IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SW LIQUIDATION, LLC,[1]	Case No. 15-10327 (LSS)
Debtor.	**Ref. No. 417**

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF AMENDED PLAN OF LIQUIDATION OF SW LIQUIDATION, LLC PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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[1] The last four digits of the Debtor's tax identification number are (7282). The Debtor's mailing address is P.O. Box 440, Gladwyne, PA 19035.

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INTRODUCTION

The above-captioned debtor and debtor-in-possession (the "Debtor") submits this memorandum of law (this "Memorandum of Law") in support of the *Amended Plan of Liquidation of SW Liquidation, LLC Pursuant to Chapter 11 of the Bankruptcy Code* (as it may be modified or amended, the "Plan") pursuant to Section 1129 of title 11 of the United States Code (collectively, the "Bankruptcy Code"). In addition, as set forth herein, the Debtor requests a waiver of the 14-day stay of the confirmation order imposed by Rule 3020(e) of the Federal Rules of Bankruptcy Procedure. This Memorandum of Law is supported by the *Declaration of John M. Scardapane in Support of the Debtor's Memorandum of Law* (the "Scardapane Declaration"), and the *Declaration of Wayne Weitz in Support of the Debtor's Memorandum of Law* (the "Weitz Declaration").

PRELIMINARY STATEMENT[1]

1. On February 17, 2015, facing imminent catastrophic damage to the enterprise as a result of Prepetition Litigation orchestrated by Vernon W. Hill, II ("Hill") and entities under his control (collectively, the "Hill Entities"), the Debtor commenced its bankruptcy case in order to recapitalize itself or sell substantially all of its assets and distribute proceeds to its creditors and stakeholders. If confirmed, the Plan will fairly and appropriately distribute net sale proceeds to creditors, settle bitter, expensive litigation that chased the Debtor into bankruptcy, and create a Liquidating Trust to wind down the estate.

2. To that end, the Debtor ran a wide-open and extensive marketing process, ultimately consummating in the Court-approved sale (the "Sale") of substantially all of its assets to SW Acquisition Company (the "Buyer") on June 12, 2015. Prior to the consummation of the

[1] All capitalized terms not defined in this Preliminary Statement shall have the meaning ascribed to them in the Memorandum of Law.

Sale, the Debtor, in consultation with the Committee, laid the groundwork for proposing a plan of liquidation: it set a claims bar date, identified two independent directors to serve on its board following the resignations of Paul Steck and Anthony Scardapane, and commenced a detailed review and analysis of the claims asserted against the Debtor and the Derivative Claims filed by Hill against J Scar and Scardapane. The Debtor's professionals also created various waterfall and liquidation scenarios in an attempt to ensure that general unsecured creditors would be able to exit the case regardless of what happened between the feuding equity holders. Indeed, the Debtor was able to reach a settlement with the Creditors' Committee that would ensure this important result would be achieved.

3. Despite the efforts of the Debtor, the Committee and the Scardapane Entities to achieve a global settlement, the Hill Entities continue to seek the Debtor's ruin, without regard to (or in total disregard of) their rational economic interests. Given the option to have their claims paid in full (if and to the extent ultimately allowed), the Hill Entities nonetheless seek to vote against the Plan, void the Scardapane Settlement (which does not affect the Hill Entities' direct claims against the Scardapane Entities) and burden the estate with continued, costly and wasteful litigation.

4. For the reasons set forth herein and to be adduced at the Confirmation Hearing, the Debtor submits that the Plan meets all of the requirements under the Bankruptcy Code to be confirmed. Accordingly, the Debtor requests any objections of the Hill Entities or other parties be overruled and the Plan be confirmed.

STATEMENT OF FACTS

I. History of the Debtor

5. Saladworks, LLC ("Saladworks") was the nation's first and largest fresh-salad franchise concept. *Scardapane Declaration*, ¶2. It was conceived in 1986, by John M.

Scardapane ("Scardapane"), whose idea was to provide customers with fresh, healthy, made to order entrée-sized salads as an alternative food on the go option. *Id.* From its beginnings in the Cherry Hill Mall, Saladworks quickly expanded to twelve (12) additional locations in area malls and soon thereafter began franchising. *Id.*

6. On the Petition Date, Saladworks was a party to one hundred and forty-nine (149) franchise agreements with one hundred and sixty-two (162) different franchisees, along with an additional one hundred and forty-one (141) franchise agreements where the franchisee had not yet opened a franchise. *Id.* at ¶3. Pursuant to the applicable franchise agreements, Saladworks would provide franchisees with the use of its intellectual property, trademarks and proprietary recipes, operational support and coaching, training and centralization of purchasing. *Id.* In return, franchisees would pay certain fees, including initial fees and related start-up fees, a royalty fee equal to five percent (5%) of the franchisee's net sales and either one and one-half percent (1.5%) or three percent (3%) of net sales for marketing and other brand development costs. *Id.* Saladworks also generated revenue from the franchisees' purchase of foodstuffs and required products, such as private label products, including purchases from designated purchasers and suppliers. *Scardapane Declaration*, ¶3.

II. The LLC Agreement, Contribution Agreement and Related Agreements

7. Hill, an individual who owns or controls a variety of entities engaged in business dealings with Saladworks, and Scardapane, Saladworks' founder and Chief Executive Officer, once enjoyed a close personal friendship and business relationship. *Id.* at ¶4. At the height of their friendship, Hill and Scardapane spent several hours a week together discussing business issues and pursuing mutual hobbies and interests; and frequently traveled both domestically and internationally together. *Id.* The souring of their personal friendship and business relationship

resulted in extensive litigation and Saladworks' filing for protection under the Bankruptcy Code. *Id.*

A. Hill, through JVSW, Makes an Equity Contribution of $7.75 Million, Requires Guaranteed Payments and the Engagement of Hill and Certain Hill Related or Controlled Entities to Provide Services to Saladworks

8. In March of 2008, JVSW, LLC ("JVSW"), an entity that is owned and controlled by Hill and certain of his related entities,[2] entered in to that certain Contribution Agreement dated March 9, 2008 with Saladworks (the "Contribution Agreement") wherein JVSW contributed $7,750,000 to Saladworks in exchange for 300 Class C membership shares and the entrance into certain consulting and related agreements with entities owned or controlled by Hill and his wife. *Id.* at ¶6. A true and correct copy of the Contribution Agreement is attached to the Scardapane Declaration as "**Exhibit 1**."

9. In connection with the Contribution Agreement, JVSW and J Scar Holdings, Inc. ("J Scar") (an entity wholly-owned by Scardapane) also entered into that certain *Amended and Restated Limited Liability Company Agreement of Saladworks, LLC* dated March 9, 2008 (the "Operating Agreement"), which set forth the parties' agreement on how Saladworks would be governed. *Id.* A true and correct copy of the Operating Agreement is attached to the Scardapane Declaration as "**Exhibit 2.**" The Operating Agreement specified that Hill would serve as the Chairman of the Executive Committee of Saladworks and preside over all meetings of the Executive Committee.[3] *Operating Agreement*, §5.1.E.ii.

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[2] Specifically, JVSW is owned: (i) fifty percent (50%) by JV Properties, an entity believed to be owned and/or controlled by Hill, (ii) twenty-five percent (25%) by the Collina Trust, an entity believed to be owned and/or controlled by Hill and (iii) twenty-five percent (25%) by Hill in his individual capacity.

[3] By letter dated June 4, 2014, Hill resigned from this position, which he stated was retroactive to July 15, 2013 (the "Retroactive Resignation Letter"). *Scardapane Declaration*, ¶6. A true and correct copy of the Retroactive Resignation Letter is attached to the Scardapane Declaration as "**Exhibit 3**." Hill has not filled his two (2) vacancies on the board of directors or participated personally or by designee in any board meetings since November 12, 2014. *Scardapane Declaration*, ¶7.

10. The Operating Agreement also entitled Hill to select two (2) members of the board of directors. *Operating Agreement*, §5.1.B.ii. Hill served as the sole Hill appointed director until his resignation on July 15, 2013, after which he appointed Damien Del Duca to serve on the board, by letter dated July 24, 2013, and Michael Kadelski, by letter dated May 29, 2014. *Scardapane Declaration*, ¶7. Messrs. Del Duca and Kadelski resigned on November 12, 2014. *Id.*

11. Pursuant to the Operating Agreement, so long as JVSW was a shareholder, Saladworks was required to pay JVSW certain "guaranteed payments" for the use of capital in the amount equal to the product of (i) 1.9625% multiplied by (ii) the Preference Amount[4] outstanding as of the first day of the applicable calendar quarter or other period on a quarterly basis. *Operating Agreement*, Schedule II, §2.4. Between April of 2008 and April of 2013, Saladworks paid JVSW $3,080,211.19 in connection with these guaranteed payment obligations, which is approximately forty percent (40%) of Hill's $7,750,000 contribution (through JVSW) to Saladworks. *Scardapane Declaration*, ¶8.

12. In connection with JVSW's contribution, and as a condition to closing under the Contribution Agreement, Saladworks was required to enter into consulting agreements with Hill (the "Hill Consulting Agreement")[5] and InterArch, Inc. ("InterArch"), an entity owned by Hill's

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[4] The term "Preference Amount" is defined in the Operating Agreement as:

> $7,750,000, provided that there has been no complete conversion of all of the Class C Membership Shares to Class B Membership Shares pursuant to the terms of Section 3.1(D) hereof, and shall mean a pro-rata portion of such amount if there is a Partial Conversion of the Class C Membership Shares, and shall be subject to adjustment pursuant to the terms of Section 6. 7 of the Contribution Agreement. Thus, upon an election of [JVSW] to convert all three hundred (300) Class C Membership Shares into Class B Membership Shares, the Preference Amount shall be zero.

Operating Agreement, §2.1.

[5] Under the Hill Consulting Agreement, Saladworks was required to engage Hill to provide "independent consulting" advice to Saladworks, its directors, officers, employees, agents and other consultants (the "Consulting Services") as follows: (i) Hill was to provide at least two (2) hours of Consulting Services per week during the Debtor's weekly

wife, Shirley Hill (the "InterArch Consulting Agreement").[6] *Scardapane Declaration*, ¶9; *Contribution Agreement*, § 5.2(d) and (e). Between July of 2008 and May of 2013, Saladworks paid Hill $577,664.29 under the Hill Consulting Agreement. *Scardapane Declaration*, ¶9. Between April of 2008 and August of 2013, Saladworks paid InterArch $2,059,845 in fees and expenses under the InterArch Consulting Agreement. *Id.* This does not include fees paid separately by franchisees. *Id.*

13. Additionally, by letter agreement dated January 14, 2008, Saladworks entered into an Exclusive Area Agreement with Site Development Inc. ("SDI"), an entity upon information and belief is owned and/or controlled by Hill, whereunder Saladworks was to utilize SDI exclusively to find acceptable locations for Saladworks restaurants, negotiate mutually acceptable purchase agreements or leases, as applicable, and assist in the resolution of all zoning and permitting matters related to construction (the "SDI Agreement"). *Scardapane Declaration*, ¶12; *SDI Agreement*, p. 2. A true and correct copy of the SDI Agreement is attached to the Scardapane Declaration as "**Exhibit 6**." Under the SDI Agreement, Saladworks was required to pay SDI "a fee of $10,000 per location upon execution of the lease or other documentation to secure occupancy of the site." *Scardapane Declaration*, ¶12; *SDI Agreement*, at pp. 1-2. Between March of 2009 and March of 2013, Saladworks paid SDI $210,000 pursuant to the SDI

executive committee meetings (which he was the Chairman of until his retroactive resignation allegedly effective as of July 15, 2013) and (ii) Hill was also to consult with Saladworks regarding real estate. *Scardapane Declaration*, ¶10. Hill was to be reimbursed for reasonable business related expenses and paid an annual consulting fee equal to the greater of: (i) ten percent (10%) of the audited pre-tax net profit of Saladworks over $1 million or (ii) $120,000. *Id.* Mr. Hill terminated the Hill Consulting Agreement effective May 31, 2013. *Id.* A true and correct copy of the Hill Consulting Agreement is attached to the Scardapane Declaration as "**Exhibit 4**."

[6] Pursuant to the InterArch Consulting Agreement, Hill's wife's company served as Saladworks' exclusive design, architectural, and marketing firm. *Scardapane Declaration*, ¶11. InterArch was to provide, among other services: (i) prototype development priced at $50,000 upon acceptance of the prototype, (ii) on-going brand development billed on an hourly basis pursuant to a rate schedule that was to be provided prior to the start of any such project, (iii) store architectural services at $12,000 paid by each franchisee and (iv) optional construction, management and/or review services to and payable by the franchisee ranging between $3,000 and $20,000 depending on the services requested. *Id.* Shirley Hill terminated the InterArch Consulting Agreement effective June 30, 2013. *Id.* A true and correct copy of the InterArch Consulting Agreement is attached to the Scardapane Declaration as "**Exhibit 5**."

Agreement. *Scardapane Declaration*, ¶12. These amounts did not include the broker fees that were paid by the landlords. *Id.*

14. Thus, in the (5) years after Hill made his $7,750,000 investment in Saladworks, he and his related entities were paid $5,927,720.38 by the company; this is exclusive of additional amounts required to be paid by franchisees and landlords. *Id.* at ¶13.

B. The Priority of Payments Under the Operating Agreement

15. Schedule II of the Operating Agreement sets forth Hill and Scardapane's agreements with respect to the establishment of their capital accounts, the allocation of profits and losses and the distribution priority in the event of liquidation. Because JVSW never converted any of its Class C shares to Class B shares, all of the profits and losses were allocated to J Scar. *Operating Agreement,* Schedule II, Article 2.1. By agreement of the parties, the Operating Agreement required that Saladworks would make quarterly distributions to J Scar "in an amount reasonably estimated to enable [JScar] to satisfy [its] required federal, state and local quarterly estimated tax payments attributable to their holding of such Class A Membership Shares…(at the assumed top rate brackets to any such member…." *Id.*, Article 2.3(b).[7]

16. By further agreement of the parties, the Operating Agreement provided that in liquidation, any debts, including debts of the members of the LLC, would be paid prior to distributions to the LLC's members on account of their membership interests. Section 8.3 of the Operating Agreement provides that upon liquidation "***after satisfaction (whether by payment of by establishment of reserves therefor) of creditors, including Members who are creditors***, shall distribute the remaining of the assets to and among the Members in accordance with the

[7] While Tax Distributions are deemed in the Operating Agreement to be an advance of a Member's share of "Available Cash," such treatment does not in any way modify Saladworks' requirement to pay and/or reserve such amounts prior to the distribution of Liquidation Proceeds to members. *Id.*

provisions of Section 2.3(e) of Schedule II." *Operating Agreement*, §8.3 (emphasis added). Schedule II, Section 2.3(e) provides:

> the assets of [Saladworks] after the ***payment of all liabilities of [Saladworks]***, including, without limitation, the outstanding amount of principal and interest of any loans from ***or debts*** to the Members, ***funding of all reserves***, and any accrued but unpaid Guaranteed Payments owing to VH (the "Liquidation Proceeds"), shall be distributed to Members in accordance with the positive Capital Account balances of the Members....; provided, however, if the payment of the Liquidation Proceeds pursuant to the foregoing sentence does not have the result of fully paying the Preference Amount outstanding, if any, Liquidation Proceeds shall first be applied to the repayment of outstanding Preference Amounts....

Id., Article 2.3(e) (emphasis added).

17. Accordingly, prior to the payment of JVSW's "Preference Amounts," Saladworks is required to satisfy all outstanding liabilities (including debts or claims of the Scardapane Entities, including Mr. Scardapane as a creditor and J Scar as a Member) and to make all Tax Distributions. This is consistent with normal and customary principles governing LLC agreements and the pass-through obligations of their members: claims and tax obligations are satisfied prior to distributions on account of equity. *Weitz Declaration*, ¶25.

III. The Metro Bank Loans

18. In connection with Hill's equity contribution, Hill also required Saladworks to move its banking relationship from First Bank and Commerce Bank – Philadelphia to Commerce Bank[8] – Harrisburg. *Scardapane Declaration*, ¶14. Commerce Bank – Harrisburg is the

[8] Hill was the founder and former Chairman and CEO of Commerce Bank. Hill's tenure with Commerce Bank was terminated following investigations by the Office of the Comptroller of the Currency (the "OCC") and the Federal Reserve Bank of Philadelphia into related-party transactions and other potential banking violations of Commerce Bank. Commerce Bankcorp, Inc., Definitive Proxy Statement (Jan. 4, 2008). According to the New York Times, "the business arrangement at Commerce that [] attracted the most scrutiny [was] its relationship with InterArch, the architectural and design company owned by [Mr. Hill's wife]. Over the past decade, the bank [] paid the company about $50 million to design and furnish bank branches. Last year alone, it paid Mrs. Hill $9.2 million for her services." Jeremy W. Peters and Eric Dash, *A Banker's Last Day at the Office, in a Bank He Built Aggressively*, N.Y. Times, July 31, 2007, http://www.nytimes.com/2007/07/31/nyregion/31hill.html. Following an investigation by the

predecessor of Metro Bank and an institution in which, on information and belief, Hill had (and may to this day continue to have) substantial interests, influence and/or control. *Id.*

19. In connection therewith, Saladworks entered into: (a) that certain business loan agreement dated July 16, 2008, Loan No. 3657695, with Commerce Bank;[9] (b) that certain business loan agreement dated March 30, 2010, Loan No. 3798488, with Metro Bank; (c) that certain business loan agreement dated September 9, 2011, Loan No. 999992004, with Metro Bank; and (d) that certain business loan agreement dated March 8, 2011, Loan No. 3865788, with Metro Bank (collectively, with any and all related promissory notes, changes in terms agreement, amendments, guarantees and related agreements the "Term Loans"). Copies of the Term Loans are attached to the *Scardapane Declaration*, as "**Exhibit 8**."

20. Both Hill and Scardapane personally guaranteed the Term Loans (the "Personal Guarantees"). *Scardapane Declaration*, ¶16. In addition, Hill and Scardapane entered into an agreement pursuant to which they agreed that (a) if either of their Personal Guarantees were called, and either of them were unable to satisfy his Personal Guaranty, the other party would loan the other the amount of the required payment and (b) if a capital call were required that Saladworks maintained a net worth of $2,500,000 as required as a covenant of the Term Loans, and either party was unable to contribute its pro rata share of the capital call, the other party would loan the other the amount required to satisfy the capital call. *See Agreement*, dated July 16, 2008 (the "Hill/Scardapane Guaranty Agreement"), annexed to the Scardapane Declaration as

OCC, Hill and various Hill-related entities and individuals were, and are today, restricted in their ability to engage in any real estate related activity in connection with any insured depository institutions. See *Stipulation and Consent Order* entered with the OCC dated November 2008 (the "OCC Consent Order"). *Stipulation and Consent Order*, pp. 2-5. A true and correct copy of the OCC Consent Order is attached to the Scardapane Declaration as "**Exhibit 7**."

[9] Saladworks and Commerce Bank, or its successor in interest Metro Bank, entered into several *Change In term Agreements* dated March 30, 2010, September 28, 2010, February 22, 2011, May 10, 2012 and June 26, 2012 to modify, among other things, the principal amount of Term Loan 1.

"**Exhibit 9**." The Hill/Scardapane Guaranty Agreement was to continue until Loan No. 3657695 with Commerce Bank and the guarantees thereunder remained in effect. *Scardapane Declaration*, ¶16.

IV. Prepetition Litigation

21. Beginning in late 2012, Messrs. Hill and Scardapane had various personal differences and both their personal and business relationships soured. *Scardapane Declaration*, ¶17. Thereafter, Scardapane had a number of meetings with Hill to attempt to fix their business relationship. *Id.* During those meetings, Scardapane advised that Saladworks could not continue the InterArch Consulting Agreement and the SDI Consulting Agreement because the amounts required to be paid thereunder by both Saladworks and the franchisees were having a negative effect on Saladworks' and the franchisee's profitability. *Id.* In response, Hill insisted that Saladworks continue to use InterArch and SDI and that Scardapane, through JScar, provide Hill, through JVSW, an additional twenty percent (20%) interest in Saladworks. *Id.*

22. In early and mid-March 2013, Scardapane continued to try to resolve disputes with Hill, or at least obtain a breathing spell, so that Hill would not "put" his interests to Saladworks and thus trigger obligations that Hill knew Saladworks could not satisfy, negatively affecting the company, its relationship with existing franchisees, and its ability to attract new franchisees.[10] *Id.* at ¶18. After several attempts to reach agreement failed, Hill embarked on a mission to destroy Saladworks. *Id.*

23. On March 25, 2013, JVSW elected to send a written notice to Saladworks pursuant to section 6.3 of the Operating Agreement demanding that Saladworks repurchase all of JVSW's Class C Membership Shares (the "Put Notice"). *Scardapane Declaration*, ¶19.

[10] Pursuant to applicable franchise law, Saladworks was required to disclose the Put Notice and its inability to satisfy such amounts in the company's franchise disclosure document. *Scardapane Declaration*, ¶18.

Pursuant to the Put Notice, JVSW demanded payment of $7.75 million, which pursuant to the Operating Agreement was payable in one-fifth (1/5) yearly installments commencing on May 25, 2013 following receipt of the Put Notice. *Id.* In addition, on or about July 26, 2013, JVSW demanded payment of a guaranteed payment equal to the product of 1.9625% and $7.75 million (the "Guaranteed Payments"), which were due on a quarterly basis. *Id.* These demands were made at a time when Hill knew Saladworks did not have sufficient funds to make the payments. *Id.* These demands also were made prior to Hill resigning as a member of Saladworks' board of directors.[11] *Id.*

24. On October 20, 2014, JVSW commenced litigation in the Court of Chancery (the "Chancery Litigation") against Saladworks, J Scar and Scardapane. *Id.* at ¶20. In the Chancery Litigation, JVSW asserted six (6) different counts: two (2) direct claims: (a) failure to satisfy the Put Notice and (b) failure to make the Guaranteed Payments; and four derivative claims (the "Derivative Claims"): (c) fraud against Scardapane, (d) waste of company assets against Scardapane, (e) breach of fiduciary duty against Scardapane and (f) unjust enrichment against Scardapane. *Scardapane Declaration,* ¶20.

25. On November 14, 2014, Metro Bank called a default on one or more of the Term Loans. *Id.* at ¶21. Without providing Saladworks an opportunity to cure said default(s) or even engaging Saladworks regarding the defaults, on or about December 3, 2014, Metro Bank commenced three separate lawsuits in Pennsylvania, one (1) civil action and two (2) confession of judgments (the "Pennsylvania Litigation" and together with the Term Loans as the "Metro Bank Claims") against Saladworks seeking amounts allegedly due and owing under the Term

[11] The Debtor believes that Hill's actions, taken while he was a member of the board of Saladworks, give rise to a multitude of claims, including claims in connection with his breach of fiduciary duties. The Debtor has reserved these and all other claims it may have against Hill in Article IV.C of the Plan.

Loans in the aggregate amount of approximately $2.5 million. *Id.* Copies of each of the complaints related to the Pennsylvania Litigation are attached to the Scardapane Declaration as "**Exhibit 10**." Metro Bank obtained two confessed judgments relating to two of the Term Loans in the amounts of $466,467.26 and $1,388,769.58. *Id.* Prior to the bankruptcy filing, Saladworks moved to overturn the confessed judgments. *Id.*

26. As set forth in detail in the *Debtor's Preliminary Objection to Proof of Claim 38 Filed by WS Finance, LLC* [D.I. 496] (the "WS Claim Objection"), attached to the Scardapane Declaration as "**Exhibit 11**," it appears that Metro Bank intended to call a default as soon as possible, and in any pretext, be it covenant defaults or a missed payment, so that it could immediately obtain confessed judgments for the two (2) loans with such provisions – without providing Saladworks an opportunity to cure or engaging in any communications with Saladworks with respect to payment. *WS Claim Objection*, ¶¶ 23-25, *Scardapane Declaration*, ¶22. This is likely due to Hill's influence and control over Metro Bank. *Scardapane Declaration*, ¶22.

27. Metro Bank did not call the Personal Guaranty of Scardapane which, pursuant to the Hill/Scardapane Guaranty Agreement, would have triggered Hill's obligation to loan Scardapane amounts required to satisfy the Metro Bank debt under the Hill/Scardapane Guaranty Agreement. *Id.* at ¶23.[12] Upon information and belief, Metro Bank also did not call Hill's guaranty. *Id.* Rather, Hill and Metro Bank entered into that certain Assignment of Loans agreement dated December 19, 2014 (the "Assignment Agreement") between Metro Bank and WS Finance, LLC, a thinly-capitalized entity created by Hill for the sole and express purpose of

[12] Similarly, Metro Bank noticed a default on the Term Loans for Saladworks' alleged failure to maintain a net worth of at least $2,500,000. *Id.* To the extent such default could have been cured through a capital call, Hill would have been required under the Hill/Scardapane Guaranty Agreement to loan Scardapane amounts required to satisfy his pro rata share of such capital call. *Id.*

acquiring the Metro Bank Claims ("WS Finance").[13] A true and correct copy of the Assignment Agreement is attached to the Scardapane Declaration as "**Exhibit 12**."

28. In the Assignment Agreement, the purchase price is listed as $2,512,477.74 (the "Purchase Price"), payable in twenty-three (23) monthly installment payments of $100,000 and a twenty-fourth (24th) payment of all remaining unpaid Purchase Price and accrued but unpaid interest (at a rate of three and a half percent (3.5%) per year). *Assignment Agreement*, ¶5. However, the Assignment Agreement contains no default provisions or any remedies of any kind in the event of an assignee default. In short, the Assignment Agreement provides Metro Bank with not a single customary remedy typically found in commercial, arm's length transactions: if WS Finance were to default on any of its twenty-four (24) payments, Metro Bank has no ability to accelerate the debt or otherwise seek payment from WS Finance. Likewise, Metro Bank has no ability to seek payment on the Metro Bank Claims from the Debtor because, pursuant to the Assignment Agreement, it "irrevocably and absolutely assign[ed], [sold] and transfer[red]" the Metro Bank Claims "without recourse." *Assignment Agreement.* ¶1.[14]

V. Events Leading Up to and During the Bankruptcy Case

29. The Chancery Litigation and the Pennsylvania Litigation had a negative impact on the Debtor's operations by impairing its ability to sell additional franchise and increase its footprint in the marketplace. *Scardapane Declaration*, ¶24. While Saladworks had executed a number of franchise agreements, uncertainty surrounding the litigation prevented the franchisees

[13] Upon information and belief, WS Finance is owned or controlled by JVSW and/or Hill. WS Finance had, and has, no operations, generated and generates no revenue, and was capitalized by the contribution of $1,000 by Mr. Hill and his business partner, John Silvestri. *See* Operating Agreement of WS Finance, LLC dated December 2, 2014 entered into between by Vernon W. Hill, II and John P. Silvestri (the "WS Finance Operating Agreement"). A true and correct copy of the WS Finance Operating Agreement is attached to the Scardapane Declaration as "**Exhibit 13**."

[14] Regardless of the irrevocable nature of the assignment, Metro Bank elected not to file a proof of claim against the Debtor, forgoing its ability to seek payment of the Metro Bank Claims from the Debtor.

from moving forward with the opening of Saladworks stores, depriving Saladworks of additional sources of revenue. *Id.*

30. In addition, by obtaining the Metro Bank Claims and control of the Pennsylvania Litigation, Hill (through WS Finance) was able to aggressively pursue collection against Saladworks, repeatedly attempting to freeze Saladworks' bank accounts through the issuance of multiple writs of execution. *Id.* at ¶25. As Hill was aware, Saladworks' cash flow depended on using specific bank accounts to collect franchisee fees through electronic transfers; as a banker, Hill certainly knew that alternative methods were impractical, time-consuming, costly and, ultimately, would severely have impacted Saladworks' cash flow and operations. *Id.*

A. The Sale of Assets, Resignation and Appointment of Independent Directors

31. Faced with no other options to preserve its assets and operations, the Debtor commenced its bankruptcy case in order to stay the Chancery Litigation and Pennsylvania Litigation, protect its cash flow and ultimately to engage in a sale or recapitalization process free from Hill's litigation. *Scardapane Declaration*, ¶27. In connection therewith, over the objection of the Hill Entities, the Debtor engaged SSG Advisors LLC ("SSG") to run an open, extensive and thorough process. *Id.* Ultimately, the stalking horse bid was the only qualified bid and the Court approved the sale to SW Acquisition Company, LLC on May 28, 2015. The Sale closed on June 12, 2015.

32. Effective on June 11, 2015, Paul Steck and Anthony Scardapane resigned as members of Saladworks' board of directors, leaving only Scardapane as a director. *Id.* at ¶28. On June 12, 2015, Scardapane appointed Wayne Weitz and Edward Chambers (together, the "Independent Directors") so the Debtor would have independent directors to consider any transactions that might include the settlement of the Scardapane Entities' claims and a plan of liquidation. *Id.*, *Weitz Declaration*, ¶4. Wayne Weitz is a managing director at

Gavin/Solmonese, LLC. *Weitz Declaration*, ¶1. Mr. Weitz has more than twenty-five years of restructuring experience, including serving as advisors to debtors, creditors' committee and liquidating trustees. *Id.* Ed Chambers is the former chief financial officer of Wawa Corporation and had previously served as a board member of Saladworks. *Scardapane Declaration*, ¶29.

B. Bar Date Order/Proofs of Claim of Hill Entities and Scardapane Entities

33. On April 22, 2015, the Court entered an order establishing the bar date of May 29, 2015 (the "Bar Date") and related procedures. [D.I. 177]. To date, seventy-seven (77) claims and proofs of interest of been filed, including claims of insiders.

34. Without regard to the claim objections filed by the Debtor and the Scardapane Settlement embodied in the Plan, the total approximate of asserted, liquidated unsecured claims is in excess of $20 million. *Scardapane Declaration*, ¶30. The majority in amount of these claims are of the Hill Entities[15] and the Scardapane Entities.[16] *Id.*

35. On or about May 28, the Hill Entities filed a number of proofs of claims and a proof of interest:

(a) JVSW, LLC; Claim No. 37, Claim Amount: $9,337,174.33: JVSW filed this claim related to:

(i) *Prepetition Guaranty Payments:* $1,216,750.00;
(ii) *5.75% Interest on Guaranty Payments*: $73,458.94:
(iii) *Prepetition Put Obligations*: $3,100,000.00:

[15] The "Hill Entities" are defined in the Plan as "individually and collectively, Vernon W. Hill; JVSW, LLC, WS Finance LLC; and each such Entity's predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, former or current directors and officers, principals, shareholders, members, partners, employees, relatives, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals, each in its respective capacity as such.

[16] The "Scardapane Entities" are defined in the Plan as "individually and collectively, J. Scar Holdings, LLC, John M. Scardapane, Saladworks Development, Inc., Saladworks Holdings, NJ LLC, Eatnic, LLC, Joan Scardapane, and Gail Scardapane, and each such Entity's predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, former or current directors and officers, principals, shareholders, members, partners, employees, relatives, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals, each in its respective capacity as such; provided, however, that in no event shall any of the Scardapane Entities include the Hill Entities.

(iv) *5.75% Interest on Prepetition Obligations*: $220,492.79;
(v) *Balance of Put Obligation*: $4,650,000.00; and
(vi) *Legal Fees*: $76,472.62.

(b) JVSW, LLC, Administrative Claim No. 40, Claim Amount: $1,960,564.98: JVSW filed this administrative claim for post-petition administrative claims related to:

(i) *Post-Petition Put Claim:* $1,550,000;
(ii) *5.75% on Post-Petition Put Claim:* $732.51;
(iii) *Post-Petition Guaranty Payments:* $304,187.50;
(iv) *5.75% Interest on Post-Petition Guaranty Payments*: $1,365.15; and
(v) *Legal Fees:* $104,279.82.

(c) WS Finance, LLC; Claim No. 38, Claim Amount: $2,794,627,05: This proof of claim is for the Metro Bank Claims, plus alleged late charges and interest.

(d) JVSW, LCC: Proof of Interest; Claim No. 39, Claim Amount: Unliquidated. JVSW identifies its 300 Class C Membership Interests.

36. The Scardapane Entities also filed multiple claims and a proof interest;

(a) Joan Scardapane;[17] Claim No. 45, Claim Amount: Unliquidated: Ms. Scardapane is party to a Deferred Compensation Agreement, attached to the claim as Exhibit A, wherein she is entitled to receive $32,000 per year, plus reimbursement for the costs of premiums of medical insurance, which prepetition were $908.96 on a monthly basis. *See, Claim No. 45*, p.1.

(b) Gail Scardapane,[18] Claim No. 46, Claim Amount: $43,775.80. Ms. Scardapane is a former employee of the Debtor, who was terminated on June 12, 2015. Pursuant to the claim, Ms. Scardapane waived her right to a priority claim under Bankruptcy Code section 507(a)(4). This claim is for:

(i) Accrued Vacation, Sick and Personal Pay:[19] $8,438.80;
(ii) Salary Reduction:[20] $4,293.50; and
(iii) Severance Pay: $43,775.80.

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[17] Joan Scardapane is the mother of John Scardapane, who worked on training and design at Saladworks' inception and for several years thereafter. *Scardapane Declaration*, ¶31.

[18] Ms. Scardapane is a former employee of the Debtor. She served as the Debtor's public relations officer and was terminated on June 12, 2015. *Scardapane Declaration*, ¶32.

[19] The Debtor's Employee Manual afforded vacation, sick and personal days based on the employee's length of service. *Scardapane Declaration*, ¶33. The Debtor also had a severance policy based on the weeks served. *Scardapane Declaration*, ¶33.

[20] On or about July 1, 2014, Saladworks' board of directors implemented 5% salary reductions for all of its officers, other than Scardapane, and agreed to pay all officers above vice-president such deferred compensation upon a change in control. *Scardapane Declaration,* ¶34.

(c) John Scardapane, Claim No. 47, Claim Amount: $644,613.75. This claim is for the following:

(i) *Recipe Agreement*:[21] $0.00, but reserved the right to amend to the extent rejected;[22]
(ii) *Sale of Dressing Recipes*:[23] $83,382.16;
(iii) *Indemnification*:[24] $175,000 (estimated);
(iv) *Accrued Vacation Pay and Sick/Personal Pay*: $48,000.04;
(v) *Salary Reduction:* $80,769.15; and
(vi) *Severance:* $258,462.40.

(d) Gail Scardapane, Administrative Claim No. 58, Claim Amount: $1,717,38. This claim is for post-petition salary reduction claims.

(e) John Scardapne, Administrative Claim No. 57, Claim Amount: $207,307.66. This claim is for post-petition salary reduction claims.

(f) Eatnic, LLC, Claim No. 48, Claim Amount: $27,324.26. This claim is for pre-petition claims of Eatnic, LLC. It does not include rejection damage claims that were estimated at $20,000.

(g) J Scar Holdings, Inc., Claim No. 59, Claim Amount: Unliquidated. This claim is for the Tax Distribution for years 2013, 2014 and 2015. Pursuant to the claim, J Scar has estimated 2013 at approximately $1,277,349, 2014 as unknown and 2015 between $1,393,712 and $3,181,637.

C. Plan Negotiations and Related Settlement Agreements

37. Following the Bar Date, it became clear to the Debtor and the Official Committee of Unsecured Creditors (the "Committee") that absent the compromise and settlement of either

[21] On or about June 7, 2006, Saladworks and Scardapane entered into that certain *Proprietary Recipe Formulation Agreement* (the "Recipe Agreement"), which is attached to Claim No. 47 as Exhibit A. *Scardapane Declaration*, ¶35. Pursuant to the Recipe Agreement, Scardapane is entitled to compensation of $18,000 for each original recipe received by Saladworks and a royalty based on the wholesale gross sales, with a minimum royalty fee. *Scardapane Declaration*, ¶35.

[22] The Recipe Agreement was rejected on July 27, 2015 [D.I. 400]. The deadline to file rejection damage claims was August 26, 2015.

[23] In addition to the Recipe Agreement, or about July, 2014, Scardapane sold an additional thirty-five additional recipes to the Saladworks for $630,000. *Scardapane Declaration*, ¶35. Saladworks paid for these recipes by (a) offsetting the principal amount of $542,300.84 against a loan made to Scardapane pursuant to a note dated December 31, 2012 and (b) offsetting the remaining $5,317.00 owed by Scardapane for the purchase of two vehicles from Saladworks. *Id.* This left a balance due to Mr. Scardapane from the Debtor of $82,382.16.

[24] Pursuant to Section 11.2A of the Operating Agreement, Scardapane as an officer and director, is entitled to indemnification for any cost or expense in connection with acts performed in good faith on behalf of the Debtor.

or both of the Scardapane Entities' Claims and the Hill Entities' Claims, the Debtor and its estate would continue to be engaged in protracted and expensive litigation and distributions to all other creditors would be delayed, if not completely impossible to effectuate. In that regard, on April 9, 2015, Scardapane engaged his own counsel, who began negotiations with the Debtor regarding the Scardapane Entities' claims against the Debtors, the Derivative Claims, and other claims that could be asserted against the Scardapane Entities. *Scardapane Declaration*, ¶36.

38. Debtor's counsel also repeatedly requested, to no avail, that Hill's counsel engage in comprehensive settlement discussions. *Id.* at ¶37.

39. In an effort to resolve the case and propose a confirmable plan of liquidation, the Debtor began an extensive investigation into the claims filed by the Scardapane Entities (the "Scardapane Entities' Claims"), the Derivative Claims and any other claims the Debtor might be able to assert against the Scardapane Entities (together with the Derivative Claims, the "Affirmative Scardapane Claims"). *Weitz Declaration*, ¶7-9, 15-26. In connection therewith, Debtor's counsel interviewed management of the Debtor regarding the Scardapane Entities' Claims and the Affirmative Scardapane Claims, and conducted extensive due diligence, research and analysis.

40. After extensive arm's length negotiations, the Debtor, the Committee and the Scardapane Entities ultimately entered into a settlement agreement embodied in that certain *Plan Term Sheet*, attached to the *Scardapane Declaration* as "**Exhibit 14**" (the "Plan Term Sheet"). The Plan Term Sheet formed the basis of the Plan.

41. After the appointment of the Independent Directors, Debtor's counsel moved quickly to ensure that the Independent Directors were up to speed on the status of the case, the relevant background and issues relating to the claims against the Scardapane Entities and the

Scardapane Entities' claims against the Debtor. *Weitz Declaration*, ¶7. On the date of their appointment, Debtor's counsel sent the Independent Directors the Debtor's first day declaration, a pdf listing of all entries on the docket and a link to the Debtor's claim's agent which contain each of the entries, the Debtor's schedules and statements, the complaint in the Chancery Litigation, the Metro Bank 2004 Motion, the Operating Agreement, the asset purchase agreement for the Sale, and the Debtor's professionals current analysis of the claims and distribution of Sale proceeds. *Id.*

42. Prior to the approval of the Scardapane Settlement, Debtor's counsel also provided the Independent Directors with its detailed analysis of the claims asserted against the Debtor by the Scardapane Entities; the Debtor's defenses to the claims asserted by the Scardapane Entities; and the Affirmative Scardapane Claims and the Scardapane Entities' potential defenses thereto (collectively, the "Scardapane Claims Analysis"). *Weitz Declaration*, ¶¶15, 18, 20. The Independent Directors also reviewed the draft term sheet and related plan and disclosure statement. *Id.* In addition, Debtor's counsel circulated an analysis of all claims filed to date against the estate. *Id.*, ¶19. The Independent Directors also reviewed illustrative waterfalls regarding the distribution of proceeds under various settlement scenarios, the Plan and a potential Chapter 7 liquidation. *Id.* at ¶¶ 7, 15-17.

43. On June 29, 2015, the Debtor held a board meeting that was attended by the Independent Directors and Scardapane. *Id.*, ¶27. At the board meeting, Mr. Scardapane provided the Independent Directors with his views of: (a) his founding of Saladworks and his relationship with Hill; (b) the Debtor's operations and sale process outside of the Chapter 11 proceedings; (c) the events leading to the Chapter 11 filing; (d) the claims filed against the Debtor by the Scardapane Entities; and (e) the defenses to the Derivative Claims. *Weitz*

Declaration, ¶27. The Independent Directors and the Debtor's professionals asked Scardapane several questions regarding his statements. *Id.*

44. After the question and answer period, the board recused Scardapane from the remainder of the meeting. *Id.*, ¶28. Thereafter, the Independent Directors together with the Debtor's professionals reviewed and analyzed the Scardapane Claims Analysis, the draft Plan Term Sheet and the proposed plan and disclosure statement, including the classification and treatment of claims contemplated by the plan and the factual and legal bases therefore against the proposed terms of the Scardapane Settlement. *Id.*, ¶29.

45. At the June 29th board meeting, the Independent Directors also reviewed the General Unsecured Claim Settlement and determined that the release of certain Causes of Action and shortened deadline to object to General Unsecured Claims who did not opt-out of the General Unsecured Claim Settlement was fair and reasonable based on the agreed impairment and waiver of post-petition interest of such claims. *Id.*, ¶¶29-30.

46. Following the discussion and analysis of the proposed Scardapane Settlement and related issues, the Independent Directors moved and unanimously approved the Scardapane Settlement, the General Unsecured Claim Settlement, the filing and terms of the Plan and Disclosure Statement. *Weitz Declaration*, ¶¶29-30.

D. The Plan, Disclosure Statement and Related Documents

47. On July 1, 2015, the Debtor filed the *Plan of Liquidation of SW Liquidation, LLC Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 335] and *Disclosure Statement for the Plan of Liquidation of SW Liquidation, LLC* [D.I. 336], which incorporated the terms of the Scardapane Settlement and General Unsecured Claim Settlement. On August 3, 2015, the Debtor filed the *Amended Plan of Liquidation of SW Liquidation, LLC Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 417] (as amended, modified or supplemented, the "Plan") and

Amended Disclosure Statement for the Plan of Liquidation of SW Liquidation, LLC [D.I. 418] (as amended, modified or supplemented, the "Disclosure Statement"). On August 5, 2015, the Court entered the *Order Approving Motion of the Debtor for Entry of an Order (A) Approving the Disclosure Statement; (B) Approving Certain Dates Related to Solicitation and Confirmation of the Plan; (C) Approving Solicitation and Notice Procedures Related Thereto; (D) Approving the Forms of the Ballot and Notices in Connection Therewith; (E) Establishing Voting and General Tabulation Procedures; and (F) Granting Related Relief* [D.I. 428] (the " "Disclosure Statement Order"). In accordance with the Disclosure Statement Order, the Debtor caused copies of the Disclosure Statement to be sent to creditors, interest holders and other parties in interest in the Bankruptcy Cases.[25] The Court set a hearing to consider the Plan Confirmation for September 16, 2015 at 10:00 a.m., Eastern Daylight Time, which was subsequently continue to September 18, 2015 at 9:30 a.m.

48. The Plan divides holders of Claims against, and Interests in, the Debtor into nine separate Classes. Class 1 (Priority Non-Tax Claims), Class 2 (Secured Claims), Class 4 (WS Finance Claims), Class 5 (Guaranteed Payment Claims), and Class 6 (Tax Distribution Claims) will receive such treatment that renders the holders of Priority Non-Tax Claims unimpaired. Class 3 (General Unsecured Claims) are impaired and entitled to vote in favor or against the Plan, consistent with the General Unsecured Claim Settlement. Class 7 (Class C Claims) are objected to by the Debtor based on the treatment of Class 8 and the treatment of such claims as equity and such claims are deemed disallowed; thus, are impaired and deemed to reject. Class 8 (Class C Interests) and Class 9 (Class A Interests) are unimpaired and are deemed deemed to accept the Plan.

[25] See Affidavit of Service [D.I. 440].

49. On September 9, 2015, the Debtor filed the *Plan Supplement.* [D.I. 534].

50. On September 10, 2015, the Debtor filed the *Debtor's Motion to Designate the Votes of (i) Site Development, Inc., (ii) HSS Leasing, Inc. and (iii) WS Finance, LLC* [D.I. 544] (the "Debtor's Designation Motion").

51. On September 11, 2015, the Debtor filed *Certification of Ballots* [D.I. 557] (the "Voting Report").

E. Hill Entities Pleadings in Connection with Confirmation

52. On August 31, 2015, WS Finance and JVSW filed the *Preliminary Objection of Creditors WS Finance, LLC and JVSW, LLC to Amended Plan of Liquidation of SW Liquidation, LLC* [D.I. 493] (the "Preliminary Objection"). In the Preliminary Objection, WS Finance and JVSW object generally to: (a) the treatment of WS Finance Claims, arguing that they cannot be reinstated pursuant to Bankruptcy Code section 1124(2); (c) the treatment of Class C Claims, arguing that the Class C Claim and Guaranteed Payment Claim should treated as unsecured claims; (d) the Plan for not having been proposed in good faith; (e) the Tax Distribution Claims, arguing that such claims should be subordinated to the payment of the Guaranteed Payment Claim and Class C Interests; and (f) the Liquidating Trustee, arguing that it should not be paid.

53. On September 1, 2015, SDI filed the *Expedited Motion of Site Development, Inc. Pursuant to Fed. R. Bankr. P. 3018(A) [sic] For Allowance of Claims in the Full Amount for Voting Purposes* [D.I. 494] (the "SDI 3018 Motion"). The Debtor filed its objection to the SDI Motion on September 10, 2015. [D.I. 546]

54. On September 2, 2015, WS Finance filed the *Expedited Motion of WS Finance, LLC Pursuant to Fed. R. Bankr. P. 3013 for Classification of Claim and Fed. R. Bankr. P. 3018(a) for Allowance of Claim in the Full Amount for Voting Purposes* [D.I. 502] ("WS 3018 Motion"). In the WS 3018 Motion, WS Finance admits that two of the loans were accelerated

and no judgment has been entered. *WS 3018 Motion*, ¶15. Only two of the loans are subject to a confessed judgment, which the Debtor sought to overturn pre-petition. *Id.*, Scardapane Declaration, ¶24. On September 10, 2015, the Debtor objected to the WS 3018 Motion. [D.I. 547]

55. On September 4, 2015, HSS filed the *Motion of HSS Leasing, LLC for Permission to Vote Proof of Claim No. 76 in Class 3 of the Amended Plan.* [D.I. 515]. On September 10, 2014, the Debtor objected to the HSS Motion. [D.I. 550].

56. On September 9, 2015, WS Finance, HSS and SDI filed the *Expedited Motion of WS Finance, LLC, HSS Leasing, LLC and Site Development, Inc. Pursuant to Section 1126(e) of the Bankruptcy Code to Designate the Ballots of the Members of the Official Committee of Unsecured Creditors and of any General Unsecured Creditor that Voted in Class 3 of the Amended Plan to Accept the Amended Plan Without Opting Out of the Settlement* [D.I. 517] (the "Hill Entities' Designation Motion")

57. On September 9, 2015, WS Finance and JVSW filed their *Joint Objection of Creditors WS Finance, LLC and JVSW, LLC to Amended Plan of Liquidation of SW Liquidation* [D.I. 531] (the "Plan Objection"). The Plan Objection raises the following objections to the Plan:

a. Class 3 is Not Impaired: WS Finance and JVSW argue that Class is not impaired. They also argue that Class 3 is artificially impaired. *Plan Objection*, ¶¶17-18.

b. WS Finance Claim for Note 1 Should Be a Class 3- General Unsecured Claim. WS Finance argues that Note 1 cannot be reinstated under Bankruptcy Code section 1124(2) and thus, should be treated as a Class 3 – General Unsecured Claim. *Plan Objection*, ¶¶19-20.

c. Class 3 Treatment is Defective. WS Finance and JVSW argue that the treatment is defective because it is unclear to them how and when a General Unsecured Claim will get paid. *Plan Objection*, ¶¶21-23.

d. Class 4 Claims Cannot be Reinstated and is Proposed in Bad Faith. WS Finance and JVSW argue that the Class 4 –WS Finance Claims cannot be reinstated "in light of the fact that certain of the Loans were payable on-demand." *Plan Objection*, ¶¶24-27. They also argue that the plan does not state how the claim will be cured and alleges that the Debtor will be in immediate default because it is not operating. *Plan Objection, ¶¶28-29.*

e. JVSW Claims are Improperly Classified and Treated. JVSW argues that its Class 7- Class C Claims – should be treated as Class C – General Unsecured Claims. They also argue that the Class C Claims should not be disallowed. *Plan Objection*, ¶¶30-38.

f. Plan is Proposed in Bad Faith. WS Finance and JVSW argue that the Plan was proposed in bad faith because of the separate classification of WS Finance Claims and Class C Claims from other general unsecured creditors, without sound business justification. *Plan Objection*, ¶¶39-40. WS Finance and JVSW also argue that the Plan was proposed in bad faith because it contains the Scardapane Settlement and the Debtor has not provided enough information for creditors and has alleged that claims compromised have "been adroitly swept under the rug by the Debtor's insiders – including Scardapane, himself, as fiduciary and decision maker in connection with the crafting the Amended Plan." *Plan Objection*, ¶47.

g. Scardapane Settlement and General Unsecured Settlement are Not Permissible. Other than quoting applicable law, WS Finance and JVSW do not explain how or why the Scardapane Settlement is not permissible. *Plan Objection*, ¶¶49-56. WS Finance and JVSW argue that the Committee violated its fiduciary duties because it provides to them to receive less than they would have received without the settlement; and there is no consideration for the release of the Scardapane Entities. *Plan Objection*, ¶57.

h. Other Miscellaneous Objections. WS Finance and JVSW also object to the Plan based on the following arguments, allegations and assertions:

   i. JVSW should receive interest on its claim. *Plan Objection*, ¶59(a);
   ii. The Tax Distribution Claim should be a lower priority than the Guaranteed Payment Claim and Class C Claim pursuant to the terms of the operation, but does not cite to any provisions in support thereof. *Plan Objection,* ¶59(b), 60(c);
   iii. Article III.D of the Plan is objectionable because the Debtor does not define what, if any, rights the Debtor seeks to assert. *Plan Objection*, ¶60(a);
   iv. The Liquidating Trustee should not be compensated. *Plan Objection*, ¶60(c);

v. Article IV.C of the Plan cannot preserve claims that released pursuant to the Scardapane Settlement. *Plan Objection*, ¶60(d).
vi. JVSW and WS Finance object to the rejection of indemnification obligations separate from the Operating Agreement. *Plan Objection*, ¶60(e);
vii. The definition of Effective Date is unascertainable and no method of noticing parties when the Effective Date occurs. *Plan Objection*, ¶60(f);
viii. The definition of Exculpated Claims and Exculpated Persons should not apply to the Liquidating Trustee or future events. *Plan Objection*, ¶60(g);
ix. The inappropriate fixing of the Federal Judgment Rate as of the date of the Petition; *Plan Objection*, ¶60(f);
x. Inappropriate subordination in the definition of the Guaranteed Payment Claims. *Plan Objection*, ¶60(i);
xi. The definition of Hill Entities is inappropriate to the extent it uses the term "Affiliates" "which makes no sense in this context." *Plan Objection*, ¶60(j);
xii. The Plan does not set a date for the filing of the Plan Supplement. *Plan Objection*, ¶60(k). It also does not identify the Liquidating Trustee or include the Liquidating Trust Agreement; *Plan Objection*, ¶60(l);
xiii. The definition of "Released Parties" is in bad faith and as a means of deception; *Plan Objection*, ¶60(m);
xiv. The definition of "U.S. Trustee" is "improper and in accurate [sic]". *Plan Objection*, ¶60(n);
xv. Providing only 20 days to object to a Fee Claim is improper. *Plan Objection*, ¶60(o);
xvi. Article V.G is a violation of the United States Constitution and the Bankruptcy Code. *Plan Objection*, ¶60(p);
xvii. Objects to the use of the undefined term "Indemnification Obligations." *Plan Objection*, ¶60(q);
xviii. JVSW and WS Finance should have the right to prosecute claim objections filed by them prior to the Effective Date; *Plan Objection*, ¶60(r);
xix. Article VII.E of the Plan makes no sense to JVSW and WS Finance.
xx. Article VII.H of the Plan violates the Bankruptcy Rules. *Plan Objection*, ¶60(t);
xxi. The Plan should not release the members of the Committee or their professionals. *Plan Objection*, ¶60(u);
xxii. A final order should be required for determining that the Debtor solicited votes in good faith. *Plan Objection*, ¶60(v).

58. On September 10, 2015, the U.S. Trustee filed *United States Trustee's Objection to Confirmation of the Plan of Liquidation of SW Liquidation, LLC Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 533] ("U.S. Trustee Objection")

59. On September 11, 2015, Stradely Ronon Stevens & Young, LLP ("Stradley") filed the *Objection of Stradley Ronon Stevens & Young, LLP to the Expedited Motion of WS Finance, LLC, HSS Leasing, LLC and Site Development, Inc. Pursuant to Section 1126(e) of the Bankruptcy Code to Designate the Ballots of the Members of the Official Committee of Unsecured Creditors and of any General Unsecured Creditor that Voted in Class 3 of the Amended Plan to Accept the Amended Plan Without Opting Out of the Settlement* [D.I. 554] (the "Stradley Objection").

THE PLAN MEETS ALL APPLICABLE CONFIRMATION REQUIREMENTS

60. As set forth below, both the Plan and the Debtor meets all the requirements of Bankruptcy Code section 1129 and should be confirmed.

I. The Plan Complies With Bankruptcy Code section 1129(a)

A. Bankruptcy Code section 1129(a)(1)

61. The Plan complies with Bankruptcy Code section 1129(a)(1), which provides that a plan of reorganization may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1); *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 270-73 (S.D. Ohio 1996) (examining each requirement of chapter 11 to demonstrate that Section 1129(a)(1) was satisfied); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) ("In order for a plan of reorganization to pass muster . . . it must comply with all the requirements of Chapter 11 . . . .").

62. The legislative history of Section 1129(a)(1) indicates that the primary focus of this requirement is to ensure that a plan complies with Bankruptcy Code sections 1122 and 1123,

which govern classification of claims and interests and the contents of a plan, respectively. *See* S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977); *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 843 F.2d 636, 648-49 (2d Cir. 1988) (holding that legislative history indicates that Section 1129(a)(1) was intended to require compliance with Sections 1122 and 1123).

1. Bankruptcy Code section 1122 of the Bankruptcy Code – Classification of Claims and Interests

63. Bankruptcy Code section 1122 provides that the claims or interests within a given class must be "substantially similar" to the other claims or interests in that class:

> (a) Except as provided in subsection (b) of this Section, 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. Courts consistently have held that Bankruptcy Code section 1122(a) is satisfied so long as similar claims are classified together. *See In re Armstrong World Indus.*, 348 B.R. 136, 160 (D. Del. 2006) (holding that Bankruptcy Code section 1122(a) was satisfied where similar claims were classified together); *Eagle-Picher Indus.*, 203 B.R. at 270 (same).

64. The Plan classifies Claims in accordance with Bankruptcy Code section 1122(a) Code, as each of the Plan's Classes contains Claims that share the same priority status, contractual rights and enforcement rights against the Debtor's Estate. In particular, Article III of the Plan segregates into separate Classes: Priority Non-Tax Claims (Class 1); Secured Claims (Class 2); General Unsecured Claims (Class 3); WS Finance Claims (Class 4); Guaranteed Payment Claims (Class 5); Tax Distribution Claims (Class 6); Class C Claims (Class 7); Class C

Interests (Class 8); and Class A Interests (Class 9).[26] The number of Classes in the Plan reflects the diverse characteristics of the Claims and Interests classified in the various Classes, and the legal rights under the Bankruptcy Code of each of the holders of Claims or Interests within a particular Class are substantially similar to other holders of Claims or Interests within the same Class.

65. In addition, valid business, factual and legal reasons exist for the separate classification of Claims and Interests. At a threshold level, the Plan separates Claims from Interests; Priority Claims from both Secured Claims and General Unsecured Claims; Guaranteed Payment Claims and Tax Distribution Claims separately from General Unsecured Claims based on their subordination pursuant to Bankruptcy Code section 510(b); and Class C priority Interests separate from Class A Interests. The Debtor also separately classified the WS Finance Claims (Class 4) from the Claims held by other General Unsecured Creditors (Class 3). This separate classification reflects the unique circumstances relating to the WS Finance Claims and the terms of the General Unsecured Claim Settlement.

(a) The Separate Classification and Treatment by Reinstatement of Class 4 – WS Finance Claims is Appropriate

(i) The Separate Classification of WS Finance Claims is Appropriate

66. Bankruptcy Code section 1122(a) provides that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Accordingly, the sole mandatory obligation of section 1122(a) is that only substantially similar claims may be classified together. *In re Tribune Company, et al.*, 476 B.R. 843, 854 (Bankr. D. Del 2012). Section 1122(a) is, in

[26] In accordance with Section 1123(a)(1) of the Bankruptcy Code, Administrative Claims and Priority Tax Claims have not been classified. *Plan*, Article II.

fact, permissive inasmuch as "it does *not* provide that *all* similar claims must be placed in the same class." *Id.* at 855; *see also, John Hancock Mutual Life Insurance Company v. Route 37 Business Park Associates,* 987 F.2d 154, 158 (3d Cir. 1993) (emphasis in original); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir 1987) ("[W]e agree with the general view which permits the grouping of similar claims in different classes"); *In re Tribune Co.*, 476 B.R. 843, 854-55 (Bankr. D. Del. 2012); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del. 2004) (the Bankruptcy Code "does not expressly prohibit placing 'substantially similar' claims in separate classes.").

67. The Third Circuit has held that separate classification is appropriate if it is reasonable. *John Hancock*, 987 F.2d at 159. This means "that each class much represent a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed. Otherwise, the classification scheme would simply constitute a method for circumventing the requirements set out in 11 U.S.C. § 1129(a)(10)." *Id.; see also, Tribune*, 476 B.R. at 856-7 (The separate classification of senior noteholders from general unsecured creditors was appropriate because they merited a separate voice in the bankruptcy case); *Coram*, 315 B.R. at 350-1 (noting that the separate classification of noteholders from other general unsecured creditors was appropriate because their interest was specifically distinct to merit a separate voice).

68. A major theme in this case is the overarching dispute between the Debtor's minority and majority equity holders – the very dispute that resulted in Hill's efforts to destroy Saladworks and that drove Saladworks into chapter 11 and has caused obvious and material harm to non-insider general unsecured creditors. Without regard to economic interests or reality, WS Finance – which is owned and controlled by Hill – has objected to the Plan ***notwithstanding the***

payment in full of its claim to the extent it is ultimately allowed. Likewise, SDI and HSS – both Hill-related or controlled entities – have rejected the Plan notwithstanding the proposed payment in full, plus interest, of their allowed claims.

69. Given the amount and nature of the WS Finance Claim, the Debtor and, significantly, the Committee recognized that absent separate classification of the WS Finance Claim, all other General Unsecured Creditors would be left without a voice in this case. Without the separate classification – a classification that is intended to leave WS Finance ***unimpaired*** and ***paid in full*** to the extent the claim is allowed, a Plan could not be confirmed as WS Finance would have rejected the Plan as part of Hill's efforts to destroy Saladworks. This is evidenced further by the rejections by SDI and HSS.

70. The Debtor further submits that the traditional concerns regarding separate classification are not applicable in this case. In this regard, courts in the Third Circuit have taken a dim view of separate classification where there has been gerrymandering of classes to ensure that at least one ***impaired*** class votes in favor of the plan in order to invoke cramdown provisions against similarly-situated, separately classified ***impaired*** claims. *Jersey City Medical*, 817 F.2d at 1061. Here, by design, the WS Finance Claims are not impaired. Consequently, any concerns regarding separate classification are diminished, if not entirely inapplicable.[27]

71. Likewise, courts considering the issue of whether separate classification of similar claims is appropriate "have concluded that unfair discrimination occurs where a plan 'gives unequal treatment to creditors who are similarly situated regarding legal rights and priority." *In re FF Holdings Corp.*, 1998 U.S. Dist. LEXIS 10741, *13-14 (D. Del. 1998) (citing, *Corestates*

[27] Indeed, the Debtor urges the Court to take note of the lengths to which WS Finance has gone to object to its treatment as unimpaired so that it might vote in Class 3, depriving general unsecured creditors of their voice and crater the Plan. WS Finance's position is indefensible as a matter of simple economics; obviously, economics is not the motivating factor in WS Finance's gambit.

Bank v. United Chemical Technologies, 202 B.R. 33, 47 (E.D. Pa. 1996). Here, the WS Finance Claims are unimpaired and thus, the treatment is ***better*** than the General Unsecured Claims who do not opt-out of the General Unsecured Claim Settlement. Accordingly, there is no unequal treatment and the separate classification is appropriate.

(ii) The Reinstatement of the WS Finance Claims is Appropriate[28]

72. Despite WS Finance's continuing misrepresentations, none of the Term Loans were payable on demand; nor did they mature prior to the default and acceleration of the notes. *See, WS 3018 Motion*, ¶¶25-26, *Plan Objection*, ¶24. Rather, by their very terms, the Term Loans could not be accelerated until the Debtor defaulted. *See, e.g.*, Term Loan 1, pp.4-5. Accordingly, the Debtor can comply with Bankruptcy Code section 1124(2) and reinstatement is appropriate.

73. Bankruptcy Code section 1124(2) provides that:

> (2) Notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of an event of default –
>
> > (A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;
> >
> > (B) reinstates the maturity of such claim or interest as such maturity existed before such default;
> >
> > (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

[28] As the Debtor has noted, to the extent that the Court rules that the Debtor cannot reinstate the WS Finance Claims pursuant to Bankruptcy Code section 1124(2), the Debtor will modify the Plan to provide that the WS Finance Claims, to the extent Allowed, will be paid in full, plus interest. In all events, the Debtor will reserve in the full amount of the asserted WS Finance Claims pending resolution of the WS Claim Objection.

> (D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and
>
> (E) does not otherwise alter the legal, equitable or contractual rights to which such claims or interest entitles the holder of such claim or interest.

11 U.S.C. § 1124(2).

74. The plan meaning of section 1124(2) unimpairs claims based on debt that was accelerated upon default as long as the conditions contained therein are met. *In re Ace-Texas, Inc., et al.*, 217 B.R. 719, 726 (Bankr. D. Del. 1998).

75. In support of its objections, WS Finance conflates the concepts of "maturity" and "acceleration" to suggest that the Debtor cannot comply with section 1124(2). However, the "plain meaning of the term accelerate as used in an acceleration clause is that a lender has exercised its right under a loan agreement to call the loan entirely due and payable *before it otherwise would have been due but for the default.*" *In re Route One West Windsor Ltd. P'ship.*, 225 B.R. 76, 83 (Bankr. D.N.J. 1998) (emphasis in original). Conversely, maturity exists "where a loan has become due because the end of its term has been reached [and] there has been no acceleration." *Id.* (Internal quotations omitted).

76. As WS Finance admits, the Pennsylvania Litigation was commenced based on ***defaults*** under the Term Loans – not based on the maturity of such loans. See, "**Exhibit 10**" to Scardapane Declaration; Metro Bank v. Saladworks, LLC, Case No. 2014-32185, Complaint, ¶11 (the Debtor defaulted on Term Loan No. 3865788 and Term Loan No. 9999992004 by failing to make timely payments of principal interest and interest and due); Metro Bank v. Saladworks, LLC, Case No. 14-3300, Complaint for Confession of Judgment, ¶10 (The Debtor

defaulted on Term Loan No. 33798488 by failing to make timely payments of principal and interest and due); Metro Bank v. Saladworks, LLC, Case No. 14-32965, Complaint for Confessed Judgment, ¶14 (The Debtor defaulted on Term Loan No. 3657695 by failing to make timely payments of principal and interest and due). The Term Loans, accordingly, have not matured based on their terms. Rather, the acceleration of such loans was based on the alleged payment default. *See Ace-Texas, Inc.*, 217 B.R. at 719 ("The Senate Report states that a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was...***accelerated*** by the default.") (citing, S. Rep. No. 95-989, 95th Cong., 2d Sess. 120 (1978), U.S.C.C.A.N. 1978, pp. 5787, 5906) (emphasis added).

77. This is true even though two of the four Term Loans are subject to confessions of judgment. *See In the Matter of Madison Hotel Associates*, 749 F.2d 410,420 (7th Cir. 1984) ("The legislative history of section 1124(2) reveals that a creditor who is prevented from exercising a contractual and/or legal right of acceleration, but who receives the complete benefit of the bargain with the debtor, is "not impaired" for purposes of Chapter 11 analysis." This is true even of such creditor holds a judgment.); *Benevolent and Protective Order of Elks v. Hewitt (In re Hewitt)*, 16 B.R. 973, 980 (Bankr. D. Alaska 1982) (Taking section 101(4) and 1124(2) together, "these sections evidence a Congressional intent to apply the remedy of §1124(2) to obligations regardless of whether or not they have been reduced to judgment).

78. Thus, the Plan's reinstatement and treatment of the WS Finance Claims is expressly allowed pursuant to the express terms of section 1124(2).[29]

(b) The Subordination and Classification of Class 5 – Guaranteed Payments is Appropriate

[29] WS Finance further argues that section 1124(2) is inapplicable in liquidating cases, but provides no case law in support of this novel contention. *See WS 3018 Motion*, p.6, fn.8. The Bankruptcy Code itself does not limit 1124(2)'s application to reorganization cases.

79. The Guaranteed Payments are claims directly related to JVSW's 300 Class C Shares and are appropriately subordinated pursuant to Bankruptcy Code section 510(b). Bankruptcy Code section 510(b) provides:

> For the purpose of distribution under [the Bankruptcy Code], a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, **shall be subordinated** to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b) (emphasis added). Subordination is mandatory for the type of claims described in 510(b), *i.e.*, claims for *damages* that *arise from* the purchase or sale of a security. *Id.*; *see Vista Eyecare, Inc. v. Neumann (In re Vista Eyecare, Inc.)*, 283 B.R. 613, 620 (Bankr. N.D. Ga. 2002) (a claims for "damages arising from the purchase or sale of a security of the Debtor [is] subject to mandatory subordination").

80. The Third Circuit addressed the scope of section 510(b) in *Baroda Hill Investments, Ltd. v. Telegroup Inc (In re Telegroup, Inc.)*, 281 F.3d 133,138 (3d Cir. 2001), finding that the term "arising from" as used in the code to be ambiguous. After examining the legislative history, the Third Circuit rejected the argument that only claims alleging fraud or actionable conduct in the issuance of the equity to be too narrow, noting:

> Congress enacted §510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding. Nothing in this rationale would distinguish those shareholder claims predicated on post-issuance conduct from those shareholder claims predicated on conduct that occurred during the issuance itself.

Telegroup, 281 F.3d at 142. The court then concludes that the claims for damages for the debtor's failure to register the stock should be subordinated noting that "the claim would not exist but for the claimant's purchase of stock." *Id.* at 143.

81. As in *Telegroup*, the Guaranteed Payment Claims would not exist "but for" JVSW's purchase of 300 Class C Shares. Pursuant to the Operating Agreement, the Debtor was required to pay quarterly interest on the Preference Amount – the amount JVSW contributed to purchase the 300 Class C Shares. These claims expressly and specifically relate to JVSW's equity interest in the Debtor. The Plan appropriately subordinates them pursuant to section 510(b).

(c) The Subordination and Classification of Class 6 – Tax Distribution Claims is Appropriate

82. Pursuant to the Scardapane Settlement, J Scar voluntarily subordinated its Tax Distribution Claims to the claims of general unsecured creditors in Class 3. As set forth above, the Operating Agreement requires that such claims be paid out of Available Cash prior to the use of Liquidation Proceeds to satisfy Members' interests. Schedule II of the Operating Agreement sets forth the provisions applicable to the establishment of the relative capital accounts, the allocation of profits and losses and the distribution priority in the event of liquidation. Because JVSW never converted any of its Class C shares to Class B shares, all of the profits and losses were allocated to J Scar. *Operating Agreement,* Schedule II, Article 2.1. Distributions were required to be made quarterly by Saladworks to J Scar "in an amount reasonably estimated to enable such Members to satisfy their required federal, state and local quarterly estimated tax payments attributable to their holding of such Class A Membership Shares…(at the assumed top

rate brackets to any such member...." *Id.*, Schedule II, Article 2.3(b).[30] Upon the liquidation of the Saladworks, "***after satisfaction (whether by payment or by establishment of reserves therefor) of creditors, including Members who are creditors***, shall distribute the remaining assets to and among the Members in accordance with the provisions of Section 2.3(e) of Schedule II." *Operating Agreement*, Schedule 8.3. Schedule II, Section 2.3(e) of the Operating Agreement provides:

> the assets of [Saladworks] after the ***payment of all liabilities of [Saladworks]***, including, without limitation, the outstanding amount of principal and interest of any loans from or debts to the Members, ***funding of all reserves***, and any accrued but unpaid Guaranteed Payments owing to VH (the "Liquidation Proceeds"), shall be distributed to Members in accordance with the positive Capital Account balances of the Members...; provided, however, if the payment of the Liquidation Proceeds pursuant ot the foregoing sentence does not have the result of fully paying the Preference Amount outstanding, if any, Liquidating Proceeds shall first be applied to the repayment of outstanding Preference Amounts....

Id., Schedule II, Article 2.3(e) (emphasis added).

83. Thus, prior to the payment of the Preference Amounts, Saladworks is required to satisfy all outstanding liabilities, including the Tax Distributions. *Id.* Accordingly, the classification of the Tax Distribution Claims is appropriate.

(d) The Subordination and Disallowance of Class C Claims is Appropriate

84. The Class C Claims arise from JVSW's "put" of its Class C Shares to the Debtor and, thus, cannot be anything other than directly related to JVSW's purchase of equity. Consequently, the Class C Claims appropriately are subordinated pursuant to Bankruptcy Code section 510(b). *Telegroup*, 281 F.3d at 142-3.

[30] Tax Distributions were deemed an advance of such Members' future share of "Available Cash" otherwise to distributable to the Member under the Operating Agreement, but such treatment did not modify Saladworks requirement to pay and/or reserve such amounts. *Id.*

85. There are numerous cases concluding (and relying on *Telegroup*) that a claim that alleges amounts due pursuant to a put right is a claim for damages that arises from the purchase or sale of a security. *See, e.g., Vista Eyecare*, 283 B.R at 628-29 (claim alleging failure to pay under put option agreement "falls squarely within the plain language of section 510(b): a claim for 'damages arising from the purchase or sale of [a security of the debtor].'" (alteration in original)); *see also In re Enron Corp.*, 341 B.R. 141, 162, 168-69 (Bankr. S.D.N.Y. 2006) (holding that claims based on employee put rights are claims for damages arising from the purchase or sale of a security, and hence, are subject to mandatory subordination) ("the Court concludes that claims for breach of contract related to stock options are claims 'arising from' the purchase of a security and should be subordinated[.]").

86. JVSW's argument – that the claims should not be subordinated because they arise from a contract – has been rejected by several courts, including the Third Circuit. "[T]he majority of courts in recent years that have confronted ... issues concerning the scope of section 510(b) have concluded the phrase 'arising from' should be read broadly to encompass ... claims for breach of contract, even ... indirectly related to the purchase or sale of a security." *Enron Corp.*, 341 B.R. at 153-54, 161 (collecting cases that hold breach of contract claims are subject to mandatory subordination where there "exists 'some nexus or causal relationship between the claims and the purchase of the securities[.]'"). The Third Circuit addressed this issue and expressly rejected the argument that breach of a contractual obligation removes a claim from the scope of 510(b). *Telegroup,* 281 F.3d at 134. JVSW's claims arise from the purchase or sale of a security and the claims must be subordinated pursuant to section 510(b).[31]

[31] JVSW's reliance on the unreported decision in *Raven Media Investments, LLC v. DirectTV Latin America, LLC (In re DirecTV Latin America, LLC)*, 2004 LEXIS 2425 (D. Del. 2004) is misplaced. In *DirectTV*, the District Court did not subordinate a put obligation because the claimant "did not seek to hold an equity interest in DTVLA;" did

87. For the reasons set forth in the *Debtor's Objection to Proof of Claim No. 37* [D.I. 489] and the *Debtor's Reply in Support of Debtor's Objection to Proof of Claim No. 37* [D.I. 548], both of which are incorporated herein by reference, the Debtor also submits that the disallowance of the Class C Claims is appropriate.

2. Compliance With Bankruptcy Code section 1123(a) – Mandatory Contents of the Plan

88. Bankruptcy Code section 1123(a) requires that a chapter 11 plan: (a) designate classes of claims and interests; (b) specify unimpaired classes of claims and interests; (c) specify treatment of impaired classes of claims and interests; (d) provide for equality of treatment within each class; (e) provide adequate means for the plan's implementation; (f) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and (g) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors. See 11 U.S.C. § 1123(a).

89. The Plan fully complies with each requirement of Section 1123(a) described above. As previously noted with respect to the Plan's compliance with Bankruptcy Code section 1122, Article III of the Plan designates nine separate Classes of Claims and Interests, as required by Bankruptcy Code section 1123(a)(1). Article III.C of the Plan specifies that the Claims in Classes 1,2, 4, 5, 6, 8 and 9 are unimpaired under the Plan, as required by Bankruptcy Code section 1123(a)(2) of the Bankruptcy Code. Article C.3 specifies that the Claims in Classes 3

not participate in the entity's management; and did not make a capital contribution. *Id.* at 11. The facts of this case are clearly distinguishable – JVSW holds 300 Class A Shares, participated on the board and management until 2014 and made a $7.75 million capital contribution. In addition, notwithstanding JVSW's attempt to apply *DirectTV* broadly to this case, the District Court noted that "the court does not conclude that a shareholder's possession of a put option to the debtor alone relieves a holder of equity of the effect of the absolute priority rule." *Id.* at 13.

and 7 are impaired and describes the treatment of such Classes in accordance with Bankruptcy Code section 1123(a)(3) of the Bankruptcy Code. Further, as required by Bankruptcy Code section 1123(a)(4) of the Bankruptcy Code, the treatment of each Claim or Interest within a Class is either (i) the same as the treatment of each other Claim or Interest in such class or (ii) otherwise consistent with the legal rights of such claimant.[32]

90. In accordance with the requirements of Bankruptcy Code section 1123(a)(5), the Plan provides adequate means for its implementation through Article IV and various other provisions. Specifically, the Plan provides for:

(a) the creating of a Liquidating Trust and the transfer of all of the Debtor's assets to the Liquidating Trust on the Effective Date pursuant to Articles IV.A.1 and 2;

(b) the appointment of the Liquidating Trustee pursuant to Article IV.A.3;

(c) the resignation of all current officers and directors of the Debtor under Article IV.A.13;

(d) the cancellation of all issued and outstanding existing securities and related documents of the Debtor;

(e) the preservation of all Causes of Action under Article IV.C of the Plan;

(f) the vesting of all Assets in the Liquidating Trust;

(g) the authorization of the Liquidation Trustee to (i) effect all actions necessary to implement the provisions of the Plan, (ii) make distributions as contemplated in the Plan, (iii) establish and administer the Reserved Funds, and (iv) object to Disputed Claims and prosecute, settle, compromise, withdraw or resolve such Disputed Claims and Causes of Action under Article V and VII of the Plan;

[32] Pursuant to the General Unsecured Claim Settlement, Class 3 General Unsecured Claims have agreed to less favorable treatment and thus, are separately classified from WS Finance Claims.

(h) the approval of the (i) Scardapane Settlement, and (ii) the General Unsecured Claim Settlement (collectively, the "Settlements") pursuant to Bankruptcy Rule 9109 under Article VIII of the Plan;

(i) the exemption from certain transfer taxes under Article IV.A.9 of the Plan;

(j) the dissolution of the Committee upon the Effective Date under Article XII.C of the Plan;

(k) the assumption or rejection of executory contracts and unexpired leases under Article VI of the Plan;

(l) the authorization of the Liquidating Trustee to setoff or recoupment against any Claims under Article V.K of the Plan; and

(m) the authorization to execute the (i) releases provided by the Debtor and holders of General Unsecured Claims who do not opt-out, (ii) permanent injunction related to the releases, and (iii) exculpation provisions under Article X of the Plan.

91. Bankruptcy Code section 1123(a)(6) requires that a debtor's corporate organizational documents prohibit the issuance of nonvoting equity securities. The Plan does not contemplate reorganization or amended organizational documents. Thus, this provision is not applicable to the Plan.

92. Finally, Bankruptcy Code section 1123(a)(7) requires that a plan of reorganization "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, directors, or trustee under the plan . . . ." 11 U.S.C. § 1123(a)(7). This provision is supplemented by Bankruptcy Code section 1129(a)(5), which directs the scrutiny of the court to the methods by which the management of the reorganized corporation is to be chosen to provide adequate

representation of those whose investments are involved in the reorganization — *i.e.*, creditors and equity holders. *See* 7 Alan N. Resnick et al., COLLIER ON BANKRUPTCY ¶ 1123.01[7] (16th ed. rev. 2010).

93. The Plan does not appoint any officers or directors of the Debtor. Section 1123(a)(7) is thus inapplicable. In the Plan Supplement, however, the Debtor has identified the selection of the Liquidating Trustee.

3. Bankruptcy Code section 1123(b) – Discretionary Contents of the Plan

94. Bankruptcy Code section 1123(b) identifies various discretionary provisions that may be included in a plan of reorganization, but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. §§ 1123(b) (1) -(2). A plan also may provide for (a) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;" (b) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest"; (c) "the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. §§ 1123(b)(1-4); (6).

95. The Plan includes various provisions that fall under the broad spectrum of Bankruptcy Code section 1123(b). For instance, the Plan impairs Class 3 and 7, leaving Classes 1-2 and 4-6, 8-9unimpaired. *See* Plan Art. III. The Plan further provides for the retention of Causes of Action. *See* Plan Art. IV.A.10. Those Causes of Action were further described in the Plan Supplement. Article VI of the Plan includes provisions that provide for the assumption or rejection of executory contracts and unexpired leases to which the Debtors are parties. *See* Plan Art. VI.

96. In accordance with Bankruptcy Code section 1123(b)(6), the Plan includes numerous other provisions designed to ensure its implementation that are consistent with the Bankruptcy Code, including the provisions of: (a) Article V, governing distributions to the holders of Allowed Claims and Interests; (b) Article V.B, establishing the Reserved Funds; (c) Article VII, establishing procedures for resolving Contingent, Unliquidated and Disputed Claims and Interests and making distributions on account of such Disputed Claims or Interests once Allowed; and (d) Article XI of the Plan, regarding retention of jurisdiction by the Bankruptcy Court over certain matters after the Effective Date.

97. Finally, the Plan includes the Settlements that the Debtor believes are appropriate under applicable law, including sections 1123(b)(1), (3) and (6), and Bankruptcy Rule 9019. A further analysis of these provisions is set forth below.

B. Bankruptcy Code Section 1129(a)(2)

98. The Plan complies with Bankruptcy Code section 1129(a)(2), which requires that a plan proponent comply with applicable provisions of the Bankruptcy Code. The legislative history accompanying section 1129(a)(2) indicates that the principal purpose of this section is to ensure compliance with the disclosure and solicitation requirements set forth in Bankruptcy Code section 1125. *See In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000) ("[Section] 1129(a)(2) [of the Bankruptcy Code] requires that the plan proponent comply with the adequate disclosure requirements of § 1125"); *Official Comm. of Unsecured Creditors v. Michelson (In re Michelson)*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) ("Compliance with the disclosure and solicitation requirements is the paradigmatic example of what the Congress had in mind when it enacted Section 1129(a)(2)."); *In re Texaco, Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988) ("[The] principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of Section 1125 in the solicitation of acceptances to the

plan"); S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (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."); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977).

99. The Debtor has complied with the applicable provisions of the Bankruptcy Code, including the provisions of section 1125 regarding disclosure and plan solicitation. Bankruptcy Code section 1125 prohibits the solicitation of acceptances or rejections of a plan of reorganization from holders of claims or interests "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or summary of the plan, and a written disclosure statement approved . . . by the court as containing adequate information." 11 U.S.C. § 1125(b). In the instant cases, the Debtor solicited votes in favor or against the Plan from Class 3 as such Class is impaired. The Debtor did not solicit votes from Classes 1, 2, 4-9 as such Classes are deemed to either accept or reject the Plan under Bankruptcy Code section 1126(f) and (g).

100. Pursuant to the Disclosure Statement Order, the Bankruptcy Court specifically determined that the Disclosure Statement contained adequate information within the meaning of Bankruptcy Code section 1125. *See Disclosure Statement Order*, ¶ 2. The Bankruptcy Court further approved the form of notice of the confirmation hearing (the "Confirmation Hearing Notice") and required that the Debtor serve the Confirmation Hearing Notice on all holders of Claims or Interests; all persons requesting notices pursuant to Bankruptcy Rule 2002, the U.S. Trustee, the Internal Revenue Service; the Attorney Generals for each state that the Debtor operates; and all other parties on affidavit of services in this case.. *See Disclosure Statement Order*, Ex. A, ¶¶ 1.C.3.

101. The Debtor has complied with the Disclosure Statement Order and caused the mailing of the Confirmation Hearing Notice to occur in accordance with the requirements of the Disclosure Statement Order. *See Affidavit of Service* [D.I. 440]. The Debtor further has complied with all applicable provisions of the Bankruptcy Code, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018. As a result, the Plan meets the requirements of Bankruptcy Code section 1129(a)(2).

C. Bankruptcy Code section 1129(a)(3)

102. The Plan satisfies Bankruptcy Code section 1129(a)(3), which requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts consider a plan as proposed in good faith "if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code." *Hanson v. First Bank of S.D.*, 828 F.2d 1310, 1315 (8th Cir. 1987); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004) ("[F]or purposes of determining good faith under Section 1129(a)(3) ... the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.") (quoting *PWS Holding Corp.*, 228 F.3d at 242); *Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 165 (3d Cir. 1999) (the good faith standard in Section 1129(a)(3) requires that there be "'some relation'" between the chapter 11 plan and the "reorganization-related purposes" that chapter 11 was designed to serve) (citations omitted); *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) ("The good faith standard 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.") (quoting *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999)) (internal quotations omitted).

103. One must view the requirement of good faith solely in the context of the totality of the circumstances surrounding the formulation of a chapter 11 plan. *See McCormick v. Banc One Leasing Corp. (In re McCormick)*, 49 F.3d 1524, 1526 (11th Cir. 1995) ("The focus of a court's inquiry is the plan itself, and courts must look to the totality of the circumstances surrounding the plan ...."); *In re Block Shim Dev. Co.*, 939 F.2d 289, 292 (5th Cir. 1991) (finding that good faith requirement "is viewed in the context of the circumstances surrounding the plan"); *CoreStates Bank.*, 202 B.R. at 57 (concluding that courts must view good faith by looking at totality of circumstances).

104. In determining whether a plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the plan itself and not the proponent of the plan. *In the Matter of Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988); *See also Combustion Eng'g*, 391 F.3d at 246; *Sound Radio*, 93 B.R. at 853 (concluding that the good faith test provides the court with significant flexibility and is focused on an examination of the plan itself, rather than other, external factors), *aff'd in part, remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990).

105. The Debtor must show, therefore, that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success. *See In re Century Glove, Inc.*, 1993 LEXIS 2286, at *15 (D. Del. Feb. 10, 1993) ("A court may only confirm a plan for reorganization if . . . 'the plan has been proposed in good faith and not by any means forbidden by law. . . .' Moreover, '[w]here 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.'") (citations omitted); *see also Fin. Sec. Assur. Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997)

(same); *In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984) (noting that plan provisions may not contravene any law, including state law, and a plan must have been proposed with "a basis for expecting that a reorganization can be effected'") (citations omitted).

106. The Debtor structured and proposed the Plan in a manner that effectuates the objectives and purposes of the Bankruptcy Code. The Plan is a product of consensus among the Debtor, the Committee, and the Scardapane Entities, after arm's length negotiations, which in itself demonstrates that the Debtor proposed the Plan in good faith. *See Eagle-Picher Indus.*, 203 B.R. at 274 (finding that plan of reorganization was proposed in good faith when, among other things, it was based on extensive arms-length negotiations among plan proponents and other parties in interest). The Plan provides for the payment of claims and interests consistent with the Bankruptcy Code and its priority scheme. In addition, the Plan contains no provisions that are contrary to state or other laws nor is there any indication the Debtor lacks the ability to consummate the Plan.

107. The Hill Entities suggest that the "good faith" of the Debtor is lacking because the Debtor entered into the Scardapane Settlement. *Preliminary Objection*, ¶36-38. The Hill Entities provide no legal support for this contention. In fact, the Bankruptcy Code expressly provides that settlements are an appropriate component of a plan and settlements are not contrary to state law. *See*, 11 U.S.C. § 1123(b)(3)(A); Bankr. Rule 9019. As is well-known, compromises are favored in bankruptcy. *See, Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Coram*, 315 B.R. 321 at 329. Here, the Independent Directors, with the assistance of the Debtor's professionals, carefully and thoroughly reviewed the claims asserted by the Scardapane Entities against the Debtor and the Debtor's potential defenses thereto; and carefully and thoroughly reviewed the potential affirmative claims against the Scardapane

Entities and the potential defenses thereto. *Weitz Declaration*, ¶¶7-9, 15-30. The evidence is clear that the Independent Directors, not Scardapane, approved the Scardapane Settlement and the Plan. As set forth in more detail below, the Scardapane Settlement is fair and reasonable and the releases are appropriate. Accordingly, the Plan satisfies the requirements of Bankruptcy Code section 1129(a)(3).

108. The Hill Entities also allege bad faith due to the classification of the claims. *Plan Objection*, ¶¶39-40. However, as set forth in detail above, the classification and treatment of all classes is appropriate.

D. Bankruptcy Code section 1129(a)(4)

109. The Plan also complies with Bankruptcy Code section 1129(a)(4), which states the following:

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

11 U.S.C. § 1129(a)(4). In essence, Bankruptcy Code section 1129(a)(4) requires that any and all fees promised or received in connection with or in contemplation of a chapter 11 case must be disclosed and subject to the court's review. *See In re Crdentia Corp.*, 2010 Bankr. LEXIS 28383, at *8 (Bankr. D. Del. May 26, 2010) (holding that plan complied with Section 1129(a)(4) where all final fees and expenses payable to professionals remained subject to final review by bankruptcy court); *In re Johns-Manville Corp.*, 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987) *aff'd, Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (before plan may be confirmed, "there must be a provision for

review by the Court of any professional compensation"); *In re S. Indus. Banking Corp.*, 41 B.R. 606, 612 (Bankr. E.D. Tenn. 1984) (even absent challenge, court has independent duty to determine reasonableness of professional fees).

110. Article II of the Plan provides for the payment of Fee Claims subject to Court approval in accordance with applicable legal standards. While the Bankruptcy Court has authorized the interim payment of fees and expenses incurred by Professionals in connection with the Bankruptcy Cases, all such fees and expenses remain subject to the Court's final review. *See Plan*, Art. II.A.2. Accordingly, the Plan complies with the requirements of Bankruptcy Code section 1129(a)(4).

E. Bankruptcy Code section 1129(a)(5)

111. The Debtor is not reorganizing under the Plan and accordingly, is not appointing any officers or directors or retaining any insiders. Accordingly, Section 1129(a)(5) of the Plan is not applicable.

F. Bankruptcy Code section 1129(a)(6)

112. Bankruptcy Code section 1129(a)(6) is inapplicable to the Debtor, as it requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Debtor's business has no involvement with the establishment of rates over which any regulatory commission has jurisdiction or will have jurisdiction after the Plan's confirmation. Accordingly, Bankruptcy Code section 1129(a)(6) is inapplicable to the Debtor.

G. Bankruptcy Code section 1129(a)(7)

113. The Plan satisfies the "best interests of creditors" test set forth in Bankruptcy Code section 1129(a)(7). This test requires that, with respect to each impaired class of claims or

interests, each holder of such claims or interests (a) has accepted the plan or (b) will receive or retain property of a value not less than what such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *See Armstrong World Indus.*, 348 B.R. at 165-66; *see also In re Tranel*, 940 F.2d 1168, 1172 (8th Cir. 1991) (considering evidence supporting best interests of creditors test outcome); *In re AOV Indus.*, 31 B.R. 1005, 1008-13 (D.D.C. 1983), *aff'd in part, rev'd in part*, 792 F.2d 1140, 1144 (D.C. Cir. 1986) (if no impaired creditor receives less than liquidation value, plan of reorganization is in best interests of creditors), *vacated in light of new evidence*, 797 F.2d 1004 (D.C. Cir. 1986); *In re Econ. Lodging Sys., Inc.*, 205 B.R. 862, 864-65 (Bankr. N.D. Ohio 1997) (analyzing evidence relating to best interests of creditors test); *Eagle-Picher Indus.*, 203 B.R. at 266 (best interest of creditors test must be met even in cramdown situation). A court, in considering whether a plan is in the "best interests" of creditors, is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all the debtor's assets under chapter 7 of the Bankruptcy Code. *See, e.g., In re Victory Constr. Co.*, 42 B.R. 145, 151 (Bankr. C.D. Cal. 1984); *see also In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990); *In re Jartran, Inc.*, 44 B.R. 331, 389-93 (Bankr. N.D. Ill. 1984) (best interests test satisfied by showing that, upon liquidation, cash received would be insufficient to pay priority claims and secured creditors so that unsecured creditors and stockholders would receive no recovery).

114. As Bankruptcy Code section 1129(a)(7) itself makes clear, the "best interests" of creditors test is applicable only to ***nonaccepting*** holders of ***impaired*** claims and interests. 11 U.S.C. § 1129(a)(7). Thus, in the instant Bankruptcy Case, the "best interests" test applies only

to Class 7, as the Class C Claims will receive no distribution on account of such Claims and are deemed to reject the Plan under Bankruptcy Code section 1126(g).[33]

115. For the reasons set forth in the *Debtor's Objection to Proof of Claim No. 37* [D.I. 445] and the *Debtor's Reply in Support of Debtor's Objection to Proof of Claim No. 37* [D.I. [548] (together, the "Class C Claim Objection"), the Class C Claims should be disallowed because they are not "claims" under the Bankruptcy Code; rather JVSW holds 300 Class C Shares. *Class C Claim Objection*, D.I. 445, ¶¶ 14-16; D.I. 548, ¶¶ 5-7. Indeed, as set forth in the Class C Claim Objection, JVSW has stated as much before this Court on numerous occasions. *Id.* at D.I. 445, ¶16; D.I. 548, ¶6.

116. However, to the extent the Court does not sustain the Class C Claim Objection, the Plan still complies with the "best interests' test. First, Class 7 – Class C Claims are appropriately subordinated pursuant to Bankruptcy Code section 510 (b) as forth in Section I.A(1)(c) *supra*. Second, as set forth in the liquidation analysis attached as Exhibit B to the Disclosure Statement (the "Liquidation Analysis"), it is clear that the Plan satisfies the "best interests" test with respect to Class 7 because such holders of Class C Claims would receive nothing on account of their claims in a hypothetical Chapter 7 liquidation. *See Disclosure Statement*, Ex. B.[34] As a result, the Plan satisfies the requirements of Bankruptcy Code section 1129(a)(7).

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[33] If a Class 3 – General Unsecured Claim does not accept the Plan and opts out of the General Unsecured Claim Settlement, such claim is no longer impaired pursuant to the Plan. Any General Unsecured Claim that rejects the General Unsecured Claim Settlement will get paid in full, plus interest. Plan, Art. III.C.3.

[34] While the Liquidation Analysis does not expressly identify Class C Claims, based on the priority scheme of the Code, and the subordination of these claims as set forth herein, the Class C Claims are junior in priority to Class 5 and 6 Claims. The Liquidation Analysis establishes that there are not sufficient funds to satisfy any portion of Class C Claims. Likewise, even if the Court were to treat Class C Claims *pari passu* with Class 5 and Class 6 Claims, the *pro rata* distribution is significantly less in Chapter 7 under the Liquidation Analysis.

H. Bankruptcy Code section 1129(a)(8)

117. To the extent the Court does not sustain the Class C Claim Objection and disallow the Class C Claims in full, the Plan fails to comply with Bankruptcy Code Section 1129(a)(8), which requires that "with respect to each class of claims or interests — (A) such class has accepted the plan; or (B) such class is not impaired under the Plan." Specifically, Class 7 is deemed to reject the Plan under Section 1126(g) of the Bankruptcy Code, because the Plan provides no distribution to Class C Claims. Nevertheless, as set forth below, the Debtor has satisfied the necessary requirements under section 1129(b) of the Bankruptcy Code to obtain confirmation of the Plan notwithstanding Class 7's deemed rejection of the Plan.

118. In contrast, the Plan renders Classes 1-2, 4-6, 8-9 unimpaired and therefore Classes 1-2, 4-6, 8-9 are deemed to accept the Plan under Bankruptcy Code section 1126(f). Likewise, excluding any provisional ballot, Class 3 has voted to accept the Plan. *See, Voting Report.* As a result, the Plan satisfies Bankruptcy Code section 1129(a)(8) with respect to Classes 1-6, 8-9.

I. Bankruptcy Code section 1129(a)(9)

119. The Plan satisfies Bankruptcy Code section 1129(a)(9), which requires that a chapter 11 plan provide for the payment of certain priority claims in full on the effective date in the allowed amount of such claims. In particular, pursuant to Bankruptcy Code section 1129(a)(9)(A), unless otherwise agreed by the holder, holders of claims of a specific kind specified in Bankruptcy Code section 507(a)(1) — administrative claims allowed under Bankruptcy Code section 503(b) — must receive cash equal to the allowed amount of such claims on the effective date of a plan. Bankruptcy Code section 1129(a)(9)(B) further requires that the holders of claims of a kind specified in Sections 507(a)(1) and 507(a)(4) through (7) (generally, wage and employees benefit claims and consumer deposits that are entitled to priority)

must receive, if the class in which such claimants are members has accepted the plan, deferred cash payments of a value equal to the allowed amount of these claims; or, if the class in which such claimants are members has not accepted the plan, cash equal to the allowed amount of these claims on the effective date of a plan. Finally, Bankruptcy Code Sections 1129(a)(9)(C) and (D) provide for the payment of priority tax claims, including secured claims that would otherwise meet the requirements of Bankruptcy Code section 507(a)(8) absent the secured status of such claims, in cash in regular installments.

120. In accordance with Bankruptcy Code section 1129(a)(9)(A), Article II.A of the Plan provides that, unless otherwise agreed by the holder of an Administrative Claim or an order of the Bankruptcy Court provides otherwise, each holder of an Allowed Administrative Claim shall receive Cash equal to the amount of such Allowed Administrative Claim in full satisfaction of its Administrative Claim on Effective Date.

121. In accordance with Bankruptcy Code section 1129(a)(9)(B), Article II.B of the Plan provides that each holder of an Allowed Priority Tax Claim shall receive, in full satisfaction, settlement, and release of such Allowed Priority Tax Claim either (i) on the Effective Date, Cash equal to the due and unpaid portion of such Allowed Priority Tax Claim, (ii) treatment in a manner consistent with Bankruptcy Code section 1129(a)(9)(C), or (iii) such different treatment as to which such holder and the Debtor shall have agreed upon in writing.

122. In accordance with Bankruptcy Code section 1129(a)(9)(C), Article III.C.1 of the Plan provides that, unless otherwise agreed to by a holder of an Allowed Priority Claim, holders of such Priority Claims shall receive Cash equal to the amount of such Allowed Priority Claim on the Effective Date.

123. Accordingly, the Plan satisfies the requirements set forth in Bankrutpcy Code section 1129(a)(9).

J. Bankruptcy Code section 1129(a)(10)

124. Bankruptcy Code section 1129(a)(10) provides the following:

> If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10); *see In re Martin*, 66 B.R. 921, 924 (Bankr. D. Mont. 1986) (holding that acceptance by three classes of impaired creditors, exclusive of insiders, satisfied requirement of Section 1129(a)(10)). As set forth in the Voting Report, Class 3 – General Unsecured Claims overwhelming voted to support the Plan. However, if the Court allows the provisional votes of HSS and SDI and does not designate the votes pursuant to the Debtor's Designation Motion (or otherwise not count the votes), the Debtor concedes that section 1129(a)(10) has not been met. The Debtor contends, however, that regardless of whether the votes of HSS and SDI are designated pursuant to the Debtor's Designation Motion, they should not be counted for purposes of section 1129(a)(10) as they are claims of insiders.[35]

[35] Section 1129(a)(10) mandates that votes of an insider are not counted for purposes of determining whether an impaired class accepts a plan. Regardless of whether HSS's and SDI's votes are designated pursuant to the Debtor's Designation Motion, the Court should read section 1129(a)(10) broadly to exclude consideration of any vote of an insider in determining whether an impaired class accepts or rejects the Plan. First, HSS and SDI are statutory insiders of the Debtor. *See* 11 U.S.C. § 101(31)(E) (an "insider" is an "affiliate, or insider of an affiliate as if such affiliate were the debtor"). Hill is an affiliate of the Debtor as the indirect thirty percent (30%) equity owner of Saladworks and former board member. *See* 11 U.S.C. § 101(2)(A) (an "affiliate" is an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor[.]"). Furthermore, HSS and SDI are "insiders" of Hill because they are entities in which Hill is a director, officer, or person in control. 11 U.S.C. § 101(31)(A) (an insider of an individual includes a "corporation of which the [individual] is a director, officer, or person in control.").Thus, HSS and SDI are statutory insiders of Hill, who is an affiliate of the Debtor, and each is considered an insider of the Debtor under Bankruptcy Code section 101(31)(E). Second, even if HSS and SDI are not considered statutory insiders of the Debtor, they are nevertheless non-statutory insiders. HSS and SDI are owned or controlled by Hill, or entities owned or controlled by him; indeed, JVSW and WS Finance have implied that HSS and SDI are affiliated/controlled entities. *See* JVSW responses to the JVSW claims objections [D.I.s 489, 490]. Hill, himself, as an indirect thirty percent (30%) equity owner of Saladworks and former board member, is an affiliate and insider of the Debtor. *See Shubert v. Lucent Techs. Inc. (In re Winstar*

K. Bankruptcy Code section 1129(a)(11)

125. The Plan satisfies Bankruptcy Code section 1129(a)(11), which provides that a court may confirm a plan of reorganization only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need further financial reorganization, of the debtor or any successor to the debtor under the plan." 11 U.S.C. § 1129(a)(11). One commentator has stated that this Section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." 7 Alan N. Resnick, *et al.*, COLLIER ON BANKRUPTCY ¶ 1129.03[11] (16th ed. rev. 2010); *accord In re Aleris Int'l, Inc.*, 2010 Bankr. LEXIS 2997, at *27 (Bankr. D. Del. May 3, 2010); *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994); *Johns-Manville*, 68 B.R. at 635.

126. Section 1129(a)(11), however, does not require a guarantee of the plan's success; rather, the proper standard is whether the plan offers a "reasonable assurance" of success. *See Johns-Manville Corp.*, 843 F.2d at 649 (noting plan may be feasible although its success is not guaranteed); *Prudential Ins. Co. of Am. v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336,

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Commc'ns, Inc.), 554 F.3d 382, 395-97 (3d Cir. 2009) ("Congress's use of the term 'includes' in § 101(31) [creates] a category of creditors ... called 'non-statutory insiders,' who fall within the definition but outside of any of the enumerated categories" and stating "it is not necessary that a non-statutory insider have actual control; rather, the question 'is whether there is a close relationship [between debtor and creditor] and ... anything other than closeness to suggest that any transactions were not conducted at arm's length." (quoting *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 (10th Cir. 2008)); *see also In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 511 (7th Cir. 2011) (affirming decisions of the lower courts that found a member of a limited liability company was a non-statutory insider under 11 U.S.C. § 101(31) in connection with a preference action brought by a bankruptcy trustee to recover all payments made to the member within one year of the commencement of the bankruptcy case.). As insiders, HSS's and SDI's votes should not be considered under Bankruptcy Code section 1129(a)(10). Bankruptcy Code section 1129(a)(10) does not, by its text, specifically exclude insider votes to reject a plan. *See generally* 11 U.S.C. § 1129(a)(10). However, section 1129(a)(10)'s exclusion of the "acceptance of the plan by any insider" can properly be interpreted to mean exclude the "*vote* on the plan by any insider." *See In re Applegate Property, LTD*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991) ("A more difficult question is whether the [insider's] votes, when cast against the [competing] plan, should also be disregarded [under 1129(a)(10)]. Section 1129(a)(10) says nothing about what to do about votes *rejecting* a given plan...." (emphasis in original)); *but see Coram*, 315 B.R. at 350, n.18 (discussing in *dicta* whether an insider's vote against a plan could be excluded under 11 U.S.C. § 1129(a)(10)). There is no controlling caselaw that would prevent exclusion of HSS's and SDI's votes on this basis and the facts and circumstances of this case certainly warrant disregard of those votes here.

1341 (8th Cir. 1985) (same); *Rivers End Apartments*, 167 B.R. at 476 (to establish feasibility, "a [plan] proponent must demonstrate that its plan offers 'a reasonable prospect of success' and is workable"); *In re Drexel Burnham Lambert Grp.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992) ("'Feasibility does not, nor can it, require the certainty that a reorganized company will succeed.'") (citations omitted); *In re Apex Oil Co.*, 118 B.R. 683, 708 (Bankr. E.D. Mo. 1990) (guarantee of success is not required to meet feasibility standard of Section 1129(a)([11])); *In re Elm Creek Joint Venture*, 93 B.R. 105, 110 (Bankr. W.D. Tex. 1988) (a guarantee of success is not required under Section 1129(a)(11), only reasonable expectation that payments will be made); *Texaco*, 84 B.R. at 910 ("All that is required is that there be reasonable assurance of commercial viability.").

127. As set forth in the Liquidation Analysis, the Debtor possesses the necessary assets to make all distributions called for under the Plan. Specifically, with respect to the WS Finance Claim, Article V.B requires the funding of the Disputed Class 4 Reserve with Cash sufficient to pay the WS Finance Claim in full to the extent it is allowed. *See also, Plan*, Article I.A.41. The Disputed Class 4 Reserve must be segregated and held by the Liquidating Trustee on and after the Effective Date. *Id.* Thus, the Plan provides for the adequate reserves and payment of the WS Finance Claim to make all payments due and owing once such claim is allowed by a final order of this Court.

128. Accordingly, the Plan satisfies the feasibility standard of Section 1129(a)(11) of the Bankruptcy Code.

L. Bankruptcy Code section 1129(a)(12)

129. The Plan complies with Bankruptcy Code section 1129(a)(12), which requires that, as a condition precedent to the confirmation of a plan of reorganization, "[a]ll fees payable under Section 1930 of title 28, as determined by the court at the hearing on confirmation of the

plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). The Plan specifically provides that all fees payable pursuant to Section 1930 of Title 28 of the United States Code will be paid on or prior to the Effective Date. *See, Plan,* Article II.C. As such, the Plan complies with Bankruptcy Code section 1129(a)(12).

M. Bankruptcy Code section 1129(a)(13)

130. Bankruptcy Code section 1129(a)(13) is inapplicable to the Plan, as it requires that a plan of reorganization provide for the continuation of all retiree benefits at the level established by agreement or by court order pursuant to Bankruptcy Code section 1114 at any time prior to confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits. The Debtor has no retiree benefits plans. Accordingly, Bankruptcy Code section 1129(b)(13) is inapplicable to the Plan.

II. Section 1129(b) – The Plan Satisfies the "Cramdown" Requirements For Confirmation

131. The Plan complies with Bankruptcy Code section 1129(b)(1), which states the following:

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

11 U.S.C. § 1129(b)(1). Thus, to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" and is "fair and equitable" with respect to impaired, non-accepting classes. *See Zenith Elecs.*, 241 B.R. at 105 (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of

reorganization, the court shall nonetheless confirm the plan if it 'does not discriminate unfairly and is fair and equitable'"); *see also Mabey v. Southwestern Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 519 (5th Cir. 1998) (plan is fair and equitable only if the holder of any claim or interest that is junior to the claims of the non-accepting class will not receive or retain under the plan on account of such junior claim or interest any property) (citations omitted); *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 653 (9th Cir. 1997) (setting forth requirements under Section 1129(b)(1) and (2)); *John Hancock.*, 987 F.2d at 157 n.5 (same).

132. Here, to the extent that the Court does not sustain the Class C Claim Objection, Class 7, which consists solely of Class C Claims, is the sole impaired, non-accepting Class under the Plan. However, if the Court rules that the Class C Claims are "claims" under the Bankruptcy Code and are properly subordinated as argued *infra*, the Debtor will modify the Plan and the treatment of Class C Claims to provide that such Claims shall receive all remaining Cash after the establishment of the Reserved Funds, and payment in full of all Class 1-6 claims, leaving such Class C Claims unimpaired.

133. Nonetheless, if the Court determines that a "cramdown" analysis is appropriate, the Debtor asserts that the treatment of Class C Claims satisfies this requirement. Section 1129(b)(2)(C) provides the relevant "fair and equitable" standard for purposes of Class C Claims – requiring that "the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property." 11 U.S.C. § 1129(b)(2)(C). The Plan is "fair and equitable" with respect to Class C Claims because these claims possess the most junior distribution rights of any Claim classified under the Plan pursuant to the Operating Agreement and Bankruptcy Code section 510(b) (*see, supra I.A)* and, as a result,

there exists no possibility that any class junior to Class 6 will receive or retain property under the Plan. As such, the Plan complies with the "fair and equitable" requirement of Bankruptcy Code section 1129(b) with respect to Class 7.

134. With respect to the "unfair discrimination" requirement of Bankruptcy Code section 1129(b), a plan unfairly discriminates against a class if: (a) there exists another class of claims with similar legal rights and such class receives better treatment under the plan than the class at issue; and (b) there is no reasonable basis for treating the class at issue less favorably. *See, e.g., Armstrong World Indus.*, 348 B.R. at 121 ("[T]his standard ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes.") (quoting *Johns-Manville*, 68 B.R. at 636); *see also In re Acequia, Inc.,* 787 F.2d 1352, 1364 (9th Cir. Idaho 1986) (finding that provision requires that plan "allocate [ ] value to the class in a manner consistent with the treatment afforded to other classes with similar legal claims against the debtor.").

135. The Plan causes no discrimination against the holders of Class C Claims. The Claims classified in Class 7 represent the so-called "put right" related to JVSW's 300 Class C Shares in the Debtor. JVSW is the sole holder of Class C Claims and Class C Shares – thus, no party with a similar classification is receiving different or better treatment. Further, as set forth above, JVSW's Class C Claims possess a junior distribution right to all other Claims classified in Classes 1 through 6 of the Plan. As a result, there is no discrimination with respect to Class 7, and the requirements of Bankruptcy Code section 1129(b) are satisfied.

III. Section 1129(c) – No Other Plan Has Been Proposed Or Confirmed

136. The Plan satisfies Bankruptcy Code section 1129(c), which provides that, with a limited exception, a bankruptcy court may only confirm one plan. The Plan is the only plan that has been filed in these cases and is the only plan that satisfies the requirements of subsections (a)

and (b) of Bankruptcy Code section 1129. Accordingly, the requirements of Bankruptcy Code section 1129(c) are satisfied.

IV. Section 1129(d) – The Plan's Purpose Is Consistent With the Bankruptcy Code

137. The Plan satisfies Bankruptcy Code section 1129(d), which provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act of 1933. In the instant case, the Plan's principal purpose is not the avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933, and there has been no filing by any governmental agency asserting the contrary. Accordingly, the Plan complies with Bankruptcy Code section 1129(d).

OTHER PLAN PROVISIONS ARE NECESSARY AND APPROPRIATE

I. The Settlements Should Be Approved

138. As described above, the Debtor has incorporated the terms of the Settlements into the Plan. The Settlements are a critical component of the Plan and satisfy the standards for approval under Bankruptcy Code section 1123(b)(3) and Bankruptcy Rule 9019. Settlements and compromises are "a normal part of the process of reorganization." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (quoting *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)). As part of the restructuring process, the Court "may approve a compromise or settlement" under Bankruptcy Rule 9019(a). Fed. R. Bankr. P. 9019(a). Similarly, as set forth above, Bankruptcy Code section 1123(b)(3) states that a 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).

139. A decision to approve or reject a proposed compromise or settlement falls within the court's sound discretion. *Key3 Media Group, Inc. v. Pulver.com, Inc. (In re Key3 Media Group, Inc.)*, 336 B.R. 87, 92 (Bankr. D. Del. 2005); *In re Louise's, Inc.*, 211 B.R. 798, 801 (D.

Del. 1997). When exercising such discretion, the bankruptcy court must determine whether the compromise is "fair, reasonable, and in the best interests [sic] of the estate." *Key3 Media Group*, 336 B.R. at 92; *see also Fry's Metals, Inc. v. Gibbons (In re Rfe Indus., Inc.)*, 283 F.3d 159, 165 (3d Cir. 2002) (considering interests of creditors when analyzing settlement); *Louise's Inc.*, 211 B.R. at 801 (considering interests of estate when determining whether to approve settlement); *In re Marvel Entm't Group, Inc.*, 222 B.R. 243, 249 (Bankr. D. Del. 1998) (same).

140. Courts consistently have recognized that plan settlements under Bankruptcy Code section 1123(b)(3) should be evaluated under the same "fair, reasonable and in the best interests of the estate" standard applicable to Bankruptcy Rule 9019 settlements. *E.g., Aleris Int'l*, 2010 Bankr. LEXIS 2997, at *18; *Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*, 177 B.R. 791, 794 n.4 (S.D.N.Y. 1995) ("Irrespective of whether a claim is settled as part of a plan pursuant to Section 1123(b)(3)(A) of the Bankruptcy Code or pursuant to a separate motion under Bankruptcy Rule 9019, the standards applied by the Bankruptcy Court for approval are the same."), aff'd, 68 F.3d 26 (2d Cir. 1995).

141. In evaluating whether a proposed settlement is fair and equitable, courts in the Third Circuit consider the following four factors: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attendant thereto; and (d) the paramount interests of the creditors and a proper deference to their reasonable opinions. *Martin*, 91 F.3d 389 at 393; *Aleris Int'l*, 2010 Bankr. LEXIS 2997, at *19; *Key3 Media Group*, 336 B.R. at 93; *Marvel*, 222 B.R. at 249. To properly balance these values, the Court should consider all factors "relevant to a full and fair assessment of the wisdom of the proposed compromise." *Marvel*, 222 B.R. at 249 (quoting *TMT Trailer Ferry, Inc.*, 390 U.S. at 424).

142. In applying these factors, "a bankruptcy court need not decide the numerous issues of law and fact raised by the settlement, but rather should canvass the issues and see whether the settlement fall[s] below the lowest point on the range of reasonableness." *Aleris Int'l, Inc.*, 2010 Bankr. LEXIS 2997, at *19 (alteration in original) (citations omitted) (internal quotation marks omitted); *see also In re Drexel Burnham Lambert Grp.*, 134 B.R. 493, 497 (Bankr. S.D.N.Y. 1991) (same). Moreover, when considering a proposed settlement, a court should exercise its discretion in light of "the general policy of encouraging settlements and favoring compromise." *Aleris Int'l*, 2010 Bankr. LEXIS 2997, at *18 (citing *Martin*, 91 F.3d at 393). In fact, courts generally accord great deference to the recommendations of an estate representative when considering negotiated agreements. *See In re Int'l Distrib. Ctrs., Inc.*, 103 B.R. 420, 423 (S.D.N.Y. 1989).

A. The Scardapane Settlement is Fair and Reasonable

143. With respect to the first *Martin* factor – probability of success in litigation, the Independent Directors and the Debtor's counsel undertook a thorough and detailed review of both the Scardapane Entities' claims against the estate and the Debtor's defenses thereto, and the Debtor's Affirmative Scardapane Claims, and the Scardapane Entities' defenses thereto. *Weitz Declaration*, ¶¶15-16, 20-29. In particular, the Independent Directors concluded that the Scardapane Entities' claims against the Estate and Affirmative Scardapane Claims "were subject to multiple defenses, including statute of limitations issues, factual disputes and related proof issues, and the ability of the Scardapane Entities to offset any amounts for which they might ultimately be determined liable against other valid claims against the estate." *Id.*, ¶22. With respect to the Derivative Claims in particular, the Independent Directors considered the close personal and business relationship between Hill and Scardapane and the effect that would have on claims made by Hill regarding events he knew or should have known. *Id.*, ¶23. Accordingly,

the Independent Directors carefully and fully analyzed the probability of success and determined that the Scardapane Settlement was fair and appropriate. Thus, this factor weighs heavy in support of the Scardapane Settlement.

144. The Independent Directors also considered whether the Debtor would be able to collect damages relating to Affirmative Scardapane Claims; the second *Martin* factor. *Weitz Declaration*, ¶23. Given the liquidation of the Debtor, the termination of employment of Gail and John Scardapane, the rejection of contracts relating to Eatnic, LLC and Joan Scardapane (to the extent executory) and Scardapane's description of the claims and his defenses, the Independent Directors concluded that there may be issues with respect to collectability. *Weitz Declaration*, ¶¶23, 27

145. The third Martin factor also weighs heavily in support of approval of the Scardapane Settlement. The Chancery Litigation was in its initial stages and stayed upon the filing of this case. Likewise, any other Affirmative Scardapane Claims have yet to be brought; nor has claim litigation regarding the Scardapane Entities' claims been commenced. Such litigation would be complex, expensive, time consuming, and uncertain. *Weitz Declaration*, ¶23.

146. Finally, the Independent Board members expressly considered the interests of all creditors – and particularly non-insider creditors – in determining whether to approve the Scardapane Settlement. Specifically, after receiving and reviewing data regarding the proofs of claims in the case and related waterfall and distribution analyses, the Independent Directors concluded that absent settlement with the Scardapane Entities, making distributions to non-insider general unsecured creditors would be extraordinarily difficult. *Weitz Declaration*, ¶9.

147. Accordingly, after consideration of all of these factors without the influence or control of Scardapane, the Independent Directors determined that the Scardapane Settlement was

fair and reasonable and in the best interest of the Debtor's estate, its creditors and stakeholders. Viewing these facts and circumstances in their totality, the Scardapane Settlement falls well above the lowest point on the range of reasonableness.

B. The General Unsecured Claim Settlement is Fair and Reasonable

148. In addition to the Scardapane Settlement, the Independent Directors also reviewed the terms of the General Unsecured Claim Settlement and concluded that such settlement was fair and reasonable, and in the best interest of the Debtor, its creditors and stakeholders. *Weitz Declaration*, ¶30. The release of Causes of Action against holders of General Unsecured Claims who do not opt-out of the General Unsecured Claim Settlement and the reduced time period to object to such claims in exchange for the waiver of post-petition interest and the agreed impairment of such claim is fair and reasonable consideration. *Weitz Declaration*, ¶30.

149. In sum, the Settlements represent a fair and reasonable resolution of the disputes and, as such, are in the best interests of the Debtor's estates and their respective creditors, equity holders and other parties in interest.

II. The Rejection of the Executory Contracts and Unexpired Leases Under the Plan Should Be Approved

150. The Plan provides that "[o]n the Effective Date, and except for the Insurance Policies assumed hereunder, all Executory Contracts and Unexpired Leases shall be deemed rejected as of the Effective Date, unless such Executory Contract or Unexpired Lease; (i) was assumed or rejected previously by the Debtor; (ii) previously expired or terminated pursuant to its own terms; or (iii) is the subject of a motion to assume filed on or before the Effective Date." Plan, Art. VI.A.

151. Bankruptcy Code section 365(a) provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11

U.S.C. § 365(a). Courts routinely approve motions to reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984); *Grp. of Inst'l Investors v. Chi., M., St. P., & P.R.R. Co.*, 318 U.S. 523, 550 (1943); *City of Covington v. Covington Landing Ltd. P'ship*, 71 F.3d. 1221, 1226 (6th Cir. 1995); *In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (the "resolution of th[e] issue of assumption or rejection will be a matter of business judgment by the bankruptcy court"); *In re Terrell*, 892 F.2d 469, 471 (6th Cir. 1989); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989); *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir. 1983), *cert. denied*, 464 U.S. 908 (1983); *In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009); *In re Riodizio, Inc.*, 204 B.R. 417, 424-25 (Bankr. S.D.N.Y. 1997).

152. The "business judgment" test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor's estate. *See AbitibiBowater Inc.*, 418 B.R. at 831 (satisfying the business judgment standard for purposes of Section 365 of the Bankruptcy Code "is not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate"); *Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc.*, 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982) ("As long as assumption of a lease appears to enhance a debtor's estate, Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code . . . ."); *see also In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982), *aff'd sub nom. NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (test for rejection is whether rejection would benefit estate).

153. In the instant case, the Debtor believes that all Executory Contracts and Unexpired Leases have either been assumed and assigned to the Buyer pursuant to the Sale or previously rejected by orders of the Court. Nonetheless, to the extent that any Executory Contract or Unexpired Lease remains, given the liquidating aspect of the Debtor, in the exercise of its sound business judgment, the Debtor believes all other contracts should be rejected. As a result, the rejection of executory contracts and unexpired leases as set forth in the Plan should be approved.

154. With respect to the Hill Entities' objection that the Debtor cannot reject the Indemnification Obligations separate from the Operating Agreement, as set forth above, to the extent that the Operating Agreement is executory, it is being rejected. The Debtor simply included the provisions on Indemnification Obligations to make clear that these obligations also were being rejected.

III. The Plan's Release and Exculpation Provisions Are Appropriate and Should Be Approved

155. Article VIII.H.1 of the Plan provides for the releases by the Debtor of the Released Parties (the "Debtor Releases") and Article VIII.H.2 of the Plan provides for the releases by (a) each holder of Claim entitled to vote on the Plan that did not opt-out of the releases and (b) each Person who is deemed to accept the Plan, of the Released Parties (the "Consensual Third-Party Releases," together with the Debtor Releases, the "Releases")). The Plan does not release any party's direct claims against any Released Party.

156. The Debtor Releases and the Consensual Third-Party Releases are appropriately tailored under the facts and circumstances of this case and are supported by ample consideration. The Releases – each of which is subject to the occurrence of the Effective Date – are consensual and in, in any event, represent an integral part of the Plan and provide appropriate levels of

protection to the Released Parties. Accordingly, the Releases represent the sound and valid exercise of the Debtor's business judgment and are permissible under Bankruptcy Code section 1123(b)(6).

157. In evaluation releases, courts distinguish between the debtor's release of non-debtors and third parties' release of non-debtors. *See In re Washington Mut., Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011) (citing *In re Exide Techs.*, 303 B.R. 48, 71-74 (Bankr. D. Del. 2003)). With respect to a debtor's release of non-debtor, courts in this circuit consider the five *Zenith* factors:

(a) An identity of interest between the debtor and third party, such that a suit against the third party is, in essence, a suit against the debtor or will deplete the assets of the estate;

(b) Substantial contribution by the third party to the plan;

(c) The essential nature of the release to the debtor's plan;

(d) An agreement by a substantial majority of creditors to support the plan and the release; and

(e) Provision in the plan for payment of all or substantially all of the claims of the creditors and interest holders under the plan.

Zenith, 241 B.R. at 110; *see also Washington Mut., Inc.*, 442 B.R. at 314. No factor is dispositive, nor is a proponent required to establish each factor required for the release to be approved; rather the factors are intended to provide guidance to the Court in determining the fairness of the releases. *Id.*, at 346; *see also Exide Techs.*, 303 B.R. at 72 (finding that the factors are not exclusive or conjunctive requirements); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013) (approving debtors' releases despite not meeting the third and fifth *Zenith* factors).

158. Examining each of the *Zenith* factors supports the Debtor Releases. First, Scardapane is a director and J Scar is a Member of the Debtor under the Operating Agreement

and the Debtor is required to indemnify Scardapane and J Scar, which will further deplete Estate assets. *Operating Agreement*, Section 11.2. Accordingly, with respect to at least some of the claims, there is an identity of interest. With respect to the second factor, the Scardapane Entities have asserted multiple general unsecured claims that could have been allowed in excess of $1.7 million. *Weitz Declaration*, ¶9. Pursuant to the Scardapane Settlement, the Scardapane Entities have compromised these claims in the aggregate amount of $550,000 (exclusive of indemnification obligations and the Tax Distribution Claims) and have agreed that such claim will be subordinate to the payment of Class 3 claims. In addition, J Scar has agreed to voluntarily subordinate its Tax Distribution Claim, which avoids litigation on the priority of such claim. And with respect to the third *Zenith* factor, the Scardapane Entities would not have entered into the Scardapane Settlement absent the release. *Scardapane Declaration*, ¶40.

159. With respect to the fourth *Zenith* factor – the support of creditors – none of the creditors, other than the Hill Entities, elected to opt-out of the Releases. *See, Voting Report.* Finally, with respect to the last *Zenith* factor, it is not anticipated that all claims and interests will be paid in full. However, reviewing the *Zenith* factors in their totality, the Debtor Releases are fair and reasonable and should be approved.

160. The Consensual Third Party Releases similarly should be approved. As a threshold matter, the Consensual Third Party Releases are consensual in nature and may be approved on the basis that they are premised upon the releasing creditor's consent. *See Indianapolis Downs*, 486 B.R. at 306; *In re Spansion, Inc.*, 426 B.R. 144 (Bankr. D. Del 2010). Here, the ballots for Class 3 General Unsecured Claims expressly included an opt-out provision for the Consensual Third Party Releases. *Disclosure Statement Order*, Exhibit F. Moreover, courts similarly have found that a release of a non-debtor is consensual where the creditor is

unimpaired and is deemed to accept the plan. *See Indianapolis Downs*, 486 B.R. at 306 ("the third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan; these creditors are being paid in full and have therefore received consideration for the releases."); *Spansion*, 426 B.R. at 144 (finding that a release was not overreaching to the extent it bound unimpaired classes deemed to accept the plan since those creditors were being paid in full and had received adequate consideration for the release). Accordingly, the Consensual Third Party Releases should be approved.

161. The Plan includes in Article VIII.G a customary exculpation and limitation of liability that is authorized by Bankruptcy Code section 1125(e) and typically afforded to debtors, estate fiduciaries and third parties that participated in the plan process. Article VIII.G of the Plan is narrowly tailored to limit the liability of the Debtor, the Committee, the Liquidating Trustee and their related Professionals in connection with, relating to, or arising out of, the Chapter 11 Case, the formulation, negotiation, or implementation of the Plan, the solicitation of acceptances of the Plan, the filing of the Chapter 11 case; any postpetition act taken or omitted to be taken in connection with the Chapter 11 case, including the Sale; the pursuit of Confirmation and Consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan. *See Plan*, Art. VIII.G. The proposed exculpation provision does not, consistent with Third Circuit precedent, affect any liability that is determined to have constituted gross negligence, fraud or willful misconduct. *Id.*; *PWS Holding.*, 228 F.3d at 245-46 (holding that exculpation provision must not eliminate liability arising from willful misconduct or gross negligence). The Court should approve the exculpation provision in Article VIII.G of the Plan because it is consistent with: (i) the limitation of liability contained in Bankruptcy Code section 1125(e); and (ii) similar provisions approved by this Court.

162. The proposed exculpation provision is appropriate based on the limitation of liability provided in Bankruptcy Code section 1125(e). That section provides:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

11 U.S.C. § 1125(e). This statutory limitation of liability encompasses the matters listed in the proposed exculpation provision in Article VIII.G of the Plan. *See In re HSH Del. GP LLC,* Case No. 10-10187 (MFW) (Bankr. D. Del. Jan. 18, 2011) (confirming plan that provided exculpation to, among others, debtors' lenders and stating that provision was "appropriate under [Bankruptcy Code Section] 1125(e)" because it was "limited to the activities so far in the Chapter 11" and only related to prospective acts in connection with execution and implementation of plan). Accordingly, the Court has authority and should approve the exculpation provision as appropriate under Bankruptcy Code section 1125(e).

WAIVER OF STAY

163. The Debtor respectfully requests that the Court cause the Confirmation Order to become effective immediately upon its entry notwithstanding the 14-day stay imposed by operation of Bankruptcy Rule 3020(e), which 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." Fed. R. Bankr. P 3020(e); *see also* Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend (stating that a "court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately") (emphasis added).

According to the Advisory Committee notes to the 1999 amendments to the Bankruptcy Rules, the purpose of Bankruptcy Rule 3020(e) is to permit a party in interest to request a stay of the confirmation order pending appeal before the plan is implemented and an appeal becomes moot. Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend. To the extent a party wishes to seek an appeal, it may seek to stay the effectiveness of the Confirmation Order in connection with the appeal.[36] As a result, the Debtor respectfully requests that the Bankruptcy Court cause the Confirmation Order to become effective immediately upon its entry.

REPLY TO OBJECTION

164. With respect to the Hill Entities' miscellaneous objections and the objections of the U.S. Trustee, the Debtor addresses each on in the chart attached hereto as **Exhibit A**, which is incorporated herein by reference.

165. The Hill Entities have raised a number of objections to the treatment of Class 3 – arguing both it is improperly specified as impaired and that the impairment is artificial. *Plan Objection*, ¶¶14-18. It also argues that the treatment is "inherently defective" because it is "patently unclear what treatment is afforded Class 3 claimants" who opt-out of the General Unsecured Claim Settlement. *Id.*, ¶21.

166. JVSW and WS Finance[37] object the provisions of the Plan related to the General Unsecured Claim Settlement and the treatment of claims in Class 3 despite the fact that neither JVSW's nor WS Finance's direct interests are affected by those parts of the Plan. Although the

[36] If for some reason a party in interest does decide to appeal the Confirmation Order, such party is on notice that the Debtors are asking the Court for a waiver of the stay imposed by Bankruptcy Rule 3020(e). Therefore, such party is on notice that it must request a stay pending appeal immediately after the entry of the Confirmation Order. *See, e.g., Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 187 (3d Cir. 2001) (noting that all parties were on notice that plan called for "Immediate Effectiveness," allowing appellants the opportunity to seek stay immediately upon confirmation of plan).

[37] It is worth noting that HSS and SDI – who are Class 3 – General Unsecured Claims – have appeared in this case and filed the Hill Entities' Designation Motion, but did not object to the Plan.

Debtor recognizes that the Bankruptcy Code provides "[a] party in interest may object to confirmation of a plan," *see* 11 U.S.C. § 1128(b), this provision is limited by the well-established rule that a party in interest only has standing to object to provisions of a plan that directly affect its interests. *In re W.R. Grace & Co.*, 446 B.R. 96, 110, 145 (Bankr. D. Del. 2011) (holding that creditor "had no standing to object on the basis of the treatment of Class 6 claimants" where the objecting creditor was not a claimant in that class); *In re Quigley Co., Inc.*, 391 B.R. 695, 703 (Bankr. S.D.N.Y. 2008) (stating that "although a party in interest may object to confirmation of a plan, 11 U.S.C. § 1128(b), it cannot challenge portions of the plan that do not affect its direct interests."); *EFL Ltd. v. Miramar Res., Inc. (In re Tascosa Petrol. Corp.)*, 196 B.R. 856, 863 (D. Kan. 1996) (holding that creditor lacks standing to challenge portions of a plan that did not affect its direct interests and from asserting the rights of creditors in a different class); *In re B. Cohen & Sons Caterers, Inc.*, 124 B.R. 642, 646-47 (E.D. Pa. 1991) ("creditors lack standing to challenge those portions of a reorganization plan that do not affect their direct interest"); *In re Orlando Investors, L.P.*, 103 B.R. 593, 596-97 (Bankr. E.D. Pa. 1989) (holding that equity holder lacked standing to object to treatment of other equity holders in the same class who tendered voluntary releases and stating that "parties have standing only to challenge those parts of a reorganization plan that affect their direct interests." (quoting *In re Evans Prods. Co.*, 65 B.R. 870, 874 (S.D. Fl. 1986)); *see also In re Global Industrial Techs, Inc.*, 645 F.3d 201, 212 (3d Cir. 2011) (discussing standard for bankruptcy standing and stating that "the question is simply whether [parties] have legally protected interests that could be affected by the [p]lan").

167. Accordingly, because the General Unsecured Claim Settlement and the treatment of claims in Class 3 do not affect JVSW's and WS Finance's direct interests, they do not have standing to object to them. However, if the Court were to hear the objections, none of them have

merit. The classification and treatment of Class 3 – General Unsecured Creditors was the product of extensive negotiations with the Committee and is not designed to "trap" creditors, as colorfully and incorrectly asserted by JVSW and WS Finance. Rather, the General Unsecured Claim Settlement and treatment of Class 3 – General Unsecured Claims provides for the waiver of post-petition interest in exchange for a release of Causes of Action against such creditor and a shortened time period for the Liquidating Trustee to object to its claims. Despite JVSW and WS Finance's apparent difficulty understanding the relevant provision of the Plan, none of the voting creditors opted out of the General Unsecured Claim Settlement, except for non-statutory insiders HSS and SDI. In fact, Stradley – one of the Debtor's largest creditors – expressly has supported the General Unsecured Claim Settlement, noting that it is in favor of its terms because it permits payment in full in the shortest amount of time possible. *Stradley Objection*, ¶5.

168. HSS and SDI are the only Class 3 – General Unsecured Claims who opted out of the General Unsecured Claim Settlement. Thus, the remaining Class 3 – General Unsecured Claims are impaired as they are not receiving post-petition interest, notwithstanding the fact that junior claims are receiving recovery. These creditors were not "trapped" and the settlement does not unimpair them.

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CONCLUSION

169. For the reasons set forth in this Memorandum of Law, the Debtor respectfully submits that: (a) the Plan fully satisfies all applicable requirements of the Bankruptcy Code and should be confirmed by the Court; and (b) the 14-day stay of the Confirmation Order should be waived.

Dated: September 15, 2015
Wilmington, Delaware

LANDIS RATH & COBB LLP

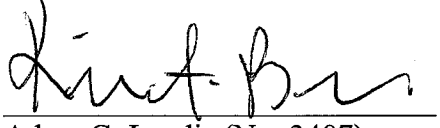

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EXHIBIT A

Objection	**Response**
JVSW should receive interest on its claim. *Plan Objection*, ¶59(a).	The Debtor incorporates by reference the Class C Claim Objection. As set forth in the Memorandum of Law, to the extent the Court determines that Class C Claims are not disallowed, the Plan will be modified to subordinate such claims and they will receive payment in full after the payment in full of all senior classes.
Article III.D of the Plan is objectionable because the Debtor does not define what, if any, rights the Debtor seeks to assert. *Plan Objection*, ¶60(a).	Article III.D of the is clear – the Debtor is reserving its right to object to unimpaired claims.
The Liquidating Trustee should not be compensated. *Plan Objection*, ¶60(c).	The compensation of the Liquidating Trustee is reasonable and appropriate
Article IV.C of the Plan cannot preserve claims that released pursuant to the Scardapane Settlement. *Plan Objection*, ¶60(d).	Article IV.C. is clear that Causes of Action are reserved "except as otherwise expressly provided in the Plan." The Scardapane Settlement, a Plan provision, expressly provides for the release.
The definition of Effective Date is unascertainable and no method of noticing parties when the Effective Date occurs. *Plan Objection*, ¶60(f).	The definition of Effective Date is not unascertainable. It identifies what conditions must be met prior to the Effective Date –thus, the Effective Date is fluid. This is a standard provision. The Debtor will file a notice of Effective Date.
The definition of Exculpated Claims and Exculpated Persons should not apply to the Liquidating Trustee or future events. *Plan Objection*, ¶60(g); *U.S. Trustee Objection*, ¶8.	The Debtor will modify the Plan to remove the Liquidating Trustee and his professionals from the definition of Exculpated Persons.
The inappropriate fixing of the Federal Judgment Rate as of the date of the Petition; *Plan Objection*, ¶60(f).	This provision is appropriate. The Liquidating Trustee needs a fixed date to calculate interest.
The definition of the Hill Entities is inappropriate to the extent it uses the term "Affiliates" "which makes no sense in this context. *Plan Objection*, ¶60(j).	The definition is appropriate. The Debtor does not understand the Hill Entities confusion on the term Affiliate, which is defined in the Bankruptcy Code.

Objection	**Response**
The Plan does not set a date for the filing of the Plan Supplement. *Plan Objection*, ¶60(k). It also does not identify the Liquidating Trustee or include the Liquidating Trust Agreement; *Plan Objection*, ¶60(l).	The Plan Supplement was filed, identifying the Liquidating Trustee and attaching the Liquidating Trust Agreement.
The definition of "Released Parties" is in bad faith and as a means of deception; *Plan Objection*, ¶60(m).	The definition is appropriate.
The definition of "U.S. Trustee" is "improper and in accurate [sic]". *Plan Objection*, ¶60(n).	The Debtor does not understand the Hill Entities confusion in this regard.
Providing only 20 days to object to a Fee Claim is improper. *Plan Objection*, ¶60(o).	The twenty (20) day period is consistent with the standard administrative fee orders and is sufficient time to file an objection.
Article V.G is a violation of the United States Constitution and the Bankruptcy Code. *Plan Objection*, ¶60(p).	Article V.G relates to allocations of distributions on Allowed Claims. The Debtor will delete, however, Section G of Article VII.
Objects to the use of the undefined term "Indemnification Obligations." *Plan Objection*, ¶60(q).	The Debtor will add a definition for Indemnification Obligations.
JVSW and WS Finance should have the right to prosecute claim objections filed by them prior to the Effective Date. *Plan Objection*, ¶60(r).	Reserving the right to prosecute claims objections solely for the Liquidating Trustee is a standard provision in Liquidating Trust Agreements and is appropriate.
Article VII.E of the Plan makes no sense to JVSW and WS Finance. *Plan Objection*, ¶60(s).	This provision is self-explanatory – it requires that claims objections be filed before the Claims Objection Deadline.
Article VII.F disallows claims that are only subordinated under the Code. *Plan Objection*, ¶60(s).	The Plan appropriately provides for the disallowance of claims filed after the Bar Date, unless otherwise ordered by the Court.
Article VII.H of the Plan violates the Bankruptcy Rules. *Plan Objection*, ¶60(t);	In order to quickly satisfy and pay all claims, the Plan appropriately does not allow for claim amendments.
The Plan should not release the members of the Committee or their professionals. *Plan Objection*, ¶60(u).	Article XII.C does not provide for a release of members of the Committee or its professionals.

Objection	**Response**
A final order should be required for determining that the Debtor solicited votes in good faith. *Plan Objection*, ¶60(v).	The Debtor will modify this order to require a final order.
The Unclaimed Property deadline should be extended. *U.S. Trustee Objection*, ¶¶9-10.	The Debtor will modify the plan to require that the Unclaimed Property is held in reserve for thirty (30) days, for a total time period of sixty (60) days.