IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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	:	
In re	:	**Chapter 11**
	:	
MILAGRO HOLDINGS, LLC, *et al.*,	:	**Case No. 15-11520 (KG)**
	:	
Debtors.[1]	:	**Jointly Administered**
	:	
	:	**Ref. Docket No. 193**
	:	
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DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF DEBTORS' AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Milagro Holdings, LLC (7232); Milagro Oil & Gas, Inc. (7173); Milagro Exploration, LLC (9260); Milagro Producing, LLC (9330); Milagro Mid-Continent, LLC (8804); and Milagro Resources, LLC (6134). The Debtors' mailing address is 1301 McKinney Street, Suite 500, Houston, Texas 77010.

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PRELIMINARY STATEMENT

1. The debtors and debtors in possession (the "Debtors") in the above-captioned cases (the "Chapter 11 Cases") submit this memorandum of law in support of confirmation of the *Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 193], dated September 1, 2015 (as modified, amended, or supplemented from time to time, the "Plan").[2] In further support of confirmation of the Plan, the Debtors rely on:

- the *Declaration of Scott W. Winn in Support of Chapter 11 Petitions and First Day Relief* filed on July 15, 2015 [Docket No. 3] (the "First Day Declaration");
- the *Declaration of James Daloia of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code Dated September 1, 2015* (the "Voting Declaration"); and
- the *Declaration of Scott W. Winn in Support of Confirmation of Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* filed concurrently herewith (the "Scott Declaration").

2. On July 15, 2015 (the "Petition Date"), the Debtors filed the Chapter 11 Cases to effectuate a restructuring transaction negotiated at arms'-length, in good faith and over an extended period of time by and among the Debtors and a number of their key stakeholders, which transaction is set forth in the Plan and the Restructuring Support Agreement (the "Restructuring Support Agreement"), dated as of July 15, 2015, by and among the Debtors, White Oak Resources VI, LLC ("White Oak"), the Consenting Noteholders, the Secured Lenders and Administrative Agent, and certain of the Equity Holders (the "Initial Equity Holders").

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Plan. A prior version of the Plan [Docket No. 64] and related Disclosure Statement [Docket No. 65] were filed on July 22, 2015.

3. The Plan has received unanimous support from those Holders of Notes Claims in Class 4—the only Class of Claims or Equity Interests entitled to vote on the Plan—who voted. Specifically, the Debtors' final voting results on the Plan are as follows:

Class	Class Description	Number Accepting	Number Rejecting	Amount Accepting	Amount Rejecting	Class Voting Result
		%	%	%	%	
4	Notes Claims	66	0	$197,999,000.00	$0.00	ACCEPTS
		100%	0.00%	100%	0.00%	

4. The Plan satisfied the requirements for confirmation pursuant to section 1129 of the Bankruptcy Code, and the Debtors believe that the Plan maximizes value for creditors and is in the best interest of the Debtors' estates. Accordingly, the Debtors respectfully submit that the Plan should be confirmed for the reasons set forth below.

THE PLAN AND THE DEBTORS' RESTRUCTURING EFFORTS

5. Substantial declines in the price of oil and natural gas beginning in late 2007 had severe impacts on the Debtors' business and their ability to service their secured debt obligations. In the years prior to the Petition Date, the Debtors explored a range of restructuring alternatives. Since 2012, the Debtors have been engaged in extensive discussions and negotiations with their stakeholders, including the Initial Equity Holders and certain of the Consenting Noteholders, regarding a variety of restructuring alternatives. In addition, the Debtors have utilized financial advisors and investment banks to assist them in exploring any strategic alternative that would maximize the value of their assets, including exchanging information with and making presentations to more than 20 interested parties in an effort to execute a transformational opportunity.

6. The Debtors' extensive efforts over the last three years have yielded only one suitor that the Debtors believe could credibly execute a transaction that would preserve value for the Debtors' stakeholders—White Oak. White Oak's initial contact with the Debtors occurred in September 2013, following an introduction from Acon Investments, one of the Initial Equity Holders. At that time, White Oak performed initial due diligence to better understand the Debtors' assets and financials. In July of 2014, White Oak's interest continued as it returned for an update on Milagro's 2013 and 2014 drilling results and mid-year 2014 reserves. Most recently, White Oak was again placed in contact with the Debtors in March of 2015.

7. Since approximately March of 2015, the Debtors have worked in good faith and at arms'-length with White Oak and the Debtors' various stakeholders to negotiate and ultimately execute the Contribution Agreement. Pursuant to the Contribution Agreement, the Debtors and White Oak will consummate the Contribution Agreement Transaction, whereby the Debtors will contribute substantially all of their oil and gas assets to White Oak in exchange for cash and equity interests in White Oak and White Oak's assumption of certain liabilities of the Debtors.

8. Concurrently with the several months spent pursuing entry into the Contribution Agreement, the Debtors worked in good-faith and at arms'-length with White Oak, the Administrative Agent, the Secured Lenders, certain of the Consenting Noteholders and the Initial Equity Holders to negotiate the Plan, the primary purpose of which is to effectuate the Debtors' reorganization through the Contribution Agreement Transaction. To ensure the commitment of these key stakeholders to that process, the parties entered into the Restructuring Support Agreement and agreed to support the Contribution Agreement Transaction and the Debtors' pursuit of confirmation of the Plan.

9. On August 17, 2015, the Court entered an Order [Docket No. 138] (the "RSA Assumption Order") authorizing the assumption of the Restructuring Support Agreement. Pursuant to the Restructuring Support Agreement, the Consenting Noteholders, which represent in excess of 80% of the aggregate outstanding principal amount of Notes, agreed to vote in favor of confirmation of the Plan.

10. The Debtors' Plan is premised on, among other things: (i) effectuation of the Contribution Agreement Transaction; (ii) the payment in full of the Senior Debt Claims of the Secured Lenders, and related claims of the Administrative Agent, to the extent such claims have not already paid under the Debtors' DIP Facility; (iii) the issuance of a certain percentage of equity interests in the Reorganized Debtor to the Noteholders; and (iv) the implementation of the Rights Offering, whereby a certain portion of the remaining equity interests in the Reorganized Debtor shall be offered for purchase to eligible Noteholders that participate in the Rights Offering and the remaining equity interest in the Reorganized Debtor shall be provided to certain of the Consenting Noteholders that are backstopping the Rights Offering. Following the Effective Date of the Plan, the Reorganized Debtor will be the owner of the Milagro Interests in White Oak, the Noteholders will be the holders of the equity interests of the Reorganized Debtor and the Reorganized Debtor will be free of its secured Senior Debt obligations and secured obligations related to the Notes.

11. Regarding Claims against and Equity Interests in the Debtors, the Plan generally provides that: (i) each Senior Debt Claim and the Transaction Expenses of the Administrative Agent shall be paid in full, to the extent such claims and expenses remain outstanding; (ii) each Allowed Other Priority Claim shall be paid in full; (iii) each Holder of an Allowed Other Secured Claim shall, at the election of the Debtors, be paid in full in cash on account of such

claim, receive the collateral securing such claim, or otherwise be Unimpaired ; (iv) (a) each Holder of an Allowed Notes Claim shall receive, (x) subject to the Second Lien Notes Trustee Charging Lien, its pro rata share of 100% of the Reorganized Debtor Common Stock subject to dilution from any Rights Interests or Reorganized Debtor Common Stock in respect of the Rights Offering or the Backstop Commitment Fee and (y) if applicable, Rights Interests or the Cash-Out Payment; and (b) the Reorganized Debtor shall pay the Transaction Expenses of the Consenting Noteholders and the Second Lien Notes Trustee and their respective legal counsel as provided for in the Restructuring Support Agreement; (v) no Holder of a General Unsecured Claim shall receive or retain any property or interest on account of such claim; provided, however, that the Plan implements a settlement whereby Holders of Allowed General Unsecured Claims who are Eligible Plan Release Consideration Recipients can consent to become Releasing Parties and, in exchange, be entitled to receive the Third Party Releases and a GUC Settlement Payment; and (vi) no Holder of an Equity Interest in the Debtors shall receive or retain any property or interest on account of such interest.

PLAN SOLICITATION, VOTING AND ADDITIONAL PROCEDURAL BACKGROUND

12. On September 1, 2015, the Court entered an Order [Docket No. 192] (the "Disclosure Statement Order") which, among other things: (i) approved the Disclosure Statement pursuant to section 1125 of the Bankruptcy Code; (ii) established procedures for solicitation and tabulation of votes to accept or reject the Plan, and (iii) scheduled the Confirmation Hearing and set related deadlines. In accordance with the Disclosure Statement Order, on September 3, 2015, the Debtors commenced solicitation of the votes to accept or reject the Plan from the Holders of Notes Claims in Class 4. Specifically, the Debtors caused Prime Clerk LLC, the claims, noticing, and balloting agent in the Chapter 11 Cases ("Prime Clerk"), to

transmit copies of the Solicitation Package (as defined in the Disclosure Statement Order), including the Disclosure Statement, Plan, the Confirmation Hearing Notice (as defined in the Disclosure Statement Order), and a copy of the Ballot to vote to accept or reject the Plan, for delivery to the Holders of Notes Claims in Class 4.

13. Additionally, the Debtors instructed Prime Clerk to deliver the Confirmation Hearing Notice and Non-Voting Creditor Notice (as defined in the Disclosure Statement Order) in accordance with the Disclosure Statement Order. A version of the Confirmation Hearing Notice was published in the Houston Chronicle and The New York Times (National Edition) on September 4, 2015. *See* Affidavit of Publication [Docket No. 210].

14. On September 14, 2015, James Daloia of Prime Clerk executed an affidavit of service, which Prime Clerk filed with the Court on September 15, 2015 [Docket No. 213] (the "Solicitation Affidavit"), regarding the mailing of the Confirmation Hearing Notice and the Solicitation Packages in accordance with the terms of the Disclosure Statement Order.

15. As described more fully in the Voting Declaration, the Debtors did not solicit votes on the Plan from the holders of (i) Administrative Claims, DIP Claims, Professional Fee Claims, or Priority Tax Claims (each in their capacity as such), which are Unclassified under the Plan and therefore are not entitled to vote on the Plan; (ii) Claims in Classes 1, 2, and 3, which are Unimpaired and therefore are conclusively presumed to accept the Plan; or (iii) Claims and Equity Interests in Classes 5 and 6, which are Impaired under the Plan, are entitled to no recovery under the Plan, and are therefore deemed to reject the Plan.

16. On September 25, 2015, September 28, 2015 and October 2, 2015, the Debtors filed the *Plan Supplement to the Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, Dated September 1, 2015* [Docket No. 250], the *Second*

Supplement to the Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, Dated September 1, 2015 [Docket No. 254], and the *Third Supplement to the Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, Dated September 1, 2015* [Docket No. 275], respectively (together with any additional amendments or supplements filed prior to the Confirmation Hearing, the "Plan Supplement").

17. The Debtors will file a proposed Confirmation Order (the "Proposed Confirmation Order") prior to the Confirmation Hearing.

18. The following objections to confirmation of the Plan have been filed:

- *Objection of Brazoria County Tax Office, Chambers County Tax Office, Sheldon Independent School District, Humble Independent School District, Barbers Hill Independent School District and Dickinson Independent School District to Debtors' Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 258] (the "Texas Tax Objection") filed by certain Texas taxing entities (the "Texas Taxing Entities"); and

- *Mischer Investment LP's Objection to Confirmation of the Debtors' Joint Plan of Reorganization* [Docket No. 267] (the "Mischer Objection") filed by Mischer Investment LP ("Mischer").

19. Further, the Debtors have received informal comments from and extended the deadline for the Environmental Protection Agency (the "EPA") and the United States Department of the Interior ("Interior") to object to the Plan.

ARGUMENT

20. Section 1129(a) of the Bankruptcy Code contains 16 conjunctive requirements for confirmation of a chapter 11 plan, which, with the exception of the requirement of unanimous acceptance by impaired classes, are either satisfied or inapplicable for the reasons set forth below. The requirement of unanimous acceptance by impaired classes cannot be satisfied due to the deemed rejection of the Plan by Classes 5 (General Unsecured Claims) and 6 (Equity Interests). However, as discussed below, the Plan satisfies the cram-down requirements under

section 1129(b) with respect to these classes. Accordingly, the Plan should be confirmed notwithstanding its deemed rejection by Classes 5 and 6.

A. The Plan Complies with the Applicable Provisions of the Bankruptcy Code (§ 1129(a)(1))

21. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) explains that this provision also encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan of reorganization, respectively. S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977); *In re S & W Enters.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was more directly aimed at were [s]ections 1122 and 1123."). As explained below, the Plan complies with the requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code, as well as other applicable provisions.

1. *The Plan's Classification Scheme is Proper*

22. Section 1123 of the Bankruptcy Code requires a plan to designate classes of claims and interests, subject to section 1122. 11 U.S.C. § 1123(a)(1). Section 1122 provides, in pertinent part, that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). This is not to say that all substantially similar claims or interests must be grouped in the same class, but rather, that all claims or interests designated to a particular class be substantially similar to each other. *In re Armstrong World Indus.*, 348 B.R. 136, 159 (D. Del. 2006). The Court of Appeals for the Third Circuit, among others, has recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided

there is a rational basis to do so. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (holding that as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (allowing a plan proponent to group similar claims in different classes, but recognizing that separate classes of claims must be reasonable).

23. The Plan classifies claims and interests into six (6) classes, namely: (i) Class 1 – Senior Debt Claims; (ii) Class 2 – Other Priority Claims; (ii) Class 3 – Other Secured Claims; (iv) Class 4 – Notes Claim; (v) Class 5 – General Unsecured Claims; and (vi) Class 6 – Equity Interests. *See* Plan, Article III.A.2. Each Class comprises only claims or interests that are substantially similar to one another, and the Classes themselves are all based on valid business, factual, or legal considerations. In essence, the Plan's classification scheme follows the Debtors' capital structure. Senior secured Claims are classified separately from junior secured Claims, secured Claims are classified separately from unsecured Claims, and Equity Interests are classified separately from Claims. Similarly, the Plan classifies unsecured Claims, in part, according to their relative priority, so that Claims afforded priority under section 507 (Class 2) are classified separately from General Unsecured Claims (Class 5). Accordingly, the Plan satisfies sections 1123(a)(1) and 1122(a) of the Bankruptcy Code.

2. *The Plan Satisfies the Other Mandatory Requirements of Section 1123(a) of the Bankruptcy Code*

24. In addition to the classification of claims and interests, there are six requirements that every chapter 11 plan must satisfy under section 1123(a) of the Bankruptcy Code. As discussed below, all of these requirements are satisfied by the Plan.

a. Specification of Unimpaired Classes (§ 1123(a)(2))

25. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan." The Plan meets this requirement by identifying Classes 1, 2, and 3 as unimpaired. *See* Plan, Article III.A.2.

b. Treatment of Impaired Classes (§ 1123(a)(3))

26. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan meets this requirement by setting forth the treatment of Classes 4, 5, and 6. *See* Plan, Article III.B.4-6.

c. Equal Treatment Within Classes (§ 1123(a)(4))

27. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." The Plan meets this requirement because holders of Allowed Claims or Equity Interests within each Class will receive the same rights and treatment on account of their Claims or interests as other holders of Allowed Claims or Equity Interests in the same Class.

d. Means for Implementation (§ 1123(a)(5))

28. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. Article IV of the Plan, as well as other provisions thereof, provide for the means by which the Plan will be implemented. Among other things, Article IV of the Plan, and the exhibits, attachments, and supplements to the Plan and the Disclosure Statement: (i) provide for substantive consolidation of the Debtors for purposes of Confirmation and Consummation; (ii) provide for the sources of consideration for Plan distributions; (iii) provide for the consummation of the Contribution Agreement Transaction; (iv) provide for the issuance of new equity interests in the Reorganized Debtor to be issued to the Noteholders in exchange for their Notes Claims; (v) provide for the issuance of new equity

interests in the Reorganized Debtor to be issued in connection with the Rights Offering and the Backstop Commitment; (vi) provide for the payment of the GUC Settlement Payment to Eligible Plan Release Consideration Participants that agree to become Releasing Parties under the Plan; (vii) authorize the Reorganized Debtor to take actions it deems necessary or desirable in connection with the Plan, including, among other things, winding up the Debtors' affairs, liquidating the remaining assets of the Estates, prosecuting any claims or interests, resolving Disputed Claims, and filing appropriate tax returns; (viii) providing for the wind-down of certain of the Debtors; (ix) provide for the vesting of assets that are not sold in the Contribution Agreement Transaction in the Reorganized Debtor; (x) provide for the conversion of the Reorganized Debtor into a Delaware limited liability company, New Milagro LLC, and the immediate conversion of the Reorganized Debtor Common Stock into New Holdings Units on a one-for-one basis; (xi) provide for the amendment of the New Holdings Operating Agreement of the Reorganized Debtor; (xii) provide for the replacement of the officers and directors of the Reorganized Debtor; (xiii) provide for the preservation and vesting of certain Causes of Action in the Reorganized Debtor; (xiv) provide for the cancellation of all notes, instruments, certificates or other documents evidencing Claims or Equity Interests unless otherwise provided in the Plan; and (xv) to the extent provided in the Plan, the cancellation of certain Claims and Equity Interests and the securities and indentures related thereto. *See* Plan, Article IV.

29. The transactions contemplated by the Plan, including the Contribution Agreement Transaction, are designed to maximize the value of the Debtors' business and assets. Accordingly, the Plan, together with the documents and agreements contemplated by the Plan and the Plan Supplement, including the Contribution Agreement, provide the means for

implementation of the Plan as required by and in satisfaction of section 1123(a)(5) of the Bankruptcy Code.

30. Good Faith of White Oak. The Contribution Agreement was negotiated at arms'-length and in good faith. Thus, White Oak is entitled to the full protections of section 363(m) of the Bankruptcy Code, which provides:

> The reversal or modification on appeal of an authorization under subsection (b) . . . of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such . . . sale or lease were stayed pending appeal.

U.S.C. § 363(m). While the Bankruptcy Code does not define "good faith," the Third Circuit in *In re Abbotts Dairies of Pa., Inc.* held that:

> [t]he requirement that a purchaser act in . . . good faith speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the [proposed] purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d 143, 147 (3d Cir. 1986) (citation omitted).

31. Accordingly, absent a showing of fraud, collusion, or an attempt by the purchaser to take grossly unfair advantage of other interested parties, courts will uphold the transaction under section 363(m) of the Bankruptcy Code. *See, e.g.*, *Sheehan v. Dobin*, Case No. 10-5054, 2011 U.S. Dist. LEXIS 46004 (D.N.J. Apr. 28, 2011) (citing *Abbotts Dairies* for the proposition that fraud, collusion or an attempt to take grossly unfair advantage of other bidders would destroy a purchaser's good faith); *In re Trans World Airlines, Inc.*, Case No. Civ.A. 01-226, 2002 WL 500569, at *1 (D. Del. Mar. 26, 2002) (upholding bankruptcy court's ruling premised on finding that there was "no evidence of unlawful insider influence or improper conduct," nor

was there "any evidence of fraud or collusion between [the prevailing purchaser] and [debtors], or [the prevailing purchaser] and other bidders," and that sale was in good faith).

32. The Contribution Agreement was the product of the Debtors' good faith, arms' length, and extended negotiations with White Oak. Although one or more affiliates of an equity holder of Milagro Holdings, LLC, one of the Debtors, hold equity interests in White Oak, such affiliate or affiliates do not hold a majority stake in either of the Debtors or White Oak. Furthermore, each of the parties to the Contribution Agreement is a sophisticated entity represented by counsel. Moreover, the terms of the Contribution Agreement are fair and reasonable and were negotiated without collusion or fraud. As set forth in the First Day Declaration and Winn Declaration, the Debtors researched and contemplated a number of restructuring scenarios over the course of approximately 3 years before executing the Contribution Agreement. *See* First Day Declaration at ¶¶ 33-35. During this time, the Debtors were free to deal with any and all parties interested in acquiring the Debtors' assets, but White Oak was the only entity with the interest and ability to effectuate a restructuring transaction. Accordingly, the Debtors submit that White Oak has acted in good faith.

33. In addition, there has been no agreement between White Oak and any other party to control the sale price. Thus, neither the Debtors nor White Oak has engaged in any conduct that would cause or permit the Contribution Agreement or the consummation of the Contribution Agreement Transaction to be avoided, or costs or damages to be imposed, under section 363(n) of the Bankruptcy Code.

34. <u>No Successor Liability for White Oak</u>. Pursuant to sections 1123(a)(5), 1123(b)(4), 1141(b) and (c) of the Bankruptcy Code and the terms and conditions of the Contribution Agreement, the transfer of the assets to be transferred to White Oak pursuant to the

Contribution Agreement (the "Contributed Assets") will be free and clear of any and all Liens, Claims, and interests, other than "Permitted Encumbrances" as set forth in the Contribution Agreement.

35. The term "any interest" is not defined in the Bankruptcy Code. *Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 257 (3d Cir. 2000). However, the Third Circuit specifically addressed the scope of the term "any interest" in *In re Trans World Airlines, Inc.*, observing that while some courts have "narrowly interpreted interests in property to mean *in rem* interests in property," the trend in modern cases is toward "a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.'" 322 F.3d 283, 288-89 (3d Cir. 2003) (citing 3 *Collier on Bankruptcy* ¶ 363.06[1]).

36. Courts have specifically held that a buyer of a debtor's assets may take free from successor liability resulting from pre-existing claims. *See Folger Adam*, 209 F.3d at 258 (holding that debtors could sell their assets free and clear of successor liability that would have otherwise arisen under federal statute); *In re General Motors Corp.*, 407 B.R. 463, 505-06 (Bankr. S.D.N.Y. 2009) (holding that "the Court will permit GM's assets to pass to the purchaser free and clear of successor liability claims."); *Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (N.D. Ind. 1996) (stating that a bankruptcy court has the power to allow the sale of assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *In re New England Fish Co.*, 19 B.R. 323, 328-29 (Bankr. W.D. Wash. 1982) (holding transfer of property in free and clear sale included free and clear of Title VII employment discrimination and civil rights claims of debtor's employees).

37. Here, the Contribution Agreement provides for the transfer of the Contributed Assets free and clear of all Liens, Claims and interests, other than the Permitted Encumbrances. For obvious reasons, the very purpose of an agreement purporting to authorize the transfer of assets free and clear of all "interests" would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against a purchaser arising from a seller's pre-sale conduct. Moreover, without the assurance that there would be no successor liability, White Oak likely would not have agreed to the transactions contemplated by the Contribution Agreement. Accordingly, White Oak should not be liable under any theory of successor liability.

38. In addition, (i) White Oak engaged in arms' length negotiations with the Debtors and did not exert control or undue influence over the Debtors, (ii) while they have equity owners that are affiliated but do not own a majority stake in either entity, White Oak is a completely and wholly-unrelated entity to the Debtors, and (iii) White Oak is not an insider of the Debtors. Accordingly, the transactions contemplated by the Contribution Agreement do not cause there to be, and there is not (i) a consolidation, merger, or de facto merger of White Oak, on the one hand, with or into the Debtors or the Debtors' Estates, on the other hand, or vice versa, (ii) a substantial continuity between White Oak, on the one hand, and the Debtors or the Debtors' Estates, on the other hand, (iii) a common identity between White Oak, on the one hand, and the Debtors or the Debtors' Estates, on the other hand, or (iv) a mere continuation of the Debtors or their Estates, on the one hand, with White Oak, on the other hand. Accordingly, the Debtors submit that it would be inappropriate to impose successor liability on White Oak or to consider White Oak to be a successor to the Debtors.

e. Charter Provision Prohibiting Issuance of Non-Voting Securities (§ 1123(a)(6))

39. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. The New Holdings Operating Agreement for the Reorganized Debtor and the amended and restated certificate of incorporation of the Reorganized Debtor, effective as of the Closing, will include such a prohibition. As such, the Debtors have satisfied section 1123(a)(6) of the Bankruptcy Code.

f. Selection of Directors and Officers (§ 1123(a)(7))

40. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any director, officer or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." Under Article IV.N of the Plan, the term sheet for the New Holding Operating Agreement, which was included in the Plan Supplement, outlines the manner of selecting the managers of the Reorganized Debtor, which accords with relevant Delaware state law, the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. As such, the Debtors have satisfied section 1123(a)(7) of the Bankruptcy Code.

3. *The Plan's Discretionary Provisions Are Proper under Section 1123(b) of the Bankruptcy Code*

41. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) provides that a plan may: (i) impair or leave unimpaired any class of claims or interests; (ii) provide for the assumption or rejection of executory contracts and unexpired leases; (iii) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estates; (iv) provide for the sale of all or substantially all of the property of the estate; and

(v) include any other appropriate provision not inconsistent with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1123(b)(1)-(3)(A), (4), (6).

42. Consistent with section 1123(b) of the Bankruptcy Code: (i) the Plan impairs certain Claims and Equity Interests (specifically, those in Classes 4, 5, and 6); (ii) the Plan leaves unimpaired other Claims (specifically, those in Classes 1, 2, and 3); (iii) Article V of the Plan provides for the rejection of all Executory Contracts and Unexpired Leases under section 365 of the Bankruptcy Code, with certain exceptions, and assumption and assignment of the Desired 365 Contracts, as of and pending the Effective Date; and (iv) as discussed above, the Plan provides for the sale of substantially all of the Debtors' oil and gas assets pursuant to the Contribution Agreement.

43. The Debtors' substantive consolidation is consistent with section 1123 of the Bankruptcy Code. Article IV.A provides for the substantive consolidation of the Debtors and their respective Estates for all purposes associated with Confirmation and Consummation of the Plan. The Debtors believe that such substantive consolidation is fair, appropriate and necessary and should be approved.

44. Sections 105(a) and 1123(a)(5) of the Bankruptcy Code empower a bankruptcy court to authorize substantive consolidation pursuant to a chapter 11 plan over the objections of creditors. *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005) amended by 2005 U.S. App. Lexis 18043 (Aug. 23, 2005). The Third Circuit in Owens Corning discussed at length substantive consolidation in bankruptcy proceedings, as well as its genesis and the impact it has on debtors' creditors and their rights and recoveries. Ultimately, the Court provided two baseline standards for approval of non-consensual substantive consolidation, while leaving the trial court with discretion to assess what facts are necessary to meet these standards:

> (i) prepetition [the debtors] disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

Id. at 211. Following *Owens Corning*, Courts in this jurisdiction have clarified that substantive consolidation is also "appropriate" where the parties consent to it. *See Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 591 (D. Del. 2009).

45. The Debtors believe that substantive consolidation is warranted here because, among other reasons, the Debtors historically operated on a consolidated basis. With two exceptions, all of the employees within the Debtors' enterprise are employed, under a co-employment relationship with Insperity PEO Services, L.P., by Milagro Exploration, LLC ("Milagro Exploration"). Milagro Exploration also serves as operator for all of the oil and gas leases within the Debtors' enterprise, which are in turn owned by Milagro Producing, LLC and Milagro Resources, LLC. Almost all outward facing activities by the Debtors are conducted by Milagro Exploration, which provides services on behalf of the other Debtors who actually own the Debtors' revenue producing oil and gas leases, and industry participants identified the Debtors merely as "Milagro" as opposed to their separate corporate identities. The Debtors also utilize a consolidated cash management system, and substantially all vendors issue invoices to Milagro Exploration and all amounts paid to outsider vendors are paid from Milagro Exploration's bank account. The Debtors' management team does not present their financial statement on a legal-entity basis and makes capital investment decisions on an enterprise-wide basis, not on a legal-entity basis. Similarly, for purposes of the Debtors' negotiation of secured financing, the Debtors believe the parties to such financing arrangements treated the Debtors' operations as unitary.

46. The Debtors submit that creditors will not be harmed by substantive consolidation. The Debtors' assets are insufficient to cover the value of the secured claims against the Debtors, which are obligations of each Debtor (other than Milagro Holdings, LLC) As a result, the Noteholders are impaired and entitled to the residue of the Debtors' estates after the payment in full of the Senior Debt Claims. The Noteholders voting on the Plan have unanimously voted to approve the Plan, including substantive consolidation, and no party in interest has objected to substantive consolidation under the Plan. Further, given the nominal amount of assets held by certain Debtors, and the expense of generating separate plans of reorganization for each of the Debtors, the Debtors believe that the overall effect of substantive consolidation will be more beneficial than harmful to creditors and will allow for greater efficiencies and simplification in administering the Plan. Accordingly, the Debtors believe that substantive consolidation of the Debtors' estates under the terms of the Plan will not adversely impact the treatment of any of the Debtors' creditors, but rather will reduce expenses by decreasing the administrative difficulties and costs related to the administration of the estates of the Debtors separately, as well as eliminating the need to determine professional fees on a case-by-case basis and streamlining the administration of the Plan. Accordingly, substantive consolidation is consistent with section 1123(b)(6) of the Bankruptcy Code and should be approved.

47. Also consistent with section 1123(b), the Plan includes (i) the release by the Debtors of certain parties in interest; (ii) the release by certain holders of Claims of certain parties in interest; (iii) an exculpation provision; and (iv) an injunction provision prohibiting parties from pursuing Claims or Equity Interests discharged or otherwise released under the Plan. These provisions are proper because, among other things, they are the product of extensive good-

faith and arm's-length negotiations, are supported by the Debtors and the stakeholder parties to the Restructuring Support Agreement, and all creditors who voted in the only Class entitled to vote on the Plan have unanimously accepted the Plan. Further, the Plan's releases are in exchange for substantial consideration.

a. The Debtors' Releases are Appropriate

48. As noted above, 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. *In re 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 Rule 9019, a settlement of a cause of action should generally be approved if it exceeds the lowest point in the range of reasonable litigation outcomes. *E.g., 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 will generally 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." *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("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)).

49. In evaluating the fairness and reasonableness of the release, courts in this district have also considered the following factors: (i) an identity of interest between the debtor and the non-debtor releasee; (ii) whether the non-debtor releasee has made a substantial contribution to

the debtor's reorganization; (iii) whether the release is essential to the debtor's reorganization; (iv) agreement by a substantial majority of creditors to support the release; and (v) 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 *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)); *Spansion*, 426 B.R. at 143 n.47 (citing the *Zenith* factors); *Wash. Mut.*, 442 B.R. at 346 (same). However, these factors are not considered to be exclusive and not all of these factors need to be satisfied for a Court to approve a release by the debtor. *See Wash. 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).

50. Article VIII.D of the Plan provides for releases by the Debtors (the "Debtor Releases"), of, among other things, certain Claims, rights, and Causes of Actions that the Debtors, the Reorganized Debtor, or the Estates may have against the Released Parties. The Released Parties are: (i) the Debtors; (ii) the Reorganized Debtor; (iii) White Oak; (iv) the Administrative Agent and Secured Lenders; (v) the Consenting Noteholders (vi) the Initial Equity Holders; (vii) Holders of Notes Claims that do not opt-out of the Third Party Release; (viii) the Second Lien Notes Trustee; (ix) the Plan Release Consideration Recipients; and (x) with respect to each of the foregoing entities in (i) through (ix), such entity's successors and assigns and current and former officers, directors, principals, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, equity holders, partners and other professionals. *See* Plan, Article I.A.111.

51. The Debtor Releases are based on the Debtors' business judgment, and meet the applicable legal standard because they are fair, reasonable, necessary and integral elements of the Plan, which was negotiated in good faith and at arm's-length among the Debtors and their various stakeholders, and in the best interests of the Debtors. The Debtor Releases are in exchange for good and valuable consideration provided by the Released Parties. The consideration given includes: (i) the Administrative Agent's, Secured Lenders', Consenting Noteholders' and Initial Equity Holders' consent to and support of the Plan and the Debtors' restructuring transaction; (ii) the Administrative Agent's, Secured Lenders', and Second Lien Notes Trustee's prepetition forbearance of remedies for the Debtors' defaults under the Credit Agreement and Second Lien Notes Indenture, as applicable; (iii) the provision by the Administrative Agent of the Debtors' DIP Facility to enable the Debtors to pursue this reorganization; (iv) a more than $2.5 million reduction in the purported Yield Maintenance Premium (as defined in the DIP Credit Agreement) and interest expenses asserted by the Administrative Agent on behalf of the Secured Lenders; (v) the Consenting Noteholders' agreement to exchange their Note Claims for equity interests in the Reorganized Debtor; (vi) the agreement by certain of the Holders of Note Claims to provide necessary funding to the Reorganized Debtor pursuant to the Rights Offering; (vii) the agreement by certain of the Consenting Noteholders to backstop the Rights Offering; (viii) Acon's efforts in facilitating and enabling the Contribution Agreement Transaction; (ix) the agreement of White Oak to enter into the Contribution Agreement and pursue the Contribution Agreement Transaction in the context of a chapter 11 proceeding; (x) the mutual releases of the Holders of Note Claims that do not opt out of the Third Party Releases; (xi) the mutual releases of the Plan Release Consideration Recipients; (xii) the waiver of approximately $17 million in management fee claims by the Initial

Equity Holders; and (xiii) the efforts of the majority of the Released Parties, including the Debtors' and other directors, officers and various professionals, in negotiating and effectuating the Plan and the Debtors' largely consensual restructuring. As discussed more fully below, the Released Parties have also created a mechanism whereby holders of general unsecured claims in these cases might obtain a recovery on their claims despite the fact that the Debtors' capital structure and asset values otherwise would not support such a recovery.

52. Also, the releases of the Administrative Agent, the Secured Lenders, the Consenting Noteholders, the Initial Equity Holders, and White Oak were negotiated prepetition in connection with the Restructuring Support Agreement. And it was pursuant to this Restructuring Support Agreement (and related Rights Offering and Backstop Commitment Letter) that certain of the Noteholders will contribute significant value in furtherance of the Plan, including, without limitation, the Consenting Noteholders' election to exchange their Notes Claims for equity in the Reorganized Debtor, the Plan Release Consideration Assets to be provided to the Plan Release Consideration Recipients, and their good-faith efforts in negotiating, documenting, and implementing the Plan. Without the release provisions, the Debtors may not have received the necessary support from the Consenting Noteholders and other key stakeholders for a largely consensual chapter 11 plan. Moreover, there are no objections to the Debtors' releases, and the Holders of Notes Claims that voted on the Plan voted unanimously to accept it, including the releases (which were disclosed prominently in the Ballot, the Disclosure Statement, and the Confirmation Hearing Notice).

53. Finally, the Debtor Releases are appropriate because there is an identity of interest between the Debtors and each of the Released Parties as they share the common goal of confirming the Plan and implementing the transactions contemplated thereby. *Zenith*, 241 B.R.

at 110. The *Zenith* Court granted the releases sought by the debtor, holding that the various released parties had an identity of interest on the basis that they were instrumental in formulating the plan of reorganization. *See Id.*; *see also In re Tribune Co.*, 2011 Bankr. LEXIS 4128, at *153 (Bankr. D. Del. Oct. 21, 2011) (holding that the debtors and their secured lenders "share the common goal of confirming the [] Plan" and implementing the consummation thereof, thus giving rise to an identity of interest between those parties). The Debtors' largely consensual reorganization is the result of both significant prepetition and postpetition negotiations and efforts by the Released Parties, resulting in the Restructuring Support Agreement, the Contribution Agreement and, ultimately, the Plan. Furthermore, a suit against certain of the Released Parties is, in essence, a suit against the Debtors or will deplete assets of the Estates, as certain of the Released Parties have indemnification obligations pursuant to the Debtors' corporate governance documents and various other agreements.

54. For these reasons, the Debtors' releases are justified, are in the best interests of creditors, are an integral part of the Plan, and satisfy the factors considered by courts in determining whether a debtor release is proper.

b. <u>The Third Party Releases are Appropriate</u>

55. Section VIII.E of the Plan also provides for the Third Party Release, whereby the Releasing Parties will release the Released Parties. The non-Debtor Releasing Parties are: (i) White Oak, (ii) the Administrative Agent and the Secured Lenders; (iii) the Consenting Noteholders; (iv) the Initial Equity Holders; (v) Holders of Note Claims that do not opt-out of the Third Party Release; (vi) the Second Lien Notes Trustee; (vii) the Plan Release Consideration Recipients; and (viii) with respect to each of the foregoing entities in (i) through (vii), such entity's successors and assigns and current and former officers, directors, principals, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants,

representatives, equity holders, partners and other professionals. *See* Plan, Article I.A.112. The Third Party Release was displayed prominently in the Ballot and the Confirmation Hearing Notice.

56. "Courts in this jurisdiction have consistently held that a plan may provide for a release of third party claims against a non-debtor upon consent of the party affected." *In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013). In addition, 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 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 Communs. Holdings, Inc.*, No. 98-2007 (MFW), 1999 Bankr. LEXIS 1853, *24-25 (Bankr. D. Del. Mar. 26, 1999). Even non-voting creditors may be "deemed" to consent to provide releases of non-debtor third parties in the context of a chapter 11 plan, particularly where the creditor-releasors' claims are unimpaired by the plan. *See Indianapolis Downs*, 486 B.R.at 305-06 (holding that third-party releases by unimpaired creditors who are deemed to accept the plan are permissible and "properly characterized as consensual" because the releasing creditors received consideration by payment in full and did not object to the releases); *Spansion*, 426 B.R. at 144 (finding "the silence of the unimpaired classes . . . [wa]s persuasive" in determining releases of third parties by unimpaired creditors who did not object to the releases were permissible); *cf.* 11 U.S.C. § 1141(a) (providing that the provisions of a confirmed chapter 11 plan bind "any creditor . . . whether or not the claim . . . of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan").

57. The following parties are parties to the Restructuring Support Agreement and have agreed to support the Plan, including the Third Party Release: (i) White Oak; (ii) the

Administrative Agent and Secured Lenders; (iii) the Consenting Noteholders; and (iv) the Initial Equity Holders. Furthermore, to be a Plan Release Consideration Recipient and receive a GUC Settlement Payment under the Plan, a Holder of an Allowed General Unsecured Claim must affirmatively elect to be a Releasing Party. Therefore, the Third Party Release is consensual with respect to these parties and should be approved.

58. All Holders of Notes Claims that are not Consenting Noteholders were provided with the opportunity to opt-out of the Third Party Release in connection with voting to accept or reject the Plan. A Holder of a Notes Claims is only a Releasing Party to the extent that it has not chosen to opt-out of the Third Party Release. As such, the Third Party Release is fully consensual with respect to Holders of Notes Claims that have not chosen the opt-out. Finally, pursuant to the Second Lien Notes Indenture, the Second Lien Notes Trustee represents the interests of the Noteholders. The holders of the vast majority of Notes Claims have agreed to support the Second Lien Notes Trustee's grant of the Third Party Releases by entering into the Restructuring Support Agreement, and the Second Lien Notes Trustee has participated in these cases and has not objected to the Third Party Release. As such, the Third Party Release should be granted with respect to the Second Lien Notes Trustee.

59. In sum, the Third Party Release is the result of the Debtors' negotiations with a number of its stakeholders, and is an integral part of the Restructuring Support Agreement and the transactions contemplated thereby and by the Plan. In addition, the Releasing Parties will receive significant consideration under the Plan; and all of the Releasing Parties either have affirmatively consented to the Third Party Release, or have not objected to the release despite opportunity to do so. Thus, the Plan's Third Party Release is appropriate and should be approved.

c. The Exculpation Provision Is Appropriate

60. Article VIII.F of the Plan, as amended by the Proposed Confirmation Order, provides for the exculpation of the Exculpated Parties from any claims arising out of or related to any act or omission (except fraud, gross negligence, or willful misconduct) in connection with the Chapter 11 Cases, or related to formulating, negotiating, soliciting, preparing, disseminating, confirming or implementing the Plan or consummating the Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document created by or entered into in connection with the Plan or any other prepetition or post-petition act taken or omitted in connection with or in contemplation of the Debtors' restructuring. The Exculpated Parties comprise, in relevant part: (i) the Debtors; (ii) the Reorganized Debtor; and (iii) with respect to the foregoing entities in clauses (i) and (ii), such entity's successors and assigns and current and former officers, directors, principals, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, equity holders, partners and other professionals. *See* Plan, Article I.A.64.

61. Exculpation provisions similar to those proposed in the Plan are appropriate where, as here, they simply restate the standard of liability that would apply to claims against the exculpated parties. *See In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (finding a "commonplace provision" for exculpation, subject to carve-outs for gross negligence and willful misconduct, "does not affect the liability of [the exculpated] parties, but rather states the standard of liability" applicable to them); *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (upholding chapter 11 plan's exculpation provision covering claims for negligent conduct relating to the bankruptcy cases, where it "d[id] not appear likely that any such claim exist[ed]").

62. As discussed below, sections 1129(a)(2) and (3) of the Bankruptcy Code require that, as prerequisite to confirmation of a plan, (i) the proponents of the plan have complied with

the applicable provisions of the Bankruptcy Code, and (ii) the plan was been proposed in good faith and not by any means forbidden by law. If these two facts are true, which they must be in order for the Plan's exculpation provision to take effect, then it is difficult to imagine what liability the Exculpated Parties could have to a party in interest in these bankruptcy cases. These bankruptcy cases and the related transactions have been negotiated and implemented in good faith and with a high degree of transparency, including the extensive negotiations among the Debtors, the Administrative Agent, the Secured Lenders, and the Consenting Noteholders in formulating the Restructuring Support Agreement and the Plan. The exculpation provisions are necessary to protect parties who have made substantial contributions to the Debtors' reorganization from future collateral attacks related to actions taken in good faith in connection with the Debtors' restructuring. And, again, the Plan, including the exculpation provision, has the unanimous support of holders of Claims that voted on the Plan. For these reasons, among others, the Debtors submit that the exculpation provision in the Plan is appropriate under the facts and circumstances of these chapter 11 cases.

d. The Injunction Provision Is Appropriate

63. The injunction provision set forth in Article VIII.G of the Plan implements the Plan's release and exculpation provisions. Thus, to the extent the Court finds that the exculpation and release provisions are appropriate, the Debtors respectfully submit that the injunction provision is also appropriate. *See* 11 U.S.C. § 105(a) (authorizing the Court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code); *In re Premier Int'l Holdings Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *9 (Bankr. D. Del. Apr. 29, 2010) (approving injunctions along with release provisions).

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

64. Section 1123(d) of the Bankruptcy Code states 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 non-bankruptcy law." Article V of the Plan provides for the satisfaction of the Cure Costs, if any, associated with each Executory Contract and Unexpired Lease to be assumed and assigned pursuant to the Plan, by payment of such Cure Costs on the Effective Date or as soon as practicable thereafter. All Cure Costs will be determined in accordance with the underlying agreements and applicable law. Accordingly, the Debtors submit that the Plan complies with section 1123(d) of the Bankruptcy Code.

B. The Debtors Complied with the Applicable Provisions of the Bankruptcy Code (§ 1129(a)(2))

65. The Debtors satisfy section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The legislative history to section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 26 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see In re Lapworth*, No. 97-34529 (DWS), 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)."). As discussed above, the Debtors have solicited acceptances and rejections of the Plan in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Disclosure Statement Order, and the Debtors believe that they have satisfied the requirements of section 1129(a)(2).

C. The Plan Was Proposed in Good Faith (§ 1129(a)(3))

66. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Courts in the Third Circuit have found that good-faith requires that the plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." *Zenith Elecs.*, 241 B.R. at 107; *accord In re Century Glove, Inc.*, Nos. 90-400-SLR, 90-401-SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) ("Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied.").

67. A fundamental purpose of chapter 11 is to enable financially distressed businesses to reorganize their affairs and thereby prevent the job losses and adverse economic effects associated with disposing of assets at liquidation value. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (stating "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start"). Here, the Debtors have proposed the Plan in good faith, with the goal of emerging from chapter 11 free from the secured obligations under the Senior Debt and Notes, while maintaining an interest in the Debtors' oil and gas assets through the Reorganized Debtor's equity interest in White Oak. The Plan is the product of months of arm's-length negotiations among the Debtors, the Administrative Agent and Secured Lenders, certain of the Consenting Noteholders and the Initial Equity Holders. The Debtors have worked tirelessly to build consensus among the various constituencies, and the Plan is a result of these extraordinary efforts. Indeed, the Plan's unanimous acceptance by those voting on the Plan evidences the Debtors' good faith in proposing the Plan.

68. The only assertion that the Plan does not meet the requirements of section 1129(a)(3) is set forth in the Mischer Objection, which is discussed in greater detail below.

69. Accordingly, for the reasons set forth herein, the Debtors respectfully submit that the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

D. Payments Made by the Debtors for Professional Fees and Expenses are Subject to Court Approval (§ 1129(a)(4))

70. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, by the debtor or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable. Pursuant to this Court's orders authorizing the Debtors to retain and employ certain professionals during the pendency of the Chapter 11 Cases [*see* Docket Nos. 140, 141, 142, 151 and 162] (collectively, the "Retention Orders"), all retained professionals' fees and expenses were approved as reasonable under section 328 of the Bankruptcy Code, or are subject to final review for reasonableness by the Court under section 330 of the Bankruptcy Code. Article 2.D.2 of the Plan provides that Professionals shall file all final requests for payments of Professional Fee Claims no later than 30 days after the Effective Date. The Court's retention of jurisdiction over the compensation of these Professionals satisfies section 1129(a)(4). *See Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 503 (D.N.J. 2005); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

71. The Administrative Agent, the Second Lien Notes Trustee and certain of the Consenting Noteholders also retained legal counsel and, in the case of certain of the Consenting Noteholders, a financial advisor, in connection with the transactions contemplated by the Restructuring Support Agreement and the Plan. In addition, under the Final DIP Order, the Administrative Agent and the lenders for which it serves as an agent are entitled to reimbursement for their fees and expenses. The Disclosure Statement and budget under the Final DIP Order disclose the estimated fees and expenses to be paid to these professionals by the

Debtors in connection with these engagements. *See* Disclosure Statement, Exhibit B, §B; Final DIP Order, Exhibit A. In addition, the payment of these amounts is subject to the reporting and objection procedures set forth in the Final DIP Order and RSA Assumption Order. The Confirmation Order, therefore, constitutes an order approving the reasonableness of all fees and expenses to be paid by the Debtors pursuant to section 1129(a)(4) of the Bankruptcy Code.

72. Based upon the foregoing, the Debtors submit that the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

E. The Debtors Will Have Disclosed All Necessary Information Regarding Directors, Officers, and Insiders (§ 1129(a)(5))

73. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors. The Bankruptcy Code further provides that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the identity of an "insider" (as defined by section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider.

74. At or prior to the Confirmation Hearing, the Debtors will identify the persons proposed to serve as managers and officers of the Reorganized Debtor. Thus, the Plan satisfies section 1129(a)(5)(A)(i) of the Bankruptcy Code.

75. The Debtors assert that the proposed managers and officers of the Reorganized Debtor will comply with section 1129(a)(5)(A)(ii) of the Bankruptcy Code, which requires that the court find the appointment or continuance of such officers and directors to "be consistent with the interests of creditors and equity security holders and with public policy." This section

asks the Court to ensure the propriety of the post-confirmation governance of the Reorganized Debtor, which courts have interpreted to mean that: (a) the proposed officers and directors have experience in the reorganized debtors' business and industry;[3] (b) the proposed officers and directors have experience in financial and management matters;[4] (c) the debtors and creditors believe control of the entity by the proposed individuals will be beneficial;[5] (d) the appointment of the proposed officers and directors would not "perpetuate[] incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor."[6] The proposed managers and directors of the Reorganized Debtor will have the requisite experience necessary to serve in such positions. Therefore, the requirements under section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied.

76. Finally, the Debtors will publicly disclose at or prior to the Confirmation Hearing the identity of the insiders that the Reorganized Debtor will employ or retain and the nature of any compensation for such insiders in compliance with section 1129(a)(5)(B) of the Bankruptcy Code. Based upon the foregoing, the Debtors satisfy the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. Sections 1129(a)(6) and (14)-(16) Do Not Apply

77. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has

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[3] *See In re Rusty Jones, Inc.,* 110 B.R. 362, 372, 375 (Bankr. N.D. Ill. 1990) (stating that 1129(a)(5) not satisfied where management had no experience in the debtor's line of business); *In re Toy & Sports Warehouse, Inc.,* 37 B.R. 141, 149–50 (Bankr. S.D.N.Y. 1984) (continuation of debtors' president and founder, who had many years of experience in the debtors' businesses, satisfied section 1129(a)(5)); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992).

[4] *In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); *see In re Sherwood Square Assocs.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989) (citing positive financial changes induced by new management).

[5] *In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990).

[6] *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).

approved any rate change provided for in the plan. The Plan does not provide for rate changes by the Debtors subject to the jurisdiction of any governmental regulatory commission and will not require governmental regulatory approval. Section 1129(a)(14) and (15) of the Bankruptcy Code apply only to individual debtors. 11 U.S.C. § 1129(a)(15); *see* 11 U.S.C. § 1129(a)(14) (relating to payment of domestic support obligations). Finally, each of the Debtors 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 debtors).

G. The Plan Satisfies the Best Interests Test With Respect to Impaired Claims and Equity Interests (§ 1129(a)(7))

78. Section 1129(a)(7) of the Bankruptcy Code, requires that

> [w]ith respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .

11 U.S.C. § 1129(a)(7)(A).

79. There are three impaired classes of Claims and Equity Interests under the Plan—Classes 4, 5 and 6. With respect to Class 4 (Notes Claims), the majority of Holders of Notes Claims have voted to accept the Plan. However, with respect to those Holders of Notes Claims that have not accepted the Plan, the "best interests of creditors" test under section 1129(a)(7)(A)(ii) is satisfied because, in a chapter 7 liquidation of the Debtors, such Holders would receive less than they would receive under the Plan. Similarly, the "best interest of creditors" test is met with respect to Holders of Claims and Equity Interests in Classes 5 (General

Unsecured Claims) and 6 (Equity Interests), which are deemed to reject the Plan, because such Holders will not receive any distribution on account of their Claims or Equity Interests under either the Plan or a chapter 7 liquidation. As set forth in the liquidation analysis included as Exhibit D to the Disclosure Statement, a hypothetical chapter 7 liquidation would result in an approximately 8.4% recovery for Notes Claims and 0.0% recovery for General Unsecured Claims and Equity Interests, while the Plan provides for an approximately 26.9% recovery for Notes Claims and 0.0% recovery for General Unsecured Claims and Equity Interests. *See* Disclosure Statement, Exhibit D. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

80. The Debtors note, however, that while the Plan provides no recovery from the Debtors' on account of General Unsecured Claims, it does facilitate a mechanism that will afford the Holders of General Unsecured Claims that are Eligible Plan Release Consideration Recipients an avenue for recovery if they elect to make the GUC Third Party Consent and grant the Third Party Release.

H. Section 1129(a)(8) Is Not an Impediment to Confirmation

81. Section 1129(a)(8) requires acceptance by each class of claim or interests that is impaired by the Plan. This requirement is not satisfied because Classes 5 and 6 are deemed to reject the Plan. However, as discussed below, these classes may be crammed down under section 1129(b), so the Debtors' inability to satisfy section 1129(a)(8) is not an impediment to confirmation.

I. The Plan Provides for Payment in Full of All Allowed Priority Claims and Statutory Fees (§ 1129(a)(9) and (12))

82. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims

receive deferred cash payments. In particular, section 1129(a)(9)(A) requires holders of claims of a kind specified in section 507(a)(2) (i.e., administrative claims allowed under section 503(b)) to receive on the effective date cash equal to the allowed amount of such claims. Section 1129(a)(9)(B) requires that each holder of a claim of a kind specified in sections 507(a)(1), or (4) through (7) (generally wage, employee benefit, and consumer deposit claims entitled to priority) receive (i) deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or (ii) cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) (i.e., priority tax claims) must receive deferred cash payments over a period not to exceed five years, the present value of which equals the allowed amount of the claim.

83. Section 1129(a)(12) of the Bankruptcy Code requires a chapter 11 plan to provide for the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan."

84. The Plan satisfies all of these requirements. Article II.A of the Plan provides that holders of Allowed Administrative Claims will receive Cash equal to the amount of their Claims: (i) if such Administrative Claim is Allowed on or prior to the Effective Date, on the Effective Date or as soon as reasonably practicable thereafter (or, if not then due and payable, when such Allowed Administrative Claim is due and payable or as soon as reasonably practicable thereafter); (ii) if such Administrative Claim is not Allowed as of the Effective Date, no later than thirty (30) days after the date on which an order Allowing such Administrative Claim becomes a Final Order, or as soon as reasonably practicable thereafter (or, if not then due and

payable, when such Allowed Administrative Claim is due and payable or as soon as reasonably practicable thereafter); (iii) at such time and upon such terms as may be agreed upon by such Holder and the Debtors or the Reorganized Debtor, as applicable; or (iv) at such time and upon such terms as set forth in an order of the Bankruptcy Court.

85. Articles II.C and III.B.2 of the Plan provides that Holders of Allowed Priority Tax Claims and Allowed Other Priority Claims shall receive Cash equal to the amount of their Claims either on, or as soon as practicable after, the latest of (i) the Effective Date, (ii) the date on which such Claim becomes Allowed, (iii) the date on which such Claim becomes due and payable, and (iv) such other date as mutually may be agreed to by and among such Holder and the Debtors or the Reorganized Debtor, as applicable.

86. Article II.E of the Plan provides that all statutory fees under 28 U.S.C. § 1930, to the extent not previously paid, will be paid for each quarter (including any fraction thereof) until the Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first.

87. For the above reasons, sections 1129(a)(9) and (12) of the Bankruptcy Code are satisfied.

J. The Plan Was Accepted by an Impaired Class of Claims, Not Counting Votes of Insiders (§ 1129(a)(10))

88. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims under a plan, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider." The Plan was accepted by Class 4 (Notes Claims), which is impaired under the Plan, even after excluding potential insiders that hold Claims in Class 4. The Plan meets the requirements of section 1129(a)(10) of the Bankruptcy Code.

K. The Plan is Feasible (§ 1129(a)(11))

89. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find 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). This finding, regarding the "feasibility" of the chapter 11 plan, does not require a guarantee of success by the debtor. *See United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990); *IRS v. Kaplan (In re Kaplan)*, 104 F.3d 589, 597 (3d Cir. 1997); *see also In re U.S. Truck Co., Inc.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986). Rather, a debtor must demonstrate only a reasonable assurance of success. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988); *see Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation" (internal citations omitted)); *In re Capmark Fin. Grp. Inc.*, No. 09-13684 (CSS), 2011 WL 6013718, at *101 (Bankr. D. Del. Oct. 5, 2011) (same).

90. Courts have identified the following factors as probative of a chapter 11 plan's feasibility: (i) the adequacy of the capital structure; (ii) the earning power of the business; (iii) economic conditions; (iv) the ability of management; (v) the probability of the continuation of the same management; and (vi) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. *E.g., In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, *28 (Bankr. D. Del. May 13, 2010);

In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 226-27 (Bankr. D.N.J. 2000); *In re Leslie Fay Cos.*, 207 B.R. 764, 789 (Bankr. S.D.N.Y. 1997).

91. For purposes of determining whether the Plan satisfies the feasibility requirement, and as set forth in section 11.4 of the Disclosure Statement and in the Winn Declaration, the Debtors thoroughly analyzed the Reorganized Debtor's ability post-confirmation to meet its obligations under the Plan and to continue as a going concern without the need for further financial restructuring. As a result of this analysis, and in light of the scope of the Reorganized Debtor's post-Effective Date operations, the Debtors concluded that they would be able to make all payments required by the Plan and that confirmation of the Plan—which eliminates all of the Debtors' prepetition secured debt—would not likely be followed by liquidation or further financial restructuring.

92. With regard to payments required under the Plan and future operations of the Reorganized Debtor, as set forth in Exhibit B to the Disclosure Statement, the Debtors in consultation with their advisors have prepared projections of the Reorganized Debtor's performance through fiscal year 2018. These financial projections further demonstrate the Debtors' ability to meet their obligations under the Plan. And upon the Effective Date, the Debtors expect to have sufficient funds to make all payments contemplated by the Plan.

93. The only assertion that the Plan does not meet the requirements of section 1129(a)(11) is set forth in the Mischer Objection, which is discussed in detail below.

94. Accordingly, for the reasons set forth herein, the Debtors respectfully submit that the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

L. The Debtors Are Not Obligated to Pay Retiree Benefits (§ 1129(a)(13))

95. Section 1129(a)(13) requires that all retiree benefits, as defined in section 1114(a) of the Bankruptcy Code, be continued after the effective date of a plan "for the duration of the period the debtor has obligated itself to provide such benefits." This section does not apply. The Debtors are not obligated to provide retiree benefits within the meaning of section 1114(a). *See* Winn Dec., ¶ 42

M. The Plan Satisfies the Cram-down Requirements of Section 1129(b)

96. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) (requiring acceptance by all impaired classes of claims and interests), a plan shall be confirmed on request of a plan proponent so long as "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

97. As noted above, of the three impaired Classes of Claims and Equity Interests under the Plan, one has voted to accept the Plan (Class 4), and the others are deemed to reject it (Classes 5 and 6). For the following reasons, the Debtors meet the requirements of section 1129(b) of the Bankruptcy Code to "cram down" the rejecting classes.

1. *The Plan is Fair and Equitable (§ 1129(b)(2)(B)(ii))*

98. A plan is "fair and equitable" with respect to an impaired class of unsecured claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule.*See* 11 U.S.C. § 1129(b)(2)(B)(ii) & (C)(ii); *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999). With respect to a class of unsecured claims that is not being paid in full under a chapter 11 plan, the absolute priority rule is satisfied

so long as "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). With respect to Classes 5 and 6, there is no junior class of Claims or Equity Interests that will receive any distribution under the Plan. Furthermore, as evidence by the Debtors' liquidation analysis attached as Exhibit D to the Disclosure Statement, no Holders of Claims in a class senior to Class 5 will receive more than full value on account of such Claim. Thus, the absolute priority rule is satisfied with respect to Class 5 (General Unsecured Claims) and Class 6 (Equity Interests). Because the Plan satisfies the absolute priority rule with respect to both impaired, non-accepting classes of claims or interests, the Plan is "fair and equitable" under section 1129(b)(1).

2. *The Plan Does Not Unfairly Discriminate with Respect to the Impaired, Non-Accepting Classes (§ 1129(b)(1))*

99. In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination). A threshold inquiry to assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment. *See In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y.

1986) (finding no unfair discrimination where interests of objecting class were not similar or comparable to those of any other class).

100. In this case, the General Unsecured Claims in Class 5 and the Equity Interests in Class 6 are not legally similar or similarly situated to claims or interests in any other class under the Plan. As such, treatment off these classes is proper because no similarly situated class will receive more favorable treatment. Thus, the Plan does not discriminate, unfairly or otherwise, in contravention of section 1129(b)(1) of the Bankruptcy Code and the Plan may be confirmed notwithstanding the deemed rejection by Classes 5 and 6.

N. Response to Plan Confirmation Objections

101. Mischer and the Texas Taxing Entities have filed the Mischer Objection and Texas Tax Objection, respectively, objecting to confirmation of the Plan. Furthermore, the Debtors have received informal comments from the EPA and the Interior, and, in the interests of negotiating a consensual resolution, the Debtors have granted these entities an extension to object to the Plan through October 7, 2015.

102. The Texas Tax Objection and the informal objection of the EPA have been resolved by the addition of language to the Proposed Confirmation Order. The Debtors currently are in the process of negotiating with Interior regarding proposed language resolving their informal objection to the Plan. In the event that Interior files an objection prior to the Confirmation Hearing, the Debtors will address such objection at the hearing.

1. *The Mischer Objection Should Be Overruled*

103. On its face, the Mischer Objection appears to be an attempt to obtain leverage regarding what would likely be—if ultimately allowed—only a general unsecured claim against the Debtors. Mischer has filed in the Chapter 11 Cases a proof of claim asserting a general unsecured claim in an amount not less than $500,000 (the "Mischer Claim"). The Mischer

Objection states that the Mischer Claim is "arising from the Debtors' *pre-petition* environmental contamination and pollution" from the Debtors' dehydration facility (the "Facility") formerly located on Mischer's property. Mischer Objection, ¶ 2 (emphasis added). While the Mischer Objection appears to assert that the Debtors are continuing to operate the Facility, the Facility ceased production and related activity in February of 2015, and the majority of the Facility's operating components were removed from the premises by early May of 2015. The Debtors are continuing to research the assertions set forth in the Mischer Objection and Claim and reserve all rights to supplement this response at or prior to the Confirmation Hearing.

104. As discussed above in greater detail, the Plan was proposed in good faith. Similarly, the Plan satisfies the section 1129(a)(3) requirement that it not be proposed "by any means forbidden by law." This provision of section 1129(a)(3) of the Bankruptcy Code focuses on the manner in which the Plan is "proposed" and not whether or not a plan complies with all aspects of nonbankruptcy law. *See, e.g.*, *In re Charter Commc'ns. Inc.,* 419 B.R. 221, 261 (Bankr. S.D.N.Y. 2009) ("[T]he plain language of section 1129(a)(3) does not require that the Plan's contents comply in all respects with the provisions of all nonbankruptcy laws and regulations because it speaks only to the proposal of a plan.") (internal quotations and citations omitted); *aff'd* 691 F.3d 476 (2d. Cir. 2012); *see also Irving Tanning Co. v. Maine Superintendent of Ins.*, 496 BR. 644, 660 (B.A.P. 1st Cir. 2013) ("Section 1129(a)(3) focuses not on the terms of the plan and its means of implementation but on the manner in which the plan has been proposed") (internal quotation and citation omitted); *In re 431 Ponce De Leon LLC*, 515 B.R. 660, 673 (Bankr. N.D. Ga. 2014) ("[Section] 1129(a)(3) requires only the *plan's proposal*, as opposed to the contents of the plan, be in good faith and in compliance with all nonbankruptcy laws.") (emphasis in original) (internal quotations and citations omitted); *In re*

Buttonwood Partners, Ltd., 111 B.R. 57, 59-60 (Bankr. S.D.N.Y. 1990) (holding that "means forbidden by law" should not be construed to require compliance with all nonbankruptcy laws or regulations, but rather involves conduct involved with obtaining confirmation of a plan). As evidenced by the Winn Declaration and the Voting Declaration, the Debtors have not violated the Bankruptcy Code or any other law or regulation in the solicitation or confirmation of the Plan. Mischer does not and cannot claim otherwise. Rather, Mischer incorrectly asserts that section 1129(a)(3) requires the Plan to comply with all nonbankruptcy law and baldly asserts that the Debtors' Plan violates unidentified provisions of unnamed federal and state environmental laws. The Debtors have satisfied the requirements of section 1129(a)(3).

105. The Plan also meets the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. Mischer asserts that the Plan is not feasible because it "does not address the pollution and clean-up liabilities, nor does it explain how the Facility will be remediated to prevent further contamination." Mischer Objection, ¶ 14. The Plan, however, clearly addresses how Mischer's claim for Milagro's alleged prepetition pollution from the Facility will be addressed. In the event that Mischer holds an Allowed General Unsecured Claim and qualifies as a Plan Release Consideration Recipient, it will be entitled to its pro rata share of the Plan Release Consideration Assets. In the unlikely event that any portion of the Mischer Claim is entitled to administrative expense or other priority, the Plan provides for Holders of Allowed Administrative Claims or Allowed Other Priority Claims to be paid in full. The Debtors' financial projections set forth as Exhibit B to the Disclosure Statement and additional availability under the Rights Offering indicate that the Debtors will have sufficient liquidity to pay any affirmative post-petition obligations of the Debtors to engage in remediation activities.

Therefore, the Debtors' Plan is feasible in accordance with section 1129(a)(11) of the Bankruptcy Code.

106. For the above reasons, the Mischer Objection should be overruled.

THE CONFIRMATION ORDER
SHOULD BE EFFECTIVE IMMEDIATELY

107. Bankruptcy Rule 3020(e) states that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon the Court's order.

108. The Debtors submit that ample cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004 and 6006 such that the Confirmation Order will be effective immediately upon its entry. As noted above, the Chapter 11 Cases and the related transactions have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information. And the holders of Claims entitled to vote on the Plan who voted have unanimously accepted it. The longer the Debtors remain in bankruptcy, the greater the administrative and professional costs to the Debtors. Additionally, the terms of the Restructuring Support Agreement require the Effective Date of the Plan to occur on or before the later of (i) 18 days of the entry of the Confirmation Order and (ii) October 31, 2015. For these reasons, the Debtors and their agents and advisors are working to expedite the closing of the transactions contemplated by the Plan so that the Effective Date may occur as soon as practicable.

109. Based on the foregoing, the Debtors submit that good cause exists for, and therefore request that the Court authorize, a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

CONCLUSION

110. For the reasons set forth above, and to be shown at the Confirmation Hearing, the Debtors respectfully request that the Court enter an order, substantially in the form of the Proposed Confirmation Order, (i) confirming the Plan, and (ii) granting the Debtors such other and further relief as is just and proper.

Dated: October 6, 2015
Wilmington, Delaware

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