IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
BANKRUPTCY DIVISION
ST. CROIX, VIRGIN ISLANDS

In re:	)	
	)	Chapter 11
HOVENSA L.L.C.,	)	
	)	Case No. 1:15-bk-10003-MFW
Debtor.	)	
	)	Re: Docket Nos. 467 and 542

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF (A) APPROVAL OF DISCLOSURE STATEMENT AND (B) CONFIRMATION OF PLAN

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HOVENSA L.L.C., debtor and debtor in possession in the above-captioned chapter 11 case (the "Debtor"), submits this Memorandum of Law (the "Memorandum") in support of (a) approval of the *Disclosure Statement for the Debtor's Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 467] (as it may be amended, supplemented, restated or modified, the "Disclosure Statement"), pursuant to section 1125 of title 11 of the United States Code (the "Bankruptcy Code"), and (b) confirmation of the *Debtor's First Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 542] (as it may be amended, supplemented, restated or modified, the "Plan"),[1] pursuant to section 1129 of the Bankruptcy Code. In support of approval of the Disclosure Statement and confirmation of the Plan, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Debtor is on the verge of achieving, in just over four months, what many had doubts would be possible—a consensual chapter 11 plan of liquidation resolving substantial claims of key stakeholders predicated on the successful sale of substantially all of the Debtor's assets. Prior to bankruptcy, the Debtor experienced many challenging years in which it was forced to cease its refinery operations and saw a prior sale effort fail when it was rejected by the prior USVI Legislature. During the Chapter 11 Case, however, the Debtor and its major stakeholders, including the JV Parties, the Committee, the GVI, the DPNR, the EPA, and the DOJ, engaged in renewed, extensive, good faith, arm's-length negotiations regarding the terms of a potential sale and a plan of liquidation. These negotiations culminated in Court approval of the Sale Transaction, followed by an historic vote on December 30, 2015, whereby the USVI Legislature ratified a landmark operating agreement between the GVI and the Purchaser. With

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan or the Disclosure Statement, as applicable.

this approval, the Debtor was able to consummate the Sale Transaction, yielding approximately $90 million in sale proceeds for the benefit of the Debtor's Estate.

2. The support for the Plan is evidenced by the fact that it has not drawn a single objection, and all but one of the 981 votes cast on the Plan was an acceptance.[2] In order to achieve this consensus, the Debtor and its advisors spent countless hours working closely with numerous parties, including the GVI, the DPNR, the EPA, the DOJ, the JV Parties, and the Purchaser to formulate a plan ensuring that, among other things, the Environmental Response Trust to be established pursuant to the Plan will have adequate resources to address all of the Debtor's ongoing and prospective environmental and remediation obligations. In addition, the Debtor conferred with the Committee to establish the Liquidating Trust, which will resolve Claims and make meaningful distributions to Holders of Allowed General Unsecured Claims in Classes 4, 5, and 6 of the Plan in an efficient and effective manner.

3. Ultimately, the Plan reflects numerous agreements, compromises, and concessions by and among the Debtor and each of the Debtor's major stakeholders. As described in detail below, the Plan reflects resolution with the JV Parties, the Committee, the PBGC, the EPA, the GVI, and the USW of the outstanding issues at the heart of the Chapter 11 Case. The net result of these agreements and compromises is an estimated recovery for Holders of Allowed General Unsecured Claims in the amount of approximately 49%.

4. Notwithstanding the Debtor's significant achievements to date, an expeditious conclusion to the Chapter 11 Case remains critical to conserving the Debtor's limited resources for the benefit of creditors. As the Court is aware, a significant portion of the Sale Transaction

[2] The one rejecting vote is on account of a pension-related claim that will never come to fruition if the Plan is confirmed and the Debtor's Pension Plan obligations are assumed as provided in the Plan.

proceeds are earmarked for various purposes (as set forth in the Sale Order), and the Debtor lacks access to additional financing and is expected to exhaust its liquidity in short order. Thus, the Debtor seeks approval of the Disclosure Statement and confirmation of the Plan at the Combined Hearing in order to minimize administrative expenses associated with the Chapter 11 Case and maximize distributions to Holders of Allowed Claims.

5. As described in more detail below, the Disclosure Statement contains ample information for stakeholders to make an informed decision regarding whether to vote to accept or reject the Plan. Accordingly, the Debtor submits that the Disclosure Statement contains "adequate information" in accordance with section 1125 of the Bankruptcy Code and should be approved. Moreover, the Plan satisfies the requirements for confirmation set forth in section 1129 and other applicable provisions of the Bankruptcy Code, and is supported by all of the Debtor's major stakeholders. Each of the Classes of Claims entitled to vote on the Plan has voted to accept the Plan. As a result, the Debtor submits that the Plan is in the best interests of the Debtor's Estate, creditors, and other stakeholders, and requests that the Plan be confirmed.

GENERAL BACKGROUND OF THE CHAPTER 11 CASE

6. On September 15, 2015 (the "Petition Date"), the Debtor filed the Chapter 11 Case. The goal of the Chapter 11 Case was to expeditiously complete a sale of substantially all of the Debtor's assets through a court-supervised sale process under section 363 of the Bankruptcy Code and to wind-down the Debtor's remaining operations and make meaningful distributions to the Debtor's creditors.

7. On December 1, 2015, the Court entered the *Order (A)(I) Approving the Sale of the Debtor's Assets, Free and Clear of All Liens, Claims, Encumbrances, and Interests; and (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (B) Granting Related Relief* [Docket No. 394] (the "Sale Order"). Pursuant to the

Sale Order and as described in more detail in the Disclosure Statement, the Court, among other things, approved the sale of substantially all of the Debtor's assets to Limetree Bay Terminals, LLC (the "Sale Transaction"). On January 4, 2016, the Debtor closed the Sale Transaction. *See Notice of Closing of Sale of Debtor's Assets* [Docket No. 528].

8. The Court is respectfully referred to the Disclosure Statement and the *Declaration of Thomas E. Hill in Support of Confirmation of the Debtor's Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Hill Declaration"), filed contemporaneously herewith, for all other facts relevant to the Plan and Confirmation.

THE PLAN

I. Global Settlement Embodied in the Plan

9. Concurrently with the Debtor's efforts to consummate the Sale Transaction, the Debtor has been working diligently to formulate a consensual chapter 11 plan that provides for the distribution of the net proceeds of the Sale Transaction to creditors in an equitable manner consistent with the principles of the Bankruptcy Code. *See Begier v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (observing that the underpinning policy of the Bankruptcy Code is maximizing property available to satisfy creditors). In connection with those efforts, the Debtor has engaged in extensive, good faith, arm's-length negotiations with virtually every major constituency involved in the Chapter 11 Case, including the Committee, the JV Parties, the GVI, the DPNR, the EPA, the DOJ and the USW.

10. The Plan contains a series of agreements and compromises by major stakeholders that will enable the Debtor to maximize recoveries to all creditors on a fair and equitable basis. For example, in connection with the Plan, the JV Parties, in their capacity as lenders under the

Promissory Notes, have agreed to waive and release their respective Promissory Note Claims in the amount of approximately $1.9 billion (inclusive of interest) as of the Petition Date. *See* Plan Article IV.J. In addition, as part of the Sale Transaction, HOVIC agreed that it (or one of its Affiliates) would assume the Debtor's obligations under the Pension Plan (subject to consummation of the Plan with Estate releases for HOVIC and its Affiliates).[3] *See* Sale Order ¶ 31 (including agreement to assume the Debtor's obligations under the Pension Plan as a condition precedent to closing of the Sale Transaction); Plan Article XI.A.10 (including assumption of Pension Plan obligations as a condition precedent to the Effective Date of the Plan).

11. The Debtor and the EPA have agreed to settle the EPA's dischargeable Claims against the Debtor arising under section 112(r) of the Clean Air Act for an Allowed Claim in the aggregate amount of $115,000 (although the settlement will not resolve any other Claims or any claims of the EPA relating to nondischargeable environmental matters, which will be addressed by the Environmental Response Trust). *See* Plan Article IV.O; Hill Decl. ¶ 32.

12. Moreover, the GVI has agreed to support the Plan in exchange for the treatment of the GVI Claims provided in Article III.B.3 of the Plan. In addition to payment of the USVI Concession Fee and the transfer of the Government Parcels free and clear of all claims, liens, and encumbrances or any other interest in such property in connection with the Sale Transaction,[4] the Plan provides that the Environmental Response Trust will perform the Debtor's obligations relating to or arising under RCRA or other Environmental Law giving rise to claims that are not dischargeable under current bankruptcy law. Specifically, in accordance with Article VIII of the

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[3] The Debtor understands that Hess will assume the Pension Plan obligations.

[4] The Debtor does not believe that any party asserts a lien or other interest in any of the Government Parcels.

Plan, the Environmental Response Trust will conduct the Environmental Remediation/Compliance Program, including undertaking any Remedial Actions, to the satisfaction of the GVI, the DPNR, and the EPA. The GVI's agreement to support the Plan is essential to the Debtor's ability to safely and efficiently satisfy its ongoing environmental and remediation obligations.

13. The aggregate amount of unsecured claims against the Debtor will be materially reduced by the assumption of the Pension Plan obligations by Hess, the waiver by the JV Parties of the Promissory Note Claims, the EPA settlement and the resolution of the GVI Claims, resulting in increased recoveries for Holders of other Allowed General Unsecured Claims. Indeed, approximately $30 million of the net proceeds of the Sale Transaction will be available for Holders of other Allowed General Unsecured Claims. The estimated recoveries to Holders of Allowed General Unsecured Claims under the Plan are approximately 49%. The Debtor believes that the agreements embodied in the Plan will provide Holders of Allowed General Unsecured Claims with the maximum possible recoveries available under the circumstances. As a result of the benefits provided by those agreements, the Committee has agreed to support the Plan.

14. The Plan also contains Debtor release, exculpation, and consensual third party release provisions that are an integral part of the compromises embodied in the Plan. Without the agreements, concessions, waivers of claims, and assumption of certain liabilities by major stakeholders in the Chapter 11 Case, confirmation of a chapter 11 plan would be nearly impossible, and the Chapter 11 Case almost certainly would be converted to a case under chapter 7. In the event of a conversion to a case under chapter 7, as set forth in the Liquidation Analysis, the Holders of Allowed General Unsecured Claims would receive no recovery. Given the Plan's significant recoveries for Holders of Allowed General Unsecured Claims as a direct

result of the agreements and compromises set forth in the Plan, the Debtor and key stakeholders agreed to include certain releases and exculpations as an integral part of the Plan. The Committee also agreed to support an Estate release in favor of the JV Parties in exchange for various concessions, including the agreement by Hess to assume the Debtor's ongoing Pension Plan liabilities.

II. Summary of Plan Structure

15. The Plan provides for the creation of a Liquidating Trust and an Environmental Response Trust. The Liquidating Trust will be established for the primary purpose of administering the Liquidating Trust Assets, resolving Disputed Claims, and making distributions to Holders of Allowed General Unsecured Claims. The Environmental Response Trust will be established for the purpose of carrying out the Environmental Remediation/Compliance Program and, thereby, ensuring appropriate clean-up of the Facility, as required by the RCRA Permit, the RCRA Post-Closure Permit, and Environmental Law. In carrying out this purpose and function, the Environmental Response Trust shall: (a) act as successor to the Debtor solely for the purpose of paying for any post-Environmental Response Trust Effective Date costs and expenses associated with the Environmental Remediation/Compliance Program or the Environmental Response Trust Assets, and associated costs and fees incurred by the Environmental Response Trust in accordance with Article VIII of the Plan, the Confirmation Order, the Termination and Release Agreement, and the Environmental Response Trust Agreement; (b) own the Remaining Assets; (c) implement the Environmental Remediation/Compliance Program; (d) pay certain regulatory fees and oversight costs related to compliance with the Environmental Remediation/Compliance Program or the Environmental Response Agreement; and (e) sell, transfer or otherwise dispose or facilitate the reuse of all or part of the Environmental Response Trust Assets, if possible, all as provided in the Environmental Response Trust Agreement, with

no objective or authority to engage in any trade or business unless such trade or business is approved by the Environmental Response Trust Beneficiaries.

16. On January 11, 2016, the Debtor filed the *Plan Supplement to the Debtor's Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 541], which includes, among other things, the forms of the Liquidating Trust Agreement and the Environmental Response Trust Agreement.

PLAN SOLICITATION AND RESULTS THEREOF

17. On December 8, 2015, the Debtor filed the *Debtor's Motion for an Order (I) Conditionally Approving the Disclosure Statement, (II) Scheduling Combined Hearing on Approval of Disclosure Statement and Confirmation of Plan, (III) Establishing Procedures for Solicitation and Tabulation of Votes on Plan and (IV) Approving Related Matters* [Docket No. 412] (the "Solicitation Procedures Motion").

18. On December 17, 2015, the Court entered an order granting the Solicitation Procedures Motion [Docket No. 462] (the "Solicitation Procedures Order"). The Solicitation Procedures Order, among other things, (a) conditionally approved the Disclosure Statement solely for purposes of soliciting votes to accept or reject the Plan, (b) scheduled a combined hearing (the "Combined Hearing") for approval of the adequacy of the Disclosure Statement and confirmation of the Plan for January 19, 2016 at 10:00 a.m. (prevailing Eastern Time), (c) approved the form and manner of notice of the Combined Hearing, and (d) established procedures for the solicitation and tabulation of votes to accept or reject the Plan.

19. As detailed in the Pullo Declaration (as defined below), the Debtor began the noticing and solicitation process on December 18, 2015. By December 21, 2015, the Debtor had completed distribution of the Disclosure Statement and related materials to holders of Claims in Impaired Classes entitled to vote on the Plan (each a "Voting Class," and, collectively, the

"Voting Classes"): Class 3 (GVI Claims), Class 4 (Tort Claims), Class 5 (Other Non-Governmental and Non-Tort General Unsecured Claims), and Class 6 (Other Governmental General Unsecured Claims). Specifically, Prime Clerk LLC, the Debtor's administrative agent ("Prime Clerk"), transmitted a solicitation package (the "Solicitation Package") to known Holders of Claims in the Voting Classes as of December 17, 2015, containing, among other things, notice of the Combined Hearing and the deadlines for filing objections to approval of the Disclosure Statement and confirmation of the Plan, instructions for voting to accept or reject the Plan, and copies of the Disclosure Statement and the Plan. Pursuant to the Solicitation Procedures Order, the court established January 12, 2016 at 4:00 p.m. (prevailing Eastern Time) as the Voting Deadline.

20. On December 29, 2015, Prime Clerk filed an affidavit of service evidencing the timely service of the Solicitation Packages [Docket No. 505]; and affidavits evidencing publication of the notice of Combined Hearing in the national edition of *The New York Times* and in *The Virgin Islands Daily News* [Docket Nos. 504 and 518, respectively].

21. Pursuant to the Solicitation Procedures Order, Prime Clerk was authorized to receive on behalf of the Debtor, Ballots, E-Ballots and Master Ballots from Holders of Claims in the Voting Classes and to tabulate votes on the Plan. The results of the voting on the Plan are set forth in the *Declaration of Christina Pullo of Prime Clerk LLC Regarding Solicitation of Votes and Tabulation of Ballots Cast on Debtor's First Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Pullo Declaration"), filed concurrently herewith, and summarized below:

Class	Class Description	Number Accepting	Number Rejecting	Amount Accepting	Amount Rejecting	Class Voting Result
		%	%	%	%	
3	GVI Claims	17	0	$54,621,387.11	$0.00	Accepts
		100%	0%	100%	0%	
4	Tort Claims	948	0	$948.00	$0.00	Accepts
		100%	0%	100%	0%	
5	Other Non-Governmental and Non-Tort General Unsecured	14	1	$4,571,292.85	$500,000.00	Accepts
		93.33%	6.67%	90.14%	9.86%	
6	Other Governmental General Unsecured Claims	1	0	$1.00	$0.00	Accepts
		100%	0%	100%	0%	

OBJECTIONS AND RESERVATIONS OF RIGHTS

22. The Debtor received no objections to either the Disclosure Statement or the Plan prior to the Objection Deadline (as the same has been extended with respect to certain parties as a courtesy by the Debtor), and only three parties—the GVI, the U.S. Trustee, and the Purchaser—filed reservations of rights with respect to the Plan. Each of the reservations of rights related to the fact that the Plan and the Plan Supplement documents remain subject to ongoing discussions with various parties in interest. *See* Docket Nos. 531-532, 544. The Debtor has discussed and will continue to discuss these matters with the parties and hopes to achieve a resolution of any remaining issues prior to the Combined Hearing.

ARGUMENT

23. In accordance with the Solicitation Procedures Order, at the Combined Hearing, the Debtor will request (a) approval of the adequacy of the information contained in the Disclosure Statement, and (b) confirmation of the Plan. As described further below, the Disclosure Statement contains ample information for a typical claimholder to make an informed judgment regarding acceptance or rejection of the Plan. On the basis of the adequate information contained in the Disclosure Statement, each of the Voting Classes voted to accept the Plan. Notwithstanding the deemed rejection of the Plan by Class 7, the Plan satisfies each of the requirements for confirmation, including the requirements contained in section 1129(b) of the Bankruptcy Code with respect to Class 7. Consequently, the Disclosure Statement should be

approved, and the Plan, including the modifications made thereto after the commencement of the solicitation process, should be confirmed.

I. Approval of the Disclosure Statement

24. The Debtor requests that the Court approve the Disclosure Statement as containing "adequate information" in accordance with section 1125 of the Bankruptcy Code. The Court conditionally approved the Disclosure Statement in the Solicitation Procedures Order, but reserved for the Combined Hearing a final determination regarding the adequacy of the information contained in the Disclosure Statement and the rights of all parties in interest to object to the adequacy of such information. The Debtor now seeks approval of the Disclosure Statement as containing adequate information.

25. Under section 1125 of the Bankruptcy Code, a debtor must provide its creditors and interest holders with "adequate information" regarding the debtor's proposed plan. Adequate information means:

> 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 . . . . [I]n 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 additional information . . . .

11 U.S.C. § 1125(a)(1).

26. The primary purpose of a disclosure statement is to provide all material information that creditors and interest holders affected by a proposed plan need in order to make an informed decision on whether to vote to accept or reject a plan. *See, e.g., Century Glove, Inc.*

v. First Am. Bank of New York, 860 F.2d 94, 100 (3rd Cir. 1988) ("§ 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote"); *In re Monnier Bros.*, 755 F.2d 1336, 1341 (8th Cir. 1985); *In re Phoenix Petroleum, Co.*, 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001); *In re Unichem Corp.*, 72 B.R. 95, 97 (Bankr. N.D. Ill. 1987). Congress intended that such informed judgments would be needed to negotiate and vote on a plan. *Century Glove*, 860 F.2d at 100.

27. A court has broad discretion in determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code. Congress intended that courts exercise their discretion to tailor disclosures made in connection with a chapter 11 plan, while recognizing the broad range of businesses in which debtors engage and the circumstances accompanying chapter 11 cases. *See* H.R. Rep. No. 595, at 408-09 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6364-65. Accordingly, a court's determination of the adequacy of information in a disclosure statement must occur on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See* S. Rep. No. 95-989, at 121 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5907 (stating that "the information required will necessarily be governed by the circumstances of the case").

28. Here, the Disclosure Statement contains ample information for stakeholders to consider and make an informed decision about whether to vote to accept or reject the Plan, including the following:

(a) Overview of the Plan: Article I of the Disclosure Statement contains a summary of the classification and treatment of Claims and Interests under the Plan, the procedures for voting on the Plan, and the projected recoveries under the Plan for Holders of Allowed Claims;

(b) Debtor's Organizational Structure and Business: Article II of the Disclosure Statement describes the Debtor's organizational structure and business operations, the Debtor's assets, the Debtor's collective bargaining agreements, and the Debtor's key liabilities;

(c) Events Leading to the Chapter 11 Case: Article III of the Disclosure Statement discusses certain events leading to the commencement of the Chapter 11 Case, including the challenges faced by the Debtor in recent years and its efforts to address those challenges;

(d) Events During the Chapter 11 Case: Article IV of the Disclosure Statement describes the key events that have taken place during the course of the Chapter 11 Case;

(e) Summary of the Plan: Article V of the Disclosure Statement contains a detailed summary of the Plan, including the classification, treatment, and voting of Claims and Interests, the means for implementation of the Plan, the treatment of Executory Contracts and Unexpired Leases, provisions governing distributions, the creation of the Liquidating Trust and the Environmental Response Trust, procedures for resolving Disputed Claims, settlement, release, injunction and related provisions, conditions precedent to the Effective Date of the Plan, and the Court's retention of jurisdiction with respect to certain matters;

(f) Statutory Requirements for Confirmation of the Plan: Article VI of the Disclosure Statement describes the statutory requirements for confirmation of the Plan and the Plan's compliance with those requirements;

(g) Risk Factors: Article VII of the Disclosure Statement discusses certain risk factors that may affect the Plan and the recoveries of certain creditors under the Plan;

(h) Certain Federal Income Tax Consequences: Article VIII of the Disclosure Statement discusses certain U.S. federal income tax law consequences of the Plan; and

(i) Recommendation of the Debtor: Article IX of the Disclosure Statement sets forth the Debtor's recommendation that Holders of Claims vote to accept the Plan.

29. Based on the foregoing and the absence of any objections to the adequacy of the information contained in the Disclosure Statement, the Debtor respectfully submits that the Disclosure Statement contains "adequate information" within the meaning of section 1125 of the Bankruptcy Code and otherwise complies with that section. Accordingly, the Disclosure Statement should be approved by the Court on a final basis.

II. Plan Modifications

30. Following entry of the Solicitation Procedures Order and the solicitation of votes on the Plan, and in connection with the Debtor's continuing discussions with parties in interest,

the Debtor incorporated several modifications into the Plan (collectively, the "Plan Modifications") in accordance with section 1127 of the Bankruptcy Code. The Plan Modifications do not materially or adversely affect or change the treatment of any Claim against or Interest in the Debtor.

31. In particular, the Plan Modifications further refine the terms of the environmental settlements among the Debtor, the GVI, the DPNR, the EPA and the DOJ, including the transfer of $5 million in Cash to the Environmental Response Trust on the Environmental Response Trust Effective Date, and ensure the proper tax treatment of the Environmental Response Trust. In this regard, Article VIII of the Plan has been modified to provide additional detail regarding the purpose of the Environmental Response Trust, the operation of the Environmental Response Trust, and to reflect that the Environmental Response Trust is intended to qualify as a non-grantor trust for U.S. federal income tax purposes.

32. In addition, the Plan has been modified to provide for the Debtor's emergence from bankruptcy and continued existence as a Reorganized Debtor to fulfill certain limited roles for a limited period of time. Specifically, the Reorganized Debtor will be charged with, among other things, (a) winding down the Debtor's businesses and affairs, (b) resolving Administrative, Priority Tax, Professional Fee, Class 1, and Class 2 Claims, (c) making distributions on Allowed Administrative, Priority Tax, DIP Facility, Professional Fee, Class 1, and Class 2 Claims, (d) administering the Reorganized Debtor Assets, and (e) transferring the Environmental Response Trust Assets to the Environmental Response Trust. *See* Plan Article IV.D. Any funds remaining in the Administrative and Priority Claims Reserve after payment of all Allowed Administrative, Priority and Professional Fee Claims, and the U.S. Trustee Fees, shall be transferred by the Reorganized Debtor to the Environmental Response Trust. *See* Plan

Article IV.I.1. Based on tax considerations, it was not feasible to permit the Environmental Response Trust to receive excess Cash directly from the Liquidating Trust. To avoid adverse tax consequences to either trust, the Debtor determined to continue in existence for this limited purpose and for a limited period of time.

33. Third, as a result of discussions with the Committee, the Plan has been modified to provide for the creation of separate reserves for governmental and non-governmental General Unsecured Claims. Rather than creating a single GUC Beneficiary Reserve in the amount of $30 million, the Plan has been modified to fund the GUC Beneficiary Reserve with $29.5 million for the benefit of Holders of Allowed Claims in Classes 4 and 5, and to create a separate Governmental GUC Reserve funded with $500,000 for the benefit of Holders of Allowed Class 6 Claims. *See* Plan Article IV.I.2-I.3. Based on the Debtor's discussions with the Governmental Units that have informally or formally asserted Claims, as well as upon a review of the Debtor's books and records regarding scheduled and/or asserted Class 6 Claims, the Debtor believes that such funding is sufficient to provide these Claims with recoveries consistent with the recoveries on Claims in Classes 4 and 5.

34. Fourth, the Plan has been modified to reflect that, in full and final satisfaction of all Claims of the USW and any member of the USW against the Debtor, the Liquidating Trust shall pay, on the Effective Date or as soon as practicable thereafter, the aggregate amount of $100,000 to such individuals, as designated by the USW, from the GUC Beneficiary Reserve or the Class 5 Claims Reserve, as applicable. *See* Plan Article IV.M.; Hill Decl. ¶¶ 30-31. Upon the Effective Date, any Claims of the USW or any member of the USW against the Debtor shall be deemed satisfied and/or withdrawn with prejudice. *See id.*

35. Finally, the Plan has been modified to reflect an agreement between the Debtor and VWNA to, among other things, extend the Prepetition VWNA Agreement for 2 months to February 29, 2016 and automatically renew the Prepetition VWNA Agreement for successive terms of 2 months unless canceled in writing by the parties at least 30 days prior to the end of the then current term. *See* Hill Decl. ¶ 34. In consideration for the extension, the Debtor accepted and assumed the Prepetition VWNA Agreement and agreed to pay to VWNA $438,944.57 for services provided by VWNA to the Debtor under the Prepetition VWNA Agreement that VWNA asserts was due and owing as of the Petition Date (the "Prepetition Debt"). *See id.* In exchange, VWNA agreed that the Prepetition Debt was fully and completely satisfied, and VWNA waived, released, and discharged the Debtor from any and all prepetition Claims under the Prepetition VWNA Agreement, including, without limitation, the Prepetition Debt. *See id.*

36. Pursuant to section 1127(a) of the Bankruptcy Code, a plan proponent may modify its plan prior to confirmation so long as the modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code.[5] Bankruptcy Rule 3019 provides further:

> In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the

[5] Section 1127(a) of the Bankruptcy Code states:

> (a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

11 U.S.C. § 1127(a).

> interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Fed. R. Bankr. P. 3019. The Debtor believes that the Plan Modifications comply with these requirements.

37. Courts consistently have held that a proposed modification to a plan under Bankruptcy Rule 3019 will be deemed accepted by all creditors and equity security holders who previously accepted the plan where the proposed modification does not cause a material adverse change in the treatment of the claim of any creditor or the interest of any equity security holder. *See, e.g.*, *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *32 (Bankr. D. Del. May 13, 2010) ("disclosure and resolicitation of votes on a modified plan is only required . . . when the modification materially *and* adversely affects parties who previously voted for the plan." (emphasis in original)); *In re Federal–Mogul Global Inc.*, No. 01-10578 (JKF), 2007 Bankr. LEXIS 3940, at *113 (Bankr. D. Del. Nov. 8, 2007) (additional disclosure under section 1125 is not required where plan "modifications do not materially and adversely affect or change the treatment of any Claim against or Equity Interest in any Debtor"); *see also Enron Corp. v. New Power Co. (In re New Power Co.)*, 438 F.3d 1113, 1117-18 (11th Cir. 2006) ("[T]he 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.").

38. The Debtor anticipates that none of the Plan Modifications will have a material adverse impact on the treatment of any Claims or Interests. First, the Plan Modifications addressing the treatment of the Environmental Response Trust relate primarily to the tax treatment and internal operation of the trust and do not alter the funding requirements for the

Environmental Response Trust. *See* Hill Decl. ¶ 91. Consequently, these Plan Modifications are expected to have no impact on the Plan's treatment of Allowed Claims. The transfer of $5 million to the Environmental Response Trust on the Environmental Response Trust Effective Date also should have no impact on the treatment of Allowed Claims, because this Plan Modification alters only the timing of the delivery of funds to the Environmental Response Trust. Moreover, to the extent that these Plan Modifications have some marginal impact on the treatment of the Environmental Response Trust Beneficiaries, each of the Environmental Response Trust Beneficiaries has agreed to the revisions contained in the Plan. *See id.* Indeed, many of these modifications were made at the request of the Environmental Response Trust Beneficiaries, and the modifications will not have a material adverse impact on the treatment of the Environmental Response Trust Beneficiaries. *See id.*

39. Similarly, the Plan Modifications providing for the continued existence of the Reorganized Debtor post-Effective Date will not alter the treatment of or recoveries by any Holders of Allowed Claims. Instead, the Reorganized Debtor will resolve and pay certain Claims from the same Administrative and Priority Claims Reserve that the Plan previously contemplated the Liquidating Trust would use to pay those Claims. Thereafter, the Reorganized Debtor, rather than the Liquidating Trust, will distribute any funds remaining in the Administrative and Priority Claims Reserve to the Environmental Response Trust. Such modifications are merely administrative and will not have a material adverse effect on the treatment of any Holders of Allowed Claims under the Plan. *See* Hill Decl. ¶ 91.

40. The Debtor also submits that the Plan Modifications relating to the creation of the separate GUC Beneficiary Reserve and Governmental GUC Reserve satisfy the requirements of section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019. Based on the Debtor's

current projections regarding Claims expected to be filed by beneficiaries of the Governmental GUC Reserve, its discussions with Governmental Units that have informally and formally asserted Claims against the Debtor, and the Debtor's review of its books and records regarding scheduled and/or asserted Class 6 Claims, the Debtor believes that the payment of such Claims from the separately allocated funds in the Governmental GUC Reserve will not have an adverse effect on the recoveries of such creditors when compared with their pre-modification Plan treatment. *See* Hill Decl. ¶ 91. Additionally, because the Governmental GUC Reserve represents a relatively small portion of the overall net proceeds of the Sale Transaction, the Debtor anticipates that any effect that the segregation of funds into the Governmental GUC Reserve for payment of Class 6 Claims will have on treatment of other Holders of General Unsecured Claims will be immaterial. *See id.*

41. Finally, the modifications to the Plan with respect to the USW and VWNA were made in order to reflect the resolution of pending Claims against the Debtor and, as described in the Hill Declaration, to do so in a reasonable manner that is in the best interests of the Debtor, the Debtor's Estate, and its stakeholders. *See* Hill Decl. ¶¶ 30-31, 33-35, 91.

42. Moreover, because all creditors in the Chapter 11 Case have received notice of the Combined Hearing and will have an opportunity to object to the Plan Modifications at that time, the requirements of section 1127(d) of the Bankruptcy Code have been satisfied.

43. Accordingly, because the Plan Modifications (and any additional technical modifications that may be made prior to or at the Combined Hearing) do not materially and adversely affect the treatment of any creditor that has previously accepted the Plan, no further solicitation is required.

III. The Plan Should be Confirmed

A. The Plan Satisfies Each Mandatory Requirement for Confirmation Contained in Section 1129(a) of the Bankruptcy Code

44. To confirm the Plan, the Debtor must demonstrate that it has satisfied the provisions of section 1129 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a); *In re Bally Total Fitness of Greater N.Y., Inc.*, No. 07-12395, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007). As set forth below and as will be demonstrated at the Combined Hearing, the Plan complies with all relevant sections of the Bankruptcy Code, the Bankruptcy Rules and applicable non-bankruptcy law.

1. *The Plan Complies With the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(1))*

45. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(1). In determining whether the Plan complies with section 1129(a)(1), courts primarily consider whether the Plan satisfies sections 1122 and 1123 of the Bankruptcy Code. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648–49 (2d Cir. 1988) (observing that the "applicable provisions" in section 1129(a)(1) include the provisions of chapter 11 "such as section 1122 and 1123"); *In re Mirant Corp.*, No. 03-46590, 2007 WL 1258932, at *7 (Bankr. N.D. Tex. Apr. 27, 2007) (stating that section 1129(a)(1) is intended to assure compliance with Bankruptcy Code's scheme governing classification and contents of a plan) (citations omitted)).

(i) *The Plan Satisfies Section 1122 of the Bankruptcy Code*

46. Section 1122 of the Bankruptcy Code requires that the claims or interests within a given class be "substantially similar." 11 U.S.C. § 1122(a). *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060 (3d Cir. 1987) ("The express language of [11 U.S.C. § 1122] explicitly forbids a

plan from placing dissimilar claims in the same class . . . ."); *In re DRW Prop. Co. 82*, 60 B.R. 505, 511 (Bankr. N.D. Tex. 1986).

47. Courts in this Circuit have recognized that, under section 1122 of the Bankruptcy Code, plan proponents have significant flexibility in placing claims into different classes provided there is a rational legal or factual basis to do so and all claims or interests within a particular class are substantially similar. *See, e.g., John Hancock Mutual Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (instructing that classification is proper where a class is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed"); *In re Magnatrax Corp.*, No. 03-11402 (PJW), 2003 WL 22807541, at *4 (Bankr. D. Del. Nov. 17, 2003) (finding that a plan that classified claims and interests pursuant to valid business, factual, and legal reasons satisfied section 1122 of the Bankruptcy Code).

48. Here, the Plan classifies each Claim or Interest based on its legal and factual nature, priority or other distinguishing factors, and the Claims and Interests in each Class are "substantially similar" to one another. Additionally, the Claims and Interests in each Class under the Plan are legally and factually distinct from the Claims and Interests in each other Class. *See* Hill Decl. ¶ 14. For example, Class 3 Claims, all of which are held by the GVI, are separately classified because the GVI is in the unique position of holding Secured, unsecured, and nondischargeable Claims against the Debtor. The GVI's important role in the consummation of the Sale Transaction also supports separate classification of the GVI Claims. Moreover, the treatment afforded to the Allowed Claims of the GVI under the Plan are distinct insofar as the Plan provides for the GVI to receive a combination of Cash, real estate, and commitments from

the Debtor regarding environmental matters, in full and final settlement of all of the GVI's Allowed Claims. *See id.* ¶ 15.

49. The separate classification of Claims in Class 4 (Tort Claims), Class 5 (Other Non-Governmental and Non-Tort General Unsecured Claims), and Class 6 (Other Governmental General Unsecured Claims) is appropriate in light of the differing nature of the Claims in each of these Classes. Class 4 consists of Tort Claims, the Holders of which, by numerosity, represent the vast majority of Holders of Claims against the Debtor. *See* Hill Decl. ¶ 16. In total, over 900 parties were entitled to cast votes in Class 4. *See id.* Further, Class 4 Claims are factually distinct from Claims in Classes 5 and 6 because they are largely unliquidated and may take several years for the Liquidating Trust to reconcile. *See id.* Finally, the Holders of Class 4 Claims may be uniquely positioned to recover from the Debtor's insurance. *See id.* For these reasons, the Debtor believes the Tort Claims are sufficiently distinct to merit a separate voice in the voting process. Courts have concluded that it is reasonable to separately classify tort claims, including personal injury claims, in appropriate circumstances. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136, 146-147 (D. Del. 2006) (separately classifying personal injury claims and general unsecured claims despite their equal priority status).

50. Class 6 Claims, all of which are held by Governmental Units (other than the GVI), are separately classified because they are factually distinct from the other Voting Classes. *See* Hill Decl. ¶ 17. Holders of Class 6 Claims are not required to file Proofs of Claim until the governmental bar date, which is March 14, 2016. *See id.* Based on the Proofs of Claim that have been filed to date and the Debtor's review of its books and records, the Debtor anticipates that Class 6 will consist primarily of Claims relating to permits, fines, or penalties, Claims that may be asserted by federal agencies arising from their regulatory oversight of the Debtor, and

other dischargeable Claims relating to environmental matters. *See id.* For example, the Debtor has agreed to allow a Claim in the amount of $115,000 on account of the EPA's dischargeable Claims against the Debtor arising under the Clean Air Act, in full satisfaction of all such Claims. *See id.* ¶ 17 n.2. In addition, the EPA's nondischargeable claims will be addressed through the Environmental Response Trust's implementation of the Environmental Remediation/Compliance Program. *See id.* In light of the current unknown aggregate amount of the other potential Class 6 Claims and the factually distinct nature of the putative Claims by Governmental Units (other than the GVI), the Debtor believes it is appropriate to separately classify them.

51. Finally, Class 5 Claims are all other General Unsecured Claims that do not fall into Classes 4 or 6 and are separately classified for the reasons set forth above. *See* Hill Decl. ¶ 18.

52. In sum, valid legal and factual reasons exist to approve the Plan's classification scheme. Importantly, the Class structure was not created to affect the outcome of voting on the Plan, as evidenced by the overwhelming support of the Voting Classes, coupled with the absence of any Objection to the Plan's classification scheme. By recognizing the differing nature and legal and equitable rights of the Holders of Claims and Interests, the Debtor's proposed classification scheme fits well within the flexible standard of section 1122 of the Bankruptcy Code. Thus, the Plan satisfies section 1122 of the Bankruptcy Code.

(ii) ***The Plan Satisfies the Mandatory Plan Requirements of Sections 1123(a)(1)–(a)(7) of the Bankruptcy Code***

53. Section 1123(a) of the Bankruptcy Code sets forth seven mandatory requirements with which every chapter 11 plan must comply. 11 U.S.C. §§ 1123(a)(1)–(7). Specifically, each chapter 11 plan must:

(1) designate classes of claims and interests;
(2) specify unimpaired classes of claims and interests;

> (3) specify the treatment of classes of claims and interests that are impaired under the plan;
> (4) provide the same treatment for each claim or interest of a particular class, unless the holder agrees to a less favorable treatment;
> (5) provide adequate means for the plan's implementation;
> (6) prohibit the issuance of non-voting equity securities and provide for appropriate distribution of voting power among classes of securities; and
> (7) 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.

Id.

54. Article III of the Plan satisfies the first three requirements of section 1123(a) by: (a) designating Classes of Claims and Interests; (b) specifying that Classes 1 and 2 are Unimpaired under the Plan, and specifying that Allowed Administrative, Priority Tax, Professional Fee, and DIP Facility Claims, which are not classified under the Plan, are also Unimpaired; and (c) specifying that Classes 3, 4, 5, 6 and 7 are Impaired under the Plan, and identifying the proposed treatment for those Classes. *See* Plan Article III.A–III.B; Hill Decl. ¶ 20.

55. Article III.B of the Plan also satisfies section 1123(a)(4) of the Bankruptcy Code by providing the same treatment for each Claim and Interest within a specific Class, unless the Holder of a particular Claim or Interest has agreed to a less favorable treatment. *See id*.

56. Article IV and other provisions of the Plan provide adequate means for the Plan's implementation, as required by section 1123(a)(5) of the Bankruptcy Code, including by providing for, among other things: (a) sources of consideration for distributions under the Plan; (b) formation of the Liquidating Trust to administer the Liquidating Trust Assets, resolve Disputed Claims in Classes 4, 5, and 6, and make distributions to Holders of Allowed Claims in Classes 4, 5, and 6; (c) formation of the Reorganized Debtor to administer the Reorganized

Debtor Assets, resolve Disputed Administrative, Priority Tax, Professional Fee, Class 1, and Class 2 Claims, and make distributions to Holders of Allowed Administrative, Priority Tax, DIP Facility, Professional Fee, Class 1, and Class 2 Claims (to the extent not already paid prior to the Effective Date); (d) formation of the Environmental Response Trust to carry out the Environmental Remediation/Compliance Program; (e) creation of reserves for the payment of specified Claims; (f) payment in full of the DIP Facility Claims as described in Article II of the Plan (to the extent not already paid in connection with the Sale Transaction); (g) satisfaction of the GVI Claims as described in Article III.B.3 of the Plan (to the extent not already paid or resolved); (h) cancellation of the Debtor's obligations under any certificate, share, note, bond, indenture, purchase right or other instrument or document, including the DIP Agreement, the Promissory Notes, and the LLC Agreement, as described in Article IV.R of the Plan; (i) wind-down and dissolution of the Reorganized Debtor following the Reorganized Debtor Completion Date; and (j) the closing of the Chapter 11 Case. *See* Plan Articles IV, VII, VIII and IX; Hill Decl. ¶ 22.

57. Section 1123(a)(6) is inapplicable because the Plan provides that all Interests in the Debtor shall be cancelled as of the Effective Date, and no new shares or other ownership interests will be issued pursuant to the Plan. *See* Plan Article IV.S; Hill Decl. ¶ 24.

58. Finally, section 1123(a)(7) of the Bankruptcy Code requires that a plan's provisions with respect to the manner and selection of any officer, director, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123(a)(7). The Debtor will identify the Liquidating Trustee and the Environmental Response Trustee at or prior to the Combined Hearing. *See* Hill Decl. ¶ 25. The Manager, the Liquidating Trustee, and the Environmental Response Trustee shall have

the same fiduciary duties to the Reorganized Debtor, the Liquidating Trust, and the Environmental Response Trust, respectively, as the Executive Committee had to the Debtor, in each case, solely with respect to the matters described in, and pursuant to the terms of, the Plan, the Liquidating Trust Agreement, and the Environmental Response Trust Agreement. *See* Hill Decl. ¶ 26. Notably, (a) the Committee is actively involved in the selection of the Liquidating Trustee and negotiation of compensation for the Liquidating Trustee and (b) the GVI, the DPNR, the EPA, and the DOJ participated in the selection of the Environmental Response Trustee and the negotiation of compensation for the Environmental Response Trustee. Furthermore, the Reorganized Debtor's Manager will be Matthew Kahn, who has acted as an independent member of the Debtor's Executive Committee since on or about June 30, 2015. *See id.* Accordingly, the Plan satisfies the requirement of section 1123(a)(7) of the Bankruptcy Code.

(iii) *The Discretionary Contents of the Plan are Appropriate and Comply with the Bankruptcy Code (Section 1123(b))*

59. Section 1123(b) of the Bankruptcy Code contains various discretionary provisions that may be included in a chapter 11 plan. Here, the Plan contains a number of such provisions, each of which is reasonable and appropriate. For example, (a) Article III of the Plan provides for the impairment of certain Claims and Interests (specifically, those in Classes 3, 4, 5, 6, and 7) and leaves unimpaired other Claims (specifically, the unclassified Claims and Claims in Classes 1 and 2); (b) Article V provides for the rejection of all Executory Contracts and Unexpired Leases other than those assumed or assumed and assigned previously (including pursuant to the Purchase Agreement and the Sale Order) or expressly assumed or assumed and assigned pursuant to the terms of the Plan; and (c) Articles VII and IX, along with the Liquidating Trust Agreement, establish procedures for the settlement of Claims and the mechanics for distributions on account of Allowed Claims. *See* 11 U.S.C. §§ 1123(b)(1)–(b)(3)(A); Hill Decl. ¶ 28.

60. In addition, 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]." 11 U.S.C. § 1123(b)(6). The Plan contains a number of provisions of this type, as detailed below.

61. Article XIII of the Plan provides that, among other things, the Court shall retain jurisdiction over all matters arising out of, or related to, the Chapter 11 Case and the Plan, except as otherwise specifically stated therein. This provision is appropriate because the Court otherwise has jurisdiction over all of these matters during the pendency of the Chapter 11 Case, and the Third Circuit has established that a bankruptcy court may retain jurisdiction over the debtor or the property of the Estate following confirmation. *See In re Resorts Int'l, Inc.*, 372 F.3d 154, 164–67 (3d Cir. 2004). Accordingly, the continuing jurisdiction of the Court is consistent with applicable law and therefore permissible under section 1123(b) of the Bankruptcy Code.

62. The Plan also includes provisions implementing certain releases and exculpations, discharging Claims and Interests, and permanently enjoining certain causes of action. *See* Hill Decl. ¶ 29. These provisions form an integral part of the agreements, compromises and settlement of Estate Claims embodied in the Plan. As demonstrated below, the releases are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtor, and its Estate and creditors. Therefore, the release, exculpation, and injunction provisions are consistent with the Bankruptcy Code and Third Circuit law.

63. ***Debtor Release.*** Article X.D. of the Plan provides for the release by the Debtor, as of the Effective Date, of, among other things, certain claims, rights, and causes of action that the Debtor or its Estate may have against the Released Parties. The Released Parties include,

among other parties, the Debtor's current and former officers and managers, the Executive Committee Members, the DIP Lenders, the JV Parties, the Committee and the Committee Members, Hess, and PDVSA. The Debtor Release was a critical component of the agreements and compromises embodied in the Plan and is permissible under section 1123(b)(3)(A) of the Bankruptcy Code.

64. A chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). The standard for approval of plan settlements is generally the same as the general standard for approval of settlements under Bankruptcy Rule 9019. *See Coram Healthcare Corp.*, 315 B.R. 321, 334 (Bankr. D. Del. 2004) (holding that standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019). Under Bankruptcy Rule 9019, a settlement of a cause of action generally should be approved if it falls above the lowest point in the range of reasonableness. *See, e.g.*, *In re Washington Mut., Inc.*, 442 B.R. 314, 328 (Bankr. D. Del. 2011); *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 (Bankr. D. Del. 2008); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006). The release of an estate cause of action in the context of a chapter 11 plan generally will be approved "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see In re Washington Mut., Inc.*, 442 B.R.at 327 ("In making its evaluation [whether to approve a settlement], the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" (internal citation omitted)).

65. Here, the Debtor proposes to release those parties that have participated in good faith negotiations and have made essential concessions and/or contributions to help facilitate the Debtor's orderly liquidation as contemplated by the Plan. There can be no doubt that without the support of the Released Parties, the Debtor would not have been able to formulate the Plan. The Debtor Release is based on the Debtor's business judgment, and meets the applicable legal standard because it is fair, reasonable, and in the best interests of the Debtor and the Estate.

66. In evaluating the fairness and reasonableness of a debtor release, the court may also consider the following factors: (a) an identity of interest between the debtor and the non-debtor releasee; (b) whether the non-debtor releasee has made a substantial contribution to the debtor's reorganization; (c) whether the release is essential to the debtor's reorganization; (d) agreement by a substantial majority of creditors to support the release; and (e) whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (*citing Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994)); *Spansion*, 426 B.R. at 143 n.47 (citing the *Zenith* factors); *Washington Mut. Inc.*, 442 B.R. at 346 (same). However, not all of these factors need to be satisfied for a Court to approve a debtor release. *See Washington Mut.*, 442 B.R. at 346 ("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 *Zenith* factors are not exclusive or conjunctive requirements). Here, the Debtor Release satisfies each of the *Zenith* factors.

67. The Debtor Release satisfies the first *Zenith* factor because each of the Released Parties shares an identity of interest with the Debtor. In particular, the Debtor and all of the Released Parties "share the common goal" of confirming the Plan and implementing the terms of

the broadly supported agreements and compromises contained therein. *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"). Here, nearly all of the Released Parties either participated in (or represented, or were represented by, parties participating in) the negotiation of the key terms of the Plan and the Sale Transaction. *See* Hill Decl. ¶ 36. The Debtor's officers, the Executive Committee Members, and the JV Parties also share an "identity of interest" with the Debtor based on their rights to indemnification from the Debtor, such that pursuing litigation against them amounts to litigation against the Debtor or its insurance coverage. *See In re Indianapolis Downs*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the nondebtor receiving the release.") (quoting *In re Washington Mutual*, 442 B.R. at 347); Hill Decl. ¶ 36.

68. The second *Zenith* factor—a substantial contribution to the reorganization—is satisfied because each of the Released Parties has made a substantial contribution to the Chapter 11 Case. First, the JV Parties, the Committee, the Debtor's Executive Committee Members and officers, and each of their professionals were actively involved in the negotiation and consummation of the Sale Transaction, the proceeds of which form the basis for distributions to creditors. Specifically, each of these parties and individuals (a) engaged in discussions with the Purchaser over the terms of the Sale Transaction that was supported by the Debtor's major

stakeholders; (b) negotiated the terms and conditions of the Sale Order, which order forms the basis for certain material provisions of the Plan; and (c) assisted in obtaining the consents necessary to effectuate the Sale Order and consummate the Sale Transaction, among other things. *See* Hill Decl. ¶ 37

69. Second, both (a) HOVIC and PDV-VI in their capacities as JV Parties and DIP Lenders and (b) Hess and PDVSA as affiliates of HOVIC and PDV-VI have made and will make substantial financial contributions and concessions under the Plan that are essential to the Debtor's ability to make meaningful distributions to the Holders of Allowed General Unsecured Claims under the Plan. *See id.* at ¶ 38. For example, the DIP Lenders provided debtor-in-possession ("DIP") financing at a time when third-party financing was not otherwise available to the Debtor. *See id.* Notably, the DIP financing was granted on a junior basis with the DIP liens subordinate to the prepetition liens of the GVI, and included various other favorable terms relative to the most comparable market financing. *See* DIP Motion [Docket No. 4] at ¶ 3; Hill Decl. ¶ 38. Although the DIP Lenders could have sought to prime the GVI's liens, the DIP Lenders agreed to provide the DIP financing on a junior basis in an effort to work constructively and consensually with the GVI towards consummation of the Sale Transaction and to maximize value for all stakeholders. Critically, the DIP financing provided by the DIP Lenders afforded the Debtor with the liquidity necessary to engage in a postpetition marketing and sale process, consummate the Sale Transaction, and develop and propose the Plan. *See* Hill Decl. ¶ 38. Additionally, HOVIC, PDV-VI and PDVSA (through its subsidiary PDVSA Petróleo, S.A.) have agreed to waive any right to a recovery on account of nearly $1.9 billion in Promissory Note Claims. *Id.*; Plan Article IV.J. The waiver of the Promissory Note Claims will avoid the potential for extraordinary dilution in the recoveries by Holders of Allowed General Unsecured

Claims and avoid additional litigation and investigation costs associated with potential recharacterization claims. *See* Hill Decl. ¶ 38. Moreover, Hess has agreed to assume the Debtor's obligations under the Pension Plan, which is estimated to reduce the unsecured claims pool by at least $55.2 million. *See id.* These contributions and concessions have made it possible to fund meaningful distributions to Holders of Allowed General Unsecured Claims and were essential in reaching the agreements necessary to consummate the Sale Transaction. *See id.* ¶ 39. Without these valuable contributions, a consensual plan simply would not have been possible, and the Debtor would have faced the very real prospect of administrative insolvency.

70. Finally, the Debtor's officers, employees, consultants and professionals, as well as the JV Parties, have made a substantial contribution to the Chapter 11 Case by, among other things, participating in various discussions and meetings with certain Governmental Units, including the GVI, the DPNR, the EPA and the DOJ, regarding the Debtor's wind down budget and activities relating to the Debtor's ongoing remediation activities. *See id.* at ¶ 37. These discussions formed the basis of the provisions of the Plan relating to the Environmental Response Trust and the Environmental Response Trust's ability to meet ongoing environmental remediation obligations to the satisfaction of the GVI, the EPA, the DPNR, and the DOJ. These parties also (a) expended substantial time and effort in connection with restructuring matters, in addition to their normal duties in connection with the day-to-day operation of the Debtor's remaining business; and (b) engaged in extensive negotiations with the Debtor's key stakeholders to build consensus around the Plan, which is broadly supported by the Debtor's creditors, maximizes recoveries to the Debtor's creditors and, importantly, provides significant recoveries to Holders of Allowed General Unsecured Claims that otherwise might not have received any recovery. *See* Hill Decl. ¶ 37, 40. In addition, the officers and employees

continued to provide critical services to the Debtor during the period leading up to and throughout the Chapter 11 Case.

71. These are precisely the types of "substantial contributions" that the second *Zenith* factor contemplates: agreements to affirmatively contribute value necessary to the chapter 11 process or to compromise or forgo rights to which releasees otherwise would be entitled in furtherance of Plan confirmation efforts. *See W.R. Grace*, 446 B.R. 96, 138 (Bankr. D. Del. 2011) (finding that parties involved in settlement with the debtor made substantial contribution where, absent the release, settling parties would not have contributed a significant sum necessary to the reorganization); Hr'g Tr. at 68, *Energy Future Holdings Corp.*, No. 14- 10979 (CSS) (Bankr. D. Del. Dec. 3, 2015) (finding that debtors' directors and officers made critical contribution to plan based on extensive participation in board and committee meetings); *see Prop. Holdings v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.),* 780 F.3d 1070, 1079-80 (11th Cir. 2015), *cert denied*, 136 S. Ct. 109 (2015) (debtors' professionals provided substantial contribution in the form of labor and services); *In re Mercedes Homes, Inc.*, 431 B.R. 869, 881 (Bankr. S.D. Fla. 2009) (finding substantial contribution in the form of debtors' directors' and officers' expertise and knowledge). Without the contributions of these parties, it is unlikely that the Holders of General Unsecured Claims (all of whom stand to receive meaningful recoveries under the Plan) would receive *any* distribution, based on the Liquidation Analysis attached to the Disclosure Statement as **Exhibit C**. *See also* Hill Decl. ¶ 64.

72. Moreover, absent the Debtor Release it is unlikely that many of the Released Parties would have agreed to the comprehensive settlement embodied in the Plan. *See id.* ¶ 39. As one example, HOVIC's agreement, embodied in the Sale Order, that it or one of its Affiliates (ultimately, Hess) would assume the Debtor's obligations under the Pension Plan was expressly

conditioned upon the Plan providing for Estate releases of HOVIC and its Affiliates. *See* Sale Order ¶ 31.

73. The third *Zenith* factor—the essential nature of the releases—also weighs in favor of the Debtor Release provided in the Plan. The Debtor Release (and the Third Party Release described further below) was extensively negotiated by the Debtor and its key stakeholders. Based on those negotiations, it is clear that the release and injunctive provisions of the Plan were necessary to induce each of the valuable contributions of the Released Parties as discussed above, without which the Plan (and even the Sale Transaction) would not have been possible. *See* Hill Decl. ¶ 39. Thus, the Debtor Release was essential to the Debtor's ability to propose the value-maximizing Plan, and should therefore be approved.

74. The fourth *Zenith* factor looks to "whether the substantial majority of creditors support the releases, and whether, in particular, the impacted class[es] overwhelmingly vote to accept the plan." Hr'g Tr. at 23, *Millennium Lab Holdings, II, LLC*, No. 15-12284 (LSS) (Bankr. D. Del. Dec. 11, 2015). It is clear that this factor is satisfied here. Each of the Voting Classes, which are comprised of Holders of Impaired Claims that are being compromised under the Plan, has voted to accept the Plan. *See* Pullo Decl. ¶ 9, Exhibit A. Indeed, only one of the 981 votes submitted voted to reject the Plan.[6] *See id.* In addition, each Holder of a Claim in a Voting Class received notice of the Debtor Release, and as of the date hereof, no party in interest has objected to such release.

75. The final *Zenith* factor looks to whether the plan provides for the payment of substantially all affected claims. This factor is also satisfied here. The standard for determining

[6] As indicated above, the vote against the Plan was cast by a creditor asserting a pension-related claim. Because Hess has agreed to assume the Debtor's obligations under the Pension Plan, the creditor will suffer no loss.

whether this factor is present is "whether the non-consenting creditors receive[ ] reasonable compensation in exchange for the release." *In re Tribune Co.*, 464 B.R. at 178 (*citing In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001)). Under the Plan, Holders of Allowed Claims in each of the four Voting Classes will receive meaningful recoveries. Without this Plan—of which the Debtor Release is an integral component—these recoveries would not have been possible, and Holders of Allowed General Unsecured Claims likely would have received no recovery whatsoever. *See* Hill Decl. ¶ 64; Hr'g Tr. at 73-74. This also supports a finding that the affected creditors are receiving fair consideration for the release.

76. For all of the foregoing reasons, the Debtor Release is justified, is in the best interests of creditors, is an integral part of the Plan, and satisfies the key factors considered by courts in determining whether a debtor release is proper.

77. ***Exculpation.*** Article X.F. of the Plan contains an Exculpation provision in favor of the Released Parties. It is well established in the Third Circuit that exculpation is appropriate for certain individuals and entities acting on behalf of a debtor's estate, including, in this case, the Debtor and the Committee and any of their respective Related Parties (including the Debtor's officers and managers, the Executive Committee Members, and the JV Parties). *See In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *Washington Mut.*, 442 B.R. at 350; *In re Signal Int'l , Inc.*, No. 15-11498 (MFW) (Nov. 24, 2015) [D.I. 555]. The underlying rationale for approval of an exculpation provision is that the covered individuals are acting in a fiduciary capacity on behalf of the debtor's estate. *See Washington Mut.*, 442 B.R. at 350–51.

78. Here, the Exculpation (a) is specifically tailored to cover the Exculpated Parties from actions falling within two discrete categories: (i) actions taken or omitted to be taken in connection with or in contemplation of the restructuring or liquidation of the Debtor, including

the bidding and sale process for any assets of the Debtor, and (ii) actions taken in formulating and implementing the Plan, and (b) expressly excludes any liability arising out of gross negligence or willful misconduct of the Exculpated Parties. *See* Plan Article X.F; Hill Decl. ¶ 42.

79. Furthermore, the unique circumstances of the Chapter 11 Case demonstrate that the Exculpation is appropriate. The Sale Transaction and the Plan were negotiated and implemented in good faith and with a high degree of transparency, including extensive negotiations between and among the Debtor, the Committee, the JV Parties, the GVI, the DPNR, the EPA and the DOJ. *See id.* The Exculpation is necessary to protect those parties that (a) played a critical role in formulating the Plan, the Disclosure Statement, and related documents in furtherance of the transactions contemplated by the Plan, (b) made substantial contributions to the Chapter 11 Case, including with respect to the Sale Transaction, and (c) participated in good faith in the negotiation, formulation, solicitation, and, eventually, implementation of the Plan, from future collateral attacks related to such actions. *See id.* The Plan, including the Exculpation, also has the overwhelming support of Holders of Claims that voted on the Plan.

80. For these reasons, among others, the Debtor submits that the Exculpation is appropriate under the facts and circumstances of the Chapter 11 Case.

81. ***Consensual Third Party Releases.*** Finally, the Plan provides for consensual third-party releases of the Released Parties (the "Third Party Release"). The Third Party Release in Article X.E of the Plan provides for consensual releases by (a) each of the Released Parties and (b) any Holder of a Claim in a Voting Class that voted to accept the Plan and did not

affirmatively opt out of the Third Party Release pursuant to a duly executed ballot (the "Consenting Claimants").[7] *See* Plan Article I.A.167.

82. Courts have held that an "affirmative agreement" from an affected creditor will render a release consensual. *See Zenith*, 241 B.R. at 111. A chapter 11 plan "is a contract that may bind those who vote in favor of it." *Coram Healthcare*, 315 B.R. at 336. Voting creditors are, therefore, free as a matter of contract law to release their claims against non-debtor third parties in consideration of their treatment under the plan. *In re Int'l Wireless Commc'ns. Holdings, Inc.*, No. 98-2007, 1999 Bankr. LEXIS 1853, *24-25 (Bankr. D. Del. Mar. 26, 1999).

83. All of the Consenting Claimants voted to accept the Plan, did not opt out of the Third Party Release, and are receiving consideration under the Plan. *See* Hill Decl. ¶ 43. As described further herein, without the benefits provided by the Released Parties, distributions to Holders of Allowed General Unsecured Claims would be substantially reduced, if not eliminated

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[7] The ability of a Holder of a Claim in a Voting Class to "opt-out" of the Third Party Release was disclosed prominently in the Ballots, E-Ballots and Master Ballots, which contained the following bolded language (or, in the case of the Master Ballot, language of similar import) in all caps:

> **YOU MAY OPT OUT OF THE THIRD PARTY RELEASE PROVIDED IN ARTICLE X.E OF THE PLAN BY CHECKING THE BOX BELOW AND YOU WILL NOT BE BOUND BY SUCH RELEASE. ADDITIONALLY, IF YOU DO NOT RETURN THIS BALLOT, YOU WILL NOT BE BOUND BY THE THIRD PARTY RELEASE. FURTHERMORE, IF YOU VOTE TO REJECT THE PLAN, YOU WILL NOT BE BOUND BY THE THIRD PARTY RELEASE.**
>
> **THE ELECTION TO WITHHOLD CONSENT TO GRANT SUCH RELEASE IS AT YOUR OPTION. CHECK THE BOX BELOW IF YOU ELECT NOT TO GRANT THE THIRD PARTY RELEASE CONTAINED IN ARTICLE X.E OF THE PLAN. IF YOU VOTE TO ACCEPT THE PLAN AND SUBMIT YOUR BALLOT WITHOUT CHECKING THE BOX BELOW, YOU WILL BE DEEMED TO CONSENT TO THE THIRD PARTY RELEASE SET FORTH IN ARTICLE X.E OF THE PLAN.**

entirely. Accordingly, the Consenting Claimants have consented to the Third Party Release set forth in Article X.E of the Plan and are bound under principles of contract law.

84. Additionally, each of the non-Debtor Released Parties has made significant contributions to the Chapter 11 Case, and their inclusion in the Third Party Release was also a material inducement for their participation, negotiation, and ultimate resolution of Claims and Interests through the Plan. *See* Hill Decl. ¶ 44. The agreement among these parties was supported by valuable consideration including, among other things, the assumption by Hess of the Debtor's Pension Plan obligations (conditioned upon approval of certain Estate releases), the JV Parties' waiver of the Promissory Note Claims, and the DIP Lenders' agreement to provide the financing necessary to implement and consummate the Sale Transaction and formulate the Plan, where such financing likely would not have been available otherwise and almost certainly not on the favorable terms offered by the DIP Lenders.. None of the non-debtor Released Parties voted against or objected to the Plan. Accordingly, the non-debtor Released Parties have consented to the Third Party Release and are bound under principles of contract law.

85. For all of the foregoing reasons, the Third Party Release should be approved.

(iv) ***The Plan Complies with Section 1123(d) of the Bankruptcy Code***

86. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." In accordance with section 1123(d) of the Bankruptcy Code, Article V.B of the Plan provides for the payment of any Cure Obligations associated with the assumption or assumption and assignment of an Executory Contract or Unexpired Lease pursuant to section 365 of the Bankruptcy Code. *See* Hill Decl. ¶ 47; Plan, Article V.B.

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

87. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of the [Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). While section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of the plan, section 1129(a)(2) mandates compliance with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. *See PWS Holding*, 228 F.3d at 248; *In re Lapworth*, No. 97-34529, 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."). The Debtor has satisfied section 1129(a)(2) by soliciting acceptances or rejections of the Plan concurrently with the transmission of the Plan and the conditionally approved Disclosure Statement to each Holder of a Claim in a Voting Class. *See* Hill Decl. ¶ 48. As described in the Pullo Declaration, the solicitation process was conducted through Prime Clerk pursuant to the procedures authorized by the Solicitation Procedures Order and utilizing notices substantially in the forms approved by the Solicitation Procedures Order. Pullo Decl. ¶¶ 4-8. In addition, as demonstrated above, the Disclosure Statement contains "adequate information" as required by section 1125 of the Bankruptcy Code. Moreover, the Debtor has complied with all orders of the Court entered during the pendency of the Chapter 11 Case and with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules with respect to disclosure and solicitation of votes on the Plan. Accordingly, the requirements of section 1129(a)(2) of the Bankruptcy Code are satisfied.

3. *The Plan is Proposed in Good Faith (Section 1129(a)(3))*

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

Code does not define "good faith" for purposes of section 1129(a)(3). The good faith standard requires that a plan be proposed with good intentions to obtain a result that is consistent with the objectives and the purposes of the Bankruptcy Code. *See PWS Holding*, 228 F. 3d at 243 ("'For purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'") (*quoting In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986))); *see also In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004) ("At its most fundamental level, the good faith requirement ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy . . . ."). Whether the good-faith requirement is met is a fact intensive inquiry based on the totality of the facts and circumstances that affords considerable discretion to the Court. *See In re W.R. Grace & Co.*, 475 B.R. 34, 88 (D. Del. 2012); *Coram Healthcare*, 315 B.R. at 234; *accord Am. Family Enters.*, 256 B.R. 377, 401 (D.N.J. 2000).

89. Here, the Plan is proposed in good faith. The Plan is the culmination of extensive, arm's-length, good faith negotiations between and among the Debtor, the Committee, the JV Parties, the GVI, the EPA and the DOJ, among others. *See* Hill Decl. ¶ 50. Indeed, the Committee's support for the Plan speaks volumes to the finding of good faith under section 1129(a)(3), particularly in light of the Committee's statutorily-charged duty of representing all unsecured creditors' interests. The Plan was proposed with the legitimate purpose of allowing creditors to realize the highest possible recoveries under the circumstances of the Chapter 11 Case. *See id*. The Debtor proposed the Plan with the goal of expeditiously distributing value to creditors, while also providing for the creation of a mechanism to resolve all Claims asserted

against the Debtor and provide finality to all parties in interest. *See id.* ¶ 51. The Plan is premised upon (a) the creation of the Reorganized Debtor, which will pay all Holders of Allowed Administrative, Priority Tax, Professional Fee, DIP Facility, Class 1, and Class 2 Claims (to the extent not already paid in full prior to the Effective Date), and (b) the creation of the Liquidating Trust, which will pay all Holders of Allowed Class 4, 5, and 6 Claims, in each case, in a manner consistent with the priority scheme under the Bankruptcy Code and in a manner that fully maximizes creditor recoveries under the circumstances of the Chapter 11 Case. *See id.* In addition, the Plan, along with the Environmental Response Trust Agreement, provides for the creation of the Environmental Response Trust, which will be responsible for conducting the Environmental Remediation/Compliance Program in full satisfaction of any nondischargeable Environmental Claims against the Debtor. *See id.* The substantial compromises embodied in the Plan, along with the broad-based, overwhelming support of the Plan by all of the Debtor's major stakeholders, dispel any suggestion of bad faith or collusion. The Plan satisfies the objectives of the Bankruptcy Code, and in no way attempts to abuse the judicial process or delay or frustrate the legitimate efforts of creditors to enforce their rights. *See In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988). In sum, the Plan accomplishes the precise goals underpinning the Bankruptcy Code.

90. For these reasons, the Plan is proposed in good faith to promote the objectives and purpose of the Bankruptcy Code, and therefore satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

4. *The Plan Provides for Approval of Professional Fees and Expenses (Section 1129(a)(4))*

91. Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor for post-petition professional fees remain subject to the Court's review and approval for

reasonableness. 11 U.S.C. § 1129(a)(4). In accordance with section 1129(a)(4) of the Bankruptcy Code, all payments made or to be made by the Debtor or the Reorganized Debtor for services rendered or expenses incurred in connection with the Chapter 11 Case prior to the Effective Date, including requests for payment of Professional Fee Claims, will be paid only after allowance of such Claims by the Court, to the extent not previously approved and paid in accordance with existing orders of the Court. *See* Hill Decl. ¶ 54. The Court will retain jurisdiction after the Effective Date with respect to allowance of Professional Fee Claims incurred up to and through the Effective Date in accordance with Article II.C of the Plan. Plan Article XIII.2. Thus, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

5. *The Plan Discloses Necessary Information Regarding Post-Effective Date Directors, Officers and Trustees (Section 1129(a)(5))*

92. Section 1129(a)(5)(A) requires the proponent of any plan to disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan," along with a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and public policy." 11 U.S.C. § 1129(a)(5)(A)(i)–(iii). In addition, a plan must disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B).

93. The requirements of section 1129(a)(5) of the Bankruptcy Code are satisfied with respect to the Liquidating Trustee, the Environmental Response Trustee, and the Manager. The Liquidating Trustee and the Environmental Response Trustee will be identified at or prior to the Combined Hearing, and will not be "insiders," as defined in section 101(31) of the Bankruptcy

Code. Pursuant to section 2.5 of the Liquidating Trust Agreement and section 4.10 of the Environmental Response Trust Agreement, the Liquidating Trustee and the Environmental Response Trustee shall be reimbursed for all reasonable out-of-pocket costs and expenses incurred by the Liquidating Trustee and the Environmental Response Trustee in connection with the performance of their duties. *See* Hill Decl. ¶ 57. The appointments of the Liquidating Trustee and the Environmental Response Trustee are consistent with the interests of Holders of Claims and with public policy, as (a) the Committee participated in the selection and the negotiation of compensation of the Liquidating Trustee and (b) the GVI, the DPNR, the EPA, and the DOJ participated in the selection and the negotiation of the compensation of the Environmental Response Trustee. *See id.*

94. Matthew Kahn, who has acted as the independent and disinterested representative of the Debtor's Executive Committee since on or about June 30, 2015, will be the Manager of the Reorganized Debtor. *See id.* at ¶ 58. Mr. Kahn will be compensated at a rate of $25,000 per month for his services to the Reorganized Debtor. *See id.* The appointment of Mr. Kahn is consistent with the interests of Holders of Claims and with public policy because of his prior service as a member of the Executive Committee and his familiarity with the Debtor.

95. The Debtor submits that the disclosures described herein satisfy section 1129(a)(5) of the Bankruptcy Code.

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

96. Section 1129(a)(6) of the Bankruptcy Code requires that any governmental regulatory commission having jurisdiction over the debtor post-confirmation approve any rate change provided for in the debtor's plan. 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) is inapplicable to the Chapter 11 Case because the Debtor's business does not involve the

establishment of rates subject to approval of any governmental regulatory commission and, in any event, the Reorganized Debtor will not be engaged in a trade or business post-Effective Date. *See* Hill Decl. ¶ 60.

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

97. Section 1129(a)(7) of the Bankruptcy Code—the "best interests test"—requires that, with respect to each class, each holder of a claim or an equity interest in such class either: "(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 [the Bankruptcy Code] on such date." 11 U.S.C. § 1129(a)(7).

98. As section 1129(a)(7) of the Bankruptcy Code makes clear, the "best interests test" applies to individual holders of impaired claims or interests that do not accept the plan. *See Bank of Am. Nat'l Trust*, 526 U.S. at 441 n.13 ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."). Section 1129(a)(7)(A) requires a determination whether "a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization." *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) (internal quotation marks and citation omitted). The relevant date for comparing recoveries is the effective date of the proposed bankruptcy plan. Thus, a bankruptcy court must contrive a hypothetical chapter 7 liquidation on the effective date of the plan to determine each creditor's treatment. *See Lason*, 300 B.R. at 232 (*citing In re Sierra-Cal*, 210 B.R. 168, 171–72 (Bankr. E.D. Cal. 1997)). Given that a hypothetical chapter 7 liquidation is inherently speculative, it is appropriate for bankruptcy

courts to rely on credible assumptions and judgments. *See In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 366–67 (Bankr. S.D.N.Y. 2007).

99. With respect to each Impaired Class of Claims or Interests, the Pullo Declaration and the Liquidation Analysis attached as **Exhibit C** to the Disclosure Statement indicate that each Holder of a Claim or Interest in an Impaired Class either has accepted the Plan or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than the amount that such Holder would receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code on such date. *See* Pullo Decl., Exhibit A; Hill Decl. ¶ 61.[8]

100. The Debtor believes that the Liquidation Analysis includes fair and reasonable "best estimates" of the cash proceeds, net of liquidation-related costs, that would be available for the Holders of Allowed Claims and Interests if the Debtor were to be liquidated under chapter 7 of the Bankruptcy Code. *See* Hill Decl. ¶ 62. The Liquidation Analysis also examines the effects that a conversion of the Chapter 11 Case to a case under chapter 7 could have on the assets available for distribution to Holders of Allowed Claims. For example, a chapter 7 liquidation likely would result in both a liquidation of the Debtor's assets at a distressed value and an increase in Administrative Claims due to chapter 7 trustee fees, chapter 7 professional fees, shutdown costs and environmental wind-down costs. *See id.* Moreover, in the event of a conversion of the Chapter 11 Case to a case under chapter 7, the Debtor's Pension Plan obligations would not be assumed by Hess. As a result, as set forth in the Liquidation Analysis, a conversion to a case under chapter 7 likely would result in all Holders of Claims receiving little

[8] The Liquidation Analysis was prepared by the Debtor's advisors, at the Debtor's direction and supervision, with the assistance of the Debtor's counsel. The Liquidation Analysis is subject to the assumptions, qualifications, and limitations set forth therein.

or no recovery. However, based on all available information, the Debtor currently estimates a 100% recovery under the Plan for Holders of Allowed (a) Administrative Claims, (b) Priority Tax Claims, (c) Professional Fee Claims, (d) DIP Facility Claims, (e) Other Priority Claims, and (f) Other Secured Claims. *See id.* at ¶ 64. In addition, the Plan provides that the GVI Claims will receive the full unpaid amount, if any, of the USVI Concession Fee on the Closing Date of the Sale Transaction or as soon as reasonably practicable thereafter, which treatment will provide the GVI with a recovery that is in excess of the amount it would receive in a chapter 7 liquidation scenario. *See id.* Finally, the Holders of Allowed General Unsecured Claims in Classes 4, 5 and 6 are estimated to receive a recovery of approximately 49% on account of such Allowed Claims. *See id.* at ¶ 64.

101. Moreover, as set forth in the Hill Declaration, even if the Liquidation Analysis had assumed a closing of the Sale Transaction prior to conversion to a case under chapter 7, the Plan would still satisfy the "best interests of creditors" test. *See* Hill Decl. ¶ 65. Recoveries under the Plan would be greater than in a chapter 7 liquidation because, among other things, in a chapter 7 scenario: (a) the estate would incur the substantial costs of a chapter 7 trustee and his/her professionals, and (b) Hess would not agree to assume the Debtor's Pension Plan obligations (which would result in at least $55.2 million in additional Claims against the Debtor).

102. Thus, each Holder of a Claim or Interest will receive at least as much under the Plan as they would receive in a liquidation under chapter 7. The proposed administration of the Debtor's Estate under the Plan is more efficient, less expensive, and more likely to result in maximum distributions to Holders of Allowed Claims. Accordingly, the "best interests test" is satisfied as to each Holder of an Impaired Claim or Interest, and the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

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

103. Section 1129(a)(8) of the Bankruptcy Code requires that, with respect to each class of claims or interests, such class has accepted the plan or is not impaired under the plan. 11 U.S.C. § 1129(a)(8). Even if certain impaired classes of claims or interests do not accept a plan and therefore the requirements of section 1129(a)(8) are not satisfied, the plan nevertheless may be confirmed over such non-acceptance pursuant to the "cramdown" provisions of section 1129(b)(1) of the Bankruptcy Code.

104. Acceptance of a plan by an impaired class of claims or interests is determined by reference to section 1126 of the Bankruptcy Code, which identifies the members of a class that may vote on a plan and the number and amount of votes necessary for the acceptance of a plan by a class of claims or interests. In particular, section 1126 provides that a plan is accepted (a) by an impaired class of claims if the class members accepting hold at least two-thirds in amount and more than one-half in number of the claims held by the class members that have cast votes on the plan, and (b) by a class of impaired interests if the class members accepting hold at least two-thirds in amount of the interests held by the class members that have cast votes on the plan. Under section 1126(g) of the Bankruptcy Code, however, impaired classes that neither receive nor retain property under the plan are deemed to have rejected the plan.

105. As reflected in the Pullo Declaration, each of the Voting Classes voted to accept the Plan, thus satisfying section 1126(c) of the Bankruptcy Code with respect to those Classes. Pullo Decl., Exhibit A. Although Class 7 is deemed to reject the Plan, the Debtor meets the "cramdown" requirements in section 1129(b) of the Bankruptcy Code with respect to Class 7, as discussed more fully below.

9. *The Plan Provides for Payment of Allowed Priority Claims (Section 1129(a)(9))*

106. Section 1129(a)(9) of the Bankruptcy Code requires that holders of allowed claims entitled to priority under section 507(a) of the Bankruptcy Code receive payment in full absent agreement to differing treatment. *See* 11 U.S.C. § 1129(a)(9). As required by section 1129(a)(9) of the Bankruptcy Code, pursuant to Articles II and III of the Plan, Holders of Allowed (a) Administrative Claims, (b) Priority Tax Claims, (c) Professional Fee Claims, (d) DIP Facility Claims, and (e) Class 1 (Other Priority) Claims will be paid in full in Cash on the Effective Date or as soon as reasonably practicable thereafter (to the extent not already paid in full prior to the Effective Date). *See* Plan, Articles II & III; Hill Decl. ¶ 69. Accordingly, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

10. *At Least One Class of Impaired Claims Has Accepted the Plan (Section 1129(a)(10))*

107. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of at least one impaired class of claims, excluding the votes of any insider. *See* 11 U.S.C. § 1129(a)(10). As previously noted, Holders of Claims in each of the Voting Classes, which are Impaired Classes, have voted to accept the Plan. *See* Pullo Decl., Exhibit A. The Plan, therefore, satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

11. *The Plan is Feasible (Section 1129(a)(11))*

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

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

11 U.S.C. § 1129(a)(11). "Even a planned liquidation 'must be feasible.'" *In re Am. Capital Equip., LLC*, 688 F. 3d 145, 155-56 (3d Cir. 2012) (citing *In re Calvanese*, 169 B.R. 104, 107 (Bankr. E.D. Pa. 1994)).

109. "[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed." *Johns-Manville Corp.*, 843 F.2d at 649; *see Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006) ("A 'relatively low threshold of proof' will satisfy the feasibility requirement." (*quoting Comput. Task Grp., Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 191 (9th Cir. 2003)). The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. *See W.R. Grace*, 475 B.R. at 115 ("The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." (internal citations and quotations omitted)); *In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *28. The purpose of the feasibility test is to protect against visionary or speculative plans. *See Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985).

110. Here, the Plan is feasible because the net proceeds of the Sale Transaction, the assets to be maintained by the Reorganized Debtor, and the assets to be transferred to the Reorganized Debtor, the Liquidating Trust, and the Environmental Response Trust will be sufficient to enable the Manager, the Liquidating Trustee, and the Environmental Response Trustee, as applicable, to make all of the distributions to the Holders of Allowed Claims contemplated under the Plan and to satisfy the Debtor's post-Effective Date obligations. *See* Hill Decl. ¶¶ 72-73.

111. Moreover, the Debtor has satisfied or will be able to satisfy or waive each of the conditions precedent to the Effective Date pursuant to the Plan, including, among other things:

(a) the appointment of the Liquidating Trustee and the Environmental Response Trustee (*see* Plan Article XI.A.2, Hill Decl. ¶ 74); (b) the execution of the Liquidating Trust Agreement and the Environmental Trust Agreement (*see* Plan Article XI.A.3-4, Hill Decl. ¶ 74); (c) the closing of the Sale Transaction (*see* Plan Article. XI.A.5, Hill Decl. ¶ 74); (d) establishment of the Administrative and Priority Claims Reserve, the GUC Beneficiary Reserve and the Governmental GUC Reserve (*see* Plan Article XI.A.6-8, Hill Decl. ¶ 74); and (e) Hess' assumption of the Debtor's Pension Plan obligations (*see* Plan Article XI.A.10, Hill Decl. ¶ 74).

112. Based on the foregoing, the Plan is feasible and has a reasonable likelihood of success, thereby satisfying the requirements of section 1129(a)(11) of the Bankruptcy Code.

12. *All Statutory Fees Will be Paid (Section 1129(a)(12))*

113. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. 11 U.S.C. § 1129(a)(12). The Plan provides that all U.S. Trustee Fees that are due prior to the Effective Date shall be paid in full by the Debtor or the Reorganized Debtor, as applicable, on the Effective Date or as soon as practicable thereafter. From and after the Effective Date, the Plan provides that the Reorganized Debtor, the Liquidating Trust, or the Environmental Response Trust, respectively and as applicable, shall pay all U.S. Trustee Fees in Cash for each quarter (including any fraction thereof) from the Administrative and Priority Claims Reserve, the Liquidating Trust Assets, and the Environmental Response Trust Assets, respectively and as applicable, until the Chapter 11 Case is converted, dismissed, or closed, whichever occurs first. *See* Plan Articles II.A.3, II.E, IV.D and IV.R; Hill Decl. ¶ 77.

13. *The Plan Provides for the Continuation of Retiree Benefits (Section 1129(a)(13))*

114. Section 1129(a)(13) of the Bankruptcy Code requires that a chapter 11 plan provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). Article IV.L. of the Plan provides that "[t]he Debtor or the Reorganized Debtor, as applicable, may continue to honor the Debtor's retiree benefits (as defined in section 1114(a) of the Bankruptcy Code) and any similar health, disability or death benefits in accordance with the terms of the Retiree Benefit Plan or other agreements governing the payment of such benefits, subject to the Debtor's and the Reorganized Debtor's rights to amend, modify or terminate such benefits at any time under the terms of the Retiree Benefit Plan, other agreements or applicable non-bankruptcy law (to the extent not otherwise assumed by Hess)." *See* Plan Article IV.L; Hill Decl. ¶ 78. Accordingly, the Plan satisfies section 1129(a)(13) of the Bankruptcy Code. *See, e.g., IUE-CWA v. Visteon Corp. (In re Visteon Corp.)*, 612 F.3d 210, 224 (3d Cir. 2010), as amended (July 15, 2010), as amended (July 19, 2010) ("So long as they do not take on new durational obligations during the § 1114 process, debtors emerge from Chapter 11 as free to terminate benefits as they would have been had they never entered Chapter 11.").

14. *Sections 1129(a)(14)–(a)(16) are Inapplicable*

115. Sections 1129(a)(14) and (15) of the Bankruptcy Code apply only to individual debtors. *See* 11 U.S.C. §§ 1129(a)(14) (relating to the payment of domestic support obligations); 1129(a)(15) (expressly relating only to individuals). Additionally, the Debtor is a "moneyed, business, or commercial corporation" and, therefore, section 1129(a)(16) does not apply. *See* 11 U.S.C. § 1129(a)(16) (relating to transfers of property by non-profit debtor). Accordingly, the

Debtor submits that the requirements of sections 1129(a)(14)–(16) of the Bankruptcy Code are inapplicable in this case.

B. The Plan Satisfies the "Cramdown" Provisions of Section 1129(b) of the Bankruptcy Code With Respect to Class 7

116. As described above, Class 7 is deemed to have rejected the Plan. As a result, section 1129(a)(8) of the Bankruptcy Code, which requires that all Impaired Classes accept the Plan, has not been satisfied with respect to Class 7. Nonetheless, section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met other than section 1129(a)(8), then a court may confirm a plan over the dissenting vote of an impaired class of claims as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class of claims. 11 U.S.C. § 1129(b)(1). The express terms of section 1129(b) dictate that its requirements are only applicable to a class of creditors that rejects a plan. *See id.* (instructing that requirements apply only "with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."). Thus, a dissenting creditor in an accepting class is without standing to object to the plan on the basis of unfair discrimination or absolute priority. *See Jersey City Med. Ctr.*, 817 F.2d at 1062.

1. *The Plan Does Not Discriminate Unfairly With Respect to Class 7 (Section 1129(b)(1))*

117. Section 1129(b)(1) does not prohibit discrimination between classes. Instead, it prohibits only discrimination that is unfair with respect to the dissenting class. The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment. *See Exide*, 303 B.R. at 78; *In re Kennedy*, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); *In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990). The unfair discrimination standard of section 1129(b) of the Bankruptcy Code "ensures that a dissenting

class will receive relative value equal to the value given to all other similarly situated classes." *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (*citing In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986)); *Aleris*, 2010 WL 3492664, at *31. "Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes; it only prohibits discrimination that is unfair." *Aleris*, 2010 WL 3492664, at *31 (*citing Armstrong*, 348 B.R. at 121 and *In re 11, 111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990)).

118. "In considering whether a plan unfairly discriminates, courts apply a rebuttable presumption that unfair discrimination exists if there is: (1) a dissenting class, (2) another class of the same priority, and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of net present value of all payments) or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution." *Aleris*, 2010 WL 3492664, at *31 (*citing Armstrong*, 348 B.R. at 121 and *In re Dow Corning Corp.*, 244 B.R. 696, 701 (Bankr. E.D. Mich. 1999)); *see also In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (explaining rebuttable presumption); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 228 (Bankr. D.N.J. 2000) (adopting rebuttable presumption test). Absent such factors, there cannot be unfair discrimination. Further, the presumption can be rebutted by a showing that there is a reasonable basis for disparate treatment. *Genesis Health Ventures, Inc.*, 266 B.R. at 611–12.

119. The Plan does not discriminate unfairly with respect to Class 7 (Interests), as such Interests are legally and factually distinct from the Claims in the other Classes set forth in the Plan. *See* Hill Decl. ¶ 81. Class 7 is the only Class of Interests; all other Classes contain Claims. Accordingly, there is no Class similarly situated to, or of the same priority as, Class 7, and the

Plan satisfies section 1129(b)(1) of the Bankruptcy Code. *See, e.g.*, *Lernout*, 301 B.R. at 661-62 (finding no unfair discrimination in the disparate treatment of subordinated claims); *Aleris*, 2010 WL 3492664, at *31 (same).

2. *The Plan is Fair and Equitable With Respect to Class 7 (Section 1129(b)(2))*

120. Section 1129(b)(2)(B) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a class of unsecured claims if either (a) the plan provides that each holder of a claim of such class will receive property of a value, as of the effective date of the plan, equal to the allowed amount of such claim, or (b) the holder of any claim or interest that is junior to the claims of such class will not receive or retain any property under the plan on account of such junior claim or interest. 11 U.S.C. § 1129(b)(2)(B). Section 1129(b)(2)(C) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a class of interests if either (a) the plan provides that each holder of an interest of such class receives or retains on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest, or (b) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property. 11 U.S.C. § 1129(b)(2)(C).

121. There are no Holders of Claims or Interests that are junior to the Interests classified in Class 7. Therefore, no Holders of Claims or Interests will receive or retain any property under the Plan on account of a Claim or Interest junior to the Interests in Class 7, and the Plan is "fair and equitable" with respect to Class 7 within the meaning of section 1129(b). *See* 11 U.S.C. § 1129(b)(2)(C)(ii).

3. *The Plan Satisfies Sections 1129(c), (d), and (e) of the Bankruptcy Code*

122. The Plan is the only plan on file presented for confirmation in the Chapter 11 Case and, as such, section 1129(c) of the Bankruptcy Code does not apply. *See* Hill Decl. ¶ 82. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of Section 5 of the Securities Act of 1933, and no party in interest has alleged otherwise. *See id.* at ¶ 84. The principal purpose of the Plan is to effectuate the Debtor's orderly liquidation through a distribution mechanism that will maximize creditor recoveries. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. Finally, the Chapter 11 Case is not a "small business case" as such term defined in the Bankruptcy Code and, accordingly, section 1129(e) of the Bankruptcy Code does not apply. *See id.* at ¶ 85.

WAIVER OF STAY OF CONFIRMATION ORDER

123. 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). The Debtor requests that notwithstanding Bankruptcy Rule 3020(e), the Confirmation Order be effective and enforceable immediately upon its entry to enable the Debtor to consummate the Plan as soon as practicable thereafter. The Debtor believes that such relief is appropriate and warranted under the circumstances. Each day the Debtor remains in chapter 11, it incurs significant administrative and professional costs. *See* Hill Decl. ¶ 87. Prompt emergence from chapter 11 will enable the Debtor to minimize costs and maximize recoveries for the benefit of its stakeholders. *See id.* Moreover, there have been no objections to the Plan. Consequently, a waiver of the stay contained in Bankruptcy Rule 3020(e) will not prejudice any parties in interest with respect to their appellate rights or otherwise.

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

CONCLUSION

125. For all of the foregoing reasons, and based on the authorities cited herein, and as will be further demonstrated at the Combined Hearing, the Debtor submits that (a) the Disclosure Statement contains "adequate information" in accordance with section 1125 of the Bankruptcy Code and should be approved, and (b) the Plan satisfies all of the applicable requirements of section 1129(a) and other applicable provisions of the Bankruptcy Code and should be confirmed. Accordingly, the Debtor respectfully requests that the Court enter the Confirmation Order, waive the stay under Bankruptcy Rule 3020(e), and grant such other relief as is just and proper.

Dated: January 13, 2016
St. Thomas, U.S. Virgin Islands

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