory Park is providing Cha Cha with $24.5 million in exit financing. Cha Cha, in exchange for a 50% equity interest in Reorganized Mi Pueblo, will contribute to Mi Pueblo (directly or indirectly) the following: (a) a loan from certain of the proceeds of its exit financing evidenced by two promissory notes totaling approximately $19.2 million, comprised of a subordinated secured promissory note from Reorganized Mi Pueblo in the approximate amount of $2.2 million and a subordinated unsecured note from NewCo in the approximate amount of $17 million, which amount will then be contributed to Reorganized Mi Pueblo; (b) Cha Cha's check cashing business; (c) the real property leases related to certain subleased property as well as lease/license agreements for space in Mi Pueblo stores; and (d) a release for Cha Cha's approximately $14 million claim against Mi Pueblo. In addition, Cha Cha will pledge all of its assets on a senior basis to secure $24.5 million in exit financing to be provided by Victory Park and on a junior basis to guaranty the $31.5 million in exit financing to be provided by Victory Park to Mi Pueblo, which amounts will be used to assist Mi Pueblo and Cha Cha in their respective reorganizations. Chavez Decl. ¶ 12.

Under the Plan, all Administrative Claims and Priority Claims will be paid in full on the Effective Date of the Plan or as soon thereafter as such Claim becomes an Allowed Claim. Class 4 Convenience Claims will be paid in full on account of such claims 180 days after the Effective Date without interest. Class 3 General Unsecured Claims – including the disputed alter ego claim of NUCP – will receive a pro rata portion of the GUC Note in the amount of

$5,975,000 which is expected to be paid approximately three years after the Effective Date.

Contrary to NUCP's assertion that the good faith requirement is not met because of its treatment under the Plan, the Plan properly treats NUCP. NUCP will have its day in court against Cha Cha on its alter ego claims unless, as is likely, the alter ego claims are of the type NUCP does not have standing to bring.[10] Should NUCP's claim be allowed in any amount against Cha Cha, NUCP would receive its pro rata share of the $5.975 million GUC Note, which could be 35% of its alleged claim in the unlikely event its claim is adjudicated at the $11.9 million it asserts.[11]

(ii) Cha Cha Management Is Not Conflicted Plan and Has Acted in the Best Interests of the Estate

NUCP further objects under the good faith requirement that Cha Cha's decisions before and during the bankruptcy case were not in Cha Cha's best interests. Despite being involved in what it admits was hotly contested litigation for over a year before the bankruptcies, NUCP presents no facts to support its conjecture. Instead, NUCP merely attempts to raise suspicions.

At the time Cha Cha and Mi Pueblo filed their bankruptcy cases, there was a default in the loans of both entities to Wells Fargo Bank and the parties had reached an impasse with respect to negotiating a forbearance agreement. Wells Fargo Bank could have cut off the credit to both

[10] While NUCP presumes it has standing to assert an alter ego claim against Cha Cha, such may not be the case. The Ninth Circuit has determined that an individual creditor may hold the right to pursue alter ego liability only under certain circumstances. *Ahcom Ltd. v. Smeding*, 623 F.3d 1248 (9th Cir. 2010). For example, if alter ego liability is based on a transfer of assets from the corporation to the shareholder or conversion of corporate assets by a corporation's shareholder or depositing corporate assets into the personal bank account of the shareholder, then such claims belong to the bankruptcy trustee. *See In re O'Reilly & Collins*, 2014 U.S. Dist. LEXIS 13264 (N.D. Cal. Feb. 3, 2014) (holding alter ego claims based on transfer of assets from corporation to shareholder and personal use of corporate funds belonged to chapter 7 trustee and not to the creditor). *Compare Shaoxing County Huayue Import & Export v. Bhaumik*, 191 Cal. App. 4th 1189 (2011) (holding the specific creditor could pursue an alter ego claim against the shareholder because the shareholder did not open a bank account for the corporation, file tax returns for the corporation, issue shares for the corporation or have corporate bylaws or minutes). To the extent NUCP asserts an alter ego claim on the ground that Mi Pueblo and Cha Cha's operations are a unitary enterprise and the separate corporate existences of Mi Pueblo and Cha Cha should not be recognized, Cha Cha asserts that such claims belong to Mi Pueblo's bankruptcy estate and NUCP does not have standing to assert such claims.

[11] If NUCP's claim is eventually adjudicated at the capped amount of approximately $1.3 million, its recovery would be approximately 82%.

Debtors at any time. Coupled with Mi Pueblo's flat sales and immigration issues, bankruptcy was an appropriate move for Mi Pueblo, and because of the Wells Fargo debt tied to Mi Pueblo, for Cha Cha as well. Chavez Decl. ¶ 13.

NUCP tries to paint a picture of self-interested acts by Cha Cha that harmed Mi Pueblo's general unsecured creditors, but neglects to mention the over $14 million Cha Cha lent to Mi Pueblo pre-petition to support Mi Pueblo's operations, NUCP has it wrong; NUCP's speculation is that Mi Pueblo was supporting Cha Cha and its owners. Cha Cha's cash infusions clearly benefited the interests of Mi Pueblo's general unsecured creditors. In addition, as part of plan confirmation, Cha Cha will waive that claim (i.e., the largest unsecured claim in the Mi Pueblo case) so that there are more funds available for the benefit of Mi Pueblo's post-confirmation operations, and Mi Pueblo's 503(b)(9) and general unsecured creditors.

(iii) The Cha Cha Plan and the Mi Pueblo Plan Are the Result of Extensive Marketing

NUCP also suggests that the assets of Mi Pueblo and Cha Cha were not exposed properly to the marketplace. Such is not the case. First and most notably, NUCP, which has been represented in both Debtors' bankruptcy cases since at least early August 2013,[12] did not object to either Debtors' motions to approve the DIP Facility provided by Victory Park, when this issue should have been raised. In fact, the Court made findings in the Interim Order and Final DIP Order approving the DIP Facility that belie NUCP's argument. Specifically, the Court found at paragraph K of the Interim Order and paragraph L of the Final DIP Order as follows:

> The terms of the DIP Facility are the best available and are fair and reasonable under the circumstances, reflect the Debtor's exercise of prudent business judgment consistent with its fiduciary duty, and are supported by reasonably equivalent value and fair consideration. The financing and the guaranty authorized hereunder have been negotiated in good faith and at arm's length among the Debtor, Mi Pueblo with respect to the guaranty, the DIP Agent, and the DIP Lenders. Any credit extended and loans made to the Debtor and the guaranty provided by the Debtor pursuant to this Interim Order shall be deemed to have been extended, issued, made, or consented to, as the case may be, in "good faith" as required by, and within the meaning of, section 364(e) of the Bankruptcy Code, and the DIP Agent and the DIP Lenders shall have all of the protections thereunder.

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[12] *See* Notice of Appearance, Request for Special Notice and for Inclusion on Mailing List filed by NUCP in the Cha Cha case (Dkt. No. 58) and in the Mi Pueblo case (Dkt. No. 110).

Interim Order (I) Authorizing Debtor In Possession To Obtain Postpetition Financing And Providing Guaranty Pursuant To 11 U.S.C. §§ 105, 361, 362, 363, And 364; (II) Granting Liens, Security Interests, And Superpriority Claims; (III) Authorizing Use Of Cash Collateral; (IV) Modifying The Automatic Stay; (V) Scheduling A Final Hearing; And (VI) Granting Related Relief (Dkt. No. 228) and Final DIP Order (Dkt. No. 238).

Further, as the records from the DIP financing motions in both cases reflect, from October to November 2013, as directed by the Board of Directors of Mi Pueblo, Mi Pueblo's financial advisor, Avant Advisory ("Avant"), contacted 42 potential bidders to determine their interest in financing or the acquiring the Debtors. Ultimately, three parties submitted written initial indications of interest. Stratton DIP Decl. ¶ 4 (Dkt. No. 221).

In early December 2013, in consultation with the Bank and the Mi Pueblo Committee, Mi Pueblo engaged Piper Jaffray & Co. ("Piper Jaffray") to run a broader process more focused on a sale of Mi Pueblo's assets, as well as considering the sale of Cha Cha's assets. In addition, it became clear that Mi Pueblo required additional debtor-in-possession financing ("DIP financing") to be obtained by mid-February. Piper Jaffray looked for DIP financing such that it would need to be completed by no later than mid-January 2014 because such financing was unavailable from the Bank. *Id.* ¶¶ 5-6.

Piper Jaffray began a remarketing process to the 42 parties previously contacted by Avant and an additional 29 parties including strategic potential buyers. Of the 71 parties contacted, 42 parties negotiated confidentiality agreements and received a Confidential Information Memorandum. Twenty-five of those parties requested and received data room access, six conducted management calls and meetings, resulting in five written proposals for the financing and acquisition of the Debtors or acquisition only of the Debtors. *Id.* ¶ 7.

After a thorough review of the proposals by Piper Jaffray, Avant and the Debtors, the proposal from Victory Park was selected to be the prevailing proposal as it provided adequate DIP financing to finance the continued operations of the Debtors while in bankruptcy and exit financing to be effected through plans of reorganization to be negotiated once the DIP financing was in place. *Id.*

Further, NUCP fails to acknowledge that the Mi Pueblo Committee was intimately involved in the solicitation and selection process. The order approving Piper Jaffray specifically requires at paragraph 6 that the Mi Pueblo Committee be involved in the process as follows:

> the Committee and the [Wells Fargo Bank] shall have rights (a) to receive regular written and telephonic updates from PJC concerning the status of PJC's efforts with respect to a transaction involving the Debtor (including lists of all parties contacted and the status of PJC's negotiations with such parties); (b) to receive copies of all written offers, term sheets, proposals, and expressions of interest received by either the Debtor or PJC, within 24 hours after the Debtor or PJC receives such documents; and (c) to consult with the Debtor and PJC regarding the evaluation, negotiation, and documentation of any particular transaction.

Order Pursuant to 11 U.S.C. Sections 327(a) and 328(a) and Fed. R. Bankr. P. 2014 Approving Employment of Piper Jaffray & Co., as Investment Banker, Effective as of December 9, 2013 (Mi Pueblo Dkt. No. 519).

The Debtors assert that by contacting 71 parties, providing data room information to 25 parties, conducting management calls and meetings with 6 parties and receiving 5 written proposals for the financing and acquisition of the Debtors or acquisition only of the Debtors, the Debtors' assets have been adequately exposed to the marketplace. NUCP's belated attacks on the process that has unfolded in open, public proceedings, in which it decided not to participate until now, are misplaced and unfounded.

(iv) The Cha Cha Plan Classification is in Good Faith

The NUCP Objection asserts that the classification in the Plan is not in good faith. First, NUCP asserts that the Victory Park DIP Facility Claim is an administrative claim and cannot be separately classified. Second, NUCP asserts that Class 4 is artificially impaired. Neither assertion is accurate.

The Plan does not violate section 1123(a)(1) of the Bankruptcy Code by designating the class of DIP Facility Claims, which qualify as administrative claims under section 507(a)(2) of the Bankruptcy Code. Section 1123(a)(1) of the Bankruptcy Code requires any plan to "designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests." The plain language of this section does not prohibit the classification of claims specified in sections

507(a)(2), (a)(3), or (a)(8) of the Bankruptcy Code. Rather, the language merely indicates that the classification of claims in such sections is permitted but not required. *See In re 20 Bayard Views, LLC*, 445 B.R. 83, 94 (Bankr. E.D.N.Y. 2011) (noting that "[a]dministrative claims and priority tax claims do not require designation under Section 1123(a)(1)"); *cf. In re Perdido Motel Group, Inc.*, 101 B.R. 289, 294 (Bankr. N.D. Ala. 1989) (finding that designation of claims under section 507(a)(2), (a)(3), or (a)(8) prohibited by section 1123(a)(1), in part, because of favorable treatment such claims receive under section 1129 of the Bankruptcy Code).

The Claims designated in Class 1 are distinguishable from the other administrative claims that were not designated under the Plan because the DIP Facility Claims are impaired and will not be paid on the Effective Date, as required by section 1129(a)(9)(A) of the Bankruptcy Code. In *Perdido Motel Group*, the court expressed concern with confirming a debtor's plan that designated a class of priority tax claims, which received favorable treatment under section 1129(a)(9) of the Bankruptcy Code, where the class constituted the only class of impaired claims to vote to accept the plan. In this case, the DIP Facility Claims will be rolled up into the Exit Facility and will not be paid in cash in full on the Effective Date as provided in section 1129(a)(9)(A) of the Bankruptcy Code.

Further, the Class 1 DIP Facility Claims and the Class 4 Convenience Claims are legitimately impaired under the Plan. Under section 1124 of the Bankruptcy Code, a class of claims or interests is impaired, unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." With respect to the classification of the Class 4 Convenience Claims, there is a business or economic justification for the separate classification of those claims. The convenience class claims represent trade creditors whose claims Cha Cha has determined in its business judgment and considering available liquidity on the Effective Date should be paid quickly to maintain a good relationship so Reorganized Cha Cha can continue to do business with them. Creditors in Class 3, on the other hand, are not trade creditors and can be classified separately. Chavez Decl. ¶ 6.

The Class 1 DIP Facility Claims also are impaired because such claims will not be paid in

full on the Effective Date of the Plan, as normally provided for under the Bankruptcy Code. As noted above, the DIP Facility Claims will be rolled over and combined with a new debt structure in the form of the Exit Financing, which will be satisfied post-confirmation. The impairment of the Class 1 Claims also will enable the Debtor to have sufficient liquidity to make payments required under the Plan and sufficient working capital to operate as a going concern following Confirmation.

Even if the Claims designated in Class 1 and Class 4 were "artificially impaired," such impairment is permissible under Ninth Circuit case law if a debtor acts in good faith. Artificial impairment is generally described by courts and commentators as "minimally impairing [claims] . . . solely to create an accepting impaired class" to satisfy the requirements of section 1129(a)(9). In *In re L & J Anaheim Assoc.*, 995 F.2d 940, 942-43 (9th Cir. 1993), for example, the Ninth Circuit found that the motive of a plan proponent, or any alleged "abuses" by the plan proponent, does "not affect the application of Congress's definition of impairment." In that case, the plan proponent, an impaired creditor, placed itself alone in a class, enhanced its own claim under the plan, and, subsequently, submitted a "yes" vote on the plan, which it then used as the sole accepting impaired vote required under section 1129(a)(10) to effectuate cram down. The Ninth Circuit stated that any alleged "abuses" by the plan proponent should be addressed in the context of determining whether the plan had been proposed in good faith under section 1129(a)(3). *Id.* At 943 n. 2. Ultimately, the Ninth Circuit affirmed the decision of the bankruptcy court that the plan did satisfy section 1129(a)(3) and had been proposed in good faith. *Id.* at 943.

In addition, the Ninth Circuit BAP has held that a plan is proposed in good faith "where it achieves a result consistent with the objectives and purposes of the Code," and that, "the requisite good faith determination is based on the totality of the circumstances." *Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC)*, 473 B.R. 762, 778-79 (9th Cir. BAP 2012) (citing *Platinum Capital, Inc. v. Sylmar Plaza, LP (In re Sylmar Plaza, LP)*, 314 F.3d 1070, 1074 (9th Cir. 2002)). In *Beal Bank*, a creditor asserted that the debtor had not proposed its plan in good faith "because it created an artificially impaired class." *Id.* at 779. The court, however, held that, "[t]he record in its totality amply supports a conclusion that the debtor's

second amended plan achieves a result consistent with the objectives and purposes of the Bankruptcy Code," and specifically found that "the evidence submitted by the debtor in support of confirmation presented multiple business and economic reasons for deferring payment of allowed unsecured claims." *Id.*

In this case, there is clear evidence that the Debtor acted in good faith in impairing the Claims designated in Class 1 and Class 4 contrary to the assertions made by NUCP. The treatment provided to such claims was arrived at following extensive, arm's length negotiations with the Debtor and interested parties and available liquidity. The impairment of Claims in Classes 1 and 4 constitute two of several compromises made in the Plan. The impairment of Class 1 and Class 4, therefore, reflects a compromise among interested parties to enable the Debtor to reorganize successfully and receive a "fresh start" free from burdensome debt obligations.

Based on the totality of the circumstances, the Plan is proposed in good faith and not by any means forbidden by law, and meets the requirements of section 1129(a)(3).

D. The Plan Complies with Section 1129(a)(4)

Section 1129(a)(4) requires mandatory disclosure of any payments for services or for costs and expenses in connection with the case or plan. The plan must provide that:

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

11 U.S.C. § 1129(a)(4). Section 1129(a)(4) "ensures compliance with the policies of the Code that the bankruptcy court should police the awarding of fees in title 11 cases and that holders of claims and interests should have the benefit of information that might affect the claimants' decision to accept or reject the plan." *In re Beyond.com Corp.*, 289 B.R. 138, 144 (Bankr. N.D. Cal. 2003) (citing to *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988)). The requirements of section 1129(a)(4) are twofold in that there must be disclosure and the court must approve the reasonableness of payments. *Beyond.com*, 289 B.R. at 144.

The Plan satisfies the requirements of section 1129(a)(4). As disclosed in the Disclosure

Statement, the Debtor has retained bankruptcy counsel and other special counsel and professionals. *See* Disclosure Statement, Art. III. All professionals have been employed with Court approval during the Case, and, except where flat fee arrangements were specifically approved by the court, fees and expenses remain subject to final review by the Court for reasonableness under sections 328 or 330. Chavez Decl. ¶ 15. Other than payments made or to be made pursuant to orders entered by the Court and those described in the Disclosure Statement or the Plan, the Estate has neither made nor promised any payment to any party who will acquire property under the Plan, for services or costs and expenses in connection with the Case, or in connection with the Plan. *Id.* ¶ 16. Further, the Plan provides that Reorganized Cha Cha may employ professionals without court approval or notice. *See* Plan, Art. II.

E. The Plan Complies with Section 1129(a)(5)

Section 1129(a)(5)(A)(i) requires the plan proponent to disclose the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor. The appointment to such office must be consistent with the interests of creditors and equity security holders, and with public policy. 11 U.S.C. § 1129(a)(5)(A)(ii). Any insiders that will be employed or retained by the reorganized debtor, and the nature of compensation, must be disclosed. 11 U.S.C. § 1129(a)(5)(B).

The Plan complies with section 1129(a)(5). Cha Cha's current manager, Juvenal Chavez, will manage Reorganized Cha Cha. Mr. Chavez's compensation as Manager will be paid in the ordinary course of business and such compensation will consist of a market-based salary for a comparable position and is expected to include certain benefits such as health insurance. Presently, no amounts are budgeted for payment of a salary for Mr. Chavez, but that is subject to change. Plan Supplement, Ex. I; Chavez Decl. ¶ 17.

F. Section 1129(a)(6) is Inapplicable to the Plan

Section 1129(a)(6) requires that any governmental regulatory commission having jurisdiction over the rates of the debtor approve any rate change provided for in the plan. The requirements of section 1129(a)(6) are inapplicable since no governmental regulatory commission

has jurisdiction over any rates of the Debtor. Chavez Decl. ¶ 18.

G. The Plan Complies with Section 1129(a)(7)

Section 1129(a)(7), also referred to as the "best interests of creditors" test, requires that the plan be in the best interests of creditors under which each holder of a claim or interest in each impaired class has accepted the plan, or will receive value, as of the effective date of the plan, that is not less than the amount such holder would receive under liquidation in chapter 7 of the Bankruptcy Code. *See e.g.*, *Mutual Life Ins. Co. v. Patrician St. Joseph Partners, Ltd. P'ship (In re Patrician St. Joseph Partners Ltd. P'ship)*, 169 B.R. 669, 679 (D. Ariz. 1994). Section 1129(a)(7)(A)(i) excludes creditors who have accepted the plan from those entitled to claim the benefit of this provision. *In re Marshall*, 298 B.R. 670, 680 (Bankr. C.D. Cal. 2003). The application of the best interests of creditors test "involves a hypothetical application of chapter 7 to a chapter 11 plan." *In re Stone & Webster, Inc.*, 286 B.R. 532, 544 (Bankr. D. Del. 2002).

There were no objections that the Plan fails to comply with section 1129(a)(7).

To demonstrate compliance with section 1129(a)(7) of the Bankruptcy Code, Cha Cha has prepared a liquidation analysis estimating and comparing the range of proceeds generated under the Plan and a hypothetical chapter 7 liquidation (the "Liquidation Analysis"). The Liquidation Analysis presents a range of potential recoveries if Cha Cha was to liquidate under chapter 7 of the Bankruptcy Code. The pool of general unsecured claims would include rejection damage claims from Cha Cha's landlords in an estimated amount of $3,738,000. In Cha Cha's "low recovery" scenario, no assets would be available for any creditors other than Victory Park. In this scenario, no recoveries are available for holders of any other claims. In Cha Cha's "high recovery" scenario, holders of Administrative Claims and Priority Claims would be paid in full and general unsecured creditors – not including NUCP – would receive only 37 percent of their estimated claims. If NUCP's claim is estimated at $7,727,189, the capped amount at which NUCP seeks temporary allowance pursuant to NUCP's reply to the Motion to Allow, general unsecured creditors would receive only 21 percent of their estimated claims. Stratton Decl. ¶ 17.

Conversely, the Plan provides for all Administrative Claims and Priority Claims to be paid in full, all legitimate, non-insider undisputed general unsecured claims to be paid in full within

180 days of the effective date and for the secured claim to be treated as agreed. Insider general unsecured claims, and NUCP, if it is determined to hold a legitimate claim in the capped amount of $7,727,189, would recover 44% under the Plan (if capped at $1.3 million and allowed against Cha Cha, NUCP could recover 82%). These recoveries are exclusively a function of the liquidity available. Because the recoveries provided under the Debtor's Plan far exceed the recoveries available in a chapter 7 liquidation, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

H. The Plan Complies with Section 1129(a)(8)

Section 1129(a)(8) provides that a plan may be confirmed if each class of claims or interests has accepted the plan or such claim is not impaired under the plan. Pursuant to section 1126(c), a class accepts a plan if voting creditors holding at least two-thirds in amount, and more than one-half in number, of the allowed claims of the class that are voted, cast affirmative ballots.

As set forth in the Ballot Decl. and in the chart below, the requisite number and amount of holders of claims in all impaired classes have voted to accept the Plan. Thus, section 1129(a)(8) is met as to Classes 1, 3 and 4.

Class	Acceptance Votes	Rejection Votes	% Acceptance by Number	% Acceptance by Amount	Class Vote
1	1	0	100%	100%	Accept
3	2	1	67%	99%	Accept
4	6	0	100%	100%	Accept

The Debtor's Plan has overwhelming support from the Debtor's creditors. Only NUCP, with its motives plainly stated to ensure no recovery to Mr. Chavez, votes to reject the Cha Cha Plan.

I. The Plan Complies with Section 1129(a)(9)

Section 1129(a)(9) provides the requirements for treatment of certain administrative and priority claims. For administrative claims specified in sections 507(a)(2) and (3), the holders of such claims must receive cash equal to the allowed amount on the effective date of the plan, except to the extent that a claim holder has agreed to a different treatment of such claim. 11 U.S.C. § 1129(a)(9)(A). For priority claims specified in sections 507(a)(1), (4), (5), (6), or (7), except to the extent that a claim holder has agreed to a different treatment of such claim, the

holders of such claims must receive cash equal to the allowed amount on the effective date of the plan if such class has not accepted the plan. 11 U.S.C. § 1129(a)(9)(B)(ii). If such class has not accepted the plan, the holders of such claims must receive deferred cash payments of the value of the allowed amount as of the effective date of the plan. 11 U.S.C. § 1129(a)(9)(B)(i). Finally, for those priority tax claims specified in section 507(a)(8), the allowed amount must be paid in regular cash installments within five years from the entry of the order for relief and cannot be paid in a manner less favorable than the most favored nonpriority unsecured claim. 11 U.S.C. §§ 1129(a)(9)(C), (D).

In accordance with section 1129(a)(9)(A), the Plan provides that all Administrative Claims shall be paid in full as soon as practicable after the date on which such Administrative Claim becomes an Allowed Administrative Claim or on the Effective Date, whichever is later, or in the ordinary course of business, unless different treatment is agreed to among the claimant, Cha Cha or Reorganized Cha Cha, as applicable, and Victory Park. *See* Plan, Art. II.A.

In accordance with section 1129(a)(9)(B), the Plan provides that all Other Priority Claims shall be paid in full as soon as practicable after the date on which such Priority Claim becomes an Allowed Priority Claim or on the Effective Date, whichever is later, or in the ordinary course of business, unless different treatment is agreed to among the claimant, Cha Cha or Reorganized Cha Cha, as applicable, and Victory Park. *See* Plan Art. II.C.

In accordance with sections 1129(a)(9)(C) and (D), the Plan provides that each Priority Tax Claim shall be paid in full as soon as practicable after the date on which such Priority Claim becomes an Allowed Priority Claim or on the Effective Date, whichever is later, or in the ordinary course of business, unless different treatment is agreed to among the claimant, Cha Cha or Reorganized Cha Cha, as applicable, and Victory Park. Cha Cha reserves the right to the maximum deferral of payment of claims of a kind specified in section 507(a)(8) as permitted by section 1129(a)(9)(C). *See id.*

J. <u>The Plan Complies with Section 1129(a)(10)</u>

Section 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan" when there is a class of claims impaired under the Chapter 11 plan,

without including any acceptance by any insider. Section 1129(a)(10) is a technical requirement for confirmation, but not a substantive right of objecting creditors. *In re 7th St. & Beardsley P'ship*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994). Any change of a creditor's rights constitutes impairment. *7th St.*, 181 B.R. at 431 (citing *In re L&J Anaheim Assoc.*, 995 F.2d 940 (9th Cir. 1993)).

Here, Class 1 (DIP Facility Claims) and Class 4 (Convenience Claims) are impaired under the Plan and have voted to accept the Plan. Ballot Decl. ¶¶ 3-4.

Relying on *Schubert v. Lucent Techs. (In re Winstar Communications, Inc.)*, 554 F.3d 382 (3rd Cir. 2009), NUCP may assert that Victory Park is an insider for voting purposes and so Class 1 is not an impaired accepting class for section 1129(a)(10) purposes. However, NUCP misstates *Winstar*. In *Winstar*, a party is not an insider where the parties operate at arm's length. *Winstar*, 554 F.3d at 396. "An arm's-length transaction is a transaction in good faith in the ordinary course of business by parties with independent interests . . . [that] each acting in his or her own best interest [ ] would carry out . . . ." *Id.* at 399 (citation and quotation omitted). That is precisely the relationship among Cha Cha, Mi Pueblo and Victory Park, as the Court found in the Final DIP Order approving the DIP Facility. NUCP, which has been represented in both Debtors' bankruptcy cases since at least early August 2013, did not object to either Debtors' motions to approve the DIP Facility provided by Victory Park. The Court found at paragraph L of the Final DIP Order that "the financing and the guaranty authorized hereunder have been negotiated in good faith and at arm's length among the Debtor, Mi Pueblo with respect to the guaranty, the DIP Agent, and the DIP Lenders." Final DIP Order at 7:9-11. Based on the express finding by the Court, there is no basis for determining that Victory Park is an insider of Cha Cha.

Accordingly, the Plan complies with section 1129(a)(10).

K. <u>The Plan Complies with Section 1129(a)(11)</u>

Under section 1129(a)(11), the plan proponent must show that plan confirmation is unlikely to be followed by liquidation or further reorganization, unless such liquidation or reorganization is provided for in the plan. The purpose of section 1129(a)(11)'s feasibility requirement is to prevent "confirmation of visionary schemes which promise creditors and equity

security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Pizza of Hawaii, Inc. v. Shakey's Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted). Rather than a guarantee of the future, courts will require a reasonable probability of success. *In re Patrician St. Joseph Partners Ltd. P'ship*, 169 B.R at 674.

There were no objections to the Cha Cha Plan based on section 1129(a)(11). The Plan provides that all of the Debtor's assets and all claims, rights and causes of action held by the Debtor under the Code and non-bankruptcy law will be deemed fully preserved and vested in the Reorganized Debtor except those that are the subject of the Debtor Release. *See* Plan, Art. V.E and V.L. The Plan also provides for exit financing which will provide sufficient funds to pay Priority Claims and Administrative Claims. *Id.* The Reorganized Cha Cha is projected to have sufficient funds to make all payments required under the Plan. Stratton Decl. ¶¶ 7-14. The foregoing demonstrates the Plan's feasibility.

L. <u>The Plan Complies with Section 1129(a)(12)</u>

Section 1129(a)(12) requires that "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." Section 507(a)(2) provides that "fees and charges assessed against the estate under chapter 123 of title 28" are to be accorded priority treatment.

All fees required under 28 U.S.C. § 1930 shall be paid in full on the Effective Date and will be paid thereafter when due. *See* Plan, Art. I.A.3 and II.A; Chavez Decl. ¶ 14. The Plan provides for the payment of post-confirmation quarterly fees by the Debtor. *See* Plan, Art. XI.F. Therefore, the Plan complies with section 1129(a)(12).

M. <u>Section 1129(a)(13) is Inapplicable to the Plan</u>

Section 1129(a)(13) requires that a plan provide for the continuation of retiree benefits at the level under subsection (e)(1)(B) or (g) of section 1114, for the duration of the period the debtor has obligated itself to provide such benefits. The Estate has no responsibility to fund retiree benefits as that term is defined in section 1114. Chavez Decl. ¶ 25. Therefore, this

requirement is inapplicable.

N. Sections 1129(a)(14), (15) and (16) Are Inapplicable to the Plan

These provisions were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (2005), to modify the treatment of individuals and nonprofit entities in chapter 11. *See* 7 *Collier on Bankruptcy* § 1129.LH[9] (16th ed. 2013). As the Debtor is neither an individual nor a nonprofit entity, these provisions are inapplicable.

O. The Plan Complies with Section 1129(d)

Section 1129(d) of the Bankruptcy Code provides 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 of the application of section 5 of the Securities Act of 1933. Moreover, no party 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.

P. The Plan Complies with Section 1129(b)

Because all impaired classes have accepted the Plan, the Debtor does not need to address the requirements for confirmation pursuant to section 1129(b) of the Bankruptcy Code. However, should the Court rule on the NUCP's Motion to Designate or Motion to Allow or on NUCP's Objection such that section 1129(b) is implicated, Cha Cha reserves the right to modify the Plan as needed to ensure confirmation.

III. CONCLUSION

Based on the foregoing, the Debtor respectfully requests that the Court enter an order confirming the Plan.

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