IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In re:	
XINERGY LTD., *et al.*,	**Chapter 11**
	Case No. 15-70444 (PMB)
	(Jointly Administered)
Debtors.[1]	

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF XINERGY LTD. AND ITS SUBSIDIARY DEBTORS AND DEBTORS IN POSSESSION AND RESPONSE TO CERTAIN OBJECTIONS THERETO

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Dated: January 25, 2016

[1] The Debtors, along with the last four digits of each Debtor's federal tax identification number, are listed on Schedule 1 attached hereto.

BACKGROUND

1. The debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors") submit this Memorandum of Law in support of confirmation of the *First Amended Chapter 11 Plan of Reorganization Proposed by Xinergy Ltd. and Its Subsidiary Debtors and Debtors in Possession* [Doc. No. 453] (as may be amended, modified or otherwise supplemented from time to time, the "Plan"), pursuant to section 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code").[2]

2. After due notice and a hearing held on October 16, 2015, the United States Bankruptcy Court for the Western District of Virginia (the "Court") entered its *Order (I) Approving the Disclosure Statement; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, Including (A) Approving Form and Manner of Solicitation Procedures, (B) Approving Form and Notice of the Confirmation Hearing, (c) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots and (F) Approving Procedures for Vote Tabulations; (III) Establishing Deadline and Procedures for Filing Objections (A) to Confirmation of the Plan, and (B) to Proposed Cure Amounts; and (IV) Granting Related Relief* [Doc. No. 465] (the "Disclosure Statement Order") that, among other things, (i) approved the *First Amended Disclosure Statement Accompanying First Amended Joint Plan of Reorganization Proposed by Xinergy Ltd. and Its Subsidiary Debtors and Debtors in Possession* [Doc. No. 545] (as containing adequate information of a kind and in sufficient detail to enable a hypothetical investor of the relevant voting Classes under the Plan to make an informed judgment whether to vote to accept or reject the Plan; (ii) established November 24,

[2] Capitalized terms used herein, but not otherwise defined herein, shall have the meanings ascribed to such terms in the Plan.

2015, at 5:00 p.m. (prevailing Eastern Time) as the deadline to vote to accept or reject the Plan; (iii) established November 24, 2015, at 5:00 p.m. (prevailing Eastern Time) as the deadline to file and serve objection to the Plan; and (iv) scheduled a hearing to consider confirmation of the Plan for December 1, 2015, at 11:00 a.m. (prevailing Eastern Time). Thereafter the Debtors commenced their solicitation of votes to accept or reject the Plan.

3. On November 20, 2015, the Debtors filed the *Motion for Entry of an Order (I) Continuing Hearing on Confirmation of Joint Plan of Reorganization, (II) Extending Deadline for Submitting Ballots, (III) Extending the Deadline for Filing the Plan Supplement and (IV) Granting Related Relief* [Doc. No. 519] (the "Motion to Continue"). On November 24, 2015, the Court granted the Motion to Continue, and entered its *Order (I) Continuing and Rescheduling Hearing on Confirmation of Joint Plan of Reorganization, (II) Extending Deadline for Submitting Ballots, (III) Extending Deadline for Filing Plan Supplement and (IV) Granting Related Relief* [Doc. No. 523] (the "Continuance Order"). The Continuance Order (i) extended the previous deadline to vote to accept or reject the Plan to January 20, 2016, at 5:00 p.m. (prevailing Eastern Time) (the "Voting Deadline"); (ii) extended the previously scheduled deadline to file and serve any objection to the Plan to January 20, 2016, at 5:00 p.m. (prevailing Eastern Time) (the "Plan Objection Deadline"); and (iii) adjourned the previously scheduled confirmation hearing to January 27, 2016 at 11:00 a.m. (prevailing Eastern Time) (the "Confirmation Hearing").

4. At 12:14 a.m. on January 14, 2016, the Debtors filed the *Plan Supplement to the First Amended Chapter 11 Plan of Reorganization Proposed by Xinergy Ltd. and Its Subsidiary Debtors and Debtors in Possession* [Doc. No. 628] (the "Plan Supplement"), containing the Exit Facility Term Sheet outlining the Exit Facility to be made available to the Debtors upon

emergence, an overview of corporate governance changes to apply upon emergence, the identification of proposed directors and officers to serve the Reorganized Debtors, and the Rejection Schedule.

5. On January 25, 2016, the Debtors filed the *Declaration of Jeffrey L. Pirrung Certifying Vote On and Tabulation of Ballots Accepting and Rejecting the First Amendment Plan of Xinergy Ltd.* [Doc. No. 660] (the "Pirrung Declaration"). As set forth in the Pirrung Declaration, by the Voting Deadline, [Description of Voting]. The table below summarizes the certified results from the Plan solicitation process:

CLASSES	**TOTAL BALLOTS RECEIVED**			
	Accept		Reject	
	Percentage Accepting (Dollar Amount)	Percentage Accepting (Number of Claims)	Percentage Rejecting (Dollar Amount)	Percentage Rejecting (Number of Claims)
Class 3 – Senior Note Secured Claims	100% ($65,291,416.50)	100% (40)	0%	0%
Class 4 – General Unsecured Claims (excluding Senior Secured Note Deficiency Claims)[3]	100% ($2,231,659.58)	100% (31)	0%	0%

6. In further support of confirmation of the Plan, the Debtors have filed or will file their *Proposed Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Amended Joint Chapter 11 Plan* (the "Proposed Confirmation Order") contemporaneously with this Memorandum of Law.

[3] Pursuant to Section 3.2 of the Plan, the Holders of Allowed Class 4 Claims representing at least two-thirds in amount and more than one-half in number have voted to accept the Plan. Therefore, the Senior Secured Note Deficiency Claims will not participate in Distributions on account of such Class 4 Claims. For the purposes of presenting this tabulation, certain identical claims asserted against multiple debtors were excluded (total excluded: $538,638.75).

7. The Plan is the product of a highly negotiated agreement among the Debtors, the Consenting Noteholders, and the Creditors Committee.

8. All Classes receiving distributions under the Plan have voted to accept the Plan. Thus, as explained below, the Debtors submit that the Plan satisfies all of the confirmation requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and should be confirmed.

ARGUMENT

I. THE PROVISIONS OF THE BANKRUPTCY CODE NECESSARY FOR CONFIRMATION OF THE PLAN HAVE BEEN SATISFIED

A. The Plan Satisfies the Applicable Requirements of the Bankruptcy Code in Accordance with Section 1129(a)(1).

9. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1); *see also In re Smith*, 58 B.R. 652, 654 (Bankr. W.D. Va. 1985) *aff'd sub nom. In re Architectural Design, Inc.*, 59 B.R. 1019 (W.D. Va. 1986) ("Section 1129(a) of the Bankruptcy Code authorizes confirmation of a plan of reorganization if all of the requirements of the listed subsections are met."). The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code which governs classification of claims and contents of a plan, respectively. *See, e.g.*, H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 98-989, at 126 (1978); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648-49 (2nd Cir. 1988) ("[T]he legislative history of subsection 1129(a)(1) suggests that Congress intended the phrase 'applicable provisions' in this subsection to mean provisions of Chapter 11 that concern the form and content of reorganization plans[,] . . . such as section 1122 and 1123, governing classification and contents of plan.") (citations and emphasis omitted). As

demonstrated below, the Plan complies fully with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as with all other applicable provisions of the Bankruptcy Code.

1. 11 U.S.C. § 1122: Classification of Claims and Interests

10. Section 1122 of the Bankruptcy Code, in pertinent part, provides:

> (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 other claims or interests of such class.

11 U.S.C. § 1122(a). Under this section, a plan may provide for multiple classes of claims or equity security interests as long as each claim or equity security interest within a class is substantially similar to other claims or equity security interests in that class. *See Aetna Cas. & Sur. Co. v. Clerk, United States Bankruptcy Court* (*In re Chateaugay Corp.),* 89 F.3d 942, 949 (2d Cir. 1996) ("[C]lassification is constrained by two straight-forward rules: [d]issimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason"). In evaluating a plan's proposed classification scheme, courts generally recognize that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so. *See, e.g.*, *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes).

11. The Plan provides for the separate classification of Claims and Interests in the Debtors. Collectively, the Plan designates five Classes of Claims, one Class of Intercompany Claims and Interests, and one Class of Interests in the Debtors based upon differences in the legal nature and/or priority of such Claims and Interests. Administrative Claims and Priority Tax

Claims (collectively, the "Unclassified Claims") are not classified and are separately treated. The Classes are as follows:

- Class 1: Allowed Priority Non-Tax Claims
- Class 2: Other Secured Claims
- Class 3: Senior Secured Note Claims
- Class 4: General Unsecured Claims
- Class 5: Intercompany Claims and Interests
- Class 6: Interests in Xinergy Ltd. Common Stock
- Class 7: Section 510(b) Claims (if any)

12. In light of the foregoing classification scheme, it is indisputable that each of the Claims or Interests in each particular Class under the Plan is substantially similar to the other Claims or Interests in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests in the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests. Namely, the Plan separately classifies the Claims because each Holder of such Claims or Interests may hold rights in the Debtors' Estates that are legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification. For example, Claims are separately classified from Interests. Secured Claims are classified separately from General Unsecured Claims because the Debtors' Obligations with respect to the former are secured by collateral. The Senior Secured Note Claims are further grouped into a separate Class based on the characteristics that distinguish how those claims arise from the Other Secured Claims. Accordingly, the Debtors' classification of Claims or Interests in the Plan does not prejudice the rights of the Holders of such Claims and Interests. *See Olympia & York Fla. Equity Corp. v. Bank of New York (In re Holywell Corp.)*, 913 F.2d 873,

880 (11th Cir. 1990) (holding that the plan proponent is allowed considerable discretion to classify claims and equity interests according to the facts and circumstances of the case so long as the classification scheme does not violate priority rights or manipulate class voting). The classification of Claims and Interests in the Plan complies with section 1122 of the Bankruptcy Code.

2. 11 U.S.C. § 1123: Contents of the Plan

13. Section 1123(a) of the Bankruptcy Code sets forth seven requirements that are applicable to the Plan.[4] As demonstrated herein, the Plan complies fully with each such requirement. Section 1123(b) of the Bankruptcy Code sets forth the permissive provisions that may be incorporated into a chapter 11 plan. Each such provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

(a) 11 U.S.C. § 1123(a)(1): Designation of Classes of Claims and Interests

14. Section 1123(a)(1) of the Bankruptcy Code requires that the Plan must designate Classes of Claims and Interests subject to section 1122 of the Bankruptcy Code. *See* 11 U.S.C. § 1123(a)(1). As discussed above, Article III of the Plan designates seven Classes of Claims and Interests subject to section 1122 of the Bankruptcy Code. Section 1123(a)(1) of the Bankruptcy Code excludes Claims specified in sections 507(a)(2), 507(a)(3) and 507(a)(8) of the Bankruptcy Code from the classification requirement. The Unclassified Claims set forth in Article II of Plan need not be classified. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (Bankr. D. Del. 2006) (section 1123(a)(1) of the Bankruptcy Code does not require a plan to classify classes of administrative claims and priority tax claims). Accordingly, the Plan complies with the requirements of section 1123(a)(1) of the Bankruptcy Code.

[4] The requirement set forth in section 1123(a)(8) of the Bankruptcy Code is only applicable to individual debtors and, therefore, does not apply to the Plan.

(b) 11 U.S.C. § 1123(a)(2): Classes That Are Not Impaired Under the Plan

15. Section 1123(a)(2) of the Bankruptcy Code requires the Plan to specify which Classes of Claims or Interests are Unimpaired under the Plan. *See* 11 U.S.C. § 1123(a)(2). Article III of the Plan specifies that Classes 1, 2, and 5 are Unimpaired under the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

(c) 11 U.S.C. § 1123(a)(3): Treatment of the Classes That Are Impaired Under the Plan

16. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan specify how the Classes of Claims or Interests in the Debtors that are Impaired under the Plan will be treated. *See* 11 U.S.C. § 1123(a)(3). Article III of the Plan specifies that each of Classes 3, 4, 6, and 7 are Impaired under the Plan and specifies the treatment of Claims and Interests in those Classes. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

(d) 11 U.S.C. § 1123(a)(4): Equal Treatment Within Each Class

17. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan provide the same treatment for each Claim or Interest within a particular Class unless the Holder of such Claim or Interest agrees to less favorable treatment than other Class members. *See* 11 U.S.C. § 1123(a)(4). Under the Plan, the treatment of each Claim or Interest, in each respective Class, is the same as the treatment of each other Claim or Interest in such Class. Additionally, the Holders of Senior Secured Note Deficiency Claims have agreed to waive recovery on behalf of those Claims as General Unsecured Claims if the Holders of Claims in Class 4 vote to accept the Plan, which has occurred here. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

(e) 11 U.S.C. § 1123(a)(5): Adequate Means for Implementation

18. Section 1123(a)(5) of the Bankruptcy Code requires that chapter 11 plans provide adequate means for their own implementation. *See* 11 U.S.C. § 1123(a)(5). Article IV of the Plan provides adequate and proper means for implementation of the Plan. Other articles of the Plan set forth means for the implementation of the Plan as well, including resolution of disputed, contingent, and unliquidated Claims (Article VII), distributions under the Plan (Article VI), and the continuing jurisdiction over matters arising out of or related to the Chapter 11 Cases and the Plan (Article XI). Additionally, the Summary of Proposed Principal Terms of Governance and Related Rights, the Exit Facility Term Sheet, and Disclosure of Proposed Officers and Directors of Reorganized Debtors included in the Plan Supplement provide further detail regarding implementation of the Plan. Accordingly, the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

(f) 11 U.S.C. § 1123(a)(6): Prohibition on the Issuance of Nonvoting Equity Securities

19. Section 1123(a)(6) of the Bankruptcy Code requires that a plan for a corporate debtor provide for the inclusion in the debtor's charter of "a provision prohibiting the issuance of nonvoting equity securities" and "as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes." 11 U.S.C. § 1123(a)(6). The organizational documents of the Reorganized Debtors will include a provision prohibiting the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code. Accordingly, the Debtors submit that the Plan fully complies with and satisfies section 1123(a)(6) of the Bankruptcy Code.

(g) 11 U.S.C. § 1123(a)(7): The Plan's Provisions Regarding Directors, Managers and Officers are Consistent with the Interests of Creditors and Interest Holders and Public Policy

20. Section 1123(a)(7) of the Bankruptcy Code provides that chapter 11 plans must set forth provisions for the selection of directors, managers and officers that are consistent with the interests of creditors and equity security holders and public policy. *See* 11 U.S.C. § 1123(a)(7). The provisions of Article IV of the Plan, and as updated by the Plan Supplement, are consistent with the interests of Creditors and Interest Holders and with public policy. Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

(h) 11 U.S.C. § 1123(b)(1): The Plan Appropriately Impairs or Leaves Unimpaired Each of the Seven Classes

21. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). The Plan is consistent with section 1123(b)(1) of the Bankruptcy Code. Article III of the Plan specifies that Classes 1, 2, and 5 are Unimpaired and Classes 3, 4, 6, and 7 are Impaired.

(i) 11 U.S.C. § 1123(b)(2): The Plan Provides for the Assumption or Rejection of Executory Contracts or Unexpired Leases

22. Section 1123(b)(2) of the Bankruptcy Code provides that a plan may "subject to section 365 of [the Bankruptcy Code], provide for the assumption of any executory contract or unexpired lease of the debtor not previously rejected under such section." 11 U.S.C. § 1123(b)(2). Consistent with section 1123(b)(2) of the Bankruptcy Code, Article V of the Plan provides that unless an Executory Contract or Unexpired Lease (i) is expressly identified on the Rejection Schedule; (ii) has been previously rejected by Debtors by Final Order or has been rejected by the Debtors by order of the Court as of the Effective Date, which order becomes a Final Order after the Effective Date; (iii) is the subject of a motion to reject pending as of the

Effective Date; or (iv) is otherwise rejected pursuant to the terms herein, each Executory Contract and Unexpired Lease shall be deemed assumed, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, as of the Effective Date under section 365 of the Bankruptcy Code. Accordingly, the Plan satisfies section 1123(b)(2) of the Bankruptcy Code.

(j) 11 U.S.C. § 1123(b)(3)(A): Settlement

23. Section 1123(b)(3)(A) of the Bankruptcy Code permits the debtor to settle or adjust any claim or interest belonging to the debtor and its estate. *See* 11 U.S.C. § 1123(b)(3)(A). Consistent with section 1123(b)(3)(A) of the Bankruptcy Code, the Article VIII Provisions of the Plan provide for the settlement of certain claims and interests belonging to the Debtors. Accordingly, and for the reasons set forth in the *Memorandum of Law in Support of the Consensual Third Party Release, Exculpation, and Injunction Provisions of the First Amended Joint Chapter 11 Plan of Xinergy Ltd. and its Subsidiary Debtors and Debtors in Possession and Response to Certain Objections Thereto* [Doc. No. 659], the Court should approve the Article VIII Provisions.

(k) 11 U.S.C. § 1123(b)(6): Retention of Jurisdiction

24. Article XI of the Plan provides that, among other things, the Court shall retain jurisdiction as to all matters involving the Plan and the Claims allowance and disallowance process. These provisions are appropriate because the Court would have otherwise had jurisdiction over all of these matters during the pendency of the Chapter 11 Cases. Moreover, case law establishes that a bankruptcy court may retain jurisdiction over the debtor or property of the estate following confirmation. *See Universal Oil Ltd. v. Allfirst Bank (In re Millennium Seacarriers, Inc.)*, 419 F.3d 83, 96 (2d Cir. 2005) (holding that "a bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise

over a bankruptcy plan of reorganization") (internal quotation marks and citation omitted). Accordingly, the continuing jurisdiction of the Court is consistent with applicable law and therefore permissible under section 1123(b)(6) of the Bankruptcy Code.

25. Based upon the foregoing, the Plan complies fully with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as all other provisions of the Bankruptcy Code and thus satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code.

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

26. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent, the Debtors in this case, comply "with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The legislative history to section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595 at 412 (1977); S. Rep. No. 98-989 at 126 (1978) ("Paragraph 2 of [§ 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *In re Drexel Burnham Lambert Group*, 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992) (stating that the "legislative history to § 1129(a)(2) explains that this provision embodies the disclosure and solicitation requirements under §§ 1125 and 1126"); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (same). The Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of sections 1125 and 1126, as well as Bankruptcy Rules 3017 and 3018, regarding disclosure and plan solicitation by distributing the Disclosure Statement and soliciting acceptances of the Plan through the voting agent pursuant to the Disclosure Statement Order.

1. Compliance with 11 U.S.C. § 1125

27. Section 1125 of the Bankruptcy Code, in pertinent part, provides:

> (b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .
> . . . .
>
> (c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

11 U.S.C. § 1125(b), (c).

28. The purpose of section 1125 of the Bankruptcy Code is to ensure that parties in interest are fully informed regarding the condition of the debtor, the means for implementation of the plan and related transactions and the treatment of all classes of claims and equity security interests, all so they may make an informed decision whether to vote to accept or reject a chapter 11 plan. *See Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) (finding that section 1125 of the Bankruptcy Code obliges a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

29. The Debtors have satisfied section 1125 of the Bankruptcy Code. Before the Debtors began their solicitation of votes on the Plan, the Court, in the Disclosure Statement Order, approved the Disclosure Statement pursuant to section 1125(b) of the Bankruptcy Code as containing "adequate information" of a kind and in sufficient detail to enable hypothetical, reasonable investors typical of the Debtors' Creditors in the relevant voting Classes to make an informed judgment whether to accept or reject the Plan. *See* Disclosure Statement Order, ¶ 3.

30. Thereafter, the Debtors commenced their solicitation of votes to accept or reject the Plan. The manner in which votes were solicited in respect of the Plan is described in the Affidavit of Service, dated October 27, 2015 [Docket No. 477] (the "Solicitation Affidavit") prepared by American Legal Claims Services, LLC. Specifically, the Solicitation Affidavit provides that the Disclosure Statement and Plan, together with the additional solicitation materials approved by the Court in the Disclosure Statement Order, were transmitted to each Creditor entitled to vote to accept or reject the Plan (the "Solicitation Package"). As set forth in the Solicitation Affidavit, certain non-voting materials approved by this Court in the Disclosure Statement Approval Order were provided to Holders of Claims and Interests that are not entitled to vote to accept or reject the Plan, in compliance with the Disclosure Statement Order. The Debtors did not solicit acceptances of the Plan by any Creditor prior to the transmission of the Solicitation Packages. The Debtors also published voting notice in the print editions of the *Globe and Mail* and the *Charleston Gazette-Mail* on October 22, 2015. This notice contained information regarding the Voting Deadline, the Confirmation Hearing, and instructions on how to obtain copies of the Plan and Disclosure Statement through the Debtors' claims agent's website and the Court's PACER website.

31. Pursuant to the Continuance Order, the previously established Voting Deadline of November 24, 2015, was extended to January 20, 2016, providing an extended period of time for parties to submit votes on the Plan. The Debtors subsequently filed the Plan Supplement prior to the Voting Deadline. The Pirrung Declaration describes the methodology for the tabulation and certifies the results of the voting with respect to the Plan. The results of the vote in respect of the Plan are discussed herein in more detail.

2. Compliance with 11 U.S.C. § 1126

32. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a chapter 11 plan. Under section 1126 of the Bankruptcy Code, only Holders of Allowed Claims in Impaired Classes of Claims that will receive or retain property under the Plan on account of such Impaired Claims may vote to accept or reject the Plan. As set forth in section 1126:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
> . . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1126(a), (f), (g).

33. As set forth in the Pirrung Declaration and the Solicitation Affidavit, in accordance with the Disclosure Statement Order and section 1126 of the Bankruptcy Code, the Debtors solicited acceptances of the Plan from Holders of Allowed Claims against the Debtors in the Classes of Impaired Claims that are to receive distributions of property under the Plan. The Impaired Classes entitled to vote on the Plan are Classes 3 and 4. The Plan reflects that (i) Classes 1, 2, and 5 are Unimpaired and thus, are conclusively presumed to have accepted the Plan, and (ii) Classes 6 and 7 are Impaired and the members thereof will not receive or retain any interest in property or property under the Plan, and thus, are deemed to have rejected the Plan. Consequently, Classes 1, 2, 5, 6, and 7 are not entitled to vote to accept or reject the Plan. Based

upon the foregoing, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code as they relate to the nonvoting Classes.

34. As to Impaired Classes entitled to vote to accept or reject the Plan, section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance by such Classes of Impaired Claims:

> (c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c).

35. As evidenced in the Pirrung Declaration, the Plan has been accepted by Creditors holding in excess of two-thirds in amount and one-half in number of the Allowed Claims voted in each of Classes 3 and 4. Specifically, one hundred percent (100%) in number of Creditors and one hundred percent (100%) in dollar amount of all Allowed Claims in Class 3 that voted on the Plan voted to accept the Plan. As further provided in the Pirrung Declaration, one hundred percent (100%) in number of Creditors and one hundred percent (100%) in dollar amount of all Allowed Claims in Class 4 that voted on the Plan voted to accept the Plan.

36. Based upon the foregoing, the Debtors submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

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

37. Pursuant to section 1129(a)(3) of the Bankruptcy Code, a court shall only confirm a plan that has been proposed in good faith and not forbidden by law. 11 U.S.C. § 1129(a)(3). Although the Bankruptcy Code does not define good faith, courts in the Fourth Circuit and elsewhere have held that "[t]he overriding standard for good faith within the meaning of 11

U.S.C. § 1129(a)(3) is whether 'there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'" *In re Walker*, 165 B.R. 994, 1001 (E.D. Va. 1994) (quoting *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310, 1315 (8th Cir. 1987)). Bankruptcy courts in the Fourth Circuit have found that "[a] further refinement of the test for whether a plan is proposed in good faith is found in the notion that the plan must provide for fundamental fairness in dealing with creditors." *In re Eagan*, No. 12-30525, 2013 WL 237812, at *4 (Bankr. W.D.N.C. Jan. 22, 2013). Whether a plan satisfies this test is a question of fact assessed on a case-by-case basis in light of the totality of the circumstances. *In re Manchester Oaks Homeowners Ass'n, Inc.*, No. 11-10179-BFK, 2014 WL 961167, at *11 (Bankr. E.D. Va. Mar. 12, 2014) (citing *In re Walker*, 165 B.R. 994, 1001 (E.D. Va. 1994)) ("[W]hether a plan is filed in good faith is a matter to be assessed in view of the totality of the circumstances which necessitated the plan, in perspective of the purposes of the Bankruptcy Code."). As a general rule, where a plan maximizes the economic return to creditors in light of the totality of the facts and circumstances of the case, the good faith standard is satisfied. *In re Bennett*, No. 07-10864-SSM, 2008 WL 1869308, at *2 (Bankr. E.D. Va. Apr. 23, 2008) (finding the good faith requirement met where "no evidence was presented at the [confirmation] hearing to show that the debtor had the financial ability to pay more on account of unsecured claims than proposed in his plan."). Bankruptcy courts evaluate the fairness of a plan's proposed treatment of creditors in light of the debtor's ability to pay. *See Deans v. O'Donnell*, 692 F.2d 968, 970 (4th Cir. 1982) (examining the legislative history of the good faith requirement and stating that "[w]e conclude that the plain language of the statute precludes importation of a per se rule of substantial repayment into the "good faith" requirement in every case").

38. The Debtors, as the proponents of the Plan, have met their good faith obligation under the Bankruptcy Code. The Chapter 11 Cases were filed and the Plan was proposed with the legitimate and honest purpose of reorganizing the Debtors' assets and liabilities. The Plan (including all documents necessary to effectuate the Plan, including but not limited to those comprising the Plan Supplement) is the result of extensive arm's-length negotiations among the Debtors, the informal committee of holders of the Senior Secured Notes, and the Creditors Committee. These negotiations took place over many months, through telephone calls, meetings, and proposals and regular correspondence among the parties and their advisors. In fact, the distribution being made to General Unsecured Claims under the Plan is the result of negotiations between these parties. Thus, the Plan contains a series of compromises that represent a good faith effort on behalf of the Debtors and is in the best interests of the Debtors and the Debtors' creditors.

39. Moreover, the Plan achieves two of the primary objectives underlying a chapter 11 bankruptcy—the resolution of disputes and distribution of value to creditors for amounts owing. *See Crestar Bank v. Walker (In re Walker)*, 165 B.R. 994, 1001 (E.D. Va. 1994) (recognizing that the "prompt payment of creditors is a primary objective of a [c]hapter 11 reorganization"); *In re Hoosier Hi-Reach, Inc.*, 64 B.R. 34, 38 (Bankr. S.D. Ind. 1986) (stating that among the objectives of the Bankruptcy Code are "the expeditious resolution of disputes and speedy payment of creditors").

40. The Plan accomplishes these goals by providing the means through which the Debtors may effectuate a prompt distribution to Creditors. Inasmuch as the Plan promotes the objectives and purposes of the Bankruptcy Code and has garnered the overwhelming support of all of the Creditors voting on the Plan, the Plan and all documents necessary to effectuate the

Plan, including but not limited to those in the Plan Supplement, have been filed in good faith and the Debtors have satisfied their obligations under section 1129(a)(3) of the Bankruptcy Code.

D. 11 U.S.C. § 1129(a)(4): The Plan Provides that Payments by the Debtors for Services or Costs and Expenses are Subject to Court Approval as Reasonable

41. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval of the Court as reasonable. *See* 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) of the Bankruptcy Code has been construed to require that all payments of professional fees and expenses that are made from estate assets be subject to review and approval as to their reasonableness by the Court. *See In re Drexel Burnham Lambert Group*, 138 B.R. at 760.

42. Pursuant to the interim compensation procedures established in the *Order Granting Motion for Entry of Order Establishing Procedures for Interim Monthly Compensation and Reimbursement* [Doc. No. 103] and section 331 of the Bankruptcy Code, the Court has authorized and approved the payment of certain fees and expenses of professionals retained by the Debtors and the Committee in the Chapter 11 Cases. All such fees and expenses, as well as all other accrued fees and expenses of retained professionals through the Effective Date, remain subject to final review by the Court for reasonableness under section 330 of the Bankruptcy Code. In addition, pursuant to subsections (b)(3) and (b)(4) of section 503 the Bankruptcy Code, the Court must review any application for substantial contribution to ensure compliance with the statutory requirements and that the fees requested are reasonable.

43. Section 2.3 of the Plan requires that all requests for payment of Professional Claims, which include compensation for services rendered or reimbursement of expenses incurred through and including the Confirmation Date under sections 328, 330 or 331 of the

Bankruptcy Code, be filed and served in accordance with the Compensation Procedures approved by the Bankruptcy Court no later than 45 days after the Effective Date.

44. The foregoing procedures for the Court's review and ultimate determination of the professional fees and expenses to be paid by the Debtors satisfy the requirements of section 1129(a)(4) of the Bankruptcy Code. *See In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D. N.J. 1988) (holding that requirements of section 1129(a)(4) of the Bankruptcy Code are satisfied where the plan provided for payment of only "allowed" administrative expenses and such payments were subject to court approval); *see also In re Texaco, Inc.,* 84 B.R. 893, 903 (Bankr. S.D.N.Y. 1988) (holding that requirements of section 1129(a)(4) of the Bankruptcy Code are satisfied where final applications for the payment of fees and expenses are subject to court approval).

E. 11 U.S.C. § 1129(a)(5): The Debtors have Disclosed All Necessary Information Regarding Directors, Managers and Officers and the Employment of Such Directors, Managers and Officers is Consistent with the Interests of Creditors and Interest Holders and Public Policy.

45. Section 1129(a)(5) of the Bankruptcy Code requires that (i) the plan proponent disclose the identity and affiliations of the proposed directors and officers of the reorganized debtor; (ii) that the appointment or continuance of such directors and officers be consistent with the interests of creditors and equity security holders and public policy; and (iii) that there be disclosure of the identity and the nature of the compensation of any insiders to be retained or employed by the reorganized debtor. *See* 11 U.S.C. § 1129(a)(5). Section 1129(a)(5) of the Bankruptcy Code requires such disclosures to be made to the extent known. *See In re American Solar King Corp.*, 90 B.R. 808, 815 n.8 (Bankr. W.D. Tex. 1988) ("If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i).").

46. Section 1129(a)(5) of the Bankruptcy Code has been satisfied. The Plan Supplement, in accordance with section 4.13 of the Plan, discloses the identities and affiliations of the proposed directors and officers of the Reorganized Debtors to the extent known. The appointment of the directors and officers identified in the Plan Supplement is consistent with the best interests of the holders of Claims against, and Interests in, the Debtors and with public policy.

47. Section 1129(a)(5) also requires the disclosure of any insiders to be retained and the compensation proposed to be paid to such insiders. As previously disclosed in the Plan Supplement, the Debtors propose to retain Jeffrey Wilson and Michael Castle, each of which are insiders as defined in 11 U.S.C. § 101(31). Mr. Castle's compensation will be $20,000 per month plus benefits consistent with his pre-petition employment agreement. Mr. Wilson will be compensated immediately following the Effective Date at his current monthly rate as approved by this Court.

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

48. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over rates charged by a reorganized debtor in the operation of its business approve any rate change provided for in the plan. *See* 11 U.S.C. § 1129(a)(6). This provision is inapplicable to the Debtors. The Plan does not contain any rate changes subject to the jurisdiction of any governmental regulatory commission and does not require approval by any governmental regulator.

G. 11 U.S.C. § 1129(a)(7): The Plan Satisfies the Best Interests Test

49. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity security interest holders. Specifically, section 1129(a)(7) of the Bankruptcy Code provides:

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

11 U.S.C. § 1129(a)(7)(A). This section is often referred to as the best interests test.

50. The best interests test requires that each holder of a claim or equity security interest either accept the plan or receive or retain property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtors were liquidated in a hypothetical liquidation under chapter 7 of the Bankruptcy Code. *See In re Leslie Fay Cos.,* 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997).

51. Under the best interests test, the court must find that each non-accepting creditor or equity security interest holder under a chapter 11 plan will receive or retain value that is "not less than the amount that such holder would receive . . . if the debtor were liquidated." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship.*, 526 U.S. 434, 441–42 n. 13 (1999); *see also In re Leslie Fay Cos.*, 207 B.R. at 787. The best interests test concerns individual creditors and equity security holders rather than classes of claims or interests. *See In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. at 761.

52. By its express terms, section 1129(a)(7) of the Bankruptcy Code does not apply to Unimpaired Classes under the Plan, and the best interests test is satisfied to the extent each

Holder of an Impaired Claim votes to accept the Plan. *See* 11 U.S.C. § 1129(a)(7). Under the Plan, Classes 1, 2, and 5 are Unimpaired and deemed to accept the Plan. The best interests test, therefore, is inapplicable to the members of Classes 1, 2, and 5. Likewise, all Holders of Claims in Classes 3 and 4 that returned ballots voted to accept the Plan. Therefore, the best interest test is satisfied with respect to all Holders of Claims in Classes 3 and 4.

53. Under the Plan, Classes 6 and 7 will not receive or retain any property under the Plan and therefore are deemed to reject the Plan. However, Holders of Claims in Classes 6 and 7 would do no better under a hypothetical dissolution of the Debtors' Estates under chapter 7 of the Bankruptcy Code, as the value of the Debtors' Assets is less than the total value of the Debtors' debts and liabilities and a chapter 7 liquidation would not increase the value of the Assets available for distribution to Creditors. The Debtors will request at the Confirmation Hearing that the Court make a finding that Claims and Interests in Classes 6 and 7 have no value for purposes of the "best interest" test under section 1129(a)(7) of the Bankruptcy Code.

54. Based on the foregoing, the Debtors believe that the Plan meets the best interests test provided in section 1129(a)(7) of the Bankruptcy Code.

H. 11 U.S.C. § 1129(a)(8): The Plan Has Been Accepted by the Impaired Voting Classes and the Unimpaired Classes, and, as to such Classes, the Requirements of Section 1129(a)(8) of the Bankruptcy Code Have Been Satisfied

55. Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or equity interests accept the plan. *See* 11 U.S.C. § 1129(a)(8) ("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"). Holders of Claims in Classes 1, 2 and 5 are Unimpaired under the Plan, and, pursuant to section 1126(f) of the Bankruptcy Code, are collectively presumed to have

voted to accept the Plan. Thus, the requirements of section 1129(a)(8) of the Bankruptcy Code are satisfied with respect to Classes 1, 2 and 5.

56. As to the Impaired Classes entitled to vote to accept or reject the Plan, sections 1126(c) and 1126(d) of the Bankruptcy Code specify the requirements for acceptance or rejection of the Plan by Classes of Claims and Interests, respectively. Classes 3 and 4 are the Impaired Classes of Claims eligible to vote on the Plan. As set forth above, the Holders of Allowed Claims in Classes 3 and 4 affirmatively have voted to accept the Plan.

57. The tabulation of votes is discussed in more detail in the Pirrung Declaration. As to the Unimpaired Class and the Impaired and accepting Classes, the requirements of section 1129(a)(8) of the Bankruptcy Code have been satisfied.

58. The holders of Claims and Interests in Classes 6 and 7 will not receive any distributions of property under the Plan and therefore are deemed to have rejected the Plan. Because the requirements of section 1129(a)(8) of the Bankruptcy Code have not been satisfied with respect to these Classes, section 1129(b) of the Bankruptcy Code applies to these classes. Nonetheless, as set forth below, the Plan may be confirmed under the "cram down" provisions of section 1129(b) of the Bankruptcy Code with respect to these Classes.

I. 11 U.S.C. § 1129(a)(9): The Plan Provides for Payment in Full of Allowed Administrative Claims and Allowed Priority Claims

59. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and authorizes the holders of certain other priority claims to be paid the value of their allowed claim through deferred cash payments. In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative expenses allowed under section

503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims.

60. In accordance with sections 1129(a)(9)(A) and (B) of the Bankruptcy Code, Article II of the Plan provides that all Allowed Administrative Claims under section 503(b) of the Bankruptcy Code, unless the Holder of such Claim agrees to less favorable treatment, will be paid in full in Cash either: (a) if an Administrative Claim is Allowed on or prior to the Effective Date, on the Effective Date or as soon as reasonably practicable thereafter (or, if not then due, when such Allowed Administrative Claim is due or as soon as reasonably practicable thereafter); (b) if such Administrative Claim is not Allowed as of the Effective Date, no later than 30 days after the date on which an order Allowing such Administrative Claim becomes a Final Order, or as soon as reasonably practicable thereafter; (c) if such Allowed Administrative Claim is based on liabilities incurred by the Debtors in the ordinary course of their business after the Petition Date in accordance with the terms and conditions of the particular transaction giving rise to such Allowed Administrative Claim without any further action by the holders of such Allowed Administrative Claim; (d) at such time and upon such terms as may be agreed upon by such holder and the Debtors or the Reorganized Debtors, as applicable; or (e) at such time and upon such terms as set forth in an order of the Bankruptcy Court.

61. Article II of the Plan provides that all Allowed Priority Tax Claims will receive (i) the treatment provided by section 1129(a)(9)(C) of the Bankruptcy Code, (ii) be paid in full in Cash on the Effective Date, or (iii) such other treatment as may be agreed upon between the Holder of such an Allowed Priority Tax Claim and the applicable Debtor.

62. Article II of the Plan provides that the Reorganized Debtors will pay Professional Claims in Cash in the amount the Bankruptcy Court allows, including from the Professional Fee

Escrow Account, which the Reorganized Debtors will establish in trust for the Professionals and fund with Cash equal to the Professional Fee Amount on the Effective Date.

63. Additionally, section 2.2 of the Plan provides for appropriate treatment of the DIP Facility Claims. As further described in the Exit Facility Term Sheet included in the Plan Supplement, the DIP Facility Claims pertaining to the $1,500,000 loan made pursuant to the *Second Supplemental Order Authorizing the Debtors to Amend the DIP Credit Agreement and Obtain Incremental Financing Under the DIP Credit Agreement and Granting Related Relief* [Doc. No. 611] (the "Senior DIP Facility Claims") will convert to First Lien Term Loans under the Exit Facility. All other DIP Facility Claims will convert to Second Lien Term Loans under the Exit Facility. In each case, the face amount of the Exit Facility Term Loans will equal the amount of the DIP Facility Claims. Holders of the Senior DIP Facility Claims will receive a pro rata share of 20% of the Plan Securities along with other lenders providing the First Lien Term Loans under the Exit Facility as a commitment fee. At maturity, the Second Lien Term Loans will convert into 48% of the equity in New Holdco if not refinanced in cash or prepaid in full.

64. Thus, for these reasons, Article II of the Plan satisfies the requirements of sections 1129(a)(9)(A) and (B) of the Bankruptcy Code.

J. 11 U.S.C. § 1129(a)(10): At Least One Class of Impaired Claims Has Accepted the Plan

65. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider," if a class of claims is impaired under the Plan. 11 U.S.C. § 1129(a)(10); *see also In re Martin*, 66 B.R. 921, 924 (Bankr. D. Mont. 1986) (holding that where three classes of impaired claims accepted the plan, exclusive of insiders, requirements of 11 U.S.C. § 1129(a)(10) are satisfied); *see also In re Drexel Burnham Lambert Group*, 138 B.R.

at 771 (holding that the plan satisfied section 1129(a)(10) of the Bankruptcy Code where at least one class of claims, exclusive of insiders, had accepted the plan). As demonstrated below, the Plan satisfies this requirement.

66. As discussed above, Classes 3 and 4 are Impaired under the Plan. The members of Classes 3 and 4 received ballots that enabled those Creditors to vote on the Plan. The voting results demonstrate that, despite their impairment under the Plan, members of both Classes 3 and 4 voted to accept the Plan in accordance with section 1126 of the Bankruptcy Code. Classes 3 and 4 therefore, qualify as impaired accepting Classes and satisfy the requirements of section 1129(a)(10) of the Bankruptcy Code.

K. 11 U.S.C. § 1129(a)(11): Confirmation of the Plan is Not Likely to Be Followed by Liquidation or the Need for Further Financial Reorganization of the Debtors

67. Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition precedent to Confirmation, the Court determine that the Plan is feasible, meaning:

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

11 U.S.C. § 1129(a)(11). As described below, and as will be demonstrated at the Confirmation Hearing, the Plan is feasible within the meaning of this provision. The feasibility test set forth in section 1129(a)(11) of the Bankruptcy Code requires the Court to determine whether the Plan is workable and has a reasonable likelihood of success. *See In re River End Apartments, Ltd.,* 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994) ("To establish feasibility under § 1129(a)(11), a proponent must demonstrate that its plan offers a reasonable prospect of success and is workable") (internal quotation marks and citation omitted).

68. In the Fourth Circuit, "the standard for feasibility is whether there is a 'reasonable assurance of success. Success need not be guaranteed.'" *Quality Inns Int'l, Inc. v. L.B.H. Associates Ltd. P'ship*, 911 F.2d 724 (4th Cir. 1990) (citing *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 868, 109 S.Ct. 176 (1988)). Importantly, "the feasibility inquiry is peculiarly fact intensive and requires a case by case analysis, using as a backdrop the relatively low parameters articulated in the statute. . . . There is a relatively low threshold of proof necessary to satisfy the feasibility requirement." *See Mercury Cap. Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006) ("[A] 'relatively low threshold of proof' will satisfy the feasibility requirement.") (quoting *In re Brotby*, 303 B.R. 177, 191–92 (B.A.P. 9th Cir. 2003)). Indeed, "a court is never presented with a plan that is guaranteed to succeed. Nevertheless, the plan proponent—here the debtor—must demonstrate 'a reasonable prospect that the plan of reorganization will succeed.'" *In re DeLuca*, No. 95-11893-AM, 1996 WL 910908, at *18 (Bankr. E.D. Va. Apr. 12, 1996) (quoting *In re Adamson Co., Inc.*, 42 B.R. 169, 176 (Bankr. E.D. Va. 1984)).

69. Here, there is no doubt that the Plan is feasible, and the Plan has not drawn any feasibility objections. The Plan restructures the Debtors' outstanding debt obligations and, through the Exit Facility outlined in the Plan and the Plan Supplement, provides the Debtors with the liquidity necessary to satisfy the conditions precedent to the Effective Date, fund distributions to the Debtors' creditors pursuant to the Plan, and provide the Debtors with sufficient working capital to fund their ongoing operations. The terms of the Exit Facility, as set forth in the Exit Facility Term Sheet included in the Plan Supplement, also demonstrates that Plan confirmation is unlikely to be followed by liquidation or a need for additional reorganization. The Exit Facility Term Sheet provides a mechanism for the automatic

conversion of the Second Lien Facility (as defined in the Exit Facility Term Sheet) into equity of the Reorganized Debtors if not refinanced with cash or prepaid in full. This further supports the feasibility of the Plan by providing additional potential future liquidity to the Reorganized Debtors.

70. The Debtors submit that adequate sources of Cash exist to implement the Plan, fund the ongoing operation of the Debtors, and make all distributions contemplated under the Plan. The terms of the Exit Facility will also allow the Debtors to avoid the need for additional restructuring or liquidation. Thus, because the Plan is workable and has a reasonable likelihood of success, the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code is satisfied.

L. 11 U.S.C. § 1129(a)(12): All Statutory Fees Have Been or Will be Paid

71. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 [title 28, the United States Code], as determined by the court at the hearing on confirmation of the plan. . . ." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930,] chapter 123 of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, section 12.2 of the Plan provides that all such fees and charges payable have been or will be paid in Cash on the Effective Date and thereafter as may be required until the entry of a final decree and order closing the Chapter 11 Cases. Thus, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. 11 U.S.C. §§ 1129(a)(13), (a)(14), (a)(15) and (a)(16)

72. Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. *See* 11 U.S.C.

§ 1129(a)(13). Section 1129(a)(13) of the Bankruptcy Code is inapplicable as the Debtors provide no retiree benefits (as defined in Section 1114 of the Bankruptcy Code). Section 1129(a)(14) of the Bankruptcy Code is inapplicable because the Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Moreover, section 1129(a)(15) of the Bankruptcy Code is inapplicable because the Debtors are not individuals. Finally, none of the Debtors is a corporation or trust that is not a moneyed, business or commercial corporation or trust. Therefore, section 1129(a)(16) of the Bankruptcy Code is inapplicable to the Plan.

N. 11 U.S.C. § 1129(d): The Principal Purpose of the Plan is not Avoidance of Taxes

73. Section 1129(d) of the Bankruptcy Code states "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. § 1129(d). The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no Governmental Unit, or any other entity, has objected to the Plan on those grounds. The Debtors therefore submit that the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

II. THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS OF SECTION 1129(B) BECAUSE THE PLAN DOES NOT DISCRIMINATE UNFAIRLY AND IS FAIR AND EQUITABLE

74. Classes 6 and 7 are receiving no distributions under the Plan, and thus, are deemed to reject the Plan. No filed Claims in Class 7 have been allowed in these chapter 11 cases. Therefore, as Class 7 is an empty Class, the cram down requirements of section 1129(b) of the Bankruptcy Code are only applicable to Class 6. Here, cram down of the holders of Class 6 Interests is appropriate under the Bankruptcy Code.

75. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where the plan is not accepted by all impaired classes of claims and interests. This mechanism is commonly referred to as "cram down." Section 1129(b) provides in pertinent part:

> Notwithstanding section 510(a) of [the Bankruptcy Code], if all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] 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, and 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) (emphasis added).

76. Under section 1129(b) of the Bankruptcy Code, the Bankruptcy Court may cram down a plan over a dissenting impaired class or classes of claims or interests so long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the dissenting class or classes. *See In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005) (quoting 11 U.S.C. § 1129(b)(1)); *Travelers Ins. Co. v. Bryson Porps., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496, 503 (4th Cir. 1992); *see also In re Dura Auto Sys., Inc.*, 379 B.R. 257, 270 (Bankr. D. Del. 2007) (discussing unfair discrimination); *In re Catron*, 186 B.R. 194, 197 (Bankr. E.D. Va. 1995). The Plan does not "discriminate unfairly" and is "fair and equitable" with respect to Class 6.

77. Section 1129(b)(1) does not prohibit discrimination between classes, only discrimination that is unfair. *See In re Cypresswood Land Partners, I*, 409 B.R. 396, 434 (Bankr. S.D. Tex. 2009) ("Section 1129(b)(1) prohibits only unfair discrimination, not all discrimination. The mechanical approach threatens the vitality of the word 'unfairly' in § 1129(b)(1)."); *In re Salem Suede, Inc.*, 219 B.R. 922, 933 (Bankr. D. Mass. 1998); *In re 11,111,*

Inc., 117 B.R. 471, 478 (Bankr. D. Minn. 1990). The overwhelming weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment, or a class of claims receives consideration of a value that is greater than the amount of its allowed claims. *See In re Kennedy*, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); *In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990); *In re Future Energy Corp.*, 83 B.R. 470, 492–93 (Bankr. S.D. Ohio 1988); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff d in part, rev'd in part*, 78 B.R. 407 (S.D.N.Y. 1987). Accordingly, as between two classes of claims or two classes of interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, *see, e.g.*, *Johns-Manville*, 68 B.R. at 636; or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment. *See, e.g.*, *Buttonwood Partners*, 111 B.R. at 63. As the foregoing standards demonstrate, the Plan does not "discriminate unfairly" because all interest holders are treated the same under the plan, and the more senior classes of claimants are not being paid in full.

78. Under the Plan, the "fair and equitable" standard, known as the "absolute priority rule," is satisfied as to each holder of a an Interest in Class 6. Although holders of Interests in Class 6 shall neither receive nor retain any property under the Plan, since holders of claims in Classes 3 and 4 are not being paid in full and no holder, if any, that is junior to their Interests will receive or retain property under the Plan on account of their junior Claims or Interests, the Plan is "fair and equitable" with respect to holders of Interests in Class 6. Based on the foregoing, the Plan satisfies the cram down requirements of section 1129(b) of the Bankruptcy Code.

III. THE PLAN SHOULD BE CONFIRMED OVER SABRA INVESTMENTS, LP'S OBJECTION[5]

79. Sabra Investments, LP ("Sabra") has filed two objections to the Debtors' Plan: (i) *Sabra Investments, LP's (I) Objection to Debtors' Motion to Assume; and (II) Limited Objection to the Plan* [Doc. No. 538] (the "First Sabra Objection") and (ii) *Sabra Investments, LP's (I) Application for Allowance and Payment of Administrative Expense Claim Pursuant to 11 U.S.C. § 503(B)(1)(A); and (II) Supplemental Objection to the Plan* [Doc. No. 645] (the "Second Sabra Objection") (collectively, the First and Second Sabra Objections are referred to as the "Sabra Objections").

80. The First Sabra Objection raises objections related to the amount of property taxes owed by the Debtors under the mineral lease (the "Mineral Lease") and the surface lease (the "Surface Lease") (collectively, the Surface Lease and the Mineral Lease are referred to as the "Leases") between Sabra and the Debtors. The Debtors seek to assume the Mineral Lease as part of the Plan, and the Surface Lease has expired and was included on the Debtors' lease rejection list filed as part of the Plan Supplement.

81. The Debtors owned the real property that is the subject of the Leases until late 2014, when the Debtors transferred ownership to Sabra. On December 29, 2014, the Debtors and Sabra entered into the Surface Lease, under which the Debtors leased from Sabra six cabins, an office building and lounge area, plus one acre surrounding each site, along with full use of the roadways located on the leased premises. On January 1, 2015, the Debtors and Sabra entered into the Mineral Lease, under which the Debtors acquired the underground mining rights for the same property as included in the

[5] The Debtors address the *United States Trustee's Objection to Confirmation of Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Doc. No. 647] and the *Joinder of Jon Nix to the United States Trustee's Objection of Debtors' First Amended Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Doc. No. 656] through the *Memorandum of Law in Support of the Consensual Third Party Release, Exculpation, and Injunction Provisions of the First Amended Joint Chapter 11 Plan of Xinergy Ltd. and its Subsidiary Debtors and Debtors in Possession and Response to Certain Objections Thereto* [Doc. No. 659].

Surface Lease, plus additional areas adjacent to or near the Surface Lease premises. The Leases require the Debtors to pay real estate taxes during the effective date of the Leases, as is explained below.

82. On October 30, 2015, the Debtors filed their *Omnibus Motion for Authorization to Assume Unexpired Leases of Nonresidential Real Property* [Doc. No. 486].

83. The West Virginia real property tax year runs from July 1 to June 30. *See* W. Va. Code § 11A-1-2. The real property taxes applicable to the Leases that are at issue here relate to the 2014 tax year (the "2014 Taxes") and the 2015 tax year (the "2015 Taxes"). The Fayette County, West Virginia, tax notices applicable to the Leases provide for payment of the 2015 Taxes under both Leases in two installments. The first-half 2015 Taxes were due on September 1, 2015, and the second-half 2015 taxes do not become due until March 1, 2016.

84. The Debtors submit that the 2014 Taxes are not an obligation of the Debtors under the Leases because they were assessed prior to the effective date of the Leases. The Mineral Lease obligates the Debtors "to pay all taxes, assessments, and governmental charges that may be levied or assessed against" the leased property "while this Lease is in effect." Mining Lease Art. VIII. Similarly, the Surface Lease provides the Debtors "shall pay all property taxes and utilities incident to Lessee's use of the Property and Lessor's ownership thereof during the Initial Lease Period." Surface Lease Art. 9. Under West Virginia Code section 11A-1-2 the annual real property tax assessment date is July 1. W. Va. Code § 11A-1-2; *see also George F. Hazelwood Co. v. Pitsenbarger*, 141 S.E.2d 314, 319 (W. Va. 1965) ("The statutory assessment date determines the taxability of property and not the actual date the assessment is made.").

85. Under the terms of Leases and West Virginia's applicable statute, the 2014 Taxes are not an obligation of the Debtors. First, the Mineral Lease clearly provides that the Debtors are only required to pay taxes assessed while the lease is in effect. The effective date of the Mineral Lease is January 1,

2015. Under West Virginia law, the 2014 Taxes would have been levied on July 1, 2014, six months prior to the existence of the Mineral Lease. Likewise, the Surface Lease, which was entered into on December 29, 2014, only obligates the Debtors to pay property taxes incurred during the initial term of that lease. Neither lease contains any language obligating the Debtors to pay the 2014 Taxes, and Sabra has presented no evidence establishing such an arrangement between the parties. As the 2014 Taxes would have been assessed well prior to the effective date of the Leases, they cannot be incident to the Debtors' use of the leased property. Thus, payment of the 2014 Taxes are not an obligation of the Debtors under the Leases.

86. Turning to the 2015 Taxes, the Debtors agree that any outstanding first-half 2015 Taxes due under the Mineral Lease should be included in the Debtors' cure obligations.[6] However, payment of the second-half 2015 Taxes, which do not become due for over a month, should not be included in the Debtors' cure obligations under the Mineral Lease, as the second-half 2015 Taxes due under the Mineral Lease will be paid by the Debtors in the ordinary course.

87. The Debtors also agree that payment of the first-half 2015 Taxes under the Surface Lease is an obligation of the Debtors. However, based on the termination and rejection of the Surface Lease and the fact that the second-half 2015 Taxes have not yet come due, any second-half 2015 Taxes due under the Surface Lease are not an obligation of the Debtors because such taxes are not "incident to Lessee's use of the Property." Surface Lease Art. 9.

88. In sum, the Debtors submit that they have no obligation under the Leases to pay the 2014 Taxes. The Debtors have an obligation under the Mineral Lease to pay to first-half 2015 Taxes, and the Debtors will pay the second-half 2015 Taxes as they become due in the ordinary course. The Debtors also have an obligation under the Surface Lease to pay the first-half 2015 Taxes. However, based on the

[6] The Debtors submit that the stated cure amount of $5,231.40 accurately reflects the Debtors' obligation regarding the first-half 2015 Taxes.

termination and rejection of the Surface Lease, the Debtors have no obligation to pay the second-half 2015 Taxes.

89. The Second Sabra Objection does not assert any grounds for objecting to confirmation of the Debtors' Plan, but instead appears to be asserting an application for an alleged administrative expense claim. Article II of the Plan provides a process for resolving applications for administrative expenses claims. While the Debtors believe that Sabra's application is without merit, they will respond to this application in due course, in accordance with the process set forth in Article II of the Plan. For these reasons, the Court should confirm the Debtors' Plan over the Sabra Objections.

CONCLUSION

90. For the foregoing reasons, the Plan complies with and satisfies all applicable requirements of section 1129 of the Bankruptcy Code, and thus, should be confirmed.

DATED: January 25, 2016

Respectfully submitted,

/s/ *Justin F. Paget*

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1. Xinergy Ltd. (3697)
2. Xinergy Ltd. (3865)
3. Xinergy Finance (US), Inc. (5692)
4. Pinnacle Insurance Group LLC (6851)
5. Xinergy of West Virginia, Inc. (2401)
6. Xinergy Straight Creek, Inc. (0071)
7. Xinergy Sales, Inc. (8180)
8. Xinergy Land, Inc. (8121)
9. Middle Fork Mining, Inc. (1593)
10. Big Run Mining, Inc. (1585)
11. Xinergy of Virginia, Inc. (8046)
12. South Fork Coal Company, LLC (3113)
13. Sewell Mountain Coal Co., LLC (9737)
14. Whitewater Contracting, LLC (7740)
15. Whitewater Resources, LLC (9929)
16. Shenandoah Energy, LLC (6770)
17. High MAF, LLC (5418)
18. Wise Loading Services, LLC (7154)
19. Strata Fuels, LLC (1559)
20. True Energy, LLC (2894)
21. Raven Crest Mining, LLC (0122)
22. Brier Creek Coal Company, LLC (9999)
23. Bull Creek Processing Company, LLC (0894)
24. Raven Crest Minerals, LLC (7746)
25. Raven Crest Leasing, LLC (7844)
26. Raven Crest Contracting, LLC (7796)