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 8 fka Zacky Farms, LLC

9 UNITED STATES BANKRUPTCY COURT  
 10 EASTERN DISTRICT OF CALIFORNIA  
 11 SACRAMENTO DIVISION

12 In re:

13 ZF IN LIQUIDATION, LLC, a  
 California limited liability company  
 14 fka ZACKY FARMS, LLC, a  
 California limited liability  
 15 company,

16 Debtor-In-Possession.

CASE NO. 12-37961-B-11

Confirmation Hearing:

Date: December 10, 2013  
 Time: 2:00 p.m.  
 Courtroom: 32  
 501 I Street, 6th Floor  
 Sacramento, CA

17 **SECOND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
 18 **CONFIRMATION OF DEBTOR'S AMENDED PLAN OF LIQUIDATION**  
 19 **(DATED: JUNE 27, 2013)**

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 22 [THE TEXT OF THE DOCUMENT BEGINS ON THE NEXT PAGE]  
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**OTHER AUTHORITIES**

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1 ZF in Liquidation, LLC fka Zacky Farms, LLC, debtor and debtor-in-possession (the  
2 “Debtor”), hereby submits this Memorandum of Points and Authorities in Support of  
3 Confirmation of the Amended Plan of Liquidation (Dated: June 27, 2013) (the “Plan”), pursuant  
4 to section 1129.<sup>1</sup>

5 The evidentiary support for the facts supporting confirmation is provided in the Second  
6 Declaration of Sean M. Harding in Support of Confirmation of the Plan (“Harding Decl.”) filed  
7 herewith, the Declaration of Karen L. Widder Regarding Tabulation of Ballots in Support of  
8 Confirmation of the Plan (“Ballot Decl.”) and the Ballots filed on August 6, 2013 (Dkt. Nos. 2057  
9 and 2055, respectively), the Amended Declaration of Karen L. Widder Regarding Tabulation of  
10 Ballots in Support of Confirmation of the Plan filed on August 12, 2013 (Dkt. No. 2072), and the  
11 Supplemental Declaration of Karen L. Widder Regarding Tabulation of Ballots in Support of  
12 Confirmation of the Plan (“Supp. Ballot Decl.”) and the Ballots and Amended Ballots received  
13 after August 6, 2013, both filed herewith, as well as such further evidence and argument as may  
14 be submitted at the confirmation hearing.

## 15 I. BACKGROUND

### 16 A. Plan Overview

17 On the Petition Date,<sup>2</sup> the Debtor filed its voluntary petition under Chapter 11 of the Code.  
18 Dkt. No. 1. The Plan provides for the continued liquidation of assets of the Estate and  
19 distribution of the proceeds in accordance with existing Court-approved settlements and the  
20 priorities established under the Code. Disclosure Statement Accompanying the Plan filed May 1,  
21 2013 (Dkt. No. 1539) (“Disclosure Statement”) at 1:6-9.

### 22 B. Plan Voting

23 On May 2, 2013, after notice and a hearing, the Court entered its Order Approving  
24 Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined  
25 with Notice of Hearing on Confirmation and of Related Deadlines (Dkt. No. 1543) (“Order  
26

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27 <sup>1</sup> Statutory citations, unless otherwise noted, are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

28 <sup>2</sup> Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Plan.

1 Approving Disclosure Statement”). On May 10, 2013, the Debtor served the solicitation package  
2 regarding the proposed confirmation of the Plan. Dkt. No. 1650. On May 15, 2013, the Debtor  
3 filed an application to amend the Order Approving Disclosure Statement to permit the Debtor to  
4 serve the exhibits to the Plan on CD-ROM. Dkt. No. 1678. On May 21, 2013, the Court entered  
5 its Order Approving Application to Amend Order Approving Disclosure Statement. Dkt. No.  
6 1713.

7 The Plan provides for sixteen classes of impaired claims: Class 1 (Settled Claim of DIP  
8 Lender); Class 2 (Settled Secured Claim of Western Milling); Class 3 (Disputed Secured Claim of  
9 Dreisbach); Class 4 (Settled Claim of the Lillian Zacky Trust); Class 5 (Disputed Secured Claim  
10 of Office Max North America); Class 6 (Disputed Secured Claim of Dave Dodge Service, Inc.);  
11 Class 7 (Disputed Secured Claim of B&B Quality Food Providers); Class 8 (Disputed Secured  
12 Claim of Wei Chan DDS); Class 9 (Disputed Secured Claim of Idaho Avenue Land Company);  
13 Class 10 (Disputed Secured Claim of USA Petroleum Corporation); Class 11 (Disputed Secured  
14 Claim of GFC LLC); Class 12 (Disputed Secured Claim of Richard Zacky Trust); Class 13  
15 (Holders of Permitted Liens); Class 14 (Settled 503(b)(9) Claims); Class 15 (General Unsecured  
16 Claims); and Class 16 (Debtor’s Members’ Interests). Plan, Art. 5. The ballots and other filings  
17 the Debtor has received demonstrate acceptances of the Plan by impaired Classes 2, 12, 14, 15  
18 and 16. Ballot Decl. ¶ 4; Supp. Ballot Decl. ¶ 9. No votes were received from Classes 1, 3, 4, 5,  
19 6, 7, 8, 9, 10, 11 or 13. Supp. Ballot Decl. ¶ 9.

20 Since the solicitation of the Plan, the Debtor has obtained a Court order determining that  
21 Class 3 has no outstanding pre- or post-petition claim against the Debtor. Dkt. No. 2040. The  
22 Debtor also has obtained Court orders disallowing the secured claims of Classes 5, 6 and 8. Dkt.  
23 Nos. 1841; 1846 & 1852. In addition, the Debtor has filed a motion for a Court order determining  
24 the amount of the disputed secured claim of Class 7 at zero (\$-0-) for plan confirmation purposes  
25 and that motion has been taken under submission by the Court. Dkt. No. 2357.

26 At a hearing on November 26, 2013, the Court granted the Debtor’s motion for default  
27 judgment as to the holder of claims in Class 9. Adv. Proc. Dkt. No. 46. The Debtor has  
28 submitted a proposed judgment to the Court with respect to the holder of claims in Class 9 that



1 provides, *inter alia*, that the holder of claims in Class 9 has no lien on or other claim to the \$3.5M  
2 Creditor Note. Harding Decl. ¶ 44.

3 The Debtor also has obtained stipulations from the holders of claims in Classes 10 and 11  
4 providing that those creditors do not have any interest in the Debtor's property. Adv. Proc. Dkt.  
5 Nos. 37 & 38. The Debtor is awaiting entry of orders approving those stipulations as well as  
6 entry of stipulated judgments for the holders of claims in Classes 10 and 11 which will provide,  
7 *inter alia*, that the holders of claims in Class 10 and Class 11 have no lien on or other claim to the  
8 \$3.5M Creditor Note. Harding Decl. ¶ 45.

9 **C. Objections to the Plan**

10 (i) *Resolved Objections*

11 The Court initially fixed June 11, 2013, as the deadline to file objections to Plan  
12 confirmation. Order Approving Disclosure Statement at 2:12-15. As of that deadline, objections  
13 to confirmation were filed by: (1) the United States of America ("USDA") (Dkt. No. 1761);  
14 (2) Integrated Grain & Milling, Inc. ("IGM") (Dkt. No. 1763); (3) Richard Zacky, individually  
15 and in his capacity as trustee of the Richard N. Zacky Irrevocable Trust dated 11/25/07, the  
16 Survivor's Trust of Albert and Beverly Zacky Trust dated 2/10/88, the Barbara Jean Zacky  
17 Irrevocable Trust dated 12/30/06, and ZF Enterprises, LLC (collectively, the "Richard Zacky  
18 Entities") (Dkt. No. 1765); (4) Big Feather Ranch, LLC, Lucky Wishbone Ranch, LLC and  
19 American Huntsman, LLC (collectively, the "Ranches") (Dkt. No. 1767); and (5) Sharon Zacky  
20 Wilensky, individually and in her capacity as trustee of the Sharon Zacky Wilensky Irrevocable  
21 Trust dated 11/26/07 ("Wilensky") (Dkt. No. 1769) (collectively, the "Objections").

22 The Objections were filed with respect to the plan dated May 1, 2013. On June 27, 2013,  
23 the Debtor filed an amended plan (including a redlined copy to show the changes from the  
24 version dated May 1, 2013) to address certain issues raised in the Objections. The Court  
25 subsequently raised concerns with respect to the amended plan filed on June 27, 2013, based on  
26 the rejection of that plan by the general unsecured creditors. The Debtor filed another amended  
27 plan on September 3, 2013 (Dkt. No. 2167) ("September Plan") to address those issues. Each of  
28 the Objections subsequently has been resolved or withdrawn and, as a consequence, the general

1 unsecured class has accepted the Plan and the modifications proposed by the Debtor in the  
2 September Plan are no longer necessary. The Debtor withdrew the September Plan on  
3 November 19, 2013 (Dkt. No. 2341).

4 On October 30, 2013, pursuant to the Court's order, the Debtor re-noticed confirmation of  
5 the Plan and provided a new deadline of November 26, 2013 in which to file objections to the  
6 Plan as well as a chance to file amended ballots (Dkt. Nos. 2298, 2312 & 2330).

7 (ii) *Only Remaining Conditional Objection/Request for Clarification*

8 On November 26, 2013, Western Milling, LLC ("Western Milling") filed a conditional  
9 objection to/request for clarification of the Plan ("Western Milling Objection"). Notwithstanding  
10 having voted for the Plan in three classes (Classes 2, 14 and 15), Western Milling now objects to  
11 the Plan because the Plan does not provide for the pro rata distribution to Class 2 and 503(b)(9)  
12 Claimants of the interest and maturity extension fee paid by the borrower of the \$6.4M 503(b)(9)  
13 Note.

14 The Western Milling Objection should be denied and the Plan should be confirmed as  
15 filed. Western Milling asserts that Bankruptcy Code section 1123(a)(4) embodies the concept  
16 that "all claims of equal priority are entitled to the same treatment *in a chapter 11 case.*" Western  
17 Milling Objection, 5:9-10 (emphasis added). Such is not the case. Bankruptcy Code section  
18 1123(a)(4) provides in relevant part that "*a plan shall . . . provide the same treatment for each*  
19 *class of claim . . . unless the holder of a particular claim . . . agrees to a less favorable*  
20 *treatment[.]*" 11 U.S.C. § 1123(a)(4) (emphasis added). Here, the Plan does provide for the same  
21 treatment for each class of claims, and both Classes 2 and 14 have accepted the treatment of their  
22 claims under the Plan. The Plan clearly provides that Class 2 and the 503(b)(9) Claimants,  
23 including those holding Settled 503(b)(9) Claims in Class 14, are to be paid the amount of their  
24 claim without interest. Western Milling provides no legal basis to adjust that treatment now. The  
25 Western Milling Objection should be overruled.

26 **II. ARGUMENT**

27 Section 1129 sets forth the requirements for confirmation of a plan. As the proponent of  
28 the Plan, the Debtor bears the burden of establishing each of the elements under section 1129 by a

1 preponderance of the evidence. *In re Arnold*, 177 B.R. 648, 654-55 (9th Cir. BAP 1994). For  
2 reasons set forth below, the Plan satisfies the requirements of section 1129, the Objections to the  
3 Plan should be overruled, and the Court should therefore confirm the Plan.

4 **A. The Plan Complies with Section 1129(a)(1)**

5 Pursuant to section 1129(a)(1), a plan must comply with “the applicable provisions of”  
6 the Code. The applicable provisions are section 1122, which sets guidelines for permissible  
7 classification of claims or interests in a plan, and section 1123, which sets forth the required and  
8 permissible contents of a plan. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126  
9 (1978); *see In re Michelson*, 141 B.R. 715, 721 (Bankr. E.D. Cal. 1992) (noting that the court will  
10 review classification and contents of a plan *sua sponte*); *In re Toy & Sports Warehouse, Inc.*,  
11 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (holding that a plan must comply with the requirements  
12 of Chapter 11, even absent objections to confirmation). Here, the Plan complies with sections  
13 1122 and 1123, and other provisions of the Code.

14 (i) *The Plan Complies with Section 1122*

15 Under section 1122(a), with the exception of administrative convenience classes covered  
16 under section 1122(b), “a plan may place a claim or an interest in a particular class only if such  
17 claim or interest is substantially similar to the other claims or interests of such class.” Although  
18 section 1122 provides that dissimilar claims may not be classified together, there is no express  
19 prohibition of separate classification of similar claims. *Bakarat v. Life Ins. Co. of Va. (In re*  
20 *Bakarat)*, 99 F.3d 1520, 1524-25 (9th Cir. 1996); *Travelers Ins. Co. v. Bryson Properties XVIII*  
21 *(In re Bryson Properties XVIII)*, 961 F.2d 496, 502 (4th Cir. 1992) (acknowledging that section  
22 1122 “grants some flexibility in classification of unsecured claims”). Nevertheless, most courts  
23 will only allow separate classification of similar claims where such classification does not  
24 represent gerrymandering. *Id.*; *In re Corcoran Hospital District*, 233 B.R. 449, 455 (Bankr. E.D.  
25 Cal. 1999) (affirming that the Ninth Circuit requires a business or economic justification for the  
26 separate classification of unsecured claims).

27 The Plan classifies claims as follows:

- 28 1. Class 1 consists of the settled secured claim of the DIP Lender.

- 1           2.     Class 2 consists of the settled secured claim of Western Milling.
- 2           3.     Class 3 consists of the disputed secured claim of Dreisbach.
- 3           4.     Class 4 consists of the settled secured claim of the Lillian Zacky Trust.
- 4           5.     Class 5 consists of the disputed secured claim of Office Max North America.
- 5           6.     Class 6 consists of the disputed secured claim of Dave Dodge Service, Inc.
- 6           7.     Class 7 consists of the disputed secured claim of B&B Quality Food Providers.
- 7           8.     Class 8 consists of the disputed secured claim of Wei Chan DDS.
- 8           9.     Class 9 consists of the disputed secured claim of Idaho Avenue Land Company.
- 9           10.    Class 10 consists of the disputed secured claim of USA Petroleum Corporation.
- 10          11.    Class 11 consists of the disputed secured claim of GFC LLC.
- 11          12.    Class 12 consists of the disputed secured claim of the Richard Zacky Trust.
- 12          13.    Class 13 consists of the secured claims of holders of Permitted Liens.
- 13          14.    Class 14 consists of allowed Settled 503(b)(9) Claims.
- 14          15.    Class 15 consists of allowed general Unsecured Claims.
- 15          16.    Class 16 consists of allowed interests of the Debtor's Members.

16           These classifications are rationally based on the legal nature and/or priority of the claims  
17 and interests, and there is no scheme that allows for voting manipulation. Harding Decl. ¶ 7.

18           (ii)       *The Plan Complies with Section 1123*

19           Section 1123(a) sets forth mandatory requirements, and section 1123(b) sets forth  
20 permissive requirements, for the contents of a plan. The Plan complies with the requirements of  
21 section 1123.

22           1.     Pursuant to subsection (1) of section 1123(a), the Plan designates classes of claims  
23 and interests. *See* Plan, Art. 2.

24           2.     Pursuant to subsection (2) of section 1123(a), the Plan specifies any classes of  
25 claims or interests that are not impaired. *See* Plan, Art. 5.

26           3.     Pursuant to subsection (3) of section 1123(a), the Plan specifies the treatment of  
27 any class of claims or interests that is impaired under the Plan. *See* Plan, Art. 4.

28           4.     Pursuant to subsection (4) of section 1123(a), the Plan provides the same treatment

1 of each class or interest as the treatment of other claims or interests in such class, unless the  
2 holder of a particular claim or interest agrees to a less favorable treatment. *See* Plan, Art. 4.

3 5. Subsection (5) of section 1123(a) requires that a plan provide adequate means for  
4 its implementation. Article VI of the Plan sets forth the means for implementation of the Plan.  
5 The Plan provides for, among other things, the revesting of Estate Assets in the Liquidating  
6 Debtor (Plan at Articles 6.2, 9.2), the enforcement of the Secured Sale Notes and other DIP  
7 Lender obligations (Plan at Articles 6.10, 6.11), the management of the Liquidating Debtor by a  
8 Plan Administrator (subject to certain oversight restrictions by the Post-Confirmation Committee)  
9 (Plan at Articles 6.4, 6.20), and the rights of the Liquidating Debtor to prosecute, investigate,  
10 liquidate and/or settle Claims and Defenses and Avoidance Actions for the benefit of the Estate  
11 (Plan at Articles 6.12, 6.15). Article VI of the Plan also contains provisions governing the  
12 allowance, distribution and payment of Claims (Plan at Articles 6.23, 6.24), the establishment of  
13 reserves for Disputed Claims (Plan at Article 6.25), the Reserved Claims Pool Account and the  
14 Claims Reserve Account (Plan at Article 6.16), and procedures for governing the payment of Plan  
15 Expenses (Plan at Article 6.22). Article VI of the Plan also creates the Post-Confirmation  
16 Committee (Plan at Article 6.19), delineates the power and authority of the Post-Confirmation  
17 Committee as of the Effective Date (Plan at Article 6.20), fixes procedures for the post-Effective  
18 Date employment and compensation of Professionals (Plan at Article 6.38), and provides for the  
19 entry of a final decree closing the Debtor's chapter 11 case upon full administration of the  
20 Bankruptcy Case (Plan at Article 6.45). The Debtor submits that the foregoing constitutes  
21 adequate means for implementation of the Plan.

22 6. Subsection (6) of section 1123(a) requires that a plan provide for the inclusion in a  
23 corporate debtor's charter a provision prohibiting the issuance of nonvoting equity securities, and  
24 providing, as to the classes of securities possessing voting power, an appropriate distribution of  
25 such power among such classes. 11 U.S.C. § 1123(a)(6). This provision is not applicable as the  
26 Debtor is a limited liability company and not a corporation. *In re Univ. Shoppes, LLC*, 2010  
27 Bankr. LEXIS 4814, \*13 (Bankr. S.D. Fla. Sept. 17, 2010) (finding section 1123(a)(6) not  
28 applicable because the debtor was a limited liability company). If the Court determines that the

1 Debtor is required to comply with section 1123(a)(6), the Debtor will amend the Plan to include  
2 language consistent with section 1123(a)(6). Such an amendment would not be material because  
3 the Debtor is liquidating under the Plan.

4 7. Subsection (7) of section 1123(a) requires that a plan contain only provisions that  
5 are consistent with the interests of creditors, equity security holders, and public policy with  
6 respect to the manner of selection of any officer, director or trustee under the plan and any  
7 successor thereto. Pursuant to Article VI of the Plan, the Debtor has disclosed the identity of, and  
8 the terms of engagement for, the Plan Administrator and the manner in which a successor Plan  
9 Administrator will be selected. (Plan at Articles 6.3, 6.4 & 6.32). The Plan Administrator will be  
10 required to act in consultation with the Post-Confirmation Committee by, among other things,  
11 (a) providing the Post-Confirmation Committee members with periodic status reports regarding  
12 the status of the Secured Sale Notes and the Liquidating Debtor's budget to actual performance  
13 regarding the Post-Confirmation Budget; (b) working with the Post-Confirmation Committee to  
14 schedule Post-Confirmation Committee meetings as needed; and (c) as long as the Post-  
15 Confirmation Committee has one or more members remaining, the Plan Administrator may not  
16 take certain enumerated actions (such as settling claims against third parties in excess of  
17 \$100,000.00) without the written approval of the Post-Confirmation Committee. These  
18 provisions satisfy the requisites of section 1123(a)(7) of the Code and are consistent with the  
19 interests of creditors, equity security holders, and public policy.

20 8. Subsection (8) of section 1123(a) is not applicable because the Debtor is not an  
21 individual.

22 9. Pursuant to the permissible provisions of section 1123(b), the Plan renders all  
23 classes of claims impaired. *See* Plan, Art. 4; 11 U.S.C. § 1123(b)(1). The Plan provides that all  
24 executory contracts and unexpired leases of the Debtor entered into prior to the Petition Date  
25 which are not assumed or rejected pursuant to section 365 prior to the Confirmation Date shall be  
26 deemed rejected upon the Effective Date. *See* Plan, Art. 7; 11 U.S.C. § 1123(b)(2). Each non-  
27 debtor party to an executory contract or unexpired lease rejected under the Plan shall have thirty  
28 (30) days subsequent to the Effective Date to file a proof of claim with the Court asserting

1 damages arising from such rejection. *Id.* The Plan provides for the retention of all claims or  
2 interests held by the Estate. *See* Plan, Art. 6; 11 U.S.C. § 1123(b)(3)(B). The Plan will be  
3 executed by the vesting of Estate Assets in the Liquidating Debtor. *See* Plan, Art. 6, 11 U.S.C.  
4 § 1123(b)(4). The rights of holders of secured claims are modified, but not in a manner that is  
5 prohibited by section 1123(b)(5). *See* Plan, Art. 4; 11 U.S.C. § 1123(b)(5).

6 (iii) *Additional Briefing Regarding Plan Treatment of Late Filed Claims*

7 The Plan further includes other provisions not inconsistent with Title 11. 11 U.S.C.  
8 § 1123(b)(6). During a prior hearing on confirmation of the Plan, the Court requested additional  
9 briefing regarding the propriety of Article 6.34 of the Plan. Plan Article 6.34 provides that if a  
10 creditor was scheduled as an Allowed Claim, but subsequently filed a late claim, the Allowed  
11 amount of such creditor's claim will be the scheduled amount of the Claim and not the amount set  
12 forth in the late-filed Claim. Plan Article 6.34 is proper under applicable Ninth Circuit case law,  
13 the plain language of Bankruptcy Code section 1111(a) and Federal Rule of Bankruptcy  
14 Procedure ("Bankruptcy Rule") 3003 as well as principles of equity.

15 (a) **Ninth Circuit Case Law.** Although a few bankruptcy courts in other circuits have  
16 allowed late-filed claims to relate back to scheduled claims (and to be treated as amendments to  
17 the scheduled claims), the Ninth Circuit has not made such a determination. The primary case to  
18 address this issue is *Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489  
19 (9th Cir. BAP 2003). The Bankruptcy Appellate Panel in *Varela* stated that "[a]lthough Rule  
20 3003(c)(4) provides that a creditor's filing of a proof of claim supersedes any scheduling, it does  
21 not destroy the effect of scheduling in "deemed allowed" status if the filed proof of claim is  
22 somehow procedurally incorrect. [citations omitted]. If the superseding claim is defeated on a  
23 procedural ground *such as timeliness of filing*, the "deemed allowed" claim springs back into  
24 effect." *Id.* (emphasis added).<sup>3</sup> In other words, if the creditor's filed claim fails for a reason such  
25 as untimeliness, the claim is still allowed in the scheduled amount.

26 Here, the Plan is consistent with this concept because the Plan provides that claims filed

27 <sup>3</sup> The BAP in *Varela* also held that the Debtor improperly had attempted to use a plan provision  
28 to reduce the creditor's claim below the allowed scheduled amount of the claim without specific  
notice of the requested reduction to the creditor.

1 after the Bar Date are disallowed as filed, but are Allowed as originally scheduled.

2       **(b) Statutory Construction.** The plain language of Bankruptcy Code section 1111(a) and  
3 Bankruptcy Rule 3003 also support the treatment of late-filed claims as provided in Plan Article  
4 6.34. Bankruptcy Code section 1111(a) provides that, “A proof of claim or interest is deemed  
5 filed under section 501 of this title for any claim or interest that appears in the schedules  
6 . . . except a claim or interest that is scheduled as disputed, contingent, or unliquidated.”  
7 11 U.S.C. § 1111(a). Bankruptcy Rule 3003(b)(1) implements Bankruptcy Code section 1111(a)  
8 and provides that “[t]he schedule of liabilities filed pursuant to § 521 of the Code shall constitute  
9 prima facie evidence of the validity and amount of the claims of creditors, unless they are  
10 scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or  
11 equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2)  
12 of this rule.” Fed. R. Bankr. P. 3003(b)(1). In addition, Bankruptcy Rule 3003(c)(3) provides, in  
13 relevant part, that “[t]he court shall fix and for cause shown may extend the time within which  
14 proofs of claim or interest may be filed.” Fed. R. Bankr. P. 3003(c)(3). Finally, Bankruptcy Rule  
15 3003(c)(4) states that, “A proof of claim or interest executed and filed *in accordance with this*  
16 *subdivision* shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the  
17 Code.” Fed. R. Bankr. P. 3003(c)(4) (emphasis added). Taking these provisions together, it is  
18 clear that a creditor whose claim is scheduled (and not listed as disputed, contingent, or  
19 unliquidated) is not required to file a proof of claim, and that such claim is “deemed allowed”  
20 unless there is an objection to the claim. *See* 11 U.S.C. § 502(a).

21       Nevertheless, a creditor may file a proof of claim, which will supersede the scheduling of  
22 such claim only if that claim is filed *in accordance with* the subdivisions of Bankruptcy Rule  
23 3003. As stated above, subdivision (c)(3) of Bankruptcy Rule 3003 requires that a claims bar  
24 date be fixed and may only be extended if the Court finds that “cause” exists to warrant  
25 extension. If a creditor does not file a proof of claim by the Bar Date, such creditor has not filed a  
26 claim in accordance with the subdivisions of Rule 3003, and therefore, under the plain language  
27 of the rule, a proof of claim filed after the bar date does not supersede the scheduling of the claim.

28       **(c) Equitable Considerations.** In addition, Plan Article 6.34 is proper in light of



1 equitable concerns. All scheduled creditors received a Notice of Chapter 11 Bankruptcy Case,  
2 Meeting of Creditors, & Deadlines (the “Bar Date Notice”), which provided that the deadline to  
3 file a proof of claim was February 6, 2013. *See* Dkt. No. 29. That notice also stated “If your  
4 claim is scheduled and is and is (sic) not listed as disputed, contingent, or unliquidated, it will be  
5 allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice  
6 about the claim.” *See* Explanations sheet attached to Bar Date Notice. Therefore, scheduled  
7 creditors were made aware that a claims Bar Date existed, and that if no claim was filed by such  
8 Bar Date, their claim would be allowed in the scheduled amount.

9 In addition, scheduled creditors have been provided copies of the proposed Plan and  
10 Disclosure Statement, and therefore have been provided notice of the Debtor’s proposed  
11 treatment of late-filed claims in those documents as well, namely, that such claims will be  
12 allowed in the scheduled amount only.

13 Accordingly, Plan Article 6.34 is proper under applicable Ninth Circuit case law, statutory  
14 construction and principles of equity, and should be confirmed as part of the Plan.

15 **B. The Plan Complies with Section 1129(a)(2)**

16 Section 1129(a)(2) requires that the proponents of a plan comply with the “applicable  
17 provisions” of Title 11. The applicable provisions include the disclosure requirements under  
18 section 1125. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see, e.g.,*  
19 *In re Sierra-Cal*, 210 B.R. 168, 176 (Bankr. E.D. Cal. 1997) (stating that section 1125 is an  
20 example of what section 1129(a)(2) is intended to cover); *Michelson*, 141 B.R. at 719 (explaining  
21 that “[c]ompliance with the disclosure and solicitation requirements is the paradigmatic example  
22 of what Congress had in mind when it enacted section 1129(a)(2).”).

23 Section 1125 requires disclosure prior to the solicitation of acceptances of a proposed  
24 plan. That is, plan acceptances or rejections may not be solicited unless “at the time of or before  
25 such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a  
26 written disclosure approved, after notice and a hearing, by the court as containing adequate  
27 information.” 11 U.S.C. § 1125(b). The same disclosure statement shall be transmitted to all  
28 class members, but differing disclosure statements may be transmitted among the classes.

1 11 U.S.C. § 1126(c).

2 The Court determined that the Disclosure Statement contained adequate information, as  
3 defined by section 1125(a)(1), to enable a hypothetical investor typical of the holders of claims  
4 or interests in the case to make an informed judgment about the Plan. Order Approving  
5 Disclosure Statement at 1:22-23. In accordance with the Order Approving Disclosure  
6 Statement, as amended, the Debtor mailed copies of the Disclosure Statement and Plan, in  
7 addition to ballot forms, to all creditors, equity security holders, other parties in interest, and the  
8 United States Trustee, as evidenced by the Proofs of Service filed with the Court on May 13  
9 and 23 and June 7 and 21, 2013 (Dkt. Nos. 1650, 1717, 1755 & 1857).<sup>4</sup> The Debtor did not  
10 solicit Plan acceptances before providing the required adequate information in the Disclosure  
11 Statement. Harding Decl. ¶ 10.

12 **C. The Plan Complies with Section 1129(a)(3)**

13 Section 1129(a)(3) requires that the Plan have been proposed “in good faith and not by  
14 any means forbidden by law.” “A plan is proposed in good faith where it achieves a result  
15 consistent with the objectives and purposes of the Code.” *Platinum Capital, Inc. v. Sylmar*  
16 *Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1074 (9th Cir. 2002) (citing to *Ryan v.*  
17 *Loui (In re Corey)*, 892 F.2d 829, 835 (9th Cir. 1989)). The bankruptcy court, in evaluating  
18 whether a plan is proposed in good faith, will look to the totality of the circumstances. *Id.*  
19 (citations omitted) (rejecting a *per se* rule under section 1129(a)(3)). Bankruptcy Rule  
20 3020(b)(2) provides that in the absence of a timely objection, the Court may determine that the  
21 plan has been proposed in good faith and not by any means forbidden by law without receiving  
22 evidence on such issues.

23 The Plan, which provides for adequate protection of all parties’ interests in connection  
24 with the orderly liquidation of the assets, was the result of extensive analysis and investigation  
25 by the Debtor, in addition to negotiation among the Debtor and parties in interest. Harding Decl.  
26 ¶ 12. Therefore, the Plan is proposed in good faith and not by any means forbidden by law, and

27 <sup>4</sup> On October 30, 2013, pursuant to the Court’s order, the Debtor re-noticed confirmation of the  
28 Plan and provided a new deadline of November 26, 2013 in which to file objections to the Plan as  
well as a chance to file amended ballots (Dkt. Nos. 2298, 2312 & 2330).

1 meets the requirements of section 1129(a)(3).

2 **D. The Plan Complies with Section 1129(a)(4)**

3 Section 1129(a)(4) requires mandatory disclosure of any payments for services or for  
4 costs and expenses in connection with the case or plan. The plan must provide that:

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

10 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) “ensures compliance with the policies of the Code  
11 that the bankruptcy court should police the awarding of fees in title 11 cases and that holders of  
12 claims and interests should have the benefit of information that might affect the claimants’  
13 decision to accept or reject the plan.” *In re Beyond.com Corporation*, 289 B.R. 138, 144 (Bankr.  
14 N.D. Cal. 2003) (citing to *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988)).  
15 The requirements of section 1129(a)(4) are twofold in that there must be disclosure and the court  
16 must approve the reasonableness of payments. *Beyond.com*, 289 B.R. at 144.

17 The Plan satisfies the requirements of section 1129(a)(4). As disclosed in the Disclosure  
18 Statement, the Debtor and the Committee have retained bankruptcy counsel and other special  
19 counsel and professionals. *See* Disclosure Statement, Art. III. All professionals have been  
20 employed with Court approval during the Case, and, except where flat fee arrangements were  
21 specifically approved by the court, fees and expenses remain subject to final review by the Court  
22 for reasonableness under sections 328 or 330. Harding Decl. ¶ 13. Other than payments made or  
23 to be made pursuant to orders entered by the Court and those described in the Disclosure  
24 Statement or the Plan, the Estate has neither made nor promised any payment to any party who  
25 will acquire property under the Plan, for services or costs and expenses in connection with the  
26 Case, or in connection with the Plan. *Id.* ¶ 14. Further, the Plan provides that the Plan  
27 Administrator and the Post-Confirmation Committee may employ professionals without court  
28 approval or notice, with their compensation subject to court approval if the compensation exceeds  
the amount allowed in the Post-Confirmation Budget. *See* Plan, Art. 6.

///

1 **E. The Plan Complies with Section 1129(a)(5)**

2 Section 1129(a)(5)(A)(i) requires the plan proponent to disclose the identity and  
3 affiliations of any individual proposed to serve, after confirmation of the plan, as a director,  
4 officer, voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the  
5 debtor, or a successor to the debtor. The appointment to such office must be consistent with the  
6 interests of creditors and equity security holders, and with public policy. 11 U.S.C.  
7 § 1129(a)(5)(A)(ii). Any insiders that will be employed or retained by the reorganized debtor,  
8 and the nature of compensation, must be disclosed. 11 U.S.C. § 1129(a)(5)(B).

9 The disclosure and substantive requirements of the subsections of section 1129(a)(5)  
10 ensure that there are sufficient “safeguards with respect to post-confirmation governance of the  
11 debtor to ensure that the interests of creditors and equity security holders are protected.”  
12 *Beyond.com*, 289 B.R. at 145. The interests of creditors and equity security holders are likely to  
13 be protected if prior management who is subject to potential conflicts of interest does not  
14 continue to serve post-confirmation. *Id.*

15 The Plan complies with section 1129(a)(5). Under the Plan, the Plan Administrator – and  
16 initially designated as Hank M. Spacone – will manage the Liquidating Debtor in liquidating its  
17 assets. Plan, Articles 6 & 1.86. Mr. Spacone’s appointment as Plan Administrator serves the  
18 interests of creditors, equity security holders and public policy because Mr. Spacone is a panel  
19 Chapter 7 Trustee in the Eastern District of California and has served as a Chapter 11 Trustee in  
20 the Eastern District of California and in the Northern District of California, as well as the  
21 liquidating agent in multiple Chapter 11 cases pursuant to confirmed plans. Mr. Spacone both  
22 resides in and has his principal offices located in the Eastern District of California (Sacramento  
23 Division). Harding Decl. ¶ 15. No person other than Mr. Spacone and his employees, and no  
24 insider, is presently anticipated to serve in an implementation role with respect to the Plan. *Id.*  
25 ¶ 16.

26 **F. Section 1129(a)(6) is Inapplicable to the Plan**

27 Section 1129(a)(6) requires that any governmental regulatory commission having  
28 jurisdiction over the rates of the debtor approve any rate change provided for in the plan. The

1 requirements of section 1129(a)(6) are inapplicable since no governmental regulatory commission  
2 has jurisdiction over any rates of the Debtor. *Id.* ¶ 17.

3 **G. The Plan Complies with Section 1129(a)(7)**

4 Section 1129(a)(7), also referred to as the “best interests of creditors” test, requires that  
5 the plan be in the best interests of creditors under which each holder of a claim or interest in each  
6 impaired class has accepted the plan, or will receive value, as of the effective date of the plan, that  
7 is not less than the amount such holder would receive under liquidation in chapter 7 of the  
8 Bankruptcy Code. *See e.g., Mutual Life Ins. Co. v. Patrician St. Joseph Partners, Ltd. P’ship (In*  
9 *re Patrician St. Joseph Partners Ltd. P’ship)*, 169 B.R. 669, 679 (D. Ariz. 1994). Section  
10 1129(a)(7)(A)(i) excludes creditors who have accepted the plan from those entitled to claim the  
11 benefit of this provision. *In re Marshall*, 298 B.R. 670, 680 (Bankr. C.D. Cal. 2003). The  
12 application of the best interests of creditors test “involves a hypothetical application of chapter 7  
13 to a chapter 11 plan.” *In re Stone & Webster, Inc.*, 286 B.R. 532, 544 (Bankr. D. Del. 2002).

14 As the Plan is a liquidating plan, the Plan functionally provides the Creditors with the  
15 same protections as would be granted in a Chapter and at an anticipated reduced cost. Harding  
16 Decl. ¶ 18. The Disclosure Statement and the Harding Declaration contain a detailed analysis of  
17 why the Plan satisfies the “best interests of creditors” test. *See* Disclosure Statement 23:6 - 24:28;  
18 Harding Decl. ¶¶ 19-24. That analysis, incorporated herein by reference, clearly demonstrates  
19 that the Plan complies with Section 1129(a)(7).

20 The Plan further provides the best means of maximizing payment of all legitimate secured  
21 and unsecured claims and is in the best interests of the Estate’s creditors, and provides a return  
22 not less than would be provided in a Chapter 7 and in a more expedited fashion. Harding Decl.  
23 ¶ 25.

24 **H. The Plan Complies with Section 1129(a)(8)**

25 Section 1129(a)(8) provides that a plan may be confirmed if each class of claims or  
26 interests has accepted the plan or such claim is not impaired under the plan. Pursuant to section  
27 1126(c), a class accepts a plan if voting creditors holding at least two-thirds in amount, and more  
28 than one-half in number, of the allowed claims of the class that are voted, cast affirmative ballots.

As set forth in the Ballot Decl. and in the chart below, the requisite number and amount of holders of claims in five of the sixteen impaired classes have voted to accept the Plan. Thus, section 1129(a)(8) is met as to Classes 2, 12, 14, 15 and 16.<sup>5</sup>

Class	Acceptance Votes	Rejection Votes	% Acceptance by Number	% Acceptance by Amount	Class Vote
1	No Votes Received				
2	1	0	100%	100%	Accept
3	No Votes Received <sup>6</sup>				
4	No Votes Received				
5	No Votes Received <sup>7</sup>				
6	No Votes Received <sup>8</sup>				
7	No Votes Received				
8	No Votes Received <sup>9</sup>				
9	No Votes Received				
10	No Votes Received				
11	No Votes Received				
12	1	0	100%	100%	Accept
13	No Votes Received				
14	9	0	100%	100%	Accept
15	73	3	96%	99%	Accept
16	1	0	100%	100%	Accept

The Debtor's Plan has overwhelming support from the Debtor's creditors.

As set forth in more detail in Section II.O, below, the Plan meets the requirements of Section of 1129(b) as to each class that has not accepted the Plan.

**I. The Plan Complies with Section 1129(a)(9)**

Section 1129(a)(9) provides the requirements for treatment of certain administrative and priority claims. For administrative claims specified in sections 507(a)(2) and (3), the holders of such claims must receive cash equal to the allowed amount on the effective date of the plan, except to the extent that a claim holder has agreed to a different treatment of such claim.

<sup>5</sup> The Plan does not discriminate unfairly, and is fair and equitable, with respect to all impaired classes. Harding Decl. ¶ 27; 11 U.S.C. § 1129(b).

<sup>6</sup> Secured Claim has been fully satisfied per Court Order Dkt. No. 2040.

<sup>7</sup> Secured Claim Disallowed by Court Order Dkt. No. 1846.

<sup>8</sup> Secured Claim Disallowed by Court Order Dkt. No. 1841.

<sup>9</sup> Secured Claim Disallowed by Court Order Dkt. No. 1852.

1 11 U.S.C. § 1129(a)(9)(A). For priority claims specified in sections 507(a)(1), (4), (5), (6), or (7),  
2 except to the extent that a claim holder has agreed to a different treatment of such claim, the  
3 holders of such claims must receive cash equal to the allowed amount on the effective date of the  
4 plan if such class has not accepted the plan. 11 U.S.C. § 1129(a)(9)(B)(ii). If such class has not  
5 accepted the plan, the holders of such claims must receive deferred cash payments of the value of  
6 the allowed amount as of the effective date of the plan. 11 U.S.C. § 1129(a)(9)(B)(i). Finally, for  
7 those priority tax claims specified in section 507(a)(8), the allowed amount must be paid in  
8 regular cash installments within five years from the entry of the order for relief and cannot be  
9 paid in a manner less favorable than the most favored nonpriority unsecured claim. 11 U.S.C.  
10 §§ 1129(a)(9)(C), (D).

11 In accordance with section 1129(a)(9)(A), the Plan provides that all Administrative  
12 Claims shall be paid in full as soon as practicable after the date on which such Administrative  
13 Claim becomes an Allowed Administrative Claim or on the Effective Date, whichever is later,  
14 unless different treatment is agreed to between the claimant and the Liquidating Debtor. *See*  
15 Plan, Art. 3.

16 In accordance with section 1129(a)(9)(B), the Plan provides that each Priority Employee  
17 Claim was assumed by the DIP Lender under the terms of the DIP Lender APA and have  
18 previously been paid or satisfied by such assumption. If the DIP Lender fails to pay the Priority  
19 Employee Claims, and if collection efforts by the Plan Administrator against the DIP Lender do  
20 not prompt such payment, any amounts unpaid by the DIP Lender, subject to the satisfaction of  
21 the condition in Plan Article 6.20, shall be paid by the Liquidating Debtor from Available Cash or  
22 the Reserved Claims Pool Account (as applicable) as soon as practicable after the Effective Date.  
23 No claim in a particular rank of priority shall be paid until each higher level of priority under  
24 section 507 is paid in full. *See* Plan, Art. 3.5.

25 The Plan provides that all Other Priority Claims shall be paid in full as soon as practicable  
26 after the date on which such Priority Claim becomes an Allowed Priority Claim or on the  
27 Effective Date, whichever is later, unless otherwise ordered by the Court or unless different  
28 treatment is agreed to between the claimant and the Liquidating Debtor. *See* Plan Art. 3.6. No

1 claim in a particular rank of priority shall be paid until each higher level of priority under section  
2 507 is paid in full. *Id.*

3 In accordance with sections 1129(a)(9)(C) and (D), the Plan provides that each Priority  
4 Tax Claim shall be paid by the DIP Lender under the terms of the DIP Lender APA. If the DIP  
5 Lender fails to pay the Priority Tax Claims, the Liquidating Debtor reserves the right to the  
6 maximum deferral of payment of claims of a kind specified in section 507(a)(8) as permitted by  
7 section 1129(a)(9)(C). *See* Plan, Art. 3.4.

8 **J. The Plan Complies with Section 1129(a)(10)**

9 Section 1129(a)(10) requires that “at least one class of claims that is impaired under the  
10 plan has accepted the plan” when there is a class of claims impaired under the Chapter 11 plan,  
11 without including any acceptance by any insider. Section 1129(a)(10) is a technical requirement  
12 for confirmation, but not a substantive right of objecting creditors. *In re 7th St. & Beardsley*  
13 *P’ship*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994). Any change of a creditor’s rights constitutes  
14 impairment. *7th St.*, 181 B.R. at 431 (citing *In re L&J Anaheim Assoc.*, 995 F.2d 940 (9th Cir.  
15 1993)).

16 Here, Class 2 (Settled Secured Claim of Western Milling), Class 12 (Disputed Secured  
17 Claim of Richard Zacky Trust), Class 14 (Settled 503(b)(9) Claims), Class 15 (General  
18 Unsecured Claims) and Class 16 (Debtor’s Members’ Interests) are impaired under the Plan and  
19 have voted to accept the Plan. Supp. Ballot Decl. ¶ 9. Accordingly, the Plan complies with  
20 section 1129(a)(10).

21 **K. The Plan Complies with Section 1129(a)(11)**

22 Under section 1129(a)(11), the plan proponent must show that plan confirmation is  
23 unlikely to be followed by liquidation or further reorganization, unless such liquidation or  
24 reorganization is provided for in the plan. The purpose of section 1129(a)(11)’s feasibility  
25 requirement is to prevent “confirmation of visionary schemes which promise creditors and equity  
26 security holders more under a proposed plan than the debtor can possibly attain after  
27 confirmation.” *Pizza of Hawaii, Inc. v. Shakey’s Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d  
28 1374, 1382 (9th Cir. 1985) (citations omitted). Rather than a guarantee of the future, courts will



1 require a reasonable probability of success. *In re Patrician St. Joseph Partners Ltd. P'ship*,  
2 169 B.R. at 674. That the plan provides for liquidation of assets does not preclude confirmation  
3 under section 1129(a)(11). *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352, 1364  
4 (9th Cir. 1986).

5 The Plan provides that all of the Debtor's assets and all claims, rights and causes of action  
6 held by the Debtor under the Code and non-bankruptcy law will be deemed fully preserved and  
7 vested in the Liquidating Debtor. *See* Plan, Art. 6. The Plan also provides for the funding of Plan  
8 Expenses and the establishment of a Reserved Claims Pool Account, which will have sufficient  
9 funds to pay Priority Claims, Administrative Claims and Post-Confirmation Expenses. *Id.* The  
10 Liquidating Debtor is projected to have sufficient funds to conduct an orderly liquidation to  
11 maximize the recovery to creditors. Harding Decl. ¶¶ 33-34. The foregoing demonstrates the  
12 Plan's feasibility.

13 **L. The Plan Complies with Section 1129(a)(12)**

14 Section 1129(a)(12) requires that “[a]ll fees payable under section 1930 of title 28, as  
15 determined by the court at the hearing on confirmation of the plan, have been paid or the plan  
16 provides for the payment of all such fees on the effective date of the plan.” Section 507(a)(2)  
17 provides that “fees and charges assessed against the estate under chapter 123 of title 28” are to be  
18 accorded priority treatment.

19 All fees required under 28 U.S.C. § 1930 shall be paid in full on the Effective Date and  
20 will be paid thereafter when due. *See* Plan, Art. 3; Harding Decl. ¶ 36. The Plan provides for the  
21 payment of post-confirmation quarterly fees by the Debtor. *See* Plan, Art. 6.47. Therefore, the  
22 Plan complies with section 1129(a)(12).

23 **M. Section 1129(a)(13) is Inapplicable to the Plan**

24 Section 1129(a)(13) requires that a plan provide for the continuation of retiree benefits at  
25 the level under subsection (e)(1)(B) or (g) of section 1114, for the duration of the period the  
26 debtor has obligated itself to provide such benefits. The Estate has no responsibility to fund  
27 retiree benefits as that term is defined in section 1114. Harding Decl. ¶ 37. Therefore, this  
28 requirement is inapplicable.

1 **N. Sections 1129(a)(14), (15) and (16) Are Inapplicable to the Plan**

2 These provisions were added by the Bankruptcy Abuse Prevention and Consumer  
3 Protection Act of 2005, Pub. L. No. 109-8 (2005), to modify the treatment of individuals and  
4 nonprofit entities in chapter 11. *See 7 Collier on Bankruptcy* § 1129.LH[9] (16th ed. 2013). As  
5 the Debtor is neither an individual nor a nonprofit entity, these provisions are inapplicable.

6 **O. The Plan Complies with Section 1129(b)**

7 Below is a brief description of the Debtor's resolution of the non-voting classes and why  
8 the Plan (1) meets the requirements of section 1129(b) as to each class that has not accepted the  
9 Plan and (2) does not discriminate unfairly, and is fair and equitable, with respect to each of the  
10 non-accepting impaired classes.

11 (i) *Classes 1 and 4*

12 The proposed treatment of Class 1 (Settled Claim of DIP Lender) and Class 4 (Settled  
13 Claim of the Lillian Zacky Trust) meet the requirements of section 1129(b) because Class 1 and  
14 Class 4 claims shall be treated pursuant to the terms agreed to by the DIP Lender and the Lillian  
15 Zacky Trust pursuant to the DIP Lender Settlement Order, the Zacky Farms Sale Order and the  
16 DIP Lender APA.

17 (ii) *Class 3*

18 The Class 3 (Disputed Secured Claim of Dreisbach) secured creditor has stipulated that  
19 there is nothing owed to that creditor on account of that creditor's secured claim, so there is no  
20 need to meet the requirements of section 1129(b) with respect to Class 3. Dkt. No. 2040.

21 (iii) *Classes 5, 6 and 8*

22 While Class 5 (Disputed Secured Claim of Office Max North America); Class 6 (Disputed  
23 Secured Claim of Dave Dodge Service, Inc.) and Class 8 (Disputed Secured Claim of Wei Chan  
24 DDS) did not vote to accept the Plan, the secured claim in each of these classes has been  
25 disallowed by Court order, so there is no need to meet the requirements of section 1129(b) with  
26 respect to Classes 5, 6 and 8. Dkt. Nos. 1841, 1846 and 1852.

27 (iv) *Class 7*

28 The Debtor has filed a motion for a Court order determining the amount of the disputed

1 secured claim of B&B Quality Food Providers (Class 7) at zero (\$-0-) for plan confirmation  
2 purposes and that motion has been taken under submission by the Court. Dkt. No. 2357. If the  
3 Debtor's motion is granted, there is no need to meet the requirements of section 1129(b) with  
4 respect to Class 7 since the Plan provides that no further distributions shall be made on account of  
5 the Class 7 claim and any disputed lien on the Debtor's assets shall be deemed invalid, void and  
6 expunged from all the Estate Assets on the Effective Date. If the motion is not granted, the  
7 Class 7 disputed secured claim will be secured after the Effective Date by a Disputed Secured  
8 Creditors' Post-Effective Date Lien and will be paid from the proceeds of the \$3.5M Creditor  
9 Note on the later of (i) when the Class 7 Disputed Secured Claim becomes an Allowed Secured  
10 Claim and (ii) ninety (90) days after the \$3.5M Creditor Note Payment Date. Interest on the  
11 claim will be paid concurrently in accordance with the underlying loan documents or at such  
12 other rate as determined by the Court at the Confirmation Hearing. The alternative treatment that  
13 provides for the retention of a lien until payment and the provision allowing interest at the  
14 contract rate is a treatment that does not discriminate unfairly, is fair and equitable, and is  
15 confirmable under 11 U.S.C. 1129(b). Harding Decl. ¶¶ 42-43.

16 (v) *Classes 9, 10 and 11*

17 The proposed treatment of Class 9 (Disputed Secured Claim of Idaho Avenue Land  
18 Company), Class 10 (Disputed Secured Claim of USA Petroleum Corporation) and Class 11  
19 (Disputed Secured Claim of GFC LLC) meet the requirements of section 1129(b) because each of  
20 these disputed secured claims is in the process of being resolved in the adversary proceeding to  
21 quiet title to these disputed secured claims as follows:

22 (a) The Class 10 and Class 11 claimants have stipulated that there is nothing owed  
23 to those claimants on account of their respective disputed secured claims, so there is no need to  
24 meet the requirement of section 1129(b) with respect to Classes 10 and 11. The Debtor is  
25 awaiting entry of orders approving those stipulations as well as entry of stipulated judgments for  
26 the holders of claims in Classes 10 and 11 which will provide, *inter alia*, that the holders of  
27 claims in Class 10 and Class 11 have no lien on or other claim to the \$3.5M Creditor Note.  
28 Harding Decl. ¶ 45.

1 (b) With respect to Class 9, the Court on November 26, 2013, granted the  
2 Debtor's motion for default judgment in that same adversary proceeding with respect to the  
3 Class 9 claim, so there is no need to meet the requirements of section 1129(b) with respect to  
4 Class 9. Adv. Proc. Dkt. No. 46. The Debtor has submitted a proposed judgment that provides,  
5 *inter alia*, that the holder of claims in Class 9 has no lien on or other claim to the \$3.5M Creditor  
6 Note. Harding Decl. ¶ 44.

7 (vi) *Class 13*

8 The proposed treatment of Class 13 (Holders of Permitted Liens) meets the requirements  
9 of section 1129(b) because the secured claims of the Class 13 claimants remain on the assets  
10 transferred to the DIP Lender pursuant to the Zacky Farms Sale documents and sections 1.1(mm)  
11 and 2.1 of the DIP Lender APA and shall be satisfied by the DIP Lender. This treatment is fair  
12 and equitable and does not discriminate against the holders of these permitted liens. Harding  
13 Decl. ¶ 46.

14 **III. CONCLUSION**

15 Based on the foregoing, the Debtor respectfully requests that the Court enter an order  
16 confirming the Plan.

17 Dated: December 3, 2013

18 FELDERSTEIN FITZGERALD  
19 WILLOUGHBY & PASCUZZI LLP

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