IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ENTEGRA POWER GROUP LLC, *et al.*,[1]	Case No. 14-11859 (PJW)
Debtors.	Jointly Administered

MEMORANDUM OF LAW IN SUPPORT OF DEBTORS' MOTION FOR ENTRY OF AN ORDER (A) APPROVING ADEQUACY OF THE DISCLOSURE STATEMENT; (B) APPROVING PREPETITION SOLICITATION PROCEDURES; AND (C) CONFIRMING THE DEBTORS' JOINT MODIFIED PREPACKAGED PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

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[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are Entegra Power Group LLC (3825); Entegra TC LLC (2889); EPG LLC (8348); Basso TP-2 Inc. (1726); Union Power LLC (N/A); Union Power Partners, L.P. (5385); UPP Finance Co. LLC (7090); Trans-Union Pipeline LLC (N/A); Trans-Union Interstate Pipeline, L.P. (7870); Entegra Power Services LLC (3106); Union Power Employee Company LLC (0841); and Gila River Energy HoldCo LLC (3510). The address of the Debtors' corporate headquarters is: 100 S. Ashley Dr., Suite 1400, Tampa, FL 33602.

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Entegra Power Group LLC ("**Entegra**") and certain of its direct and indirect subsidiaries (collectively, the "**Debtors**") submit this memorandum of law (the "**Memorandum**") in support of (a) approval of (i) the *Debtors' Disclosure Statement, dated July 3, 2014* [D.I. 7] (as may be amended, supplemented, restated, or modified from time to time, the "**Disclosure Statement**") and (ii) the solicitation, balloting, tabulation, and related activities undertaken in connection with the Plan (collectively, the "**Solicitation Procedures**") and (b) confirmation of the *Debtors' Joint Modified Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [D.I. 118] (as amended, supplemented, restated, or modified from time to time, the "**Plan**")[2] pursuant to sections 1125, 1126, and 1129 of the Bankruptcy Code. In support of the relief requested herein, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. Following extensive pre-filing negotiations with the Debtors' key stakeholders, the Debtors are pleased to present this fully consensual Plan to the Court, which will, among other things, deleverage the Debtors' balance sheet by eliminating more than $700 million in funded debt obligations and improve the Debtors' liquidity by extending the maturity dates thereunder. The balance-sheet restructuring embodied in the Plan recognizes both the soundness of the Debtors' fundamental business operations and the Debtors' need to deleverage and enhance their long-term growth and competitive position. The Debtors believe in good faith that the Plan presents their best opportunity to remain viable and ensure their successful reorganization.

2. The Plan also benefits the Debtors' stakeholders by providing substantial

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[2] On the Petition Date (as defined herein), the Debtors filed the *Debtors' Joint Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [D.I. 5] (the "**Original Plan**"), which was subsequently amended by the Plan to reflect informal comments from the U.S. Trustee. Capitalized terms used but not otherwise defined herein shall have the meanings used in the Plan.

recoveries in the form of equity and new debt to the Debtors' secured lenders and existing equity holders, as applicable, and leaving unsecured creditors unimpaired. Specifically, the Plan provides for the occurrence of the following:

- Holders of Allowed Prepetition Second Lien Claims will receive (a) New Second Lien Series A Notes (the aggregate principal amount of which will be equal to the principal amount outstanding under the Prepetition Second Lien Credit Agreement (approximately $237 million) plus accrued and unwaived interest and (b) the cash proceeds of the New Second Lien Series B Notes purchased by eligible holders of Allowed Prepetition Third Lien Claims.

- Holders of Allowed Prepetition Third Lien Claims will receive (a) 100% of the ETC Senior Equity Interests and (b) $550 million in New Third Lien Debt. Eligible holders of Allowed Prepetition Third Lien Claims that elected to make a New Second Lien Debt Participation Elections will also receive New Second Lien Series B Notes (the eligibility requirements for purchase of the New Second Lien Series B Notes are described in Section 5.4 of the Plan).

- Existing Equity Interests in Parent will be canceled and Holders of Allowed Equity Interests in Parent will receive 100% of the ETC Series B Equity Interests.

3. In preparing for the filing of these prepackaged chapter 11 cases (the "**Chapter 11 Cases**"), the Debtors prepared and distributed the Disclosure Statement and Plan and solicited votes from the following impaired classes entitled to vote on the Plan: (a) holders of Prepetition Second Lien Claims (Class 2); (b) holders of Prepetition Third Lien Claims (Class 3); and (c) holders of Equity Interests in Parent (Class 8) (collectively, the "**Voting Classes**" and each holder of a claim or equity interest in the Voting Classes, a "**Voting Party**"). The Debtors expended substantial time and effort to ensure that the Voting Parties would have sufficient information to make an informed decision and an appropriate period of time in which to do so. As more fully described herein, the Disclosure Statement and Solicitation Procedures comply with all applicable requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), the Local Rules of Bankruptcy Practice and Procedure of

the United States Bankruptcy Court for the District of Delaware (the "**Local Rules**"), as well as all applicable nonbankruptcy law.

4. As a result of the Debtors' diligent efforts to build consensus among their various stakeholders, every holder of a claim or equity interest that cast a vote on the Plan voted in favor of the Plan, which included 100% in amount and number of the Prepetition Second Lien Claims, 97% in amount and 80% in number of the Prepetition Third Lien Claims, and 70% in amount of the Equity Interests in Parent. No party filed an objection to the Plan. The Debtors have thus obtained acceptances of the Plan far in excess of the statutory thresholds specified in section 1126(c) of the Bankruptcy Code. Accordingly, for the additional reasons set forth herein, the Debtors submit that the Plan satisfies the requirements of section 1129 of the Bankruptcy Code and should be confirmed.

I. BACKGROUND

5. The Debtors incorporate by reference the information regarding the Debtors' businesses, their capital structure, and the events leading to the filing of the Chapter 11 Cases, as set forth in *Michael R. Schuyler's Declaration in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings* [D.I. 13] (the "**First Day Declaration**").

A. The Debtors' Prepetition Restructuring Efforts

6. In an effort to right-size their capital structure and place the Debtors in a stronger position for future competitive and strategic initiatives, the Debtors commenced negotiations with the 2011 Second Lien Lenders and the Prepetition Third Lien Lenders regarding a potential restructuring of their funded debt obligations in 2013. These negotiations resulted in significant majorities of the Debtors' key stakeholders agreeing to support a restructuring and vote to accept the Plan pursuant to a Restructuring Support Agreement, dated June 27, 2014 (the "**Restructuring Support Agreement**"), among the Debtors and the following parties: (i) 100%

in amount and number of the holders of the Debtors' Prepetition Second Lien Debt; (ii) more than 66⅔% in amount and half in number of the holders of the Debtors' Prepetition Third Lien Debt; and (iii) holders of approximately 60% in amount of the Equity Interests in Parent (collectively, the "**Plan Support Parties**"). The solicitation and proposed restructuring are being made pursuant to the terms agreed upon in the Restructuring Support Agreement.

B. The Solicitation Process and Voting Results

7. On July 3, 2014, prior to the Petition Date, the Debtors caused their notice, claims, and voting agent, Prime Clerk LLC (the "**Voting Agent**"), to distribute to the Voting Parties as of the June 30, 2014 voting record date (the "**Voting Record Date**") the following materials (collectively, the "**Solicitation Packages**"): (i) the Disclosure Statement (including the Plan and other exhibits thereto) and (ii) as applicable, a Class 2 Ballot for Allowed Prepetition Second Lien Claims, Class 3 Ballot for Allowed Prepetition Third Lien Claims, and Class 8 Ballot for Allowed Equity Interests in Parent (collectively, the "**Ballots**"), in the forms attached as Exhibit B to the *Debtors Motion for Entry of an Order (I) Scheduling a Combined Hearing on (A) Disclosure Statement, (B) Prepetition Solicitation Procedures, and (C) Confirmation of Prepackaged Plan; (II) Fixing Deadline to Object to Prepackaged Plan and Disclosure Statement; (III) Approving Form and Manner of Notice of Combined Hearing and Objection Deadline; (IV) Conditionally (A) Directing the United States Trustee Not to Convene Creditors' Meeting, (B) Waiving Requirements of Filing Statements of Financial Affairs and Schedules of Assets and Liabilities, and (C) Waiving Requirement of Filing Financial Reports Pursuant to Fed. R. Bankr. P. 2015.3(a); and (V) Granting Related Relief* [D.I. 3] (the "**Scheduling Motion**").

8. The Voting Agent transmitted the Solicitation Packages to each Voting Party via first class mail. The Voting Parties were directed in the Disclosure Statement and Ballots to

follow the instructions contained in the Ballots in completing and submitting their respective Ballots. The Voting Parties were also informed in the Disclosure Statement and Ballots that they must submit a completed Ballot by regular mail, personal delivery, overnight courier, or e-mail such that it was actually received by the Voting Agent by 5:00 p.m. (prevailing Eastern Time) on August 4, 2014 (the "**Voting Deadline**") in order to be counted.

9. Pursuant to the terms of the Plan, holders of claims and equity interests in Classes 1, 4, 5, 6, and 7 are unimpaired under, and conclusively presumed to accept, the Plan (collectively, the "**Presumed Accepting Classes**"). Because the holders of claims and equity interests in the Presumed Accepting Classes are not entitled to vote to accept or reject the Plan, such holders were not provided copies of the Solicitation Packages.

10. As set forth in the *Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Debtors' Joint Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code*, sworn to on August 5, 2014, [D.I. 28] (the "**Voting Certification**"), 100% of the Voting Parties that submitted Ballots voted to accept the Plan. As evidenced in the vote tabulation summary attached as Exhibit A to the Voting Certification, the voting results were as follows:

Plan Class	Number Accepting	Number Rejecting	Amount Accepting	Amount Rejecting	Class Voting Result
	%	%	%	%	
2	16	0	$237,095,833.33	$0.00	Accepts
	100%	0%	100%	$0.00	
3	35	0	$1,267,362,523.87	$0.00	Accepts
	100%	0%	100%	$0.00	
8	N/A	N/A	18,877,642	$0.00	Accepts
	N/A	N/A	100%	$0.00	

C. Commencement of the Chapter 11 Cases

11. On the Petition Date, the Debtors filed with this Court, among other pleadings, their voluntary petitions for relief under chapter 11 of the Bankruptcy Code, the Plan, the Disclosure Statement, and the Scheduling Motion. The following day, the Debtors filed the Voting Certification.

12. On August 6, 2014, the Court entered an order (the "**Scheduling Order**") granting the relief requested in the Scheduling Motion and, among other things, establishing (i) September 8, 2014 at 5:00 p.m. (prevailing Eastern Time) as the deadline by which objections to the adequacy of the Disclosure Statement, the Solicitation Procedures, or confirmation of the Plan were to be filed (the "**Objection Deadline**") and (ii) September 19, 2014 at 2:00 p.m. (prevailing Eastern Time) as the date of the combined hearing to consider approval of the Disclosure Statement, the Solicitation Procedures, and confirmation of the Plan (the "**Combined Hearing**").

13. In accordance with the terms of the Scheduling Order, on August 6, 2014, the Debtors caused the Voting Agent to serve a notice (the "**Combined Hearing Notice**"), which, among other things, included (i) a summary of the Plan; (ii) the date, time, and location of the Combined Hearing; (iii) the date and time of the Objection Deadline and procedures for filing objections of the adequacy of the Disclosure Statement, the Solicitation Procedures, and/or confirmation of the Plan; (iv) instructions for obtaining copies of the Disclosure Statement and the Plan; and (v) notice of commencement of the Chapter 11 Cases. In addition, on August 12, 2014, the Debtors caused publication notice of the Combined Hearing to be published in *The New York Times* (national edition) (the "**Publication Notice**").

14. On September 4, 2014, the Debtors filed a compilation of supplemental documents to the Plan [D.I. 120], which included the following (collectively, as may be

amended, supplemented, restated, or modified from time to time, the "**Plan Supplement**"): (i) forms of the Reorganized ETC LLC Agreement, the Amended Intercreditor Agreement, the New Second Lien Note Indenture, and the New Third Lien Credit Agreement; (ii) the identity of the initial officers of the Reorganized Debtors; (iii) a list of executory contracts to be assumed pursuant to Section 8.5 of the Plan; (iv) a disclosure of insider compensation; and (v) the identity of the initial New Second Lien Note Indenture Trustee.

15. The Debtors have not received any objections to the Disclosure Statement, the Solicitation Procedures, or confirmation of the Plan. The Debtors received informal comments to the Original Plan from the U.S. Trustee and the Plan reflects those comments. The Debtors also received informal comments from the United States Environmental Protection Agency, which are reflected in the proposed form of order approving the Disclosure Statement, Solicitation Procedures, and confirming the Plan (the "**Confirmation Order**") to be filed with the Court prior to the Combined Hearing.

ARGUMENT

I. THE DISCLOSURE STATEMENT AND SOLICITATION PROCEDURES SHOULD BE APPROVED

16. To determine whether a prepetition solicitation of votes should be approved, courts must determine whether such solicitation complies with sections 1125 and 1126(b) of the Bankruptcy Code, and Bankruptcy Rules 3017(d), 3018(b), and 3018(c).

A. The Prepetition Solicitation Complied with Sections 1125(g) and 1126(b) of the Bankruptcy Code

17. Sections 1125(g) and 1126(b) of the Bankruptcy Code govern the solicitation and acceptance of a plan of reorganization by a holder of a claim or equity interest before the commencement of a chapter 11 case. Section 1125(g) provides that "an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with

applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law." 11 U.S.C. § 1125(g). Section 1126(b) provides that a holder of a claim or equity interest that has accepted or rejected the plan before a commencement of the chapter 11 case is deemed to have accepted or rejected such plan if:

> (1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or
>
> (2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of [the Bankruptcy Code].

11 U.S.C. § 1126(b). Accordingly, prepetition solicitation of acceptances and rejections of a plan of reorganization is permissible if such solicitation complies with applicable nonbankruptcy law, such as federal or state securities laws and regulations, or if such laws and regulations do not apply, the solicited holder receives "adequate information" pursuant to section 1125(a) of the Bankruptcy Code. For the reasons set forth herein, the Debtors respectfully submit that they have satisfied the requirements of sections 1125(g) and 1126(b) of the Bankruptcy Code.

1. The Prepetition Solicitation Complied with Applicable Nonbankruptcy Law

18. The solicitation of votes on the Plan must satisfy all applicable securities laws, rules, and regulations including the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (as amended from time to time, including any regulations promulgated thereunder, the "**Securities Act**") and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78lll (as amended from time to time, and any regulations promulgated thereunder, the "**Exchange Act**") and similar federal or state securities or "Blue Sky" laws ("**Blue Sky Laws**").

a. The Prepetition Solicitation Was Exempt from the Securities Registration Requirements

19. Section 5 of the Securities Act requires that any offer or sale of securities using the means and instrumentalities of interstate commerce be registered by filing a registration statement and prospectus with the Securities and Exchange Commission ("**SEC**"), unless an exemption from registration is applicable to the issuer of the securities. The Debtors' prepetition solicitation of the Plan was in compliance with applicable nonbankruptcy law because, if the prepetition solicitation constitutes an "offer" of "securities" under the federal, state or other securities laws, the Debtors structured the prepetition solicitation to avail themselves of one or more of the exceptions from registration provided by the Securities Act, Blue Sky Laws, or any similar rules, regulations, or statutes.

20. First, under the Plan, holders of Allowed Prepetition Third Lien Claims will receive New Third Lien Debt pursuant to the New Third Lien Credit Agreement. The New Third Lien Debt to be issued represents commercial (*i.e.*, "bank") loans that do not constitute "securities" within the meaning of the Securities Act, and therefore, the registration requirements of section 5 of the Securities Act are inapplicable to the solicitation with respect to such indebtedness. *See Equitable Life Assurance Soc'y v. Arthur Andersen & Co.*, 655 F. Supp. 1225, 1241 (S.D.N.Y. 1987) (notes given in a commercial context are "similar to a commercial bank loan" and thus "do not constitute 'securities' within the purview of the federal securities laws").

21. Second, with respect to the ETC Equity Interests and New Second Lien Notes, to the extent the prepetition solicitation is deemed to constitute an "offer" or sale of new "securities," the solicitation is exempt from registration as a "private placement" pursuant to section 4(a)(2) of the Securities Act and Rule 506 of Regulation D promulgated thereunder because the Debtors have only solicited votes on the Plan from "Eligible Holders," defined as

(i) a "Qualified Institutional Buyer" (as defined in Rule 144A under the Securities Act); (ii) an "Accredited Investor" (as defined in Rule 501(A) of Regulation D under the Securities Act); or (iii) a person other than a "U.S. Person" (as defined in Rule 902 under the Securities Act). The Debtors also provided each Voting Party with a copy of the Disclosure Statement, did not engage in any form of general solicitation or general advertising for the votes on the Plan, and filed a Form D with the SEC on September 9, 2014. In addition, section 18 of the Securities Act provides that any registration requirements under state securities laws will not apply to offers or sales conducted in compliance with SEC rules or regulations issued under section 4(a)(2), such as Regulation D. *See* 15 U.S.C. § 77r.

22. Accordingly, to the extent the solicitation of votes on the Plan is deemed to constitute an offer or sale of new securities, the Debtors have complied with the Securities Act, Blue Sky Laws, and equivalent federal and state laws (to the extent that the latter are applicable and not preempted by federal law).

b. The Prepetition Solicitation Complied with the Antifraud and Antimanipulation Provisions of the Federal Securities Laws

23. To the extent that the solicitation constituted an "offer" of securities (although exempt from applicable registration requirements), the Solicitation Packages would be subject to the antifraud provisions of section 17 of the Securities Act. Additionally, to the extent that the solicitation involved the "sale" of securities, the Solicitation Packages would be subject to the antifraud and antimanipulation provisions of section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

24. Section 17 of the Securities Act sets forth the general standard for disclosure in the context of securities offerings:

> It shall be unlawful for any person in the offer or sale of any securities [t]o obtain money or property by means of any untrue

> statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . .

15 U.S.C. § 77q.

25. In the context of a consent solicitation under federal securities law, a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). As demonstrated below, the Disclosure Statement contains adequate information, does not omit any material facts, and clearly satisfies the standard set forth in section 17 of the Securities Act.

26. Section 10(b) and Rule 10b-5 of the Exchange Act require that a debtor soliciting acceptances of its plan not intentionally make an untrue statement of material fact(s) or omit material fact(s) necessary to make the statements made, in light of the circumstances in which they were made, not misleading. 17 C.F.R. § 240.10b-5; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212, *reh'g denied*, 425 U.S. 986 (1976). The Debtors submit that the Plan, the Disclosure Statement, and the solicitation complied with the requirements of section 10(b) and Rule 10b-5.

27. The Debtors disclosed all material facts and are not aware of any untrue statement of material fact in the Disclosure Statement or any related documents or communications contained in the Solicitation Packages. The Debtors do not believe that the Plan, the Disclosure Statement, or any related documents omit any material fact. Moreover, the Debtors had no intent to make any untrue statement or omit any material fact. Accordingly, the Debtors respectfully submit that they have complied with all applicable nonbankruptcy laws, rules, and regulations governing the prepetition solicitation.

2. The Disclosure Statement Contains Adequate Information

28. The primary purpose of a disclosure statement is to provide material or "adequate information" that would enable a holder of a claim whose vote on a plan is solicited to make an informed decision about whether to vote to accept or reject the plan. *See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *see also In re Zenith Elecs. Corp.*, 241 B.R. 92, 99 (Bankr. D. Del. 1999) (noting the importance of considering the audience when determining the adequacy of the disclosure statement). Section 1125(a)(1) of the Bankruptcy Code defines "adequate information" as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing addition information; . . .

11 U.S.C. § 1125(a)(1).

29. Whether a disclosure statement contains adequate information is intended by Congress to be a flexible, fact-specific inquiry left within the discretion of the court:

> Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation of the statements, the need for relative speed in solicitation and confirmation, and, of course, the need for investor protection. There will be a balancing of interests in each case. In reorganization cases, there is frequently great uncertainty. Therefore the need for flexibility is greatest.

H.R. Rep. No. 95-595, at 409 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6365. *See also Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) (observing that "adequate information will be determined by the facts and circumstances of each case"); *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) (opining that what constitutes adequate information is "subjective," "made on a case by case basis," and "largely within the discretion of the bankruptcy court"); *First Am. Bank of N.Y. v. Century Glove Inc.*, 81 B.R. 274, 279 (D. Del. 1988) (noting the adequacy of disclosure for a particular debtor will be determined based on how much information is available from outside sources). Congress granted bankruptcy courts this discretion to facilitate effective reorganizations in the broad range of businesses in which chapter 11 debtors engage and the broad range of circumstances that accompany chapter 11 cases. *See* H.R. Rep. No. 95-595, at 408-09; *see also In re Copy Crafters Quickprint Inc.*, 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) (adequacy of a disclosure statement "is to be determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties").

30. The Debtors submit that the Disclosure Statement contains adequate information to allow the Voting Parties to make an informed judgment about whether to vote to accept or reject the Plan. Specifically, the Disclosure Statement contains descriptions and summaries of, among other things: (i) the Plan; (ii) the operation of the Debtors' businesses; (iii) key events leading to the commencement of the Chapter 11 Cases; (iv) the Debtors' significant prepetition indebtedness; (v) the proposed capital structure of the Reorganized Debtors; (vi) a liquidation analysis setting forth the estimated return that holders of claims and equity interests would receive in a hypothetical chapter 7 liquidation; (vii) financial information and valuations that

would be relevant to a Voting Party's determination of whether to accept or reject the Plan; (viii) risk factors affecting the Plan; and (ix) federal tax law consequences of the Plan. The Disclosure Statement also provides an analysis of the alternatives to confirmation and consummation of the Plan and a description of the voting process. Moreover, during its preparation, the Disclosure Statement was subject to review and comment by the Participating Prepetition Lenders, who are significant stakeholders in the Debtors' restructuring and the holders of the majority of impaired claims.

31. In light of the comprehensive information contained in the Disclosure Statement and the absence of any objections to it, the Debtors submit that the Disclosure Statement provides adequate information, as defined in section 1125(a) of the Bankruptcy Code, and therefore satisfies the requirements of section 1126(b)(2) of the Bankruptcy Code.

32. Furthermore, given the good faith of the parties involved in the solicitation and compliance with the applicable provisions of the Bankruptcy Code, the Debtors request that the Court find that the parties are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

B. The Solicitation Procedures and Solicitation Packages Complied with Bankruptcy Rules 3017 and 3018 and the Scheduling Order

1. The Solicitation Procedures Complied with Bankruptcy Rule 3017

33. Bankruptcy Rule 3017(d) requires that, unless otherwise ordered by the court, a debtor must transmit to all creditors, equity security holders, and the U.S. Trustee:

- the plan, or a court-approved summary of the plan;
- the disclosure statement approved by the court;[3]

[3] Because the Chapter 11 Cases involves a prepackaged plan, the solicitation of acceptances and rejections of the Plan was conducted pursuant to section 1126(b) of the Bankruptcy Code, and therefore, prior to approval of the Disclosure Statement by the Court.

- notice of the time within which acceptances and rejections of the plan may be filed; and
- such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion.

Fed. R. Bankr. P. 3017(d). Bankruptcy Rule 3017(d) further requires that the debtor (a) give notice of the time fixed for filing objections to the proposed disclosure statement and for a hearing on confirmation to all creditors and equity holders and (b) mail a ballot to each creditor and equity security holder entitled to vote on the plan.

34. Bankruptcy Rule 3017(e) requires that the court "consider the procedures for transmitting the documents and information required by subdivision (d) of [Bankruptcy Rule 3017] to the beneficial holders of stock, bonds, debentures, notes and other securities, determine the adequacy of [such] procedures, and enter any orders the court deems appropriate." Fed. R. Bankr. Proc. P. 3017(e)

a. Determination of the Voting Parties

35. In a conventional chapter 11 case, the voting record date for determining the holders of prepetition claims and equity interests entitled to vote typically is the disclosure statement approval date. In that scenario, the chapter 11 commencement date is the date on which the claims and equity interests of such holders are fixed. In a prepackaged case, such as this, the solicitation of votes is conducted prior to the commencement date, without the benefit of a court-ordered voting record date for identifying class members and without a date, such as a chapter 11 commencement date, that arises by operation of law and fixes the holder's claim or equity interest.

36. The Debtors implemented a methodology for their solicitation that they believe most closely comports with that employed in a postpetition solicitation. The Debtors established the Voting Record Date as of June 30, 2014, three days prior to the commencement of

solicitation, and used that date to identify the holders of claims and equity interests in the Voting Classes. The Debtors also used the Voting Record Date as the date for fixing the amount of claims against, and equity interests in, the Debtors that could be voted. Accordingly, the principal amounts of Prepetition Second Lien Claims and Prepetition Third Lien Claims on the Voting Record Date, as identified by the Prepetition Second Lien Agent and the Prepetition Third Lien Agent, respectively, and the total amount of Equity Interests in Parent, as identified by the Debtors' books and records, were entitled to vote.

b. Distribution of the Solicitation Packages

37. On July 3, 2014, the Debtors commenced the solicitation of votes by causing the Voting Agent to distribute the Solicitation Packages to the Voting Parties (as determined in accordance with the above procedure). The Solicitation Packages included the Disclosure Statement (including the Original Plan attached as an exhibit) and an applicable Ballot, setting forth the time by which votes were to be received. Pursuant to the Scheduling Order, the Debtors were not required to provide the Solicitation Packages to the Presumed Accepting Classes.

c. Notice to Parties in Interest

38. Following the Petition Date, the Debtors mailed the Combined Hearing Notice to all known creditors and equity interest holders, in accordance with the Scheduling Order, informing them, among other things, of the commencement of the Chapter 11 Cases, the date and time set for the Combined Hearing, and the Objection Deadline. The Combined Hearing Notice provided that copies of the Plan and Disclosure Statement were available free of charge on the website of the Voting Agent at http://cases.primeclerk.com/entegra/ or for a fee on the Court's website at http://www.deb.uscourts.gov (password required). In addition, the Combined Hearing Notice stated that copies of the Plan and Disclosure Statement may be obtained free of charge by contacting the Voting Agent at the address or phone number provided therein.

39. The Debtors also caused the Publication Notice to be published in *The New York Times* (national edition) in accordance with the terms of the Scheduling Order. The Publication Notice also provided information on how to obtain a copy of the Plan and Disclosure Statement.

40. The Combined Hearing Notice and the Publication Notice afforded parties in interest sufficient notice of these proceedings. Moreover, no party has objected to the adequacy of notice. Based on the foregoing, the Debtors submit that they have fully complied with the requirements of Bankruptcy Rule 3017(d).

2. The Ballots Comply with Bankruptcy Rule 3018(c)

41. Bankruptcy Rule 3018(c) governs the form of ballot for accepting or rejecting a plan and provides, in relevant part, that an acceptance be in writing, identify the plan(s) being accepted or rejected, be signed by the creditor or equity security holder, and conform to the applicable official form.

42. The Ballots used to solicit votes on the Plan, which are based on Official Form No. 14 and modified to address the particular aspects of the Chapter 11 Cases and the Plan relevant to the Voting Classes, comply with the Bankruptcy Rules, and were approved by the Court pursuant to the Scheduling Order. No party has objected to the sufficiency of the Ballots. Accordingly, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 3018(c).

3. The Solicitation Period Complies with Bankruptcy Rule 3018(b)

43. Bankruptcy Rule 3018(b) provides that prepetition acceptances or rejections of a plan are valid if: (i) the plan was transmitted to substantially all the holders of claims and equity interests in each solicited class; (ii) the solicitation period was not unreasonably short; and (iii) the solicitation was in compliance with section 1126(b) of the Bankruptcy Code. The Debtors' prepetition solicitation meets all of these requirements.

44. First, as set forth above and in the Voting Certification, the Plan and Disclosure Statement were transmitted to all Voting Parties.

45. Second, the solicitation period, which lasted from July 3, 2014 to August 4, 2014 (the "**Solicitation Period**"), a total of 32 calendar days, was not "unreasonably short." The Solicitation Period, which followed months of negotiations with many of the Debtors' key stakeholders, provided the Voting Parties with sufficient notice of critical components of the Plan and an opportunity for the parties to make an informed decision whether to accept or reject the Plan. Moreover, the Solicitation Period is substantially longer than solicitation periods approved by courts in this District. *See, e.g.*, *In re Gatehouse Media, Inc.*, No. 13-12503 (MFW) (Bankr. D. Del. Sept. 30, 2013) [D.I. 39] (authorizing a six-day solicitation period); *In re PTL Holdings LLC*, No. 11-12676 (BLS) (Bankr. D. Del. Aug. 25, 2011) [D.I. 35] (authorizing a one-day solicitation period); *In re Jackson Hewitt Tax Serv., Inc.*, No. 11-11587 (MFW) (Bankr. D. Del. May 25, 2011) [D.I. 47] (approving a one-day solicitation period); *In re QHB Holdings LLC*, No. 09-14312 (PJW) [D.I. 141] (Bankr. D. Del. Jan. 15, 2010) (approving a 15-day solicitation period); *In re Recycled Paper Greetings, Inc.*, No. 09-10002 (KG) (Bankr. D. Del. Jan. 5, 2009) [D.I. 40] (approving a three-day solicitation period); *see also* Fed. R. Bankr. P. 2002(a)(5) (prescribing 21 days' notice of deadline to accept proposed plan modification).

46. Third, as previously discussed, the Debtors' solicitation complied with section 1126(b) of the Bankruptcy Code by providing "adequate information" to the Voting Classes within the meaning of section 1125(a).

47. Fourth, as described in greater detail in the Voting Certification, each Ballot submitted to the Voting Agent was date-stamped, scanned, assigned a ballot number, entered into the Voting Agent's database, and processed in accordance with the Solicitation Procedures. All

validly executed Ballots received by the Voting Agent on or before the Voting Deadline were tabulated, consistent with the Solicitation Procedures.[4]

48. Furthermore, the Solicitation Procedures are consistent with procedures approved in other prepackaged chapter 11 cases in this District. *See, e.g.*, *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Nov. 14, 2013) [D.I. 49]; *In re Maxcom Telecomunicaciones, S.A.B. de C.V.*, No. 13-11839 (PJW) (Bankr. D. Del. July 25, 2013) [D.I. 44]; *In re Dex One Corp.*, No. 13-10533 (KG) (Bankr. D. Del. Mar. 19, 2013) [D.I. 64]; *In re TMP Directional Mktg., LLC*, No. 11-13835 (MFW) (Bankr. D. Del. Dec. 7, 2012) [D.I. 52]; *In re Homer City Funding, LLC*, No. 12-13024 (KG) (Bankr. D. Del. Dec. 6, 2012) [D.I. 54]; *In re CHL, Ltd.*, No. 12-12437 (KJC) (Bankr. D. Del. Aug. 31, 2012) [D.I. 58]; *In re Peak Broad., LLC*, No. 12-10183 (PJW) (Bankr. D. Del. Jan. 12, 2012) [D.I. 45]. Based on the foregoing, the Debtors submit that the Disclosure Statement and the Solicitation Procedures satisfy all applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and nonbankruptcy law, and should be approved.

II. THE PLAN SHOULD BE CONFIRMED BY THE COURT

49. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (Bankr. D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 606 n.23 (Bankr. D. Del. 2001). The Debtors submit that through this Memorandum and other filings with the Court, including the First Day Declaration, the *Declaration of Michael R. Schuyler in Support of Confirmation of the Debtors'*

[4] As indicated in the Voting Certification, the Debtors received one properly completed Ballot from a holder in Class 8, Allowed Equity Interests in Parent, after the Voting Deadline. In accordance with the Solicitation Procedures, the Debtors waived the defect with respect to this Ballot and directed the Voting Agent to include this Ballot in the final tabulation.

Joint Modified Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code [D.I. 127] (the "**Schuyler Declaration**") and the *Declaration of Matthew Mazzucchi in Support of Confirmation of the Debtors' Joint Modified Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [D.I. 128] (the "**Mazzucchi Declaration**"), filed contemporaneously herewith, and testimonial and other evidence to be provided at the Combined Hearing, the Debtors will demonstrate, by a preponderance of the evidence, that the Plan complies with all relevant sections of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable nonbankruptcy law.

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

50. Section 1129(a)(1) of the Bankruptcy Code requires that a plan of reorganization "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and equity interests and the contents of a plan, respectively. H.R. Rep. No. 95-595, at 412; S. Rep. No. 95-989 (1978); *see also In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 223 (Bankr. D.N.J. 2000) ("The legislative history reflects that the applicable provisions of chapter 11 includes sections such as section 1122 and 1123, governing classification and contents of plan.") (internal citations and quotations omitted). As demonstrated below, the Plan fully complies with all applicable provisions of the Bankruptcy Code as required by section 1129(a)(1), including sections 1122 and 1123.

1. The Plan Complies with Section 1122 of the Bankruptcy Code

51. Section 1122(a) 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 the other claims or interests of such class." 11 U.S.C. § 1122(a). Accordingly, each claim and equity

interest within a class must be substantially similar to other claims and equity interests in that class. Claims and equity interests in a class need not be identical, but rather, should be similar in legal nature and effect. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060 (3d Cir. 1987); *In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992). It is not necessary that all substantially similar claims and equity interests be classified together. *See Armstrong World Indus.*, 348 B.R. at 159. Similar claims may be placed in different classes as long as the classification is "reasonable." *Jersey City Med. Ctr.*, 817 F.2d at 1060-61; *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993).

52. The Plan provides for the separate classification of claims and equity interests based upon the legal nature of such claims and equity interests or other relevant criteria. Specifically, the Plan designates the following six classes of claims and two classes of equity interests: Class 1 (Priority Non-Tax Claims), Class 2 (Prepetition Second Lien Claims), Class 3 (Prepetition Third Lien Claims), Class 4 (Other Secured Claims), Class 5 (General Unsecured Claims), Class 6 (Intercompany Claims), Class 7 (Equity Interests in Debtor Subsidiaries), and Class 8 (Equity Interests in Parent). *See* Plan § 3. Each of the claims and equity interests in each class is substantially similar to the other claims and equity interests in such class. The Debtors submit that the classification of claims and equity interests under the Plan is reasonable, consistent with the requirements of the Bankruptcy Code, and satisfies the requirements of section 1122(a).[5]

[5] Section 1122(b) of the Bankruptcy Code is an elective provision relating to the designation of a class of *de minimis* claims for administrative convenience. *See* 11 U.S.C. § 1122(b). The Plan does not include a convenience class. Therefore, section 1122(b) is inapplicable to the Plan.

2. The Plan Complies with Section 1123(a) of the Bankruptcy Code

53. Section 1123(a) of the Bankruptcy Code sets forth seven provisions to be contained in each chapter 11 plan, each of which is described below.

54. Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and equity interests subject to section 1122. As discussed above, Section 3 of the Plan designates six classes of claims and two classes of equity interests in accordance with section 1122. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

55. Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify the classes of claims and equity interests that are unimpaired. Section 3 of the Plan specifies that Classes 1, 4, 5, 6, and 7 are unimpaired. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

56. Section 1123(a)(3) of the Bankruptcy Code requires that a plan specify the treatment of impaired classes of claims and equity interests. Section 4 of the Plan sets forth the treatment of Classes 2, 3, and 8, the only impaired classes under the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

57. Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide the same treatment for each claim or equity interest within a particular class unless the holder of such claim or equity interest agrees to receive less favorable treatment. Pursuant to Section 4 of the Plan, the treatment of each claim and equity interest in each respective class is the same as the treatment of each other claim or equity interest in such class. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

58. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation." Section 5 of the Plan, as well as various other provisions,

provide adequate and proper means for the Plan's implementation, thus satisfying the requirement of section 1123(a)(5) of the Bankruptcy Code. Specifically, Section 5 of the Plan provides for, among other things:

- the sources of consideration for distributions under the Plan;
- authority to enter into the Restructuring Transactions described in the Plan;
- authority for the Debtors and/or Reorganized Debtors to take all actions necessary to effectuate the Plan, including those necessary to effect the Restructuring Transactions;
- the release of all Liens securing any Secured Claim (except as otherwise set forth in Section 5.6 of the Plan);
- the cancellation of existing securities and agreements;
- the entry into the Amended Intercreditor Agreement, the New Second Lien Note Indenture, the New Third Lien Credit Agreement, and any other agreements, documents, securities, and instruments relating to the foregoing;
- the adoption and filing of the New Constituent Documents;
- the selection of the initial officers and directors of the Reorganized Debtors; and
- the continued corporate existence of the Debtors as the Reorganized Debtors (other than those Debtors that will dissolve, as provided in Section 5.2 of the Plan).

In addition, the Debtors have filed the Plan Supplement, which contains many of the documents necessary to implement the Plan. Accordingly, the Plan, together with the documents and agreements contemplated thereby, including the Plan Supplement, provide the means for implementation of the Plan as required by section 1123(a)(5) of the Bankruptcy Code.

59. Section 1123(a)(6) requires amendment of a debtor's charter to prohibit the issuance of non-voting equity securities and requires an appropriate distribution of voting power among the classes of securities possessing voting power. The form of the Amended and Restated Certificate of Formation of Entegra TC LLC, included in the Plan Supplement, prohibits the

issuance of non-voting securities. *See* Plan Supplement at Ex. A. Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

60. Section 1123(a)(7) requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." *See* 11 U.S.C. § 1123(a)(7). The identities of the initial officers of the Reorganized Debtors were disclosed in the Plan Supplement, and the identities of the initial board of directors will be disclosed prior to the Combined Hearing. The selection of the directors and officers of the Reorganized Debtors is consistent with the interests of creditors, equity security holders, and public policy. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

3. The Plan Incorporates Certain Permissible Provisions of Section 1123(b) of the Bankruptcy Code

61. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be incorporated into a plan of reorganization. The Plan contains various provisions consistent with this section.

62. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." Section 3 of the Plan impairs the claims in Class 2 and 3 and equity interests in Class 8, and claims in Class 1, 4, 5, and 6 and equity interests in Class 7 are unimpaired. Accordingly, the Plan is consistent with section 1123(b)(1).

63. Section 1123(b)(2) of the Bankruptcy Code allows a plan to provide for assumption, assignment, or rejection of executory contracts and unexpired leases, subject to section 365 of the Bankruptcy Code. Section 8.1 of the Plan provides for the Debtors'

assumption of each executory contract and unexpired lease to which they are a party (other than an executory contract related to compensation or benefits, which, pursuant to Section 8.5 of the Plan are automatically deemed rejected on the Effective Date unless specifically identified in the Plan Supplement as a contract to be assumed), unless such contract or lease (i) is the subject of a motion to assume or reject that is pending on the Confirmation Date, which shall be assumed or rejected in accordance with the disposition of such motions or (ii) is identified in the Plan Supplement as executory contracts or unexpired leases to be rejected pursuant to the Plan. Accordingly, the assumption of executory contracts and unexpired leases set forth in Section 8.1 of the Plan is appropriate and permitted by section 1123(b)(2).

64. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate," and section 1123(b)(3)(B) of the Bankruptcy Code provides that a plan may "provide for the retention and enforcement by the debtor" of certain claims or equity interests. The Plan provides for certain settlements of claims against, and equity interests in, the Debtors, including through the discharge, release, exculpation, and injunction provisions contained in Section 10 of the Plan. In addition, Section 7.5 of the Plan preserves, subject to certain exceptions, the Reorganized Debtors' rights to enforce, sue on, settle, compromise, otherwise resolve, discontinue, abandon, or dismiss all claims, rights, causes of action, suits, and proceedings, whether at law or in equity, whether known or unknown, that the Debtors or their estates may hold against any entity. The settlement and retention of claims by the Reorganized Debtors set forth in the Plan is appropriate and permitted by section 1123(b)(3).

65. Section 1123(b)(5) of the Bankruptcy Code provides that a plan may "modify the rights of holders of secured claims." *See* 11 U.S.C. § 1123(b)(5). Section 4.2 of the Plan modifies

the rights of the Prepetition Second Lien Lenders by providing for the issuance of the New Second Lien Series A Notes and the cash received by the Debtors from the proceeds of the New Second Lien Series B Notes in satisfaction of the Debtors' obligations under the Prepetition Second Lien Credit Agreement. Section 4.3 of the Plan modifies the rights of the Prepetition Third Lien Lenders by providing for the issuance of the ETC Senior Equity Interests, the New Third Lien Debt, and if such holder qualifies as an Eligible Holder, the right to purchase its pro rata share of New Second Lien Series B Notes, in satisfaction of the Debtors' obligations under the Prepetition Third Lien Credit Agreement. The foregoing modifications are in accordance with section 1123(b)(5) of the Bankruptcy Code.

66. Finally, section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." *See* 11 U.S.C. § 1123(b)(6). In accordance with section 1123(b)(6), the Debtors have included certain discharge, release, exculpation, and injunction provisions in the Plan. *See* Plan §§ 10.3 10.4, 10.5, 10.6. The Debtors submit that such provisions are particularly appropriate based on the facts and circumstances of the Chapter 11 Cases and are the product of extensive arm's length negotiations and were unanimously accepted by the Voting Parties. The appropriateness of each of these provisions is addressed in turn below.

a. Debtor Releases

67. As contemplated by section 1123(b)(3)(A) of the Bankruptcy Code, which permits a debtor to include settlements of a debtor's claims as discretionary provisions in a plan of reorganization, Section 10.4(a) of the Plan provides for releases by the Debtors (the "**Debtor Releases**"), of certain claims, rights, and causes of actions that the Debtors may have against the following parties (collectively, the "**Released Parties**"): (i) all Persons engaged or retained by the Debtors in connection with the Chapter 11 Cases (including in connection with the

preparation of, and analyses relating to, the Disclosure Statement, the Plan, and the Restructuring Support Agreement); (ii) the Reorganized Debtors; (iii) the Prepetition Second Lien Agent; (iv) the Prepetition Second Lien Lenders; (v) the Prepetition Third Lien Agent; (vi) the Prepetition Third Lien Lenders; (vii) the Plan Support Parties; (viii) all Persons engaged or retained by the parties listed in (ii) through (vii) of this definition in connection with the Chapter 11 Cases (including in connection with the preparation of and analyses relating to the Disclosure Statement, the Plan, and the Restructuring Support Agreement); and (ix) any and all affiliates, officers, directors, partners, employees, members, managers, members of boards of managers, advisors, attorneys, actuaries, financial advisors, accountants, investment bankers, agents, professionals, and representatives of each of the foregoing Persons and Entities (whether current or former, in each case in his, her, or its capacity as such). *See* Plan §§ 1.90, 10.4. The Debtor Releases do not release any obligations arising after the Effective Date of any party under the Plan or the rights of the Debtors or the Reorganized Debtors to enforce the terms of the Plan and the contracts, instruments, releases, and other agreements or documents delivered in connection with the Plan. *See* Plan §10.4(a).

68. The Debtors have proposed the Debtor Releases based on their business judgment and such releases satisfy the standard—to the extent applicable—for court-approved settlements, which requires that a settlement exceed the lowest point in the range of reasonableness and be fair, equitable, and in the best interests of the estate to be approved. *See In re Exaeris, Inc.*, 380 B.R. 741, 746-47 (Bankr. D. Del. 2008); *In re New Century TRS Holdings, Inc.*, 390 B.R. 140, 168 (Bankr. D. Del. 2008); *In re World Health Alternatives, Inc.*, 344 B.R. 291 (Bankr. D. Del. 2006); *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 135 (Bankr. D.N.J. 2010); *In re G-1 Holdings, Inc.*, 420 B.R. 216, 257 (Bankr. D.N.J. 2009). The Debtors propose to release those parties that

have participated in good faith negotiations to accomplish the Debtors' restructuring and helped facilitate the comprehensive reorganization contemplated by the Plan through, among other things, resolution of their claims. There can be no doubt that without the support of the Released Parties, the Debtors would not have been able to formulate the restructuring contemplated by the Plan, which preserves the Debtors' going-concern value and enables them to emerge from chapter 11 in a stronger position for future competitive and strategic growth.

69. Courts in this District apply the following factors to determine whether a debtor's release of claims is appropriate:

> 1. An identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
>
> 2. Substantial contribution by the non-debtor of assets to the reorganization;
>
> 3. The essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;
>
> 4. An agreement by a substantial majority of creditors to support the injunction, specifically if the impaired class of classes 'overwhelmingly' votes to accept the plan; and
>
> 5. A provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

In re Indianapolis Downs, LLC, 486 B.R. 286, 303 (Bankr. D. Del. 2013) (*citing Zenith Elecs. Corp.*, 241 B.R. at 110). Not all of the foregoing factors need to be satisfied for a court to approve releases by a debtor. *See In re Wash. Mut. Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) ("These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the [c]ourt's determination of fairness."); *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that the Zenith factors are not exclusive or conjunctive requirements). As set forth below, these factors weigh heavily in favor of the Debtor Releases.

70. The first factor—an identity of interest—favors the Debtor Releases because the Debtors and the Released Parties "share the common goal" of confirming the Plan and implementing the restructuring as contemplated thereunder. *See In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) (noting an identity of interest between the debtors and the settling parties where such parties "share[d] the common goal of confirming the DCL Plan and implementing the DCL Plan Settlement"); *Zenith Elecs. Corp.*, 241 B.R. at 110 (concluding that the first factor—an identity of interest with the debtor—was satisfied where certain released parties who "were instrumental in formulating the Plan" shared an identity of interest with the debtor "in seeing that the Plan succeed and the company reorganize"). The negotiation and execution of the Restructuring Support Agreement illustrates that the Plan Support Parties and the Debtors share the common goal of consummating the restructuring in accordance with the terms of the Plan. Further, the Debtors are required to indemnify a number of the Released Parties (*i.e.*, the Debtors' current officers and directors) such that pursuing litigation against certain of the Released Parties amounts to litigation against the Debtors. *See Indianapolis Downs*, 486 B.R. at 303 ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the nondebtor receiving the release.").

71. The second factor—a substantial contribution to the reorganization—supports the Debtor Releases because the Released Parties made substantial contributions to the Debtors' reorganization leading up to the Petition Date, and through the date hereof. With respect to the Debtors' stakeholders, these contributions include, among other things, negotiating, formulating, supporting, implementing, and executing the Debtors' reorganization, as well as working to build the consensus necessary to implement the Plan. With respect to the Debtors' officers, directors, managers, employees, and professionals, each has made a substantial contribution to this

reorganization by, among other things, participating in negotiations with the Debtors' key stakeholders, managing the Debtors' businesses in the difficult time leading up to the Petition Date and thereafter, developing and generating consensus around the restructuring strategy, and assisting with any and all actions necessary to navigate the Debtors through the Chapter 11 Cases and toward confirmation of the Plan.

72. The third factor—the essential nature of the releases—also weighs in favor of the Debtor Releases. The Debtor Releases were negotiated by the Debtors and their key stakeholders, including the Participating Prepetition Lenders, in connection with the Restructuring Support Agreement, which is the foundation for the Debtors' restructuring. Moreover, many of the Released Parties agreed to make material concessions and substantial contributions to the Debtors' reorganization in reliance upon, and in exchange for, the Debtor Releases.

73. The fourth factor—support for the releases—favors the Debtor Releases. A substantial majority of the Debtors' stakeholders support the Debtor Releases, including the Plan Support Parties. In addition, no party objected to the Debtor Releases, and the Voting Parties unanimously voted to accept the Plan, including the Debtor Releases. *See* Voting Certification at Ex. A.

74. The fifth factor—payment of all or substantially all of the claims of the class or classes affected by the injunction—favors the Debtor Releases because all general unsecured creditors are paid in full and the Prepetition Second Lien Lenders and Prepetition Third Lien Lenders have voted in favor of their impairment.

75. For the foregoing reasons, the Debtors submit that the Debtor Releases are justified, in the best interests of creditors, are an integral part of the Plan, and satisfy the key factors considered by courts in evaluating debtor releases.

b. Third-Party Releases

76. Section 10.4(b) of the Plan provides for releases of the Released Parties (the "**Third-Party Releases**") of certain, claims, rights, and causes of actions that the following parties (collectively the "**Releasing Parties**") may have against the Released Parties: (i) the Plan Support Parties; (ii) the Prepetition Second Lien Agent; (iii) the Prepetition Second Lien Lenders; (iv) the Prepetition Third Lien Agent; (v) the Prepetition Third Lien Lenders; (vi) each holder of a claim or equity interest who either votes to accept the Plan or is conclusively presumed to have accepted the Plan; and (vii) each holder of a claim or equity interest who is entitled to vote on the Plan and (a) either votes to reject the Plan or abstains from voting to accept or reject the Plan and (b) does not check the appropriate box on such holder's timely submitted ballot to indicate that such holder opts out of the releases set forth in Section 10.4. *See* Plan §§ 1.91; 10.4(b).

77. The Third-Party Releases are consensual as they are only being provided by (i) the Voting Classes, all of which voted in favor of the Plan (including the Third-Party Releases); (ii) the holders of claims and equity interests in the Presumed Accepting Classes (and who have not otherwise objected to such releases); and (iii) and the parties who specifically negotiated such releases in connection with the Restructuring Support Agreement. *See U.S. Bank N.A. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) ("Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan."); *Exide Techs.*, 303 B.R. at 74 (holding that when a third party release only binds creditors who have accepted the terms

of the plan, it is consensual and not subject to further scrutiny); *Zenith Elecs. Corp.*, 241 B.R. at 111 (permitting releases by creditors who accept the plan). Furthermore, each Ballot specifically included the release provisions set forth in Section 10.4 of the Plan and provided each Voting Party with the ability to opt out of the Debtor Releases and the Third-Party Releases. No Voting Party that submitted a ballot elected to opt out of such releases. Finally, all parties in interest have received sufficient notice of the Third-Party Releases and have had ample time to raise any objections thereto. *See Spansion*, 426 B.R. at 144 ("[N]o creditor or interest holder whose rights are affected by the 'deemed' acceptance language has objected to the Plan . . . . [T]he silence of the unimpaired classes on this issue is persuasive."). Accordingly, the Third-Party Releases described herein should be approved.

c. Exculpation

78. Section 10.5 of the Plan exculpates the Debtors, the Reorganized Debtors, the Plan Support Parties, and their direct or indirect affiliates, officers, directors, partners, employees, members, members of boards of managers, advisors, attorneys, financial advisors, accountants, investments bankers, or agents (whether current or former, in each case, in his, her, or its capacity as such) (collectively, the "**Exculpated Parties**")—the parties that contributed most substantially to the negotiation and formulation of the Plan—from liability in connection with the Plan and the restructuring, and expressly excludes acts of willful misconduct, fraud, or gross negligence (the "**Exculpation**").

79. Courts evaluate the appropriateness of exculpation provisions based on a number of factors, including (i) whether the plan was proposed in good faith; (ii) whether liability is limited; and (iii) whether the exculpation provision was necessary for plan negotiations. *See In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (evaluating the exculpation clause based on the manner in which the clause was made a part of the agreement, the necessity of the limited

liability to the plan negotiations, and whether those who participated in proposing the plan did so in good faith).

80. First, the Exculpated Parties extensively negotiated the Restructuring Support Agreement and the Plan, and the related documents contemplated thereunder, and the resulting agreements were implemented in good faith with a high degree of transparency.

81. Second, the scope of the Exculpation is narrowly tailored to the Exculpated Parties' acts or omissions in connection with the transactions contemplated by the Plan, the Restructuring Support Agreement, and the Chapter 11 Cases. Furthermore, the Exculpation does not protect the Exculpated Parties from liability resulting from willful misconduct, fraud, or gross negligence.

82. Third, the Exculpation was critical to Plan negotiations and is necessary and appropriate to protect parties who have made substantial contributions to the Debtors' reorganization from future collateral attacks related to actions taken in good faith in connection with the Debtors' restructuring.

83. Similar exculpation provisions are routinely upheld in this District, particularly when, as here, the provisions contain carve-outs for willful misconduct, fraud, and gross negligence. *See, e.g.*, *Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Dec. 23, 2013) [D.I. 197] (approving exculpation provision that included, among others, exit lenders, noteholders, and secured lenders); *In re Synagro Techs.*, Inc., No. 13-11041 (BLS) (Bankr. D. Del. Aug. 20, 2013) [D.I. 794] (approving exculpation provision that included, among others, secured lenders, plan sponsor, DIP agent and lenders, and prepetition sole shareholder); *In re S. Air Holdings, Inc.*, No. 12-12690 (CSS) (Bankr. D. Del. Mar. 18, 2013) [D.I. 673] (approving exculpation provision that included, among others, the debtors' prepetition majority shareholder,

DIP agent and lenders, and various consenting lender parties); *In re NewPage Corp.*, No. 11-12804 (KG) (Bankr. D. Del. Dec. 14, 2012) [D.I. 2944] (approving an exculpation provision that included, among others, the debtors' exit lenders); *In re Constar Int'l, Inc.*, No. 11-10109 (CSS) (Bankr. D. Del. May 20, 2011) [D.I. 439] (confirming a plan exculpating, among others, the holders of certain note claims and several of the debtors' lenders); *In re Leslie Controls, Inc.*, No. 10-12199 (CSS), 2010 WL 4386935, at *25 (Bankr. D. Del. Oct. 28, 2010) (finding that an exculpation provision exculpating, among others, the debtor-in-possession lender and the future claimants representative was "fair and equitable, [] given for valuable consideration, and [] in the best interests of the Debtor and its chapter 11 estate" and satisfied the requirements of the law in the Third Circuit).

d. Injunctions

84. Section 10.6(a) of the Plan permanently enjoins all persons or entities who have held, hold, or may hold claims or equity interests (other than claims reinstated under the Plan) from:

> (i) commencing or continuing in any manner any action or other proceeding of any kind, against the Debtors or the Reorganized Debtors, or in respect of any Claim or Cause of Action released or settled [under the Plan]; (ii) enforcing, attaching, collecting, or recovering by any manner or means of any judgment, award, decree, or order against the Debtors or Reorganized Debtors; (iii) creating, perfecting, or enforcing any encumbrance of any kind against the Debtors or Reorganized Debtors; or (iv) asserting any right of setoff, subrogation, or recoupment of any kind, against any obligation due from the Debtors or Reorganized Debtors, or against the property or interests in property of the Debtors or Reorganized Debtors, on account of such Claims or Equity Interests.

See Plan § 10.6(a)

85. Additionally, Section 10.6(b) of the Plan permanently enjoins all persons or entities who have held, hold, or may hold claims or equity interests from "taking any actions to interfere with the implementation or consummation of the Plan." *See* Plan § 10.6(b)

86. The Debtors submit that the injunctions contained in Section 10.6 of the Plan (the "**Injunctions**") are necessary to preserve and enforce the discharge, Debtor Releases, and Exculpation provided by the Plan and are narrowly tailored to achieve that purpose.

87. The Debtors submit that the Debtor Releases, Third-Party Releases, Exculpation, and Injunctions constitute good faith compromises and settlements of the matters covered thereby and are consensual. Such compromises and settlements recognize the significant contributions by parties, including the Participating Prepetition Lenders, to achieve an efficient and consensual reorganization of the Debtors, and are made in exchange for consideration, including the release of certain claims. Based upon the foregoing, the Plan fully complies with the requirements of sections 1122 and 1123, as well as with all other applicable provisions of the Bankruptcy Code, and thus satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code.

C. The Debtors Have Complied with All Applicable Provisions of the Bankruptcy Code – 11 U.S.C. § 1129(a)(2)

88. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). Legislative history and case law explain that this provision embodies the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 412; S. Rep. No. 95-989, at 126 ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Johns-Manville, Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y.

1986) ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code. These sections provide for the appropriate manner of disclosure and solicitation of plan votes.") (citations omitted).

89. As discussed in Section I of this Memorandum, the Debtors have complied with all applicable disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code and Bankruptcy Rules 3017, 3018, and 3019. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(2).

D. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law – 11 U.S.C. § 1129(a)(3)

90. Section 1129(a)(3) of the Bankruptcy Code requires that to be confirmed, a plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Third Circuit has found that good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11. *See In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999); *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988), (*citing Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (interpreting the standard as requiring a showing that "the plan was proposed 'with honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected'").

91. The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.-Irving)*, 939 F.2d 289, 292 (5th Cir. 1991). In addition, the speed with which debtors pursue approval of the disclosure statement and confirmation of the Plan is

not evidence of bad faith – to the contrary, "[b]arring extraordinary factors, a prompt confirmation process must be lauded." *Genesis Health Ventures*, 266 B.R. 591 at 609.

92. The primary goal of chapter 11 is to promote the restructuring of a troubled company. The United States Supreme Court has stated that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

93. The Plan accomplishes this goal expeditiously and has been proposed in good faith, with the legitimate and honest purpose of maximizing recoveries for all stakeholders of the Debtors. *See* Schuyler Decl. ¶ 30-32. In particular, the Plan provides the means by which the Debtors can continue their operations as a viable going concern and accomplishes a meaningful deleveraging of the Debtors, enabling them to service their debt in the future and to meet their ongoing obligations as they come due. Furthermore, the Plan is a product of extensive arm's length negotiations among the Debtors and their key stakeholders, and incorporates the substantial input of such parties. Further, the Plan's classification, indemnification, exculpation, discharge, release, and injunction provisions were negotiated in good faith and at arm's length, are consistent with sections 105, 1122, 1123, 1129, and 1142 of the Bankruptcy Code, and are each necessary for the Debtors' successful reorganization. The unanimous acceptance of the Plan by the Voting Parties reflects the acknowledgment that the Plan is fundamentally fair and should be confirmed.

94. Furthermore, as explained in the Schuyler Declaration, prior to the Petition Date, the Debtors pursued various opportunities to obtain new senior secured financing from outside lenders or to refinance their prepetition debt. *See* Schuyler Decl. ¶ 31. None of these efforts

proved successful, and the Debtors are not aware of any alternative transaction available to the Debtors that would result in as significant a recovery for all of the Debtors' stakeholders. *Id.*

95. Inasmuch as the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code and has garnered the unanimous acceptance of the Voting Classes, the Plan and the related documents have been filed in good faith and the Debtors have satisfied their obligations under section 1129(a)(3) of the Bankruptcy Code.

E. Any Payments to Be Made by the Debtors for Services or for Costs and Expenses Are Subject to the Approval of the Court – 11 U.S.C. § 1129(a)(4)

96. Bankruptcy Code section 1129(a)(4) requires that court approval be obtained for the payment of certain professional fees and expenses.

97. All payments made by the Debtors for services rendered or expenses incurred in these cases have been approved by, or are subject to approval of the Court. The Debtors have engaged O'Melveny & Myers LLP, Richards, Layton & Finger P.A., Houlihan Lokey Capital, Inc. ("**Houlihan Lokey**"), Prime Clerk LLC, and KPMG LLP, and will pay those professionals in accordance with the respective orders approving and governing such retentions. [D.I. 107, 108, 109, 111, 112.] Moreover, Section 2.3 of the Plan provides that all professionals shall file their respective final applications for allowance of compensation for services rendered and reimbursement of expenses incurred by the date that is forty-five (45) days after the Effective Date.

F. The Debtors Have Disclosed or Will Disclose All Necessary Information Regarding Directors, Officers, and Insiders – 11 U.S.C. § 1129(a)(5)

98. Section 1129(a)(5) of the Bankruptcy Code requires that (i) the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor; (ii) the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and (iii) the plan

proponent disclose the identity and compensation of any "insiders" to be retained or employed by the reorganized debtor. The Debtors have satisfied the foregoing requirements.

99. First, in accordance with Sections 5.8(d) and (e) of the Plan, Exhibit F of the Plan Supplement sets forth the identity of the proposed initial officers for the Reorganized Debtors. Additionally, the identity and biographical information, including any affiliations, of the proposed initial directors of the Reorganized Debtors will be disclosed prior to the Combined Hearing.

100. Second, the high degree of knowledge possessed by the proposed officers and directors of the Debtors' operations, businesses, accounts, finances, and business relationships is critical to achieving a successful transition out of chapter 11 and maximizing value going forward. Accordingly, the appointment to, or continuance in, such office by such individuals is consistent with the interests of the Debtors' creditors, equity security holders, and with public policy.

101. Third, Exhibit G of the Plan Supplement identifies all insiders to be employed or retained by the Reorganized Debtors and the nature of the compensation for such insiders. Accordingly, the Plan satisfied section 1129(a)(5) of the Bankruptcy Code.

G. The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission – 11 U.S.C. § 1129(a)(6)

102. Section 1129(a)(6) of the Bankruptcy Code requires that "[a]ny governmental regulatory commission with jurisdiction, after the confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Plan does not provide for any changes in any rates subject to the jurisdiction of any governmental regulatory commission.

H. The Plan Is in the Best Interests of the Debtors' Creditors and Equity Security Holders – 11 U.S.C. § 1129(a)(7)

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

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

11 U.S.C. § 1129(a)(7).

104. The "best interests test," focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999). Under the best interests test, the court must find that each non-accepting creditor will receive or retain value that is not less than the amount it would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *Id.*; *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 227-28 (1996). As section 1129(a)(7) of the Bankruptcy Code makes clear, the liquidation analysis applies only to non-accepting impaired claims or equity interests. If a class of claims or equity interests unanimously accepts the plan, the best interests test is automatically satisfied for all members of that class.

105. Pursuant to section 1126(f) of the Bankruptcy Code, each holder of a claim or equity interest, as the case may be, in a class that is unimpaired is deemed to accept the plan:

> Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

11 U.S.C. § 1126(f). The Presumed Accepting Classes (Classes 1, 4, 5, 6, and 7) are unimpaired, and therefore the best interests test is satisfied with respect to each claim or equity interest in each such class.

106. In addition, all of the Voting Classes (Classes 2, 3, and 8) unanimously voted to accept the Plan (*i.e.*, no Voting Party cast a vote against the Plan); therefore, the best interest test is satisfied with respect to each claim or interest in the Voting Classes. *See* Voting Certification at Ex. A.

107. Notwithstanding that all classes of claims and equity interests voted to accept the Plan or were presumed to accept the Plan, the liquidation analysis contained in the Disclosure Statement establishes that each holder of an allowed claim or equity interest will recover at least as much under the Plan on account of such claim or equity interest, as of the Effective Date, as such holder would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date. Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

I. The Plan Has Been Accepted by the Requisite Classes of Creditors and Equity Security Holders and Satisfies the "Cram Down" Requirements – 11 U.S.C. § 1129(a)(8)

108. Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or equity interests either votes to accept the plan or is not impaired under such plan. Pursuant to section 1126(c) of the Bankruptcy Code, a class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the claims in that class actually vote to accept the plan. Pursuant to section 1126(d) of the Bankruptcy Code, a class of equity interests accepts a plan if holders of at least two-thirds in amount of the allowed equity interests in that class actually vote to accept the plan. Each holder of a claim or equity interest in a class that is not impaired under a plan is conclusively presumed to have accepted the plan.

109. Pursuant to the Plan, Classes 1, 4, 5, 6, and 7 are unimpaired, and therefore the holders of claims and equity interests within such classes are conclusively presumed to have accepted the Plan. *See* 11 U.S.C. § 1126(f).

110. Although Classes 2, 3, and 8 are impaired under the Plan, the Plan was accepted by the holders of claims and equity interests within such impaired classes as follows: (i) 100% in amount and 100% in number of claims that were voted in Class 2; (ii) 100% in amount and 100% in number of claims that were voted in Class 3; and (iii) 100% in amount of equity interests that were voted in Class 8 – clearly satisfying the acceptance requirements of subsection (c) and (d) of section 1126 of the Bankruptcy Code. Accordingly, the Plan satisfies section 1129(a)(8).

J. The Plan Provides for Payment in Full of All Allowed Priority Claims – 11 U.S.C. § 1129(a)(9)

111. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) of the Bankruptcy Code requires that a plan satisfy administrative and priority tax claims in full in cash. The treatment of Administrative Expense Claims, Priority Tax Claims, and Priority Non-Tax Claims under the Plan satisfies the requirements of, and complies in all respects with, section 1129(a)(9) of the Bankruptcy Code.

112. Section 2.1 of the Plan provides that each holder of an allowed Administrative Expense Claim will receive, in full and complete settlement, release, and discharge of such Allowed Administrative Expense Claim, Cash equal to the unpaid amount of such allowed Administrative Expense Claim either on, or as soon as practicable after, the later of (i) the Effective Date; (ii) the date on which such Administrative Expense Claim becomes allowed; (iii) the date on which such Administrative Expense Claim becomes due and payable in the ordinary course of business under any agreement or understanding between the applicable

Debtor and the holder of such allowed Administrative Expense Claim; and (iv) such other date as may be mutually agreed to by such holder and the Debtors or Reorganized Debtors, *provided, however*, that allowed Administrative Expense Claims representing obligations incurred in the ordinary course of business or assumed by any of the Debtors will be paid in full, in Cash, or performed by the applicable Debtor or Reorganized Debtor in the ordinary course of business in accordance with the terms and subject to the conditions of any agreements or regulations governing, instruments evidencing, or other documents relating to, such transactions. Accordingly, section 1129(a)(9)(A) of the Bankruptcy Code is satisfied.

113. With respect to Priority Non-Tax Claims, Section 4.1 of the Plan provides that each holder of an allowed Priority Non-Tax Claim will receive, in full and complete settlement, release, and discharge of such Priority Non-Tax Claim, Cash equal to the unpaid amount of such allowed Priority Non-Tax Claim either on, or as soon as practicable after, the later of (i) the Effective Date; (ii) the date on which such Priority Non-Tax Claim becomes allowed, and (iii) the date on which such Priority Non-Tax Claim becomes due and payable in the ordinary course of business under any agreement or understanding between the applicable Debtor and the holder of such claim; and (iv) such other date as may be mutually agreed to by and among such holder and the Debtors or the Reorganized Debtors as applicable.

114. With respect to Priority Tax Claims, Section 2.2 of the Plan provides that each holder of an allowed Priority Tax Claim will receive, in full and complete settlement, release, and discharge of such Priority Tax Claim, Cash equal to the unpaid amount of such allowed Priority Tax Claim either on, or as soon as practicable after, the later of (i) the Effective Date; (ii) the date on which such Priority Tax Claim becomes allowed; (iii) the date on which such Priority Tax Claim becomes due and payable; and (iv) such other date as may be mutually agreed

to by and among such holder and the Debtors or Reorganized Debtors, as applicable; *provided, however*, that the Debtors will be authorized, at their option, and in lieu of payment in full, in Cash, of an allowed Priority Tax Claim as provided in clauses (i) through (iv) above, to make deferred Cash payments on account thereof in the manner and to the extent permitted under section 1129(a)(9) of the Bankruptcy Code.

115. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

K. The Plan Has Been Accepted by at Least One Impaired Class That Is Entitled to Vote – 11 U.S.C. § 1129(a)(10)

116. Section 1129(a)(10) of the Bankruptcy Code requires, if a class of claims is impaired under a plan, the acceptance of the plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). As set forth in the Voting Certification, each of the impaired Voting Classes has unanimously voted to accept the Plan, excluding the votes of any insiders. Accordingly, section 1129(a)(10) of the Bankruptcy Code is satisfied.

L. The Plan Is Not Likely to Be Followed by Liquidation or the Need for Further Financial Reorganization – 11 U.S.C. § 1129(a)(11)

117. Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the Court determine that the plan is feasible – 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).

118. The feasibility test set forth in section 1129(a)(11) requires the Court to determine whether a plan is workable and has a reasonable likelihood of success. *See Armstrong*, 348 B.R. at 167; *In re NII Holdings*, 288 B.R. 356, 364 (Bankr. D. Del. 2002); *In re Leslie Fay Cos.*, 207

B.R. 764, 788-89 (Bankr. S.D.N.Y. 1997). However, a debtor need not guarantee success. "[T]he feasibility standard is whether the plan offers a reasonable assurance of success." *Kane*, 843 F.2d at 649.

119. The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. *See Clarkson v. Cooke Sales & Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985); *Drexel Burnham*, 138 B.R. at 762; *In re Greene*, 57 B.R. 272, 277-78 (Bankr. S.D.N.Y. 1986). The purpose of the feasibility test is to protect against visionary or speculative plans. *See In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) ("The purpose of section 1129(a)(11) 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.") (*quoting* 5 Collier on Bankruptcy ¶ 1129.02, at 1129-36.11 (15th ed. 1984). However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. *See Drexel Burnham*, 138 B.R. at 762 ("The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds.") (*citing In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986).

120. Applying these standards, courts have identified the following factors as probative of a plan's feasibility:

- the adequacy of the capital structure;
- the earning power of the business;
- economic conditions;
- the ability of management;
- the probability of the continuation of the same management;
- the availability of prospective credit, both capital and trade;

- the adequacy of funds for equipment replacements;
- the provisions for adequate working capital; and
- any other matter bearing on the successful operation of the business to enable performance with the provisions of the plan.

Leslie Fay, 207 B.R. at 789 (*citing* 7 Collier on Bankruptcy ¶ 1129 LH[2], at 1129-82 (15th ed. rev. 1996); *In re Prudential Energy Co.*, 84 B.R. 857, 862-63 (Bankr. S.D.N.Y. 1986). The foregoing list is neither exhaustive nor exclusive. *Drexel Burnham*, 138 B.R. at 763.

121. For purposes of determining whether the Plan satisfies the feasibility standards, the Debtors thoroughly analyzed their ability post-confirmation to fulfill their obligations under the Plan. As part of this analysis, the Debtors, assisted by Houlihan Lokey and the Debtors' other professionals, prepared the projections of their financial performance that represent the projected financial position, results of operations, and cash flow of the Debtors for each of the ten fiscal years 2014 through 2023 (the "**Projections**"). Mazzucchi Decl. ¶ 6. As set forth in the Mazzucchi Declaration and the Disclosure Statement, the Projections reflect numerous assumptions regarding the Reorganized Debtors' future performance, industry performance, and general business economic conditions, some of which may not materialize, including the projected prices of electricity and natural gas. *See* Mazzucchi Decl. ¶ 8. Subject to the risk factors enumerated in Section VI of the Disclosure Statement, the Projections provide a reasonable basis to conclude that the Reorganized Debtors should have the future financial performance and ability to meet their obligations under the Plan. Accordingly, confirmation of the Plan will not likely be followed by liquidation or the need for further financial reorganization of the Debtors, and therefore the Plan complies with section 1129(a)(11) of the Bankruptcy Code. Mazzucchi Decl. ¶ 9.

122. Based upon the foregoing, the Plan has more than a reasonable likelihood of success and satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

M. The Plan Provides for Full Payment of Statutory Fees – 11 U.S.C. § 1129(a)(12)

123. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." 11 U.S.C. § 1129(a)(12). In accordance with section 1129(a)(12), Section 12.1 of the Plan provides that all such fees payable shall be paid by the Debtors on a per-Debtor basis on the Effective Date and thereafter as may be required.

N. Sections 1129(a)(13) Through 1129(a)(16) of the Bankruptcy Code Are Inapplicable in the Chapter 11 Cases

124. Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. Because the Debtors do not provide or pay any retiree benefits (as defined in section 1114 of the Bankruptcy Code), section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Debtors.

125. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations, and, as such, this section of the Bankruptcy Code does not apply.

126. Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). None of the Debtors is an "individual," and accordingly, section 1129(a)(15) is inapplicable.

127. Finally, each of the Debtors is a moneyed, business, or commercial corporation, and accordingly, section 1129(a)(16) of the Bankruptcy Code, which provides that property transfers by a corporation or trust that is not a moneyed, business or commercial corporation, or

trust be made in accordance with any applicable provisions of nonbankruptcy law, is inapplicable in the Chapter 11 Cases.

O. The Technical Modifications to the Original Plan Do Not Materially and Adversely Affect Any Holders of Claims or Equity Interests

128. As noted above, the Debtors have made two technical modifications to the Original Plan in response to informal comments received from the U.S. Trustee. First, the Debtors clarified the language of Section 4.5 to make it clear that the discharge provisions of the Plan do not apply to any reinstated general unsecured claims. This modification is consistent with the other provisions of the Plan, including Section 10.3 of the Plan. Second, the Debtors modified Section 6.12 of the Plan to preserve any prepetition contractual rights to postpetition interest that a holder of a claim may have. Each of these modifications was approved by the U.S. Trustee and the Participating Prepetition Lenders and complies with the Bankruptcy Code and Bankruptcy Rules.

129. Section 1127(a) of the Bankruptcy Code provides a plan proponent with the right to modify the plan "at any time" before confirmation, provided that the modifications satisfy the requirements of sections 1122 and 1123 of the Bankruptcy Code. In addition, pursuant to section 1127(d) of the Bankruptcy Code, all stakeholders that previously have accepted (or rejected) the plan are deemed to have accepted (or rejected) the modified plan. Bankruptcy Rule 3019(a) implements Bankruptcy Code section 1127(d) by providing that, to the extent plan modifications do not adversely change the treatment of any claim or equity interest under the plan, the holders of such claims or equity interests shall be deemed to accept the modified plan. Together, section 1127(d) of the Bankruptcy Code and Bankruptcy Rule 3019(a) therefore prohibit a creditor's prior acceptance from being applied to a modified plan that materially and adversely changes such creditor's treatment absent such creditor's consent. *G-1 Holdings Inc.*, 420 B.R. at 256 ("If

the amendments [to the plan] are material and adversely affect the way creditors are treated, § 1127 requires a new disclosure statement and balloting of the amended plan."); *Peltz v. Worldnet Corp. (In re USN Commc'ns, Inc.)*, 280 B.R. 573, 596 (Bankr. D. Del. 2002) ("Rule 3019 places the burden on the Court . . . to insure that the proposed modification "does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification."). At the same time, however, courts routinely allow plan proponents to make non-material changes to a plan that do not adversely affect a creditor's recovery without requiring the proponent to resolicit the plan for acceptance. *See, e.g., In re Fed.–Mogul Global Inc.*, No. 01-10578, 2007 WL 4180545, at *39 (Bankr. D. Del. Nov. 16, 2007) (stating that supplemental disclosure is not required where plan "[m]odifications do not materially and adversely affect or change the treatment of any Claim against or Equity Interest in any Debtor"); *Enron Corp. v. New Power, Co. (In re New Power Co.)*. 438 F.3d 1113, 1117–18 (11th Cir. 2006) ("the bankruptcy court may deem a claim or interest holder's vote for or against a plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated."); *Beal Bank, S.S.B. v. Jack's Marine, Inc.*, 201 B.R. 376, 380 (E.D. Pa. 1996) (holding that resolicitation is required only where modifications materially and adversely affect voting creditors).

130. The Debtors respectfully submit that for the reasons discussed above, the Plan as modified complies with sections 1122 and 1123 of the Bankruptcy Code, and the technical modifications contained in the Plan do not materially and adversely affect the recoveries of the holders of claims and equity interests. Accordingly, the Debtors submit that resolicitation of the Plan is not required.

WAIVER OF STAY OF CONFIRMATION ORDER

131. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). Bankruptcy Rule 7062, which incorporates rule 62 of the Federal Rules of Civil Procedure, provides that "no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry." Fed. R. Bankr. P. 7062.

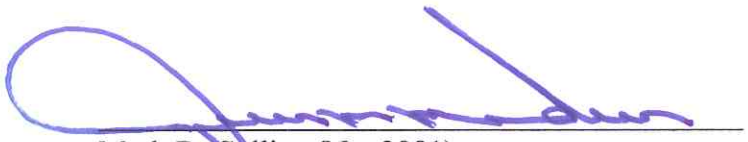
132. The Debtors request that notwithstanding Bankruptcy Rules 3020(e) and 7062, the Confirmation Order be effective and enforceable immediately upon its entry to enable the Debtors to consummate the Plan as soon as practicable thereafter. Based on the prepackaged nature of these cases, the Debtors believe that such relief is appropriate and warranted under the circumstances. Furthermore, each day the Debtors remain in chapter 11, they incur significant administrative and professional costs. The Debtors' restructuring strategy depends upon a timely exit from chapter 11.

133. In light of foregoing, the Debtors request a waiver of any stay imposed by Bankruptcy Rule 3020(e) so that the Confirmation Order may be effective immediately upon its entry.

CONCLUSION

134. For the reasons set forth herein, the Debtors respectfully submit that this Court should enter an order (i) approving the (a) Disclosure Statement and (b) Solicitation Procedures; (ii) confirming the Plan; and (iii) granting to the Debtors such other and further relief as is just.

Dated: September 15, 2014
Wilmington, Delaware



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