IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ABEINSA HOLDING INC., *et al.*,	Case No. 16-10790 (KJC)
Debtors.[1]	(Jointly Administered)
	Related D.I.: 887, 900, 901, 902, 907, 915, 919, 920, 926, 929, 930, 932, 933, 935, 940 & 941

MEMORANDUM OF LAW (I) IN SUPPORT OF APPROVAL AND CONFIRMATION OF DEBTORS' MODIFIED FIRST AMENDED PLANS OF REORGANIZATION AND LIQUIDATION AND (II) IN RESPONSE TO OBJECTIONS THERETO

Dated: December 2, 2016

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[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Abeinsa Holding Inc. (9489); Abeinsa EPC LLC (1176); Abencor USA, LLC (0184); Abener Construction Services, LLC (0495); Abener North America Construction, LP (5989); Abengoa Solar, LLC (6696); Inabensa USA, LLC (2747); Nicsa Industrial Supplies LLC (9076); Teyma Construction USA, LLC (0362); Abeinsa Abener Teyma General Partnership (2513); Abener Teyma Mojave General Partnership (2353); Abener Teyma Hugoton General Partnership (7769); Abener Teyma Inabensa Mount Signal Joint Venture (9634); Teyma USA & Abener Engineering and Construction Services General Partnership (6534); Abengoa US Holding, LLC (6871); Abengoa US, LLC (9573); Abengoa US Operations, LLC (1268); Abengoa Bioenergy Biomass of Kansas, LLC (1119); Abengoa Bioenergy Hybrid of Kansas, LLC (9711); Abengoa Bioenergy Technology Holding, LLC (7434); Abengoa Bioenergy New Technologies, LLC (8466); Abengoa Bioenergy Holdco, Inc. (8864); Abengoa Bioenergy Meramec Holding, Inc. (1803). The chapter 11 case of Abengoa Bioenergy Biomass of Kansas, LLC, Case No. 16-10876, pending before the Bankruptcy Court is stayed pending further order of the Court.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors"), submit this Memorandum of Law (the "Memorandum") in support of approval and confirmation of the *Debtors' Modified First Amended Plans of Reorganization and Liquidation* (as the same may be further modified, amended, and/or supplemented from time to time, the "Plan").[2]

As set forth below, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code. Significantly, the Plan has received overwhelming support from holders of Claims entitled to vote to accept or reject the Plan other than from a band of Surety Companies who have, since the commencement of these Chapter 11 Cases, employed a scorched earth approach; filing duplicative claims in every single debtor case (in vastly excessive and fantastical sums and directly contradictory to their stated views on substantive consolidation), eschewing a settlement process that has increased unsecured creditor distributions substantially, and seeking with no basis, appointment of an examiner. Now, consistent with the promise they made at hearing on the Motion to Appoint an Examiner to make the Plan confirmation process "brutal", "long" and "horrendous", the Surety Companies are the only parties standing in the way of the successful completion of these Chapter 11 Cases. For the reasons described below, their tactics are as ill-placed, and accordingly, the Debtors submit that the Plan should be confirmed.[3]

PRELIMINARY STATEMENT

The Plan is an integral piece of the global reorganization being undertaken by the Abengoa Group, and is the product of extensive negotiations with the Creditors' Committee and

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

[3] To the extent that the Surety Companies' votes in the EPC Liquidating Plan are not otherwise modified, the Debtors would withdraw seeking approval of that the EPC Liquidating Plan at this time.

other parties in interest, which negotiations have resulted in the Creditors' Committee's anticipated support and recommendation of the Plan and in increased recoveries for creditors, by means of a substantial increase in the New Value Contribution of the Parent, among other things. The Creditors' Committee support should not be overstated as, they expended considerable time and resources to (i) review thousands of pages of documents, (ii) conduct extensive diligence on Causes of Action, Claims, tax rights, feasibility, and Intercompany Claims, and (iii) interview numerous witnesses in both the United States and Spain. Not surprisingly, this is a far cry from the Surety Companies, whose only support appears to be reliance upon outdated financial statements and book values from Monthly Operating Reports to suggest that the Plan cannot be confirmed.

The Plan comprises the EPC Reorganizing Plan, the Solar Reorganizing Plan, the EPC Liquidating Plan and the Bioenergy and Maple Liquidating Plan. The EPC Reorganizing Plan is a "New Value" plan and confirmation is sought under section 1129(b) of the Bankruptcy Code. While the Debtors had proposed substantial New Value under the Plan of a little over $20 million, since the initial filing of the Plan, the Debtors have made available an additional $10 million in Cash, plus substantial additional consideration to support the Plan. The Solar Reorganizing Plan is a full payment plan and confirmation is sought under section 1129(a) of the Bankruptcy Code. The EPC Liquidating Plan and the Bioenergy and Maple Liquidating Plan are liquidating plans that provide for distributions to be made in accordance with the priorities established under the Bankruptcy Code and other applicable law, and confirmation is sought under section 1129(a) of the Bankruptcy Code.

Although the Debtors were able to reach a resolution with the Creditors' Committee, the Debtors received a number of objections to confirmation of the Plan. Other than

the objections of the Sureties, the Debtors believe that the majority of these objections have been resolved. As to the Sureties, however, consistent with their overarching strategy, much of their objection to confirmation are issues that have already been litigated and rejected by the Bankruptcy Court. While the Debtors – and believe the Court – understands that the Sureties are not pleased with the restructuring process contained in the Master Restructuring Agreement (the "MRA"), their objections raised against the Debtors' motion to enter into the MRA appear in their confirmation objections as well. The Debtors have already responded to these objections, *see* D.I. 663, and the Court has already overruled these objections. *See* D.I. 679; Transcript[4] of Hearing at 27:17-66:12, *In re Abeinsa Holding Inc., et al.*, No.16-10790 (KJC) (Bankr. D. Del. Oct. 18, 2016).[5]

In addition to this Memorandum, in further support of approval of the confirmation of the Plan, the Debtors anticipate submitting the following declarations prior to the hearing on confirmation of the Plan:

a. *Declaration of William H. Runge III in Support of Confirmation of Debtors' Modified First Amended Plans of Reorganization and Liquidation;*

b. *Declaration of Sebastian Felicetti in Support of Confirmation of Debtors' Modified First Amended Plans of Reorganization and Liquidation;*

c. *Declaration of Jeffrey Bland in Support of Confirmation of Debtors' Modified First Amended Plans of Reorganization and Liquidation;*

d. *Declaration of Matthew Diaz in Support of Confirmation of Debtors' Modified First Amended Plans of Reorganization and Liquidation; and*

e. *Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on Debtors' Modified First Amended Plans of Reorganization and Liquidation.*[6]

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4 The transcript is attached hereto as **Exhibit A**.

5 In lieu of responding to arguments that have already been addressed and decided, and which are arguably barred by the law of the case, the Debtors incorporate Docket Nos. 577, 663 and 679 herein as if set forth in full.

6 The Debtors anticipate that as a result of granting various parties extension of time to submit ballots due to notice, service, clerical and other issues, they will be filing a *Supplemental Declaration of Christina Pullo of*

BACKGROUND

On March 29, April 6, April 7, and June 12, 2016 (the "Petition Dates"), the Debtors commenced these Chapter 11 Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

The Debtors continue to manage and operate their businesses as debtors in possession as permitted by sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases. On April 13, 2016, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official Committee of Unsecured Creditors (the "Creditors' Committee").

On September 26, 2016, the Debtors filed the *Debtors' Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code* [D.I. 587] (the "Disclosure Statement"), relating to the *Debtors' Plans of Reorganization and Liquidation* [D.I. 579] (the original Plan), and a motion to authorize entry into the Master Restructuring Agreement [D.I. 577] (the "MRA Motion").

On October 31, 2016, the Court entered the *Order (a) Approving the Disclosure Statement, (b) Establishing Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan, (c) Approving the Forms of Ballot and Solicitation Materials, (d) Establishing Voting Record Date, (e) Scheduling Confirmation Hearing and Setting the Deadline for Filing Objections to Confirmation of the Plan, and (f) Approving the Related Forms of Notice* (the "Solicitation Procedures Order") [D.I. 746] directing that the General Commencement of Solicitation begin on October 31, 2016.

Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on Debtors' Modified First Amended Plans of Reorganization and Liquidation on December 5, 2016.

On October 31, 2016, the Debtors also filed the amended solicitation versions of the Plan [D.I. 747] and the Disclosure Statement [D.I. 748]. After entry of the Solicitation Procedures Order, the Debtors commenced solicitation of acceptances of the Plan pursuant to the procedures set forth in the Solicitation Procedures Order. On December 2, 2016, the Debtors filed a modified version of the amended Plan [D.I. 941]. A hearing is scheduled to consider confirmation of the Plan on December 6, 2016 at 10:00 a.m. (ET).

The Plan and Disclosure Statement

Summary of Chapter 11 Plan.[7]

An initial version of the Plan and Disclosure Statement was filed on September 26, 2016, with modified versions of the Plan and Disclosure Statement filed on October 31, 2016. Although the Plan is a single document, it constitutes four different plans, of which two are plans of reorganization and two are plans of liquidation, one for each of the Debtor groups into which the Debtors are proposed to be partially[8] substantively consolidated, where applicable. The following Debtor entities are in each Debtor group:

Reorganizing Debtor Groups

- **EPC Reorganizing Debtors:** Abener Teyma Mojave General Partnership, Abener North America Construction, LP, Abeinsa Abener Teyma General Partnership, Teyma Construction USA, LLC, Teyma USA & Abener Engineering and Construction Services General Partnership, Abeinsa EPC LLC, Abeinsa Holding Inc., Abener Teyma Hugoton General Partnership, Abengoa Bioenergy New Technologies, LLC, Abener Construction Services, LLC, Abengoa US Holding, LLC, Abengoa US, LLC, and Abengoa US Operations, LLC.

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7 The description of the Plan provided herein is qualified by reference to the provisions of the Plan. To the extent there is any inconsistency between this summary and the Plan, the terms of the Plan shall control.

8 The Debtors are proposed to be partially substantively consolidated under the Plan in that only certain of the Debtors have been substantively consolidated and only for voting and distribution purposes. The substantively consolidated Debtors are organized into the following distinct Debtor groups: the EPC Reorganizing Debtor Group, the EPC Liquidating Debtor Group and the Bioenergy and Maple Liquidating Debtor Group. The Solar Reorganizing Debtor is a single entity and is not proposed to be not substantively consolidated with any other entity under the Plan.

- **Solar Reorganizing Debtor:** Abengoa Solar, LLC.

Liquidating Debtor Groups

- **EPC Liquidating Debtors:** Abencor USA LLC, Abener Teyma Inabensa Mount Signal Joint Venture, Inabensa USA, LLC, and Nicsa Industrial Supplies LLC.

- **Bioenergy and Maple Liquidating Debtors:** Abengoa Bioenergy Hybrid of Kansas, LLC, Abengoa Bioenergy Technology Holding, LLC, Abengoa Bioenergy Meramec Holding, Inc., and Abengoa Bioenergy Holdco, Inc.

As described in the Plan, following the Effective Date, the Estates of the Reorganizing Debtors will emerge to resume operations and a designated Responsible Person will be appointed to ensure proper implantation and administration of the Reorganizing Debtors Plans. Additionally, a Litigation Trust will be set up to be managed by the Litigation Trustee, the proceeds of which will benefit the creditors of the EPC Reorganizing Debtors. In exchange for a New Value Contribution of $33.5 million (in addition to $1,750,000 being contributed under the EPC Liquidating Plan and $500,000 being contributed under the Bioenergy and Maple Liquidating Plan) and the agreement to pay Alvarez & Marsal's fees, Abengoa, S.A. will retain its indirect Equity Interest in the top holding company, Abengoa US Holding LLC, which in turn will retain its interests in the other Debtors. The new value is adequate to permit retention of this equity. While numerous objectors raise an absolute priority rule objection, the Creditors' Committee has performed a comprehensive review and has extracted aspects of all the value being retained by Abengoa S.A. as a result of the Plans, which demonstrates the fairness and best interest aspects of the Plan. The Estates of the Liquidating Debtors will be managed by the Liquidating Trustees. The Debtors believe that the Plan presents the best possible chance for recovery for the Debtors' creditors and is in the best interests of the Debtors' estates and all parties in interest.

As noted, following extensive negotiations with the Creditors' Committee that have continued through the filing of this Brief, the Creditors' Committee supports confirmation of the Plan. The Sureties have chosen not meaningfully to participate in further negotiation. .

Solicitation of Votes on the Plan.

In accordance with the Solicitation Procedures Order, the Debtors caused copies of the Plan and Disclosure Statement, along with the appropriate Ballots and voting instructions, to be delivered to (a) Holders of Claims of the EPC Reorganizing Debtors in Classes 3A, 3B, 4, 5, and 6, (b) Holders of Claims of the Solar Reorganizing Debtor in Classes 3, 4, 5, and 6, (c) Holders of Claims for the EPC Liquidating Debtors in Classes 3 and 3A, and (d) Holders of Claims of the Bioenergy and Maple Liquidating Debtors in Classes 3 and 3A (collectively, the "Voting Classes").

The Solicitation Procedures Order established November 29, 2016 at 4:00 p.m. (prevailing Eastern Time) as the deadline for the receipt of ballots from the Holders of Claims in the Voting Classes accepting or rejecting the Plan (the "Voting Deadline"). Prime Clerk LLC (the "Balloting Agent") collected and in accordance with the Solicitation Procedures Order tabulated Ballots received on or before the Voting Deadline, and filed a certification regarding the results and methodologies for tabulation of Ballots accepting or rejecting the Plan with respect to Holders of Claims in the Voting Classes (the "Voting Certification").

As disclosed in the Voting Certification, the Debtors received overwhelming support for the Plan from creditors in the Voting Classes. Specifically, EPC Reorganizing Class 3A, 3B and 4, Solar Reorganizing Class 3 and 4 have voted to accept the Plan, with several Classes 100% accepting. In addition, the Plan contains certain proposed third party releases, which are conspicuously disclosed in the Plan, Disclosure Statement, and Ballots, and the Ballots provided all creditors in the Voting Classes with the option to opt out of such releases.

I. THE PLAN COMPLIES WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 119-120 (D. Del. 2006). As set forth below and based on the record and filings in these Chapter 11 Cases, the Plan satisfies all applicable subsections of section 1129 of the Bankruptcy Code.

A. Section 1129(a)(1).

Section 1129(a)(1) of the Bankruptcy Code requires that a plan "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) indicates that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, governing classification of claims and contents of a plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636 (2d Cir. 1988). As demonstrated below, the Plan fully complies with the requirements of the Bankruptcy Code.

1. The Plan Complies with Section 1122 of the Bankruptcy Code.

Section 1122 of the Bankruptcy Code provides, in pertinent part, as follows:

> (a) … a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C. § 1122. Pursuant to section 1122(a), not all substantially similar claims or interests must be designated in the same class for a classification structure; however, claims or interests designated to a particular class must be substantially similar to each other.

It is without question that substantially similar claims and equity interests may be placed in the same class. *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278 (5th Cir. 1991) ("A fair reading of both subsections suggests that ordinarily 'substantially similar claims,' those which share common priority and rights against the debtor's estate, should be placed in the same class."); *In re Frascella Enters., Inc.*, 360 B.R. 435, 442 (Bankr. E.D. Pa. 2007) ("Similar claims are generally placed in the same class."). Courts, however, generally grant the debtor broad discretion in classifying claims and equity interests under a chapter 11 plan, subject to the requirements of section 1122(a) of the Bankruptcy Code.

With the exception of Administrative Claims and Priority Tax Claims, which need not be classified, Article III of the Plan provides for the separate classification of Claims against and Equity Interests in the EPC Reorganizing Debtors, Solar Reorganizing Debtor, EPC Liquidating Debtors and the Bioenergy and Maple Liquidating Debtors, respectively, based upon differences in the legal nature and/or priority of such Claims and Equity Interests. *See* Plan, Article III. The Plan designates the following Classes of Claims and Equity Interests:

EPC Reorganizing Debtors

- EPC Reorganizing 1 - Secured Claims
- EPC Reorganizing 2A - Priority Tax Claims
- EPC Reorganizing 2B - Other Priority Claims
- EPC Reorganizing 3A - MRA Affected Debt Claims
- EPC Reorganizing 3B - US Debt Claims
- EPC Reorganizing 4 - General Unsecured Claims
- EPC Reorganizing 5 - Litigation Claims
- EPC Reorganizing 6 - Debt Bonding Claims

- EPC Reorganizing 7A - Intercompany Claims By Non-Debtor Affiliates
- EPC Reorganizing 7B - Intercompany Claims By Debtor Affiliates
- EPC Reorganizing 8 - Equity Interests

Solar Reorganizing Debtor

- Solar Reorganizing 1 - Secured Claims
- Solar Reorganizing 2A - Priority Tax Claims
- Solar Reorganizing 2B - Other Priority Claims
- Solar Reorganizing 3 - US Debt Claims
- Solar Reorganizing 4 - General Unsecured Claims
- Solar Reorganizing 5 - Litigation Claims
- Solar Reorganizing 6 - Debt Bonding Claims
- Solar Reorganizing 7A - Intercompany Claims By Non-Debtor Affiliates
- Solar Reorganizing 7B - Intercompany Claims By Debtor Affiliates
- Solar Reorganizing 8 - Equity Interests

EPC Liquidating Debtors

- EPC Liquidating 1 - Secured Claims
- EPC Liquidating 2A - Priority Tax Claims
- EPC Liquidating 2B - Other Priority Claims
- EPC Liquidating 3 - General Unsecured Claims
- EPC Liquidating 3A - US Debt Claims
- EPC Liquidating 4 - Intercompany Claims
- EPC Liquidating 5 - Equity Interests

Bioenergy and Maple Liquidating Debtors

- Bioenergy and Maple 1 - Secured Claims
- Bioenergy and Maple 2A - Priority Tax Claims
- Bioenergy and Maple 2B - Other Priority Claims
- Bioenergy and Maple 3 - General Unsecured Claims
- Bioenergy and Maple 3A - US Debt Claims
- Bioenergy and Maple 4 - Intercompany Claims
- Bioenergy and Maple 5 - Equity Interests

This classification scheme complies with section 1122(a) of the Bankruptcy Code, because the Claims or Equity Interests in each particular Class are substantially similar to the other Claims or Equity Interests, as the case may be, in each such Class. Furthermore, the classification scheme created by the Plan is based on the similar nature of Claims or Equity Interests contained in each Class, including, without limitation, with respect to against which

business enterprise such Claims are asserted and the bases of such Claims, and not on any impermissible classification factor. The Debtors have a good faith, valid business justification for the classification scheme under the Plan. Similar Claims have not been placed into different Classes in order to affect the outcome of the vote on the Plan. The Debtors submit that the standard under section 1122(a) of the Bankruptcy Code has been met, because the Plan does not reflect the grouping of dissimilar claims at all, let alone for inappropriate purposes.

Because each Class consists of only substantially similar Claims or Equity Interests, the Court should approve the classification scheme as set forth in the Plan as consistent with section 1122(a) of the Bankruptcy Code.

2. The Plan Complies with Section 1123(a) of the Bankruptcy Code.

Section 1123(a) of the Bankruptcy Code sets forth several requirements with which every chapter 11 plan must comply. The Plan fully complies with each enumerated requirement.

i. Section 1123(a)(1): Designation of Classes of Claims and Equity Interests.

Section 1123(a)(1) provides that a plan must designate, subject to section 1122 of the Bankruptcy Code, classes of claims and equity interests. As discussed above, the Plan designates thirty-seven (37) different Classes of Claims and Equity Interests, consistent with the dictates of section 1122. *See* Plan, Article III. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

ii. Section 1123(a)(2): Classes that Are Not Impaired by the Plan.

Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify which classes of claims or interests are unimpaired by the plan. As set forth in Article III of the Plan, Claims in EPC Reorganizing Class 1 (Secured Claims), EPC Reorganizing Class 2A (Priority Tax Claims), EPC Reorganizing Class 2B (Other Priority Claims), EPC Reorganizing Class 8

(Equity Interests), Solar Reorganizing Class 1 (Secured Claims), Solar Reorganizing Class 2A (Priority Tax Claims), Solar Reorganizing Class 2B (Other Priority Claims), Solar Reorganizing Class 8 (Equity Interests), EPC Liquidating Class 1 (Secured Claims), EPC Liquidating Class 2A (Priority Tax Claims), EPC Liquidating Class 2B (Other Priority Claims), Bioenergy and Maple Liquidating Class 1 (Secured Claims), Bioenergy and Maple Liquidating Class 2A (Priority Tax Claims), and Bioenergy and Maple Liquidating Class 2B (Other Priority Claims) (the "Unimpaired Classes") are designated as Unimpaired under the Plan. *See* Plan, Article III. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

iii. Section 1123(a)(3): Treatment of Classes that Are Impaired by the Plan.

Section 1123(a)(3) of the Bankruptcy Code requires that a plan specify how it will treat impaired classes of claims or interests. Article III of the Plan designates Claims or Equity Interests in EPC Reorganizing Class 3A (MRA Affected Debt Claims), EPC Reorganizing Class 3B (US Debt Claims), EPC Reorganizing Class 4 (General Unsecured Claims), EPC Reorganizing Class 5 (Litigation Claims), EPC Reorganizing Class 6 (Debt Bonding Claims), EPC Reorganizing Class 7A (Intercompany Claims By Non-Debtor Affiliates), EPC Reorganizing Class 7B (Intercompany Claims By Debtor Affiliates), Solar Reorganizing Class 3 (US Debt Claims), Solar Reorganizing Class 4 (General Unsecured Claims), Solar Reorganizing Class 5 (Litigation Claims), Solar Reorganizing Class 6 (Debt Bonding Claims), Solar Reorganizing Class 7A (Intercompany Claims By Non-Debtor Affiliates), Solar Reorganizing Class 7B (Intercompany Claims By Debtor Affiliates), EPC Liquidating Class 3 (General Unsecured Claims), EPC Liquidating Class 3A (US Debt Claims), EPC Liquidating Class 4 (Intercompany Claims), EPC Liquidating Class 5 (Equity Interests), Bioenergy and Maple Class 3 (General Unsecured Claims), Bioenergy and Maple Class 3A (US Debt Claims), Bioenergy and Maple Class 4 (Intercompany Claims), and Bioenergy and Maple Class 5 (Equity Interests)

(collectively, the "Impaired Classes") as Impaired within the meaning of section 1124 of the Bankruptcy Code and clearly specifies the treatment of the Claims and Equity Interests in those Classes. *See* Plan, Article III. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

iv. Section 1123(a)(4): Equal Treatment Within Each Class.

Section 1123(a)(4) requires that a plan provide from the assets and rights of the estate the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtors in each respective Class is the same as the treatment of every other Claim or Equity Interest in such Class (without regard to rights any Holders of Claims may hold against third parties), unless the holder of a particular Claim or Equity Interest has agreed to a less favorable treatment for such Claim or Equity Interest. *See* Plan, Article III. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

v. Section 1123(a)(5): Adequate Means for Implementation.

Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Article IV of the Plan generally sets forth the means for implementation of the Plan, including, without limitation, (i) the execution by the Debtors and implementation of the Master Restructuring Agreement, (ii) appointment of the Responsible Person and the Liquidating Trustees, (iii) establishment of the Liquidating Trusts, (iv) establishment of the Litigation Trust, appointment of the Litigation Trustee and the application of Litigation Trust proceeds, (v) funding of the New Value Contribution by the Parent, (vi) procedures for making distributions to holders of Allowed Claims, and (vii) the partial substantive consolidation of certain of the Debtors to reflect the

business enterprises through which the Debtors conducted their businesses. *See* Plan, Article IV. Accordingly, the Plan, together with the documents and agreements contemplated therein and in the Plan Supplement, sets forth the means for the Plan's implementation as required by section 1123(a)(5) of the Bankruptcy Code.

vi. Section 1123(a)(6): Prohibitions on the Issuance of Non-Voting Securities.

The existing Equity Interests in the EPC Reorganizing Debtors and the Solar Reorganizing Debtor are voting Equity Interests. These Equity Interests are to be retained and no new Equity Interests are to be issued under the Plan. Therefore, the Plan satisfies the requirements set forth in section 1123(a)(6) of the Bankruptcy Code.

vii. Section 1123(a)(7): Provisions Regarding Directors and Officers.

Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Article IV.B of the Plan regarding the appointment of the Responsible Persons, Litigation Trustee and Liquidating Trustees is consistent with the interests of creditors and Equity Interest holders and with public policy, because the selection process included consultation with the Creditors' Committee, thereby satisfying section 1123(a)(7) of the Bankruptcy Code. Furthermore, existing management of the EPC Reorganizing Debtors and the Solar Reorganizing Debtor will remain in place at least through the post-Effective Date transition of the businesses of such Debtors under and through the implementation of the Plan.

3. <u>The Plan Complies with Section 1123(b) of the Bankruptcy Code</u>.

Section 1123(b) of the Bankruptcy Code sets forth various permissive provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) provides

that a plan may (i) impair or leave unimpaired any class of claims or interests, (ii) provide for the assumption or rejection of executory contracts and unexpired leases, (iii) provide for the settlement or retention of claims of the debtor, and (iv) include any other appropriate provision not inconsistent with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1123(b)(1)-(3), (6).

Consistent with section 1123(b) of the Bankruptcy Code, Article III of the Plan (i) impairs certain Classes of Claims and Equity Interests (*i.e.*, Claims and Equity Interests in the Impaired Classes), (ii) Article III of the Plan leaves unimpaired other Classes of Claims and Equity Interests, (iii) Article IX.E of the Plan provides for the preservation of certain Causes of Action, and (iv) Article VII.A of the Plan governs the assumption and rejection of executory contracts and unexpired leases.

Also consistent with section 1123(b), the Plan includes (i) the release by the Debtors of certain parties in interest, (ii) the voluntary release by holders of Claims entitled to vote on the Plan of certain non-Debtor third parties, (iii) an exculpation provision, and (iv) an injunction provision prohibiting parties from, among other things, pursing Claims or Equity Interests otherwise released under the Plan. Importantly, the Plan when confirmed and effective, will authorize the Debtors to execute and deliver the Master Restructuring Agreement, which in turn contemplates the implementation of massive restructuring of the Abengoa Group outside of the United States, which in turn permits the Parent to make the New Value Contribution for the benefit Holders of Allowed Claims against these Debtors. These provisions are proper because, among other things, they are the product of good faith and arm's length negotiations and in exchange for the good, valuable, and reasonably equivalent consideration provided by the

Released Parties and Exculpated Parties, as applicable. In addition, the Ballots provided all creditors in the Voting Classes with the option to opt out of the third party releases in the Plan.

Debtor Releases. Article IX.B.1 of the Plan provides that, as of the Effective Date, the Debtors, the Estates and the Parent will release certain claims and causes of action against certain parties in interest in the Chapter 11 Cases. Pursuant to such provision, other than with respect to claims, causes of action, or liabilities arising out of or relating to any act or omission that constitutes actual fraud, willful misconduct, gross negligence, or a criminal act, the Debtors, the Estates, and the Parent are releasing the Released Parties, which include the following: (a) Debtors and their Representatives, (b) the Parent and its Representatives, (c)(i) each of the Note Agents, (ii) the Creditors' Committee, (iii) each of the Creditors' Committee's members (solely in their capacity as members), (iv) the Restructuring Committee, (v) the NM1 Committee, (vi) each of the Consenting Existing Creditors, (viii) each of the New Money Financing Providers, (ix) each of the Consenting Other Creditors, and (x) with respect to each of the foregoing Entities or Persons in clause (c), their respective Representatives, Professionals, affiliates, subsidiaries, principals, partners, limited partners, general partners, shareholders, members, managers, management companies, investment managers, managed funds, as applicable, together with their successors and assigns. These releases are critical to the successful implementation and confirmation of the Plan, are integral to and required by the Master Restructuring Agreement, are partially in consideration for the New Value Contribution and should be approved pursuant to the standards established in the Third Circuit.

Notwithstanding the provisions of section 524(e) of the Bankruptcy Code, debtors are generally allowed to release claims pursuant to section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and

in the best interests of the estate." *U.S. Bank N.A. v. Wilmington Trust Co.* (*In re Spansion*), 426 B.R. 114, 143 (Bankr. D. Del. 2010). Courts have held that a plan may provide for the release by a debtor of non-debtor third parties after considering the specific facts and equities of each case. *See, e.g., In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999).

Bankruptcy courts consider the following factors to determine whether a release by a debtor should be approved: (i) whether there is an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (ii) whether the non-debtor has made a substantial contribution; (iii) the essential nature of the release to the extent that, without the release, there is little likelihood of success; (iv) an agreement by a substantial majority of creditors to support the release, specifically if the impacted class or classes "overwhelmingly" vote to accept the plan; and (v) whether there is a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) (citing *In re Zenith Elecs. Corp.*, 241 B.R. at 110); *see also Spansion*, 426 B.R. at 143 n.47. Importantly, a court need not find that all of these factors apply to approve a debtor's release of claims against non-debtors. *See, e.g., In re Washington Mutual, Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011). Rather, such factors are "helpful in weighing the equities of the particular case after a fact-specific review." *In re Indianapolis Downs*, 486 B.R. at 303.

An analysis of these factors demonstrates that the proposed releases granted by the Debtors in favor of the Released Parties are fair, reasonable, and in the best interests of the Debtors and the estates and are appropriate under the circumstances of these Chapter 11 Cases. *First*, there is an identity of interest among the Debtors and the Released Parties, as the Released

Parties were "instrumental in formulating the plan." *See Zenith*, 241 B.R. at 110. The *Zenith* Court granted the releases sought by the debtor, holding that the various released parties had an identity of interest on the basis that they were instrumental in formulating the chapter 11 plan. *See id.*; *see also In re Tribune Co.*, 2011 Bankr. LEXIS 4128, at *153 (Bankr. D. Del. Oct. 21, 2011) (holding that the debtors and their secured lenders "share a common goal of confirming the . . . Plan" and implementing the consummation thereof, thus giving rise to an identity of interest between those parties). The Plan is the result of extensive negotiations among and efforts by the Released Parties regarding funding for the New Value Contribution, the New Value Contribution, the compromise of the Released Parties claims, and the Released Parties' support of the Plan.

Second, the Released Parties all made important contributions to these Chapter 11 Cases, including, in addition to the matters set forth in the foregoing paragraph, the Released Parties are central to the global restructuring contemplated by and to be implemented under the Master Restructuring Agreement.

Third, the Released Parties' contributions and material concessions have allowed these Chapter 11 Cases to move expeditiously towards confirmation. Many of the Released Parties have indemnification rights against the Debtors and Reorganized Debtors that may constitute valid administrative expense obligations. Furthermore, the releases are in partial exchange for the New Value Contribution, as allocated under each of the EPC Reorganizing Plan, the Solar Reorganizing Plan, the EPC Liquidating Plan[9] and the Bioenergy and Maple Liquidating Plan, as well as the ongoing commitment financially and operationally to support the

[9] In the event the EPC Liquidating Plan is withdrawn from the Plan the New Value Contribution will be reduced by $1 million and the allocation of the New Value Contribution, as reduced, to the EPC Liquidating Plan will reduced to $750,000, nevertheless be allocated to the EPC Liquidating Debtors and available to be used by the EPC Liquidating Debtors to pay the costs of administration of the EPC Liquidating Debtors' Chapter 11 Cases and to fund a plan should one be pursued in the future.

post-Effective Date operations of the Reorganizing Debtors. The releases are a condition to such New Value Contribution and ongoing commitments. Without these releases, the Released Parties would not have been willing to contribute to the Plan process and formulation of the Plan, which the Debtors believe presents the best chance of any recovery for creditors holding Allowed Claims against the Liquidating Debtors and significantly enhanced recoveries for creditors holding Allowed Claims against the Reorganizing Debtors.

Fourth, creditors in EPC Reorganizing Class 3A, 3B and 4 and Solar Reorganizing Class 3 and 4 have overwhelmingly voted to accept the Plan.

Fifth, the Debtors believe that the Plan presents the only opportunity for a recovery by creditors of the Liquidating Debtors and the best possible chance for an enhanced recovery for creditors of the Reorganizing Debtors. *See Zenith*, 241 B.R. at 111 (explaining that the fifth factor was met because "the Plan does provide a distribution to the creditors in exchange for the Releases" and supporting that conclusion by explaining that creditors received more under the plan than they would have in a liquidation).

Accordingly, the Debtors believe that, under the specific facts and equities of these Chapter 11 Cases, the Debtors' release of the Released Parties constitutes a valid exercise of the Debtors' business judgment and should be approved.

The Third Party Release. In addition to the releases granted by the Debtors, Article IX.B.2 of the Plan provides for the voluntary release of the Released Parties by certain third parties of Causes of Action and any other debts, obligations, rights, suits, judgments, damages, actions, remedies and liabilities whatsoever, based in whole or in part upon any act or omission, transaction, or other occurrence or circumstances existing or taking place prior to or on the Effective Date arising from or related in any way to the Debtors, other than with respect to

the claims, causes of action, or liabilities arising out of or relating to any act or omission that constitutes actual fraud, willful misconduct, gross negligence, or a criminal act (as set forth more fully in Article IX.B of the Plan, the "Third Party Release"). The Third Party Release applies only to those persons, who are entitled to vote on the Plan and do not mark their Ballots as opting out of the Third Party Release under the Plan. *See* Plan, Article IX.B.

The Third Party Release was conspicuously included in the Plan, Disclosure Statement, and applicable Ballot, and holders of Claims in the Voting Classes were given the opportunity to opt out of the Third Party Release. The Third Party Release is not binding on any party that opted out of the Third Party Release. Accordingly, the Third Party Release is consensual and in accordance with applicable Third Circuit law. *See In re Indianapolis Downs, LLC*, 486 at 304–05 (consensual third party releases are permissible); *In re Washington Mutual*, 442 B.R. at 352 (same); *Spansion*, 426 B.R. at 144 (finding that third party releases contained in a plan are valid, if consensual); *In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004) (stating that a plan "is a contract that may bind those who vote in favor of it. . . . [T]o the extent creditors or shareholders voted in favor of [the Plan], which provides for the release of claims they may have against the Noteholders, they are bound by that.").

The Third Party Release is an integral part of the Plan and is appropriate under applicable law. Therefore, the Third Party Release should be approved.

Exculpation. Article IX.C of the Plan provides for an exculpation limiting the liability of certain Parties for acts or omissions in connection with, related to, or arising out of these Chapter 11 Cases, the negotiation, solicitation, or pursuit of confirmation of the Plan, and the consummation or administration of the Plan. The Exculpated Parties are limited to the Debtors, the Debtors' officers, managers, directors, employees, and Professionals, the Creditors'

Committee, the Creditors' Committee's members (solely in their capacity as members), and the Creditors' Committee's Professionals; all parties with a fiduciary obligation to the Estates. Further, the exculpation provision does not relieve any party of liability for actual fraud, gross negligence, willful misconduct, or a criminal act.

The standard within the Third Circuit for approving exculpation provisions in a plan provides that exculpations are appropriate when the protection is necessary and given in exchange for fair consideration. *See Gillman v. Cont'l Airlines* (*In re Cont'l Airlines*), 203 F.3d 203, 211–14 (3d Cir. 2000). Accordingly, courts have approved exculpation provisions when parties are exculpated for acts or omissions in connection with, or related to, "the pursuit of confirmation of the Plan, the consummation of the Plan or the Administration of the Plan or the property to be distributed under the Plan, except for willful misconduct or gross negligence . . . ." *In re PWS Holding Co.*, 228 F.3d 224, 245–46 (3d Cir. 2000) (approving an exculpation clause releasing a creditors' committee and its professionals from third party claims); *see also In re W.R. Grace & Co.*, 446 B.R. 96, 132–33 (Bankr. D. Del. 2011) (approving an exculpation clause exculpating non-debtor parties who were party to a settlement agreement); *W. Mining & Inv., LLC v. Bankers Trust Co.*, 2003 WL 503403 at * 4 (D. Del. Feb. 19, 2003) (noting there is nothing inherently suspect about a plan provision releasing, among others, the DIP lenders, bank lenders, and the committee, from any liability for past, present, and future actions taken or omitted to be taken in connection with the sale and liquidation of the debtors' assets, other than because of gross negligence or willful misconduct).

Exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *In re Enron Corp.*, 326 B.R.

497, 503 (S.D.N.Y. 2005) (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition"). Without protection from liability, key constituents would have been unwilling to cooperate in connection with the negotiation, formulation, and distribution of the Plan. Thus, the exculpation provision set forth in Article IX.C of the Plan is appropriate and consistent with applicable law.

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

9019 Settlement. Article IX.A of the Plan provides that "[t]he entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all Claims and Equity Interests, as well as a finding by the Bankruptcy Court that such compromise or settlement is fair, equitable, reasonable, and in the best interests of the Debtors, the Estates, and Holders of Claims and Equity Interests."

Section 1123(b)(3)(A) specifically provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." Settlements pursuant to a plan are generally subject to the standard applied to

settlements under Bankruptcy Rule 9019. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 334 (Bankr. D. Del. 2004). The Third Circuit applies a four factor balancing test for considering motions to approve settlements under Bankruptcy Rule 9019, weighing:

a. the probability of success in litigation;

b. the likely difficulties in collection;

c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

d. the paramount interest of the creditors.

Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996).

The Debtors believe that the Plan is a valid compromise or settlement of Claims and Equity Interests, because pursuing an alternative to the Plan through litigation or liquidation may not be successful and is unlikely to provide additional recoveries to creditors. Further, the costs involved would likely outweigh any potential benefit from pursuing such litigation. Finally, the Plan represents the best recovery to creditors of the Debtors under the circumstances. Thus, the Plan represents a valid compromise.

Additionally, similar plan provisions have been approved by this Court. *See, e.g.*, *In re Aspect Software Parent Inc.*, Case No. 16-10597 (Bankr. D. Del. 2016, Docket Nos. 346, 372); *In re Allied Nevada Gold Corp.*, Case No. 15-10503 (Bankr. D. Del. 2015, Docket Nos. 917, 1136).

4. Section 1123(d): Cure of Defaults.

Section 1123(d) of the Bankruptcy Code provides that, "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). As required by section 365(b)(1) of the Bankruptcy Code, any monetary amounts by which any executory

contract or unexpired lease that may be assumed under the Plan is in default shall be satisfied by payment of the required cure amount, if any. Accordingly, the Plan complies with section 1123(d) of the Bankruptcy Code.

B. Section 1129(a)(2).

Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a plan comply with the applicable provisions of title 11 of the United States Code. 11 U.S.C. § 1129(a)(2). The principal purpose of this section is to ensure that a plan proponent has complied with the requirements of section 1125 in the solicitation of acceptances of the plan. *In re Resorts Int'l Inc.*, 145 B.R. 412, 468–69 (Bankr. D.N.J. 1990); *see also* H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368.

Here, the Debtors, as plan proponent, have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and other applicable law in obtaining approval of the Disclosure Statement before soliciting any votes on the Plan, and in transmitting the Plan, the Disclosure Statement, the Ballots, and related documents and notices and in soliciting and tabulating the votes on the Plan. Accordingly, the Debtors have fully complied with all the provisions of the Bankruptcy Code, including, in particular, the provisions of section 1125 of the Bankruptcy Code, and have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. Section 1129(a)(3).

Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Courts in the Third Circuit have found that good faith requires that the plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." *Zenith Elecs.*, 241 B.R. at 107; *accord In re*

Century Glove, Inc., Nos. 90-400-SLR, 90-401-SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) ("Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied."). The court must also consider the totality of the circumstances surrounding a plan to determine if it has been proposed in good faith. *See In re New Valley Corp.*, 168 B.R. 73, 81 (Bankr. D.N.J. 1994).

The Plan is the product of arm's length negotiations among the Debtors, Creditors' Committee, and other constituents. The Plan is proposed to act in concert with the Master Restructuring Agreement, it is not dictated by it, and together the Plan and the Master Restructuring Agreement work to restructure billions of dollars/euros of obligations of the Abengoa Group. All the Debtors seek under the Plan is authority to execute the Master Restructuring Agreement; they do not seek to have this Court approve the Master Restructuring Agreement. The Plan, furthermore, allows holders of Allowed Claims to realize the highest possible recovery under the circumstances. As such, the Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' assets and maximizing distributions to creditors within the bounds of this Court's jurisdiction. Additionally, the Plan has been proposed in compliance with all applicable laws, rules, and regulations. The Plan has been conceived and proposed with the "honest purpose" and "reasonable hopes of success" by which "good faith" under section 1129(a)(3) of the Bankruptcy Code is measured. *See Brite v. Sun Country Dev., Inc. (In re Sun County Dev., Inc.),* 764 F.2d 406, 408 (5th Cir. 1985). Accordingly, the Plan satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

D. Section 1129(a)(4).

Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor "for services or for costs and expenses in or in connection with the case, or in connection

with the plan and incident to the case," either be approved by the Court as reasonable or subject to approval of the Court as reasonable. 11 U.S.C. § 1129(a)(4). In addition to its New Value Contribution of over $30 million, Abengoa, S.A. will pay all costs and expenses of Alvarez & Marsal, including the fees and costs it incurred in connection with its services to the Debtors. The Debtors submit that because such fees will not be paid from the assets of the Estates, such fees are not subject to Court approval under section 1129(a)(4). *See In re River Vill. Associates*, 161 B.R. 127, 141 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995) (holding that where fees and are not paid from assets of the estate, such fees are not subject to court approval under section 1129(a)(4)).

Other than the fees of Alvarez & Marsal, any payments made or promised by the Debtors, or a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in, or in connection with, the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, have been approved by, or are subject to approval of, the Court as reasonable. Specifically, Article II.C of the Plan sets forth a procedure for Court approval of any Compensation and Reimbursement Claims through the Effective Date. The procedure for the Court's review and ultimate determination of the fees, costs, and expenses to be paid by the Debtors satisfies the requirements of section 1129(a)(4) of the Bankruptcy Code. *See Resorts Int'l*, 145 B.R. at 475–76 (stating that as long as fees, costs, and expenses are subject to final approval of the court, section 1129(a)(4) of the Bankruptcy Code is satisfied).

E. Section 1129(a)(5).

Section 1129(a)(5) of the Bankruptcy Code requires that a plan proponent disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor to the debtor under the plan." 11 U.S.C. § 1129(a)(5)(A)(i). Further, section 1129(a)(5) requires that the

appointment of such individual be "consistent with the interests of creditors and equity security holders and with public policy . . . ." 11 U.S.C. § 1129(a)(5)(A)(ii).

The Plan complies with section 1129(a)(5) of the Bankruptcy Code. The identity of the directors and officers are disclosed in the Plan Supplement. The Responsible Person under both of the Reorganizing Plans will be Jeffrey Bland, Esquire. The Litigation Trustee will be Drivetrain, LLC. The Liquidating Trustees will be Drivetrain, LLC.

The selection and appointment of the Responsible Person, the Litigation Trustee and the Liquidating Trustees is in consultation with the Creditors' Committee and consistent with the interests of holders of Claims against and Equity Interests in the Debtors and with public policy. Accordingly, the Debtors submit that the provisions of the Plan satisfy the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. Section 1129(a)(6).

Bankruptcy Code section 1129(a)(6) provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Plan does not provide for any rate changes over which a governmental regulatory commission has jurisdiction. The Debtors submit that this provision of the Bankruptcy Code is not applicable to the Plan.

G. Section 1129(a)(7).

The Bankruptcy Code protects creditors and equity holders who are impaired by the Plan and have not voted to accept the Plan through the "best interests" test of section 1129(a)(7). The "best interests" test requires that holders of impaired claims or interests that do not vote to accept the plan "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). If the Court finds that each non-consenting member of an impaired class will receive at least as much under the plan as it would receive in a chapter 7 liquidation, the plan satisfies the best interests test. *See, e.g.*, *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990).

The Debtors prepared a liquidation analysis with respect to each of the EPC Reorganizing Plan, the Solar Reorganizing Plan, the EPC Liquidating Plan and the Bioenergy and Maple Liquidating Plan. Each liquidation analysis demonstrates that Impaired Creditors under each such Plan will receive more under the Plan than they would were the Debtors to be liquidated on the Effective Date under chapter 7 of the Bankruptcy Code, because (i) only under the Plan will the Parent fund the New Value Contribution, including $30.5 million available to unsecured creditors and the Sureties under the EPC Restructuring Plan, $1.75 million under the EPC Liquidating Plan, $500,000 under the Bioenergy and Maple Liquidating Plan, and $3 million to fund the Litigation Trust without which the EPC Reorganizing Debtors submit their Estates would not contain adequate liquid resources effectively to prosecute the Causes of Action, and (ii) conversion to a chapter 7 case and appointment of a stranger to these Chapter 11 Cases, the Chapter 15 Cases and the Abengoa Group global restructuring will entail substantial expense and delay while the chapter 7 trustee climbs the learning curve, such that the conclusion that chapter 7 will diminish creditor recoveries is inescapable.

The Debtors submit that, with respect to each Impaired Class of Claims or Equity Interests, each Holder of a Claim or Equity Interest in such Impaired Class (i) has accepted the Plan, (ii) will receive or retain under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date, that is not less than the amount that such holder

would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on the Effective Date, or (iii) has agreed to receive less favorable treatment. Therefore, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

H. Section 1129(a)(8).

Subject to section 1129(a)(10) and 1129(b), section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by the plan. As set forth above and in the Voting Certification, holders of Claims in EPC Reorganizing Class 3A, 3B and 4, Solar Reorganizing Class 3 and 4 voted to accept the Plan. As such, section 1129(a)(8) is satisfied with respect to those Classes. Section 1129(a)(8) is also satisfied with respect to holders of the Unimpaired Classes which are deemed to accept the Plan. *See* 11 U.S.C. § 1126(f).

Holders of Equity Interests in EPC Reorganizing Class 7B (Intercompany Claims by Debtor Affiliates), Solar Reorganizing Class 7B (Intercompany Claims by Debtor Affiliates), EPC Liquidating Class 4 (Intercompany Claims), EPC Liquidating Class 5 (Equity Interests) Bioenergy and Maple Liquidating Class 4 (Intercompany Claims) and Bioenergy and Maple Liquidating Class 5 (Equity Interests) are deemed to reject the Plan. EPC Liquidating Class 3, EPC Reorganizing Class 5, EPC Reorganizing Class 6 and Solar Reorganizing Class 6 have voted to reject the Plan. Nonetheless, as set forth below, the Plan may be confirmed pursuant to the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

I. Section 1129(a)(9).

Section 1129(a)(9) of the Bankruptcy Code provides that holders of certain types of priority claims must receive specific treatment dependent upon the circumstances of such claims, unless the holders of such claims have agreed to different treatment. *See* 11 U.S.C. § 1129(a)(9). Except to the extent that the holder of a particular Allowed Claim has agreed to a

different treatment of such Claim, the Plan provides that Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Priority Other Claims against the Debtors will be treated in accordance with section 1129(a)(9) of the Bankruptcy Code. *See* Plan, Article III.

The Plan also provides that the deadline for submission by Professionals for Court approval of Accrued Professional Compensation shall be sixty (60) days after the Effective Date. All Professionals employed by the Debtors and the Creditors' Committee shall provide to the Debtors an estimate of their Accrued Professional Compensation through the Effective Date (including an estimate and reserve for fees and expenses expected to be incurred through and after the Effective Date to prepare and prosecute allowance of final fee applications). Therefore, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. Section 1129(a)(10).

Section 1129(a)(9)(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 by the plan. Claims in EPC Reorganizing Class 3A, 3B and 4, Solar Reorganizing Class 3 and 4 have accepted the Plan, determined without including any acceptances of the Plan by any insider, thereby satisfying the requirements of section 1129(a)(10) of the Bankruptcy Code.

K. Section 1129(a)(11).

Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that

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

11 U.S.C. § 1129(a)(11). This requirement, commonly known as the "feasibility" standard, usually encompasses two interrelated determinations (where the plan does not contemplate the

liquidation of the debtor): (i) the debtor's ability to consummate the provisions of the plan, and (ii) the debtor's ability to reorganize as a viable entity. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (stating that the definition of feasibility "has been slightly broadened and contemplates whether [a] debtor can realistically carry out its Plan . . . and [b] whether the Plan offers a reasonable prospect of success and is workable").

With respect to the EPC Reorganizing Debtors, the Plan is feasible in light of the substantial New Value Contribution, EPC Reorganizing Debtors' projections and the Parent's commitment financially and operationally to support the EPC Reorganizing Debtors following the Effective Date as a standalone engineering, procurement and construction enterprise. As a result, as of the Effective Date, the EPC Reorganizing Debtors believe they will have sufficient funds to satisfy Claims pursuant to the treatment set forth in the Plan as well as to implement the Plan.

The Solar Reorganizing Debtor has historically operated profitably and will have substantial cash reserves as of the Effective Date, in an amount at least sufficient to adequately capitalize and provide liquidity for the Solar Reorganizing Debtor, and to provide additional consideration to holders of Claims in Classes 4, 5 and 6 in the EPC Restructuring Plan as part of the Plan's overall compromise or settlement. Taken together with the Parent's commitment financially and operationally to support the Solar Reorganizing Debtor, the Solar Reorganizing Debtor believes it will have sufficient funds to satisfy Claims pursuant to the treatment set forth in the Plan as well as to implement the Plan.

With respect to the EPC Liquidating Debtors and the Bioenergy and Maple Liquidating Debtors, since the Plan expressly provides for the liquidation of those Debtors' Estates and only under the Plan will each receive funding of $1.75 million and $500,000, respectively, to satisfy Allowed Administrative Claims, Allowed Priority Tax Claims and Allowed Other Priority Claims consistent with the treatment set forth in the Plan, the Liquidating Debtors will be able to implement the Plan, accordingly section 1129(a)(11) of the Bankruptcy Code is satisfied. *See In re Revco*, 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (holding that "[s]ection 1129(a)(11) is satisfied as the plan provides that the property of [the] Debtors shall be liquidated"). Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors that is not contemplated by the Plan. Thus, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

L. Section 1129(a)(12).

Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 [of title 28 of the United States Code], as determined by the court at the hearing on confirmation of the plan." 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 of] 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, Article V.N of the Plan provides that statutory fees under 28 U.S.C. § 1930 shall be paid on the Effective Date and thereafter, as such fees may thereafter accrue and be due and payable, by the Responsible Person and Liquidation Trustees in accordance with the applicable schedule for payment of such fees. Thus, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

M. Sections 1129(a)(13), 1129(a)(14), 1129(a)(15) and 1129(a)(16).

Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation of all retiree benefits, as defined in, and at the levels established pursuant to, section 1114 of the Bankruptcy Code. The Debtors have no pension or retiree benefits, thus, section 1129(a)(13) of the Bankruptcy Code does not apply to the Plan. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations and, as such, section 1129(a)(14) does not apply. Section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). The Debtors are not "individuals" and, accordingly, section 1129(a)(15) is inapplicable. Section 1129(a)(16) of the Bankruptcy Code applies to transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. The Debtors were moneyed, business, or commercial corporations and, accordingly, section 1129(a)(16) is inapplicable.

N. The Plan Satisfies Section 1129(b) of the Bankruptcy Code.

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where not all impaired classes of claims and equity interests vote to accept a plan. This mechanism is known colloquially as "cram down."

Section 1129(b) provides, in pertinent part:

> [I]f 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). Thus, pursuant to section 1129(b), a court may "cram down" a plan over the rejection of such plan by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. *See, e.g., Kane v. Johns-Manville Corp.*, 843 F.2d at 650.

Holders of Claims and Equity Interests in EPC Reorganizing Class 7B (Intercompany Claims by Debtor Affiliates), Solar Reorganizing Class 7B (Intercompany Claims by Debtor Affiliates), EPC Liquidating Class 4 (Intercompany Claims), EPC Liquidating Class 5 (Equity Interests), Bioenergy and Maple Liquidating Class 4 (Intercompany Claims) and Bioenergy and Maple Liquidating Class 5 (Equity Interests) are deemed to reject the Plan; and EPC Liquidating Class 3, EPC Reorganizing Class 5, EPC Reorganizing Class 6 and Solar Reorganizing Class 6 voted to reject the Plan (the "Rejecting Classes"). The Debtors submit that the Plan may be confirmed as to Classes not accepting the Plan pursuant to the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

1. The Plan Does Not Discriminate Unfairly.

In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so. *See Coram*, 315 B.R. at 349 (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination). A threshold inquiry to assessing whether a proposed chapter 11 plan unfairly discriminates against a dissenting class is whether the dissenting class is equally situated

to a class allegedly receiving more favorable treatment. *See In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (finding no unfair discrimination where interests of objecting class were not similar or comparable to those of any other class).

The Plan has classified the Rejecting Classes based on similar legal rights and Claims. The Plan's treatment of the Rejecting Classes is proper because there is no similarly situated Class of Claims or Equity Interests, as applicable, classified under the Plan that is receiving greater treatment. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code.

2. <u>The Plan is Fair and Equitable</u>.

A plan is "fair and equitable" with respect to an impaired class of unsecured claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) & (C)(ii); *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999). The absolute priority rule is satisfied with respect to a class of impaired unsecured claims or interests so long as the holder of any claim or interest that is junior to the claims or interests of such class will not receive or retain any property under the plan on account of such junior claim or interest. 11 U.S.C. § 1129(b)(2)(B)(ii) and (C)(ii).

Solar Reorganizing Plan, EPC Liquidating Plan and Bioenergy and Maple Liquidating Plan

The Plan satisfies the absolute priority rule with respect to all Claims and Equity Interests in the Solar Reorganizing Plan, EPC Liquidating Plan and Bioenergy and Maple Liquidating Plan. No junior holder of a Claim or Equity Interest will receive any distribution unless the holders of higher priority Claims receive the full value of their Claims or the holders of such higher priority Claims have consented to such treatment. No holders of any Claims or

Equity Interests will receive or retain any property under the Plan on account of such junior Claims or Equity Interests, until all holders of Claims or Interests senior to such Classes receive an 100% recovery on account of their Claims or Equity Interests.

EPC Reorganizing Plan

The Plan provides that the ownership of the EPC Reorganizing Debtors will remain unaffected by confirmation of the Plan. *See* Plan, Article III. In order to effectuate this transaction, Holders of Allowed Equity Interests in EPC Reorganizing Class 8 (Equity Interests) shall have their Equity Interests retained or reinstated upon the Effective Date. *See* Plan, Article IV.H. The "absolute priority rule" of the Bankruptcy Code requires senior classes of creditors to be paid in full before value can be provided to or retained by a junior class. *See* 11 U.S.C. § 1129(b)(2)(B) and (C).

With respect to EPC Reorganizing Debtors, in exchange for retaining its indirect Equity Interests in the EPC Reorganizing Debtors and the releases being provided under the Plan, the Parent shall provide the New Value Contribution in order to fund the Distributions under the EPC Reorganizing Plan. Moreover, such retention of Equity Interests will enable the EPC Reorganizing Debtors to retain the current operational structure of the EPC Reorganizing Debtors and allow them to operate without substantial interruptions following the Effective Date. The Parent is, in turn, able to provide the New Value Contribution as a result of the financing that will be provided by the New Money Financing Providers pursuant to the Master Restructuring Agreement in order to implement the global restructuring contemplated thereunder. Without the New Value Contribution, in addition to the payment of the substantial fees and expenses of Alvarez & Marsal for the services rendered to or for the benefit of the EPC Reorganizing Debtors.

In *Bank of America v. 203 N. LaSalle Street Partnership*, 526 U.S. 434 (1999), the Supreme Court concluded that a plan that only permitted existing shareholders to invest new capital to obtain equity in the reorganized debtor violated the absolute priority rule of the Bankruptcy Code. In order for existing equity to retain ownership of the debtor where classes senior to existing equity holders are not being paid in full, "new value" must be provided. Specifically, under the "new value exception" to the "absolute priority" rule, a subordinate class may pay or transfer to or for the benefit of a debtor's estate new value in order to retain that existing interest or receive a payment if senior classes are not expected to receive full payment under the plan of reorganization. *See In re Armstrong World Indus.*, 348 B.R. 111, 121 (D. Del. 2006). The "new value exception" requires a junior interest Holder to provide "1) new, 2) substantial, 3) money or money's worth, 4) necessary for a successful reorganization and 5) reasonably equivalent to the value or interest received," in order to retain its property. *In re Brown*, 498 B.R. 486, 497 (E.D. Pa. 2013); *see also In re Ne. Family Eyecare, P.C.*, No. 01-13983DWS, 2002 WL 1836307, at *5 (Bankr. E.D. Pa. July 22, 2002).[10]

Under the Plan, the Holders of Allowed Equity Interests in the EPC Reorganizing Debtors will retain or have their Equity Interests reinstated in exchange for which they will be providing a New Value Contribution. Abengoa S.A. (also referred to herein as the "Parent") has agreed to provide the New Value Contribution of over $30 million in Cash with respect to the EPC Reorganizing Debtors, which funding stems from the financing that is anticipated to be provided by the New Money Financing Providers in connection with the Master Restructuring Agreement, which includes the following: (i) Cash to fund the EPC Reorganization Distribution

[10] While certain decisions within the Third Circuit include an "upfront" requirement, this requirement is not consistently part of the test. *See, e.g.*, *In re Brown* 498 B.R. at 497 (listing the five requirements enumerated above).

in the amount of $24 million,[11] to be provided as follows: (a) no later than fifteen (15) days following the Effective Date, an amount equal to thirty percent (30%) of such Cash component (b) no later than sixty (60) days following the Effective Date, an amount equal to twenty-five percent (25%) of such Cash component, (c) no later than one hundred and twenty (120) days following the Effective Date, an amount equal to twenty-five percent (25%) of such Cash component, and (d) no later than one hundred and eighty (180) days after the Effective Date, an amount equal twenty percent (20%) of such Cash component[12]; (ii) Litigation Trust Causes of Action, following an advance of a $3 million Litigation Fund to prosecute such claims; *provided, however*, that the $3 million of recoveries resulting from the prosecution of the Litigation Trust Causes of Action will revert back to the Parent at such time as the Litigation Trust has obtained a net recovery on the Litigation Trust Causes of Action of more than twenty eight million dollars ($28,000,000);[13] and (iii) $6.5 million to the Surety Reserve, which the Parent is gifting to beneficiaries of Holders of Allowed Claims in EPC Reorganizing Debtors Class 6 (Debt Bonding Claims) and Solar Reorganizing Debtor Class 6 (Debt Bonding Claims).[14] In addition, as part of the New Value Contribution, the Parent will (i) pay all costs and expenses of Alvarez & Marsal, including the extensive fees and costs it incurred in connection with its services to the

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[11] $3.5 million of this amount may, at the election of the Creditors' Committee or the Liquidating Trustee, as applicable, be used to increase the funds in the Liquidating Trust.

[12] The Ashalim proceeds held by Abengoa Solar LLC (net of amounts necessary to pay the estimated costs of Allowed Claims in the Abengoa Solar chapter 11 case, amounts reasonably necessary to wind down the bankruptcy case of Abengoa Solar and the reasonable and necessary costs to operate the Abengoa Solar and EPC businesses) will be held in an escrow account until such time as all Cash contributions under the Plan from Abengoa SA and Abengoa Solar are paid. The escrow shall be reduced as Cash contributions are made such that the amount in the Escrow shall be no greater than the remaining Cash contributions to be funded. The terms of the Escrow shall be mutually agreed by the Reorganized Debtors, Responsible Person and Committee.

[13] Thereafter, $3 million of the recoveries goes to the EPC Reorganizing Debtors and $3 million goes to the Liquidating Trusts. Once the recoveries reach $31 million, all additional recoveries shall be distributed to Holders of Allowed Claims entitled to a Distribution from the EPC Reorganization Distribution.

[14] In exchange for the amounts contained in the Surety Reserve, the Surety Reserve Beneficiaries shall not be entitled to share in the EPC Reorganizing Distribution or the Solar Reorganizing Distribution, as applicable. Additionally, the Parent will contribute $1,750,000 under each of the EPC Liquidating Plan and $500,000 under the Bioenergy and Maple Liquidating Plan.

Debtors, and (ii) provide the Tax Attribute Contribution, which is twenty-five (25%) of the Cash value of any U.S. tax attributes received by the Parent on account of their retention of any net operating losses owned by any of the Debtors, which amounts shall be paid to the Responsible Person for the EPC Reorganizing Debtors to fund the EPC Reorganizing Distribution.

Here, the New Value Contribution by the Parent satisfies the applicable test, because the New Value Contribution is new and consists of Cash and non-Cash contributions that are required to fund distributions permitting the EPC Reorganizing Debtors to confirm and implement their EPC Reorganizing Plan. Additionally, the New Value Contribution is substantial standing alone and because it is necessary to the success of the reorganization and represents approximately 7.7 percent of the amount of Allowed General Unsecured Claims and approximately 8.9 percent of the amount of Allowed General Unsecured Claims against the EPC Reorganizing Debtors to be discharged under the Plan. *See Matter of Snyder*, 967 F.2d 1126, 1131–32 (7th Cir. 1992) (stating that to be substantial, an infusion of new capital must be necessary to the success of the undertaking and that "there is no mathematical formula for resolving the substantiality issue, and it will depend on the circumstances of the individual case."); *see also In re Elmwood, Inc.*, 182 B.R. 845, 853 (D. Nev. 1995) (finding that an new value contribution which amounted to 4% of the unsecured debt discharged under the Plan was substantial). In addition, the New Value Contribution is not only necessary for the successful reorganization of the EPC Reorganizing Debtors, but it is essential, as this is the only source of material Cash consideration to provide recoveries to creditors. Absent the financing being provided by the New Money Financing Providers to enable the Parent to make the New Value Contribution, and the Consenting Existing Creditors that are Holders of Existing Notes agreeing to compromise their claims, which together would enable other creditors of the EPC

Reorganizing Debtors that are entitled to receive distributions under the Plan to receive such distributions and for the EPC Reorganizing Debtors to reorganize, the EPC Reorganizing Debtors may have no choice but to liquidate. *See Matters of Treasure Bay Corp.*, 212 B.R. 520, 545 (Bankr. S.D. Miss. 1997) ("The proposed contribution is 'necessary to the successful reorganization' because it provides needed capital to pay operating costs and debt service under the plan."). Finally, as to the value of the contribution relative to the Equity Interests, the EPC Reorganizing Debtors believe that the New Value Contribution far exceeds any potential value of the Equity Interests, which likely have little or no economic value as of the Effective Date and any projected value results only from the Parent's continued financial and operational support of the EPC Reorganizing Debtors following the Effective Date. *See In re G-I Holdings Inc.*, 420 B.R. 216, 269 (D.N.J. 2009) (finding that a new value contribution is reasonably equivalent where equity would be "essentially worthless" without the new value contribution).

In response to this compelling evidence, the Sureties blindly contend that the Reorganized Debtors are retaining substantial additional value. As will be amply demonstrated through the evidentiary submissions at the hearing on confirmation of the Plan, there is little residual value remaining with the Reorganized Debtors (and the Committee has negotiated to share in these proceeds and residual value, if any), and any potential Claims and Causes of Action being released are either non-existent or highly speculative, and will take considerable time and the expenditure of extensive resources to prosecute, with absolutely no assurances of any recovery.

Accordingly, the New Value Contribution meets the applicable standards for the new value exception to the absolute priority rule and will provide the EPC Reorganizing Debtors with sufficient funds to make distributions under and implement the Plan.[15]

As the Plan does not violate the "fair and equitable" requirement of section 1129(b)(1) with regards to Rejecting Classes and does not unfairly discriminate against such Classes pursuant to section 1129(b)(1), the Plan meets the requirements of section 1129(b) of the Bankruptcy Code.

O. Section 1129(c).

Subject to certain conditions, section 1129(c) of the Bankruptcy Code requires that the Court confirm only one plan. The Plan is the only plan being confirmed in these Chapter 11 Cases with respect to each of the Debtor groups, and, therefore, section 1129(c) is satisfied.

P. Section 1129(d).

The principal purpose of the Plan is not the avoidance of taxes or the application of section 5 of the Securities Act of 1933. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

Q. Section 1129(e).

These Chapter 11 Cases are not "small business cases" as defined in the Bankruptcy Code and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

R. Partial Substantive Consolidation is Appropriate.

Under Article IV.HH of the Plan, the Plan serves as a motion seeking entry of a Bankruptcy Court order approving the separate partial substantive consolidation of each of the

[15] While generally, *LaSalle* would require the Debtors to conduct a market test with respect to the new value contribution, *see, e.g., In re Glob. Ocean Carriers Ltd.*, 251 B.R. 31, 49 (Bankr. D. Del. 2000), the Debtors assert that here, no such test is required because the equity is essentially worthless.

following Debtor groups: (a) EPC Reorganizing Debtors, (b) EPC Liquidating Debtors, and (c) Bioenergy and Maple Liquidating Debtors only for purposes of voting and distributions. On the Effective Date, such partial substantive consolidation of the respective Debtor groups shall take place.

The Debtors submit that such partial substantive consolidation is appropriate under the law and the facts present here. Under section 1123(a)(5)(C) of the Bankruptcy Code, "adequate means for the plan's implementation" may include "merger or consolidation of the debtor with one or more persons." Moreover, this Court and others have ordered the substantive consolidation of affiliated debtors as part of a plan of reorganization. *See In re Stone & Webster. Inc.*, 286 B.R. 532, 546 (Bankr. D. Del. 2002) ("[S]ection 1123(a)((5)(C)) clearly authorizes a bankruptcy court to confirm a Chapter 11 plan containing a provision which substantively consolidates the estates of the two or more debtors.").

Substantive consolidation is an equitable remedy that a bankruptcy court may apply in the chapter 11 cases of affiliated debtors, among other instances. *See In re Owens Corning*, 419 F.3d 195, 216 (3d Cir. 2005). When debtors are substantively consolidated, the assets and liabilities of such debtors are pooled and essentially treated as the assets and liabilities of a single debtor. *Id.* at 202. In *Owens Corning*, the Third Circuit articulated a test for whether substantive consolidation is appropriate, looking to five principles behind substantive consolidation: (i) limiting the cross-creep of liability by respecting entity separateness is a fundamental ground rule; (ii) the harms substantive consolidation addresses are nearly always those caused by debtors; (iii) mere benefit of administration of the case is hardly a harm calling for substantive consolidation into play; (iv) substantive consolidation should be a rare remedy and one of last resort after considering and rejecting other remedies; and (v) while substantive

consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively. *Id.* at 211. Based on these principles, the Third Circuit held that, absent consent, the party calling for substantive consolidation must prove: (i) that prepetition, the entities to be consolidated disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity **or** (ii) that postpetition, their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors. *Id.* The analysis is "an intentionally open-ended, equitable inquiry." *Id.* at 210. The proponent of substantive consolidation, in this case the Debtors, bears the burden of showing one of the two rationales for consolidation. *See id.* at 211. Under the "creditor reliance" standard, following a *prima facie* showing by the proponent that prepetition corporate disregard caused creditors to believe that they were dealing with a single entity, the burden then shifts to the creditor to establish that it is adversely affected and actually relied on the debtors' separate existence. *See id.*

As a preliminary matter, several Classes in the EPC Reorganizing Plan have voted overwhelmingly to accept the Plan and thus have consented. Notwithstanding that fact that certain of the Classes of creditors holding Claims against the EPC Reorganizing Debtors voted to reject the Plan, the Debtors believe that the partial substantive consolidation provided for under the Plan is appropriate under the "creditor reliance" standard set forth by the Third Circuit in *Owens Corning*. The Debtors believe that, prepetition, many of their creditors, including the issuers of Abengoa's funded debt facilities and bonding lines, and other creditors that received Parent guarantees with respect to the obligations of one or more Debtors, effectively treated each of the Debtor groups proposed to be substantively consolidated under the Plan as a single entity. Specifically, the Debtors identified three principal set of expectations that support substantive

consolidation based on creditor reliance: (a) the expectations of the lenders under the Debtors' credit agreements, (b) the expectations of purchasers of Notes, and (c) the expectations of creditors of those Debtors that are project companies. The composition of certain Debtor groups is motivated by adherence to the expectations of more than one set of creditors.

For example, the Debtors believe that the prepetition credit agreements are each based on the credit of different sets of legal entities. The lenders under these credit agreements received combined financial reports from the Debtors as to all obligors party to the applicable credit agreement, and calculated financial covenant compliance based on the assets and liabilities of those entities. The restrictions imposed on the obligors by these credit facilities (*e.g.*, restrictions on the ability to incur additional indebtedness, make certain payments, sell certain assets, and grant certain security interests to third parties) indicate that the lenders under each of these facilities relied upon the collective identity of their respective borrowers and guarantors when extending credit. *See In re Lisanti Foods, Inc.*, No. CIV.A.04-3868 JCL, 2006 WL 2927619, at *8 (D.N.J. Oct. 11, 2006), *aff'd*, 241 F. App'x 1, 2 (3d Cir. 2007) (holding that substantive consolidation was appropriate under *Owens Corning*, where, *inter alia*, "creditors did not render credit to each individual debtor, but rather as a combined entity"). *Cf. Owens Corning*, 419 F.3d at 213 (holding that substantive consolidation was inappropriate where, *inter alia*, prepetition lenders relied on entity separateness).

Additionally, with respect to certain Debtor groups, certain of the Debtors were not premised on management at the individual legal entity level; most aspects of management were consolidated and centralized, including accounting, legal, marketing, and negotiation of various contracts, and operated under very similar names, which further supports the Debtors' assertion of prepetition creditor reliance. *See Lisanti Foods*, 2006 WL 2927619, at *8 (holding

that substantive consolidation was appropriate where, *inter alia*, "all three Debtors had the same officers, directors and shareholders . . . [t]hey conducted virtually identical business operation under very similar names . . . used the same general methods of operation . . . [and] performed all of their accounting functions from one centralized location (New Jersey), and the substantial bulk of their administrative staff worked out of New Jersey").[16]

Accordingly, each of the Debtor groups should be partially substantively consolidated under the creditor reliance standard set forth in *Owens Corning*.

The Debtors also believe that such partial substantive consolidation is appropriate for the following additional reasons.

Impracticality of Separate Entity Plans

Partial substantive consolidation will avoid the onerous costs and substantial delay that would result from attempting to confirm more than twenty separate entity plans (each a "Separate Entity Plan"). A Separate Entity Plan will be prone to inaccuracies that may prejudice certain creditors. A Separate Entity Plan will inevitably rest on certain assumptions; for instance, as the Debtors were not managed operationally on an individual entity basis, it is difficult to allocate value and operational costs and benefits on a legal entity basis. In addition, many financial obligations of the Debtors are based on Debtor groups or other combinations of entities that make allocation to legal entities difficult, fact intensive and subject to challenge. Seeking to overcome the inherent limitations of a Separate Entity Plan would entail the Debtors' dedication of enormous resources and significant time to the project, which the Debtors, even with the support of the Parent, likely don't have – and it cannot be assured, even after such an

[16] Notably, Intercompany Claims held by Debtor Affiliates will receive no distribution under the plan. *Cf. In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 583 (D. Del. 2009) (holding that substantive consolidation was inappropriate, where, *inter alia*, not all intercompany claims among the substantively consolidated debtor groups were eliminated).

endeavor, that a Separate Entity Plan would be free of such assumptions, or free of potential prejudice to certain creditors resulting from such assumptions.

The assumptions that the Debtors would necessarily adopt to confirm over twenty separate plans would likely be the focus of protracted and lengthy litigation. The attendant delay from such litigation could threaten the Debtors' consummation of such plans in a timely manner. Even if the Estates were exposed to such a risk and cost, there would still be no assurances that the information contained therein would be accurate on an entity by entity basis (if even available at such time). The Debtors believe that partial substantive consolidation is warranted in these Chapter 11 Cases, because of the connection of assets and liabilities of certain of the Debtors.

Legal Ownership

In order to ensure that the substantive consolidation structure is consistent with the legal rights of third parties and is not materially inconsistent with the recoveries attainable under a Separate Entity Plan, the partial substantive consolidation structure respects the Debtors' prepetition ownership structure. Thus, the residual equity of each Debtor group inures to the benefit of the Debtor group that owned the Debtor group prior to the Petition Date.

For all the reasons set forth above, the Debtors believe that such partial substantive consolidation is appropriate.

II. PLAN MODIFICATIONS

Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation as long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications

made after acceptance but prior to confirmation, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

FED. R. BANKR. P. 3019(a).

The Debtors will be filing contemporaneously with this Brief non-material, modifications to the Plan in accordance with Article XI.A of the Plan. The modifications were to address the modifications to the New Value Contribution, other changes to the Plan that do not adversely change the treatment of any Claim or Equity Interest who has not accepted such change in writing (indeed through the changes to the New Value Contribution and other changes treatment of Claims has been materially enhanced) and certain other non-material edits.

A modification that adversely changes treatment is material if it "so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." 9 COLLIER ON BANKRUPTCY ¶ 3019.01 (16th ed. 2009); *see also In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988). Re-solicitation is appropriate only if "the modification adversely affects the interests of a creditor who has previously accepted the plan, in more than a purely ministerial *de minimis* manner . . . ." *In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023 (Bankr. D. Colo. 1988). The modifications do not have a material impact on the treatment of any holder of Claims or Equity Interests that would make such holder likely to reconsider acceptance. In fact, the modifications benefit

certain of such parties. Thus, re-solicitation is unnecessary and acceptances of the Plan should be deemed acceptances of the Plan, as modified.

III. RESPONSES TO OBJECTIONS

The Debtors have received the following formal objections to the Plan (the "Objections"):

A. Objection of SPX Heat Transfer LLC and SPX Cooling Technologies, Inc. to Confirmation of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 887; Filed 11/23/16].

B. Objection to Confirmation of Plan filed by Portland General Electric Company [D.I. 900; Filed 11/29/16].

C. Objection of MMC Contractors National, Inc. to Confirmation of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 901; Filed 11/29/16].

D. United States' Objection to Confirmation of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 902; Filed 11/29/16].

E. Limited Objection of American Piping Products, Inc. to Plan of Reorganization [D.I. 907; Filed 11/29/16].

F. Objection to Confirmation of Plan Filed by Texas Comptroller of Public Accounts and Texas Workforce Commission [D.I. 915; Filed 11/30/16].

G. Limited Objection and Reservation of Rights of FHI Plant Services, Inc. to Confirmation of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 919; Filed 11/30/16].

H. United States Trustee's Objection to Confirmation of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 920; Filed 11/30/16].

I. Objection by the Internal Revenue Service to the First Amended Plans of Reorganization and Liquidation [D.I. 926; Filed 12/1/16].

J. Objection of RLI Insurance Company to Confirmation of Debtors First Amended Plans of Reorganization and Liquidation [D.I. 929; Filed 12/1/16].

K. Objections and Joinder of Nationwide Mutual Insurance Company in Objections to Confirmation of Debtors' First Amended Plan of Reorganization and Liquidation [D.I. 930; Filed 12/1/16].

L. Objection to Confirmation of Plan Filed by Fidelity & Deposit Co. of Maryland,

Liberty Mutual Insurance Company, Zurich American Insurance Co. [D.I. 932; Filed 12/1/16].

M. Joinder by Atlantic Specialty Insurance Company and Its Affiliates OneBeacon Insurance Group and OneBeacon Surety in Objection of Liberty Mutual Insurance Company, Zurich American Insurance Company and Fidelity Deposit Company of Maryland to Confirmation Of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 933; Filed 12/1/16].

N. Joinder by Atlantic Specialty Insurance Company and Its Affiliates OneBeacon Insurance Group and OneBeacon Surety in Objection of RLI Insurance Company to Confirmation Of Debtors' First Amended Plans of Reorganization and Liquidation [D.I. 935; Filed 12/1/16].

Attached hereto as Exhibit B[17] are the Debtors' responses to the Objections. The Debtors reserve their rights to introduce further evidence or assert further responses to any objections at the hearing on confirmation of the Plan.

[17] Exhibit B will be filed under separate notice.

CONCLUSION

For all the foregoing reasons, the Debtors respectfully request entry of the proposed Plan Confirmation Order confirming the Plan and granting such other and further relief as is just and proper.

Dated: December 2, 2016
Wilmington, Delaware

Respectfully submitted,

DLA PIPER LLP (US)

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EXHIBIT A

Transcript

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

Case No. 16-10790-KJC

- x

In re:

ABEINSA HOLDING INC., et al.

Debtors.

- x

United States Bankruptcy Court

824 N. Market Street

Wilmington, DE 19805

October 18, 2016

10:30 AM

B E F O R E:

HON. KEVIN J. CAREY

U.S. BANKRUPTCY JUDGE

ECRO: ALFONSE LUGANO

HEARING RE DOCKET No. 577: Debtors' Motion for Authority to Enter Into Master Restructuring Agreement and Related Power of Attorney

HEARING RE DOCKET No. 582: Motion for an Order Authorizing the Committee to Conduct Discovery of the Debtors Pursuant to Fed. R. Bankr. P. 2004

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning, everyone.

ALL: Good morning, Your Honor.

MR. MARTIN: Good morning, Your Honor. Craig Martin on behalf of the debtors, Abeinsa Holding Inc. and its related debtors in case number 16-10790.

I have with me today at counsel table Mr. Richard Chesley and Ms. Jamila Willis. Unless Your Honor has any other questions, I thought I would just dive into the agenda and bring the Court up to speed on where we are since the last status conference by telephone.

THE COURT: You may proceed.

MR. MARTIN: Just for the record, Your Honor, items 1, 2, 3 and 4 have already been entered under certification of counsel after no objections.

That leaves with us on the agenda today two items, items 5 which is the debtors' motion for entry to enter into a master restructuring agreement, docket index 577; and a further status conference on the official committee of unsecured creditors' motion for an order pursuant to Bankruptcy Rule 2004, which is what we had the status conference on last week.

I'm pleased to report and can hand up if Your Honor likes -- the way I would like to take these is deal with the 2004 issues first for the simple reason that we had a

technology problem on the redline related to the master restructuring agreement and it's being brought over. So, I thought if we dealt with the 2004 that would enable us to get the proper redline to present to the Court and you wouldn't have to read my handwriting.

THE COURT: All right.

MR. MARTIN: So if I may approach and hand up a consent order, I will then walk the Court through where we are.

THE COURT: Thank you.

MR. SMITH: Your Honor, this is Al Smith for PGE.

THE COURT: Yes.

Mr. SMITH: I'm sorry, if I understand right that consent order is consented among other parties but not by PGE.

MR. MARTIN: Your Honor, perhaps if Mr. Smith would give me the privilege of presenting the motion on behalf of the debtor I could explain the status and then he and the other parties could be heard with respect to that.

THE COURT: Very well.

MR. MARTIN: Thank you.

So, Your Honor, the consent order reflects an agreement between the committee who filed the motion and the debtors. And that the agreement reflects essentially most of the action happens in paragraph 4 where the debtors have agreed to respond to the discovery that was proposed in the motion by Tuesday, that's today, and we've been responding to that and we

have provided information. And then to the extent we have objections to specific responsive questions, we will be providing those. And we also have agreed to respond to interrogatory responses.

We've then provided in paragraph D of paragraph 4 that to the extent we have any objections that we're not able to resolve that we would seek to reach out to the Court to schedule a discovery conference in accordance with the local rules and the Federal Rules of Civil Procedure.

Additionally, rather than depositions at this time, we have made and agree to make by this week certain business people available to confer with the committee, which I think is important because from the debtors' standpoint we recognize the committee seeing that there's a fast timeframe here with respect to the plan and disclosure statement that will be coming within the last few weeks. But the debtors really have more of a negotiation approach, they understand that this is a highly complex transaction and we maintain that through dialogue and conversation with the committee we hope to be able to educate them on the benefits of the plan, and we expect to continue to do that throughout this week in advance of the disclosure statement hearing.

That's one of the reasons why we've agreed to make witnesses available for interview but not engage in formal depositions at this time. However, we do later in paragraph 6

reserve the committee's right to seek more formal discovery with respect to the plan confirmation.

We then have extended for the committee a deadline to object to the disclosure statement to October 25th. And the reason I included that is because that date is beyond the normal date in the local rules by which I can automatically agree to extend it.

We then decided that rather than several surety companies have joined in the committee's motion and asked for specific items and most of their prayers for relief then said, we wish to fully participate in the committee's discovery. So, we thought we could take two approaches or three approaches. One is we could have taken the approach of, we resolve the committee's objection consensually so your joinder goes away. We didn't think that was the best way to go in light of the fact that we're proposing a disclosure statement and plan. We then thought about saying, well, in your motions you've essentially asked for only a couple of different items and we could produce a couple of different items to you. That would require the debtor to essentially engage in five or six different sets of discovery.

So, what we ultimately decided to do is that we would enable the joining parties, to the extent they signed an NDA, which is attached to the motion, and is similar to an NDA a committee would sign in the ordinary course, that they could

see all of the documents that we produced to the committee and see all of the interrogatory responses. And so we think that in the scheme of things as I mentioned on the telephone call last week, we you know would like to have some control over this because we certainly believe that the committee with the statutory obligation to negotiate with us and investigate our plan and disclosure statement, should see everything. But with certain creditors while we're happy to educate them on the plan and the disclosure statement, we don't want to have to produce to every single creditor every single item we're producing everywhere. But in the narrow confines of this order, we think that's going to work here.

We've actually already started some conversations with some of the sureties about how we might move the case forward. We certainly haven't brought all of them onboard, but I think we are hopeful that we'll continue to make some progress with them.

The one exception in this order is Portland General Electric Company, that also filed a joinder. And we had initially proposed that Portland General Electric would not participate at all in the discovery. And the rationale for that was that as Your Honor may recall because you wrote an opinion on it, you lifted the stay with respect to PG&E's claims so that they could file litigation in Oregon against our client.

There's already an arbitration and a litigation pending in Oregon. And while I haven't seen it, I understand that there was discovery served by PG&E on the surety companies, and that litigation is going to progress. And so in light of the fact that there is a doctrine in the law that when there's active litigation pending between a debtor and a creditor, 2004 is not the proper mechanism. We initially took the position that they wouldn't participate at all.

We did have some conversations and email exchanges with Mr. Smith regarding if there was a way that they could narrow their request and ask some more pointed questions that were really focused on the plan, the disclosure statement and the MRA. As a result of that, Mr. Smith did provide us with a truncated list of what he wanted. And in paragraph 10 of the proposed order you will see what the debtor believes is most appropriate and fair in these circumstances.

These responsive requests are those that have been identified by PGE and that our client believes are in fact responsive to plan confirmation issues. Because of the ongoing litigation, the debtors would like to reserve the right to withhold or claw back from production documents that relate to the pending litigation or arbitration that I just referenced and the proofs of claim related thereto.

And then we've also built in a mechanism where if that that information would only be used in the plan process,

not in the arbitrations or litigations. And we then built in a further process in paragraph 11 that if the committee and the debtors agree that there's additional information that should be made available to PG&E we can jointly agree to produce it to them.

Obviously in the context of a creditor asserting an extremely large claim in a forum outside of the Bankruptcy Court, we think it's appropriate for the debtors to seek to protect themselves so that they can adequately defend that litigation while at the same time trying to balance their obligations with respect to the plan and the disclosure statement.

So, I believe that the committee consents to this form of order and that it resolves their objections. I'll certainly let them speak for themselves.

I think that some of the sureties are satisfied with this. A few have expressed some slight concerns over the nondisclosure agreement that we attached, and we've suggested to them that if the Court thinks appropriate, we could insert in the form of order something that says we can enter into an NDA that's similar to that attached or substantially in the form attached, so that if there are reasonable tweaks that need to be made to the NDA to satisfy the surety companies, we could discuss that with them without having to come back to Court. Now that would be in paragraph 7, Your Honor, where there's a

reference to the attached nondisclosure agreement.

But in light of the context of these cases and where we are, I think in fact it's a little bit unusual for a debtor to be as transparent as we've proposed in this order, and essentially our plan is that upon signing the NDA we would make available by either electronic link or data room access to anyone who signs the NDA, that information that we produced to the committee.

And in light of that, we believe that this consent order is appropriate in resolving both the motion that the committee filed and all of the various joinders. Although I suspect that when I cede the podium, which I'll do now, you may hear from each of the parties individually as to their views with respect to this consent order.

THE COURT: Thank you. I'd like to hear first from the committee.

MR. DONAHO: Thank you, Your Honor, Christopher Donoho of Hogan Lovells on behalf of the official committee. Pleased to say we've been able to work through these issues around the 2004. We've started to see an initial flow of information. We have that schedule set out in the 2004 order.

It's going to be a tough race because we have a disclosure statement hearing coming up and a prompt confirmation hearing. So, we hope not to have to come back on discovery issues and that everything works out according to

plan, but like I said, we've started seeing a steady flow of information. We have had some level of interviews so far; we have more to schedule. But pleased to report that we've gotten to this point. So, thank you, Your Honor.

THE COURT: Thank you. I'll go down and ask for views as the joinders are listed in the order that the joinders are listed on the agenda.

Does RLI wish to be heard?

MR. PROUGH: Good morning, Your Honor, it's Michael Prough appearing on behalf of RLI. Our only issue would be with the terms of the nondisclosure agreement. And as debtors' counsel indicated, the wording of the order, just a form substantially similar, we had first seen that relatively recently and I forwarded it to my client. We're taking a look at it. We'll either suggest some language changes, sign the NDA or request our own discovery. So, we have no further response. I think the language debtor --

THE COURT: So when we put it this way, in concept you have agreed with the debtors' proposal with respect to language to be added to paragraph 7 and don't object to the entry of the order.

MR. PROUGH: Generally, right. We might have a specific question with the debtor about terms of the NDA, but in generally, yes.

THE COURT: All right. Thank you. Liberty Mutual

and others.

MR. COLLINS: Good morning, Michael Collins, Manier and Herod for Liberty Mutual, Zurich American and Fidelity Deposit Company of Maryland. We're fine with the changes. One thing that we, I don't know that's in there that might need to be added is to just make sure there's a reservation of rights because we may seek our own 2004 examination.

We're not 100 percent sure at this point that we'd be willing to sign an NDA because we believe that some of the information that we're going to be requesting is information that ought to just be provided to the creditors in conjunction with the plan and disclosure statement.

THE COURT: Mr. Martin, I don't see a reservation. Is there?

MR. MARTIN: Your Honor, there's one in paragraph 6 for the committee. And so it may that we could add the defined term and any joinder party. We certainly weren't seeking to limit anyone's right to seek discovery in connection with plan confirmation.

THE COURT: That seems appropriate. Thank you.

MR. COLLINS: Thank you, Your Honor.

THE COURT: PGE.

MR. SMITH: Yes, Your Honor, Al Smith of Perkins Coie for PGE.

Your Honor, we do appreciate the fact that the debtor

has in this version included us in the order to get something, but frankly it is so constrained and so limited that we think it's entirely inappropriate and frankly not very worthwhile.

The list of documents that they requested is included. But it then has a phrase that says, as Mr. Martin indicated, "they can withhold anything that relates in any way", and that's a direct quote, to the Carty project or proofs of claim or anything like that. The fact is, Your Honor, this is discovery relating to a plan, disclosure statement and this master restructuring agreement. And all of those things, if this information relates to those things, then it ought to be discoverable for everybody; ought to be disclosed for everybody in the disclosure statement. But it is inappropriate we believe to have that savings language so that they can withhold frankly almost anything they want to.

Another point, Your Honor, in the email exchanges over the last couple of days we have not had any direct discussions whatsoever, but in the email exchanges, we provided not just a list of the categories that the committee had listed, but also some questions that we wanted answered that we think are clearly and obviously disclosure statement kind of questions, such as, you know, what class are we in, when is the financial information going to be provided, will there be any schedules of intercompany transfers; things like that. And this order doesn't address any ability of PGE to ask any such

questions of anyone at any time.

With respect to the limitation of use of the materials. If you look at the nondisclosure agreement that they proposed, it requires that the parties all agree, the non-committee parties, and I assume it's going to be applicable to the committee by virtue of its role, that the use be limited to the chapter 11 cases. We understand that, we are willing to live with that, we're willing to sign that NDA. And now in the new order that we saw this morning, there is a provision that says it's not just limited to the cases, it's limited to the disclosure statement process only, the disclosure statement and plan process only. And again, there seems no reason to do that for anyone, particularly PGE, but that's the only one its applicable to.

Next point, Your Honor, as Mr. Martin made it clear, the insurers who have in many ways disputed claims against the debtors just like PGE, are not subject to the same limits that PGE is and we think that's just inappropriate, we don't know why -- we know why, they decided we're the bad guys, but we don't think it is appropriate for them to single us out as not getting the same information that other creditors get with all of the limitations and restrictions and protections that the debtor has built in here. We think PGE should be able to live the same way as all the rest of the insurers.

Finally, Your Honor, if you look at section 10(c) of

the new order that just came out, it's on page -- what is it -- page 6 of the redline, there is a new provision that says, "to the extent PGE seeks to obtain any of the information from any other party, it can only be used for permitted purposes," which is the effectively, the plan process.

Your Honor, the fact is if PGE goes to another forum and gets information, it ought to be limited in the use of that material pursuant to the rules of the other forum. We get the idea that if we are actively involved in litigation somewhere else, it would be inappropriate to come to this Court through a 2004 and ask for detailed information relating to the guts of that other litigation. That's not what we're talking about here, Judge. We are talking about information that is related to the plan and disclosure statement, that's what we asked for, that's what the committee asked for, that's what the insurers asked for, and PGE ought to be in exactly the same position as everywhere else, everyone else, and be able to use it in whatever ways that other people are entitled to use it for.

Again, the NDA is quite restrictive and we were okay with that. But now it's made even worse in this order, and in fact seems to limit our use of information that we get to perfectly appropriate discovery processes in other forums, and we think that's just simply wrong. Thank you, Your Honor.

THE COURT: Well, Mr. Smith, I'll make it easy for you. I'll give you a choice. You can agree to this language,

or I'll take it all out and say nothing with respect to PGE except that they may apply to the Court for further relief on their own account if they wish.

Listen, when I issued a ruling granting you relief from the stay to imitate a lawsuit, I think that's the first time I've done in almost 16 times on the bench. I didn't expect a thank you note from you, actually, but I did expect your request with respect to discovery to be more modest. So, I leave it to you in terms of one of those two choices.

MR. SMITH: Your Honor, honestly with paragraphs section (c) in there, that seems to limit our ability to get things in other courts I don't think I have any choice but to take your second option. I don't think that's, I think that is, that provision in this order absolutely eliminates the possibility of us getting some discovery in the other courts, and I think that's wrong.

THE COURT: Well, here's what I will do. The debtor will have to make a couple of revisions to the order. What I'll allow you to do is have one more discussion with debtors' counsel to see if you can't agree on language that without prejudice for something to happen later on, which would enable you to ask for a change, at least initially to agree to inclusion in this order. If you can't, I'll direct that whatever relief you've requested would be denied without prejudice and we'll go from there.

MR. SMITH: Okay. Thank you, Your Honor.

THE COURT: Does Nationwide Mutual wish to be heard?

MR. LEO: Yes we do, Your Honor. Scott Leo on behalf of Nationwide Mutual Insurance Company. I'll be brief. With the changes proposed to paragraph 7 relating to the nondisclosure agreement and the inclusion of the sureties and the reservation of rights as proposed by Mr. Collins through Liberty, we're fine with the order.

THE COURT: Okay, thank you. I think that covers all of those who filed papers in connection with the 2004 request.

So, Mr. Martin, I would ask that you have one more discussion with Mr. Smith, and then present an order under certification.

MR. MARTIN: Will do so, Your Honor.

THE COURT: All right.

MR. MARTIN: And again, thank you to the Court for the status conference last week. It did create a nice forum for us to resolve these issues.

THE COURT: Before we move on and before I forget, Mr. Leo, are you still on the phone?

MR. LEO: I am, Your Honor.

THE COURT: I received today Nationwide Mutual Insurance's motion to shorten with respect to its motion for appointment of an examiner. And I held it especially since I was going to see the parties today and asked that the motion be

scheduled for October 27. And before I acted on the motion, I wanted to ask here today whether anyone wanted to weigh in on that request.

MR. MARTIN: Your Honor, on behalf of the debtors we did see it on the way over here, and in principal, we object to it for the following reasons.

We have a disclosure statement hearing scheduled on the 27th. We intend to later this week after sitting down with the committee and providing some revisions and blacklines, filing an amended disclosure statement and plan. I've said to anyone that will listen that typically the way disclosure statement hearings go in Delaware is parties state what they think should be in the disclosure statement and rather than fighting those issues, if we disagree with the characterization we include them, but then note that the debtor doesn't especially agree. But it is not our intent to try to withhold information in the disclosure statement setting.

While I haven't looked at the examiner motion, I suspect that much of the work that the committee has been doing over the last few weeks and that we expect to continue will address many of the issues that are set forth in the disclosure statement. We've even began to discuss with the committee if there might be a way for more open access to their financial advisor so that they can get their arms around some of the issues that they've raised, and we would like the opportunity

to continue those discussions over the next week.

If Your Honor shortens notice on the examiner motion, some of our resources that we would have devoted to those efforts will have to be devoted to responding to and preparing to deal with the examiner motion.

And while certainly I respect that the Court will schedule motions filed as required under the Federal Rules of Civil Procedure, I believe that Your Honor and this Court has discretion with respect to motions to shorten under Federal Rule 9006 and under the local rules and we would request that Your Honor deny the motion to shorten.

THE COURT: Well, let me ask you this while you're at the podium. And I will go back to Nationwide Mutual before we're done here. The next scheduled hearing is beyond the disclosure hearing is November 29th, which is set for confirmation tentatively -- I think.

MR. MARTIN: Yes, that's correct.

THE COURT: You wouldn't expect me to wait until confirmation to have a hearing on it, would you?

MR. MARTIN: Let me briefly confer with Mr. Chesley on one point and I'll answer that question.

THE COURT: Okay.

MR. MARTIN: Your Honor, we have a -- the reason I wanted to confer with Mr. Chesley is there a couple of other issues we've been dealing with and we were thinking about

seeking a mid-November hearing in advance of confirmation.

To the extent Your Honor has time and would like to schedule that examiner motion sometime before confirmation, we could accept another omnibus during that time period in hopes that in the meantime we could work with the committee and potentially engage Nationwide in discussions about some alternate resolution and relief on their examiner motion. Sounds like Mr. Donoho wants to approach.

MR. DONOHO: Yes. Good morning, Your Honor, it's Christopher Donoho again. I think having an interim date for this would be really helpful because a number of things have to happen between now and then. We need to see what the disclosure statement is going to say. Right now the disclosure statement has a number of holes in it that need to be filled. We don't know how they're going to be filled, so it would be useful I think to see what that revised disclosure statement says.

And then it would be very useful for us from the committee's perspective and those others who are joinders to our 2004 to be able to see the information that the company provides in respect to the kind of questions that are being asked of an examiner here which really relate to a large number of prepetition transfers and intercompany relationships. That really is the heart of what we're looking at.

We are not in a position right now to say we

understand all of that and how it sorts out. So, we have a lot of work to do. Our position on whether an examiner is appropriate or not will really depend in large measure on how the next couple of weeks goes between what we see in the disclosure statement and what we get in terms of discovery and cooperation. And then also maybe preliminary plan negotiations as well.

So our view on an examiner will really hinge on all of that. So I think a time between the disclosure statement but far enough in advance of a confirmation hearing so that we can have some more water under the bridge so to speak in all these issues would be quite helpful. Thank you, Your Honor.

THE COURT: Thank you. Does anyone else wish to be heard?

MR. PROUGH: Your Honor, Michael Prough for RLI Insurance, and we join in Nationwide's motion both for appointments of the examiner and the shortened time.

As Your Honor may recall the debtors' own motion on the nondisclosure statement was set on shortened time, so they to the extent they're saying well press of business and we've got too much going on, it's perhaps a little inconsistent, we're pressing ahead with the things they want to go forward and resisting matters like this. So, that's our joinder in Nationwide's motion, Your Honor.

THE COURT: Does anyone else wish to be heard?

All right, I'll go back to Nationwide Mutual.

MR. LEO: Your Honor, Scott Leo for Nationwide. I think as pointed out by Mr. Prough everything has been really kind of on shortened notice in this case. And our concern in bringing the motion to shorten time was we knew the next date after the 27th was the 29th.

The concerns raised in the examiner motion are concerns I think you've seen throughout the case and probably will hear more of today. The sureties are, the sureties joining in this are concerned about the process between here and Spain and some issues related to how they're going to be treated, and think that an examiner would really, an examiner's report would really help us in that regard in understanding the process realizing what the estates might be able to recover.

And the examiner needs time, if there is one appointed, to do the work, you know, because everything is on shortened time here. If the examiner isn't appointed earlier as opposed to later, there may not be time to have an examiner give us any meaningful work given that things are rushing forward as they are.

THE COURT: Mr. Leo, I can't possibly see how if I had a hearing on October 27th and then granted the relief that was requested, an examiner could possibly have any meaningful information by the time of the scheduled confirmation date. Now, it's just a scheduled date, okay. So how do you -- help

me figure that out a little bit. I've appointed a couple of examiners over time and I don't think any of them set a report in 30 or 60 or 90 days. I can go back and count, but it wasn't anything like that. Help me.

MR. LEO: Well, you know, the problem here, Your Honor, is not all of the parties in that position including the committee. And you know I would direct Your Honor to what we raised in our motion that there are issues here about interlocking separate bundles of guarantees, intercompany transfers, substantive consolidation. And I think the examiner could work with the committee to get it formed as possible as we can before there is a confirmation hearing.

THE COURT: Well, the 27th is just too soon. I mean even with the debtors' statement that it would interfere with getting ready for disclosure which I take it as face value, it seems to me that even if those things weren't going on, scheduling it for that day and time just is too soon. So, I'm inclined to pick a date in the middle of November.

Now, I will say if the evidence in favor of appointment of an examiner causes me to order the appointment of one, it's obviously going to push off confirmation. But if it's warranted, I have no hesitation to do that.

On the other hand, as I look at it just on first blush it seems to me that the committee is probably doing everything that you would need them to do in order to have the

information you and others would like to have. You know, there might be a circumstance, and there was at least one I was faced with, when it came time to appoint an examiner. One of the allegations was wrongdoing, not just the complexity of the interrelationships among the companies in the debtors' corporate family, but there was an admitted, well let's say, there was admitted conduct that shouldn't have been done.

And there I pointed an examiner because I wanted a fiduciary answering to the Court and didn't want that investigation to be compromised, and I say this with kindness to the committee, by a business deal having been made without the court finding out what it thought it needed to find out. I don't see that here yet anyway. But I give you the benefit of that thinking.

So, let me look at my calendar. And let me first ask Mr. Leo how much time you think you would need.

MR. LEO: Well obviously, the concern is scheduling of the other events in the case and having an examiner being able to get up to speed. I mean I would assume the examiner, and again I agree with the comments of the Court about the committee, I think the committee is looking at the things it needs to look at. But I think there's other reasons in these cases where an examiner might be appropriate, and might even aid and assist the committee in its work.

So, you know my primary concern, Your Honor, would be

just the timing for someone who is appointed as the examiner to have an opportunity to give the creditors and the estate meaningful input.

THE COURT: I'm sorry, my question wasn't properly framed I suppose. How much hearing time would you need on your motion?

MR. LEO: Okay, I'm sorry, Your Honor. I would assume, you know, maybe 40 minutes, an hour.

THE COURT: You can't see me, but I'm smiling. Bear with me for a moment.

All right. I'm unavailable the week of the 7th. So, let's set 10:00 on November 16th as the time for the hearing on Nationwide Mutual's motion. Responses by 4:00 on November 9th. And I'll fill that in the form of order that's been submitted. Any questions?

Okay. Mr. Martin, let's move on.

MR. MARTIN: Yes, thank you, Your Honor. That takes use then to back to item number 5 on the agenda, which is the docket index number 577, debtors' motion for authority to enter into the master restructuring agreement and related power of attorney.

Your Honor, I have a clean and I now have the redlines if you would like for me to hand them up to you. And we also have in the Court at the table over here for the parties in the courtroom the redlines that reflect a change

from what we filed with our reply brief last night and what we've negotiated this morning with the committee.

THE COURT: All right. Thank you.

MR. MARTIN: So, Your Honor, let me set the stage as to how we got to where we are. And I know Your Honor has it in the agenda binder at tab 5, but I brought it in as velobound because it's a very thick document that's extremely complex. It's called the Abengoa restructuring agreement.

And what the Abengoa restructuring agreement seeks to do on general terms is to compromise claims that are pending against Spanish formed entities in Spain. And Your Honor may recall we have a chapter 15 case that is before the Court and for which we may need to seek relief later in connection with the resolution in Spain.

The master restructuring agreement also provides that there are other obligors on that debt that's being compromised in Spain. And in recognition of the fact that under the Spanish insolvency system as we've been advised by firms advising the foreign companies in Spain, the Spanish court doesn't have the ability to compromise or modify treatment to non-Spanish creditors.

So, the master restructuring agreement lists all the various obligors wherever they are formed. And then in article VII of the master restructuring agreement, provides that with respect to the non-Spanish debt that's going to restructured,

it would be restructured for obligors that are formed in different jurisdictions in accordance with a local procedure. That translates into chapter 11 in the United States. And so for the debtors that we have pending before this Court, the master restructuring agreement contemplates that a plan of disclosure statement would be filed, it would be subject to the normal procedures and orders of this Court.

However, because there is a significant amount of funding, and when I say significant I mean more than a billion dollars of new money, there were certain new money providers and other restructuring committees in Europe that insisted on certain provisions. One of which is that they wanted the restructuring agreement to be initially effective by a date certain and before it was presented to a Spanish court for approval.

There are a few conditions regarding the initial effective date that impact the chapter 11 debtors. Most specifically, there's a requirement that the boards of the various chapter 11 debtors passed resolutions finding that the master restructuring agreement is appropriate and can be entered into, and that for purposes of civil law they enter into a power of attorney which will let certain corporate officers of their parent company execute the various documents under the master restructuring agreement to implement that restructuring agreement.

Obviously as chapter 11 counsel we were concerned about the passage of those resolutions and the entry of those POAs and our clients were as well, because they recognize that they have certain obligations to this Court and the creditors both in this courtroom and that are filing proofs of claims that are scheduled to comply with the Bankruptcy Code.

As a result, we set in our motion that it was our intent that we would always, that any restructuring would be subject to this Court's oversight and the provisions of the bankruptcy Code.

In response to the motion, we received a number of objections which are listed on page 3, and 4 of the amended agenda. Predominately those objections raised some form or another of an argument that this was essentially dictating the terms of the plan, was a sub rosa plan, the types of arguments that the Court is probably familiar with over the years of practice since the Fifth Circuit decided the Braniff case.

THE COURT: Well, there were also concerns expressed about locking in obligations prior to confirmation of a plan, treatment, unfair or different treatment of different creditors, violation of absolute priority, concerns about the standard I should employ in determining whether the relief should be granted in light of the arrangements which are planned to be made among the members of the corporate family -- U.S., debtor, non-debtor and other entities. And other

objections. It was a full boat.

MR. MARTIN: Yes, and all of those objections that Your Honor just read, which I appreciate because now I don't have to go through them, we really viewed as confirmation objections to a plan. There were some MRA objections, specifically those raised by the committee about, and in negotiations they expressed maybe more forcibly than they did in their papers, that they were concerned about the entry of a power of attorney that would enable someone outside of this Court's jurisdiction to take action with respect to the chapter 11 debtors.

They had concern about actually executing the master restructuring agreement because there are terms in the master restructuring agreement that once executed require the chapter 11 debtors to exceed and agree to certain treatment for their intercompany claims which the creditor's committee did not like.

So, we decided that rather than, in light of the fact that it was our view and our client's view that we intended to always go through the disclosure statement and plan process, we sought to negotiate a form of order that would enable certain conditions precedent to the initial effectiveness of the master structuring agreement to occur but that would not permit the debtors to enter into or execute the master restructuring agreement.

It's a bit of a technicality, but I think if you let me explain it, the Court will understand why we've gotten to where we have gotten.

As stated in our reply brief which we filed and I note that we also sought leave to file that late due to the fact that we extended the objection for the committee. So, I hope Your Honor has had the chance to see it.

THE COURT: The order has been signed.

MR. MARTIN: Thank you. And there we noted that there is a -- there are many schedules -- but a specific schedule requires that the obligors each pass a resolution and sign a power of attorney in order for the restructuring to move forward with respect to all of the many other parties that have entered into and are exceeding to it.

But in our negotiations with the committee, we decided that since our view is this will always be subject to confirmation, we were able to get to a point where we proposed to them that we would defer entry into the MRA, we would defer the effectiveness of the power of attorney until after the confirmation order was entered. But we couldn't simply just withdraw the motion and walk away because we need to get those board resolutions and powers of attorneys in place so that the people in Europe can check the box that a condition precedent has occurred and they can move the deal forward.

So, it's in that context that we negotiated the order

which I've handed to Your Honor. You'll see that in the version against what we filed last night -- I'll go through it briefly. What we proposed is that the parties be authorized to enter into the master restructuring agreement in accordance with the terms of the MRA -- we did originally have within three business days after that, but we deleted that should that timeframe change -- following the date that the Court enters an order confirming the debtors' plans of reorganization and liquidation.

From last night to this morning, we inserted a clause that says, "and cause non-debtor subsidiaries to enter into the MRA or associated POAS to the extent required." We entered that provision in there, Your Honor, because we actually have a non-debtor subsidiary called Abacus Project Management LLC, which in order for it to sign the POAs or pass their resolutions would require action by its managing member which is a chapter 11 debtor, so we wanted to treat that entity similar to how we're treating the chapter 11 entities.

We then preserved in paragraph 2 that the order does not eliminate or modify our obligations to comply with 1125 and 1129 or for taking action or refraining from taking action that's required to do so under any law, regulation or fiduciary duty, and will not restrict or prohibit any party from making objections to the disclosure statement or plan in these cases.

Your Honor, as we stated in our reply, in negotiating

the MRA there was included two express provisions, one of which provides that no officer director of any of the obligor companies need take any action that would expose them to liability for breach of fiduciary duty.

And then in reviewing the various plan support agreements, most specifically the recent one approved by Judge Sontchi, we drafted what we call the fiduciary out clause of the master restructuring agreement which we referred to in our original motion which we think complies with the types of standards that courts here normally require and gives the debtors the ability to exercise their fiduciary duty under chapter 11 if they feel compelled to do so. And indeed, the master restructuring agreement even permits the chapter 11 debtors to terminate the master restructuring agreement as with respect to them should they believe it's necessary for them to do so.

Obviously with the experience that we have at the tables here, we all know that sometimes facts and circumstances and the economy changes and better deals come out of the woodwork. It would be our submission to the Court that if that happens in this instance, the debtor has the flexibility to be able to pursue and consider such options. But if not, they would then be bound by the master restructuring agreement only after entry of the Court's confirmation order.

We then in paragraph 3 have provided that if the

debtors are not able to confirm a plan that the order would become void as if it was never entered.

And in paragraph 4, we have a provision that addresses certain comments raised by the committee and the United States Trustee. The committee's concern was, okay, you're going to get a confirmation order that's going to let you sign the MRA, but the way the effectiveness of the MRA works is that we have to enter into that agreement, make the master restructuring agreement effective and the effective date of the plan will occur at the same time.

So the committee was concerned that if we signed the MRA after the confirmation order but that the deal ultimately didn't succeed, that our act of signing that post confirmation would create some type of claim or administrative expense against these estates. And so we provided a response to the committee's concern that entering into this order and our entering into the MRA in the event we get the confirmation order would not if the effective date of the plan occur subject the debtors' estates to those types of claims.

We've also indicated in clause 2 that the indemnification provisions of the MRA would not take effect without further order of this Court and that we could not pay them.

There is an indemnification provision in the MRA that provides protection for certain of the new money lenders, their

investment bankers. Unlike many cases before the Court, those parties are not before this Court, and so the United States Trustee raised concern about that provision, and so we put in here that U.S. debtors would not be bound by those provisions except by further order of the Court.

Finally, Your Honor, with respect to the power of attorney, some of the sureties raised the concern that well, this order may say that it's not, you can't enter into it and you can't do certain things, but if you give this power of attorney because you need to satisfy the condition precedent, then someone in Europe will have it and they might use it either accidentally or maliciously.

So, we proposed to them the language in paragraph 5 which makes clear that the power of attorney would be modified to expressly state that the power, that there is no power unless and until the confirmation order is entered, and this order will have, if the Court enters it, this order would then have to be attached to the power of attorney, so that anybody wielding the power of attorney would be aware that they in fact don't have the power, and this order is attached.

It's our understanding that the way these powers of attorney are used under the civil law system in Spain is that it's almost like in the 1980s when we used to all go to the printer's office and spend the afternoon going through disclosure statements. We understand that everybody in the

deal actually goes over to the notary's office and they spend many, many hours there with the notary certifying that these people are who they say they are, that the powers exist for them to sign documents, and it's a very formal process.

So, we think that those provisions address all of the MRA objections, we call them, to the motion and also preserves all of the confirmation objections that Your Honor ran through when you addressed those issues.

THE COURT: Well, some of them anyway.

MR. MARTIN: What's that?

THE COURT: Some of the issues anyway.

MR. MARTIN: Yes. Your Honor --

THE COURT: I know I didn't hit them all.

MR. MARTIN: Yes. There's no doubt, Your Honor, that this is very complex, and that as I say holding up this phone book of documents that we as debtors have a lot of work to do to help the committee understand how this transaction works and we have a lot of work to do to explain to the creditors why we think this is in their best interest. We don't think that distinguishes this from any other case, and we intend to not only communicate with our creditors and try to persuade them, but also intend to be prepared to demonstrate to the Court that we will satisfy the provisions of 1129 at the appropriate time.

But, having said that, there is some real concern that if we are not able to continue to keep this process moving

forward, that the new money funders who are funding lots of money and some of the other parties to the MRA continue to get skittish about what is happening in the United States, and continue to put pressure on the situation to encourage different or alternate treatment that we believe would not be as favorable. So, we're trying to walk the line of keeping this deal that's going to provide new money and fund our plan moving forward, while at the same time respecting creditors' rights in this jurisdiction.

I think we have struck the mark because we've been able to reach resolution with the creditors' committee on the form of order that I have handed to Your Honor. I know that certain of the sureties have expressed desire that they will continue to object to the entry of the order for reasons they've stated in their pleadings and which we've addressed.

And I think it's worth noting that as we perceive a lot of the surety objections relate to not necessarily their treatment under the plan but their treatment under the master restructuring agreement. Certain of those creditors have in fact filed objections in Spain. I think in the Liberty Mutual objection there's statements that they intend to potentially object to the mechanism for presentation of the master restructuring agreement when it's presented at the end of this month in Spain.

So we respectfully submit, Your Honor, that those

parties are really objecting to the mechanism provided in the master restructuring agreement under Spanish law, that they're capable and are already doing so in Spain as admitted in their own papers, and that with the order we've essentially agreed that we will move forward with the confirmation process.

They will have all their rights under the confirmation to object to the debtors' treatment and we would therefore ask the Court to overrule the various objections and enter the order that we believe actually resolves all of those objections that we've reached in consultation with the committee.

Unless Your Honor has any questions, I'll be happy to turn it over to the rest of the field.

THE COURT: I have a few. What effect if any will the relief that you seek have directly or indirectly on the chapter 15 debtors?

MR. MARTIN: Your Honor, the chapter 15 debtors -- the answer to the question is none. And the reason for that is the chapter 15 debtors will already be exceeding to and signing the MRA in Spain because the chapter 15 only applies within the territorial jurisdiction of the United States. And so it's our view that the chapter 15 debtors can sign this document and prosecute it in spain. If we wanted to apply in the U.S. which we very will likely file something, we will file a separate application before this Court for that.

THE COURT: Okay. So, that was my next question. I expect that at some point I'll see a request to ratify or to acknowledge the efficacy in the U.S. of whatever the chapter 15 debtors have agreed to and the court in Spain has approved.

MR. MARTIN: Yes, Your Honor. And in fact we're working towards trying to get an application on file so that it can be coordinated with confirmation so that Your Honor can potentially take that up on a consolidated basis since the two are so intricately related.

THE COURT: Okay. Now there's reference to possible additional chapter 11 or chapter 15 filings. Do you anticipate in fact making additional filings? And if so, how many and about when if you can say?

MR. MARTIN: With respect to the chapter 11, the term is I think it's future chapter 11 debtors, we have a concept in the MRA and in the plan, but at this time we don't believe that we will need to file any additional chapter 11 cases. Obviously if something changes, we would reevaluate that. At the time we were putting those provisions in place, we were less certain about that, and so we wanted to create an option to file the 11 if necessary. We do not believe as of today that that is going to be necessary.

With respect to the chapter 15, there is a company called Abengoa Concessions Investment Limited, that is, it is anticipated under the master restructuring agreement that it

will file what's called a compulsory voluntary arrangement under UK law. Because that is a separate corporate entity that is not currently subject to the chapter 15 cases pending before the Court, we anticipate filing another chapter 15 for that debtor.

However, in consultation with the person that we anticipate will be the foreign representative, the timing of that may actually run longer than the November 29th confirmation date because they have to get an agreement to their CVA, they present it to the court and put it out on 28 days' notice. If no one objects, that will then be the time when it would become final so that we could submit it. And so those timing, the timing of that may not just line up perfectly.

And just so Your Honor knows, Asil (phonetic) is the entity that holds the equity shares in a company called currently trading under the name Atlantic Yieldco which was formerly known as Abengoa Yieldco. And those shares have been pledged to emergency financiers since last November and so that CVA proceeding is designed to address that emergency funding that was provided and to restructure that entity as part of the restructuring contemplated in the MRA.

So that chapter 15, we do anticipate that we will file and hopefully that will be the only additional case that we have to file before Your Honor. Does that answer Your

Honor's questions?

THE COURT: It does. So, is it the debtors' expectation that U.S. creditors will be treated any differently as many of the submissions assert than creditors in other jurisdictions?

MR. MARTIN: Your Honor, it's a very complex question because --

THE COURT: No, it's an easy question, it might be a complex answer.

MR. MARTIN: Easy question, complex answer. So, what we're sorting through right now is there are certain creditors that have claims against the chapter 11 debtors that are either guaranteed by or are also against Spanish debtors. What we're sorting through is those claims may be entitled to treatment in both jurisdictions or those claims may really be against the Spanish debtor in which case they should be treated differently in the U.S. cases.

With respect to general unsecured claims, however, it is our intent that for those claims that would be allowed against the U.S. debtors, those claims would be treated in the same fashion. We do have some proposed classes in our plan that we will be discussing with the committee that would allow creditors that have consensually agreed to the master restructuring agreement, most specifically certain financial creditors representing banks and bondholders that have

guarantees against the chapter 11 debtors that in lieu of taking cash consideration would take go forward guarantees of new debt instruments and equity instruments that may be issued to them under the master restructuring agreement. Those creditors would be treated differently by consent than creditors in the U.S.

But with respect to just the general unsecured creditors in the U.S. that don't have claims against the Spanish debtors and have claims against the U.S. debtors, it's our expectation that we would be treating them equally.

So, the answer to your question is yes with a wrinkle which is that for those creditors that have rights against both estates, we might have to provide some alternate treatment to ensure fairness of treatment amongst those creditors that don't.

THE COURT: Sometimes in cross-border situations, the parties on both sides of the border, just to make it a simple question, will enter into protocols addressing how claims are to be treated and disposed of. I take it here it's the intention simply to let the MRA and the chapter 11 plans accomplish that.

MR. MARTIN: Yes. And I think it's a fair comment as to claim treatment. We may have some work to do still in the plan to be perfectly honest with the Court, but it would be our intent that between the MRA and the confirmation order that we

would address those issues. And in fact, as I mention the MRA in article VII does provide that the treatment of the U.S. creditors will be driven by the local proceeding, I think is the defined term.

And so certainly rather than try to enter into a protocol with a Spanish court that doesn't speak English, we thought that presenting it through the confirmation order and dealing with the creditors, what I've been calling kind of in the normal course of the chapter 11 case, was a preferable way to proceed.

THE COURT: All right. Thank you. I'll hear from the committee.

MR. DONOHO: Thank you, Your Honor, Christopher Donoho. So, I won't go back over the objection that we filed, but I think it does provide a nice preview for the issues that we have around confirmation and the treatment of the U.S. creditors as part of the global restructuring.

THE COURT: As long as some menus in a restaurant.

MR. DONOHO: Yes. And unfortunately, there are that many issues raised by a restructuring agreement that clearly on its face didn't really think about what was happening in the U.S. That was a major concern for us and our fear was that having even this kind of a lock up particularly with these kinds of powers of attorney that that would be a bell that couldn't be unrung as part of confirmation.

So, we were ready for a contested hearing today and I'm pleased to say that I think what the debtors have been able to do is to walk the fine line between keeping the deal in Spain alive which I know has some, that it's been a difficult thing to pull together, it's taken a long time, it's been complicated.

THE COURT: And some of the other objectors indicate that it won't be.

MR. DONOHO: Well, it may or may not. From the U.S. committee's perspective, I don't think we want to be the ones responsible at this point in time for tearing it down. We think that a viable path here is to allow this, the debtors to do what they need to do today to be able to say they complied with their requirements so that if it is a risk of falling apart, it's not because of anything that happened in the U.S.

But I also think it was important to make clear that just because the parties are saying yes to what's happening here today, to check the box exercise of satisfying the requirements of the MRA, that it's not any kind of statement that we agree with the treatment of the U.S. creditors at this point in time, either that's been proposed through the current state of the disclosure statement which doesn't provide information on creditor recoveries or the plan. And so all of those call them confirmation type issues that we've raised in our objection, they're still real.

I think Mr. Martin referred to a couple of things, one of which I agree with and one of which came as a surprise, but a pleasant surprise.

The first was that they're going to take this period of time between now and the disclosure statement and confirmation to educate the committee on the benefits of the restructuring agreement and its fairness. That's a big part of the information we've been looking for as part of our 2004, so that's an ongoing education process for us.

We have real concerns about how fair the MRA is to the U.S. creditors, both the intercompany claims that are held by the U.S. debtors as well as the disparate treatment between the U.S. creditors and Spanish creditors.

Now referring back to something I just said a moment ago about this is the first time I've heard something. Actually, this is the first time I've heard that there's any intention of treating U.S. creditors on a similar basis to Spanish creditors. You don't necessarily have the benefit of all the conversations that we have and I --

THE COURT: And I'm quite pleased about that actually.

MR. DONOHO: Yes you are, and you get your weekends, which is good. That's news to us and if that is part of a foundation of what emerges as a revised U.S. chapter 11 plan, we would definitely view that as a positive and then the

mechanics for how that gets implemented is something that we're eager to talk to the debtors about.

So, look, I think we are walking a thin line here. Our concern is that we don't want to be the straw that broke the camel's back on the MRA, but at the same time we also don't want to send a confusing message around that we're just going to be compliant in all this, we have those real concerns.

So, we are supportive of the entry of the order that's been handed up to you because it does feel like it walks that thin line in a way that we're comfortable with for purposes of today to keep the dialogue going over the next month and a half around confirmation.

THE COURT: Thank you.

MR. DONOHO: Thank you, Your Honor.

THE COURT: I will follow down the agenda and call each of the objectors to see whether they wish to be heard and whether the revisions have either eliminated or reduced the number of objections.

But I'll start with Liberty Mutual and others.

MR. POWELL: Good morning, Your Honor, Jason Powell from the Powell Firm on behalf of Liberty, Zurich, Fidelity. Communications among the objecting parties have generally agreed that the attorney for RLI Insurance will proceed first if that's acceptable to the Court.

THE COURT: Yes.

MR. PROUGH: Good morning, Your Honor, Michael Prough once again appearing on behalf of creditor and objecting party RLI Insurance Company.

I think the fundamental problem with crafting an order that grants a motion that should be denied and then tries to scale back the effect of that grant with a bunch of whereases and wherefore clauses, is you still have a motion being granted that has no business being granted. And once that order is signed and out in the world, there is at least, I'm sure federal judicial officers don't believe in empty acts. If this is an empty act, it's unclear why, and if it's not an empty act, what's being affected by it. And what might be affected by it is the sense that there is an implicit blessing or implicit acceptance by this Court of the terms of this MRA and power of attorney subject only to timing. And that's how it's written; that it can be done once the plan gets approved.

There are fundamental problems we've all laid out and I know debtors' position has been those are plan confirmation problems, those aren't 363 problems -- but a problem.

THE COURT: Well, I think in large measure the debtor is right about that, but there are other objections that might not be strictly confirmation objections.

MR. PROUGH: There are, and if I can address -- the point I was going to lead to there is, here the MRA and the plan are so intimately intertwined. The plan itself says it's

going to implement the MRA. The MRA defines in painstaking detail the details of this plan. And so to say something is a plan issue but not a 363 issue I think is a false dichotomy in a case like this where the MRA that is the subject of the 363 motion in fact does define terms of the plan. And we mention the other issue being an improper sub rosa plan motion.

One is that it dictates terms of the plan, plainly it does, I mean it is the plan in large measure.

Second, does it restrict loading. We laid some of that out as well with the people signing on to the MRA being locked into a yes vote for the plan and the impropriety of that.

So, I understand that the debtor says let's push this all forward to plan confirmation, but I think in analyzing some of the 363 issues, and this is presented to the Court as 363 motions, not our idea.

THE COURT: Let me just stop you there. I've concluded that 363 is the appropriate vehicle for the request that's been made here.

MR. PROUGH: Okay.

THE COURT: I understand that you and others may disagree.

MR. PROUGH: Right. So, the question of even in looking at it as a 363 motion and taking down the elements of analysis for a 363 motion, the details of the agreement

certainly matter for determining sound business purpose, fair and reasonable consideration, the other elements that would weigh even on if strictly construed as a 363 motion.

And so there certainly were the substantive plan issues raised with regard to discriminatory treatment of creditors with regard to the absolute priority rule, the retention of equity by the shareholder and the debtors.

THE COURT: Yeah, and these may be hurdles that can't be overcome. But today is not the day to decide that.

MR. PROUGH: Excuse me?

THE COURT: Today is not the day to decide that.

MR. PROUGH: And so the question is why is it the day to grant a motion that would say it's okay to sign an MRA and a POA even in the future, that has the objectionable terms in it when --

THE COURT: Look the debtor and the committee I think have given an adequate explanation for why. Is it ideal from the standpoint of the stakeholders here? Some of them say no. And I understand that. But I do agree with particularly how the committee has characterized its support at least at this stage for entry of the order, and that is look, it's important for the global reorganization that there be some signal from the U.S. debtors that subject to having the plan confirmed, they're permitted to move forward. So, unless someone can tell me that something can happen which I can't undo by denying

confirmation, my inclination is to try to keep the process moving forward as well. So, let me ask you to focus on those things.

MR. PROUGH: Absolutely. And what can happen is third parties reading an order from a United States Bankruptcy Court may conclude and believe that there is a tacit acceptance of the terms of the MRA and the POA that have been approved in this order, albeit subject to plan confirmation where --

THE COURT: But how can -- let me ask you this. Why is that any different from any other party anywhere in the world, including in the U.S. misreading a court's order or opinion? I mean the one thing a court can't -- well, courts try very hard to sign and issue things that are understandable, but you can't make people understand who are either unable or unwilling.

MR. PROUGH: And I understand that. But you're asking what can happen between now and the plan confirmation hearing date. What can happen is the MRA takes on momentum with these terms and more and more people sign on, those people are locked into votes and there become sufficient momentum behind this MRA that by the time of the plan it's essentially the only game in town. And that's the risk. And there's --

THE COURT: Well look, I've stopped a lot of trains from coming down the tracks.

MR. PROUGH: And I'm sure Your Honor can stop trains,

but we are --

THE COURT: And I probably written more opinions denying confirmation then granting it.

MR. PROUGH: And we're concerned as well.

THE COURT: As they say, "you can look it up."

MR. PROUGH: Yeah, listening to the debtors' recent argument again, and it really echoes a concern I think people reading a lot of the briefs and plans and MRA and everything else. There's a lot of discussions about what's in the interest of the Abengoa group or of the parent or of these new money lenders that are coming in to take out the old lenders.

And while that all may be right, we don't know because we don't have specifics about who is [indiscernible] interest but assuming that explains what these debtors are doing is that it serves the interest of the parent and it serves the interest of these lenders, the standard for bankruptcy court for approval of course and for the plan and for anything we know or have control over is less in the interest of the estate or the interest of the creditors.

And here we have debtors that are in fact pledging all assets undertaking additional obligations all for the benefit of the parent and the new lenders with no showing of any concrete return consideration to the estate other than there's a blank in the plan disclosure statement, Abengoa may put some money in but they won't, they didn't disclose how

much.

But setting that aside, as a 363 motion, at least two of the elements would let's say the fair and reasonable consideration that's being received by these debtors, not in the interest of international harmony or these parents that aren't before you or these unknown creditors or new money lenders that have expressed concerns less in the interest of the debtor, what monies coming into the estate, how is this if you view it as a 363 motion, of course, there needs to be reciprocity there that has not been demonstrated or shown. And among the concerns we have even with the negotiated order between the creditors committee and the debtor, obviously granting a motion that should be denied in our view, but also there are stated in the opening preamble findings on matters that have been I think vigorously disputed and refuted in several of the objections regarding best interest of the creditors' sound business reason, good faith and so on. If there's no negotiator for comprise resolution and all of those strong well-reasoned well-briefed objections are just getting swept under the rug, then there shouldn't be findings in the compromise order in our view either.

I mean I'm not trying to wordsmith the order so much, but there is a concern that there are elements in a 363 motion that haven't been met here. And we pointed out obviously, the issues of the sound business purpose, the question of giving

away their assets and obligations for no concrete return.

THE COURT: But unless I'm mistaken, nothing is being given away today.

MR. PROUGH: In the -- well by virtue of the MRA they essentially pledged all of their assets for the benefit of the parent --

THE COURT: That's not effective from the U.S. debtors unless and until I confirm a plan. Am I mistaken about that?

MR. PROUGH: Well, Your Honor, I suppose the question is, so you sign an order today granting a motion, are these findings also not in effect until or unless the plan gets confirmed? I mean there's a finding that this deal, this MRA, is in the best interest of the creditors --

THE COURT: There is no such finding as I read the order.

MR. PROUGH: Excuse me?

THE COURT: There's no such finding here as I read the proposed form of order. But if you can show me where that is. Direct my attention to it.

MR. PROUGH: I'm sorry. On the first page, beginning after the lead, and upon consideration, "and the court having determined that it has jurisdiction, good and sufficient notice has been provided with respect to the motion and that no other or further notice is necessary, and that the debtors have shown

that: a), a sound business reason justifies the relief sought or the relief provided by the order, b) adequate and reasonable notice was provided" -- it begs the question if it's a 363 motion or plan sub rosa -- "c, the motion was requested in good faith" -- there's extensive discussions of that, including our discussion of the combustion engineering case with bilateral creditor process affecting a good faith finding -- "for best interest of the debtor, debtors in possession, their estates, their creditors and all parties in interest." And I just don't know on this showing how there can be you know something that maybe in fact is could be read as a judicial finding if that's been established on a compromised resolution. I appreciate between the creditors committee and the debtors.

THE COURT: What you just said to me was the proposed form of order approves the MRA and it does not.

MR. PROUGH: "The U.S. MRA parties are authorized to enter into the master restructuring agreement and the powers of attorney" and it says "in accordance with the MRA following the date the court enters an order confirming the plan."

THE COURT: Yeah, but subject to confirmation.

MR. PROUGH: Right. And so a much simpler and cleaner way to get to probably the same result which is if a plan gets approved, they can get authority to enter into an agreement that implements the plan would be to deny this motion or to simply carry it forward to be heard and argued at the

time of plan confirmation. And that way the objections that have been raised in the 363 process are in fact preserved. We don't have this tortured process of coming up with an order that grants something but then try to scale back everything it's granting; it's simply deny the motion or carry it forward.

And the only reason why that's being argued we can't do that is that based on just a statement that there are people in Europe that want to see this moving forward. Where are those people? What's their interest in this proceeding? Where's the declaration? That's the question. There may be. Why does that trump the interest of the creditors and the estates in having an orderly process and having, if there's going to be a 363 motion granted some showing of actual fair and reasonable consideration coming back to the estate that there's been thought given to the releases that are being granted and the avoidance and preference actions.

So, those are our continuing concerns. We have many more which we briefed, I don't necessarily need to repeat everything in the briefing, of course. But I think it's hard to say something is a plan issue and not an MRA issue given the intimate inter-relatedness of the MRA to the plan.

THE COURT: All right. Thank you. PGE.

MR. SMITH: I have nothing further to add, Your Honor. Thank you.

THE COURT: Nationwide Mutual?

MR. LEO: Your Honor, Scott Leo for Nationwide. We agree with RLI in essentially their position. I think the Court asked you know what do the creditors lose by entering this order now that provides for approval of the MRA after the confirmation of the plan. The answer from my perspective is I don't know because I'm assuming they're using this approval in Spain to affect homologation of the MRA in Spain before the end of this month. And one of the questions I asked the creditors committee and I don't know that I've ever had a clear answer on is do the American creditors lose anything as a result of the homologation of the MRA by this provisional approval in this order. And that's one of the questions I have open.

Other than that, Your Honor, Nationwide adopts the position or RLI.

THE COURT: You know, I think that's a fair question. But no one here has pointed out where such harm will occur.

All right. I'll move on to Atlantic Specialty Insurance Company.

MR. FRANCELLA: Good morning, Your Honor, Tom Francella of Whiteford Taylor and Preston. We adopt and agree with the position of RLI. Thank you, Your Honor.

THE COURT: All right. Thank you. I think that covers all of the objectors. I'm sorry, did I miss somebody?

MR. COLLINS: Sorry, Your Honor, Liberty Mutual, we deferred at the beginning, but we weren't completely deferring

comments if Your Honor please.

THE COURT: I'm sorry. I understood that to be the case. Go ahead.

MR. COLLINS: Michael Collins on behalf of Liberty Mutual Insurance Company. And we have obviously filed an objection and we were very concerned with the exact same issues that Mr. Prough articulated. But we understood probably where this Court was going to go with it and we understand the committee's position. But we still have a couple of issues with the order and Mr. Martin has been good in incorporating some of our initial concerns.

Just to get on the record, and I don't know if these will be issues with Mr. Martin or the debtors, but it does appear that the plan does not restrict the execution of the MRA to -- if the plan is confirmed they execute the MRA. Well the plan, we don't know what it will entail. And so I guess my only concern is if we're going to have that blanket authority, it would seem to presume that the plan is going to incorporate the MRA. So perhaps that needs to be part of the restriction. If it is a plan incorporating the MRA, then they have authority to sign the MRA. If it is some other plan that does not incorporate the MRA then it's questionable whether that authority should be granted in that instance.

Second thing is, I would request in this order that there be some specific provision that sets forth that the

parties are not prejudiced with their rights to object to confirmation, so this isn't a tacit approval of the MRA that could be held against any party. I don't think that's the intent, but --

THE COURT: Not on this record.

MR. COLLINS: Thank you.

THE COURT: I don't think there's any doubt, but, you know, there's no problem with I think adding that to the order.

MR. COLLINS: And then finally, Your Honor, I will like to just clarify but I agree with the committee in terms of it's the first we've kind of heard of it that there won't be any different or the intent is no different treatment between the creditors in U.S. versus Spain.

As we understand the Spanish proceeding, all of the trade creditors are unimpaired in that proceeding. So, to say that unsecured trade creditors can be unimpaired here I'm sure would be great news to the committee. But --

THE COURT: But you're not a trade creditor.

MR. COLLINS: Yeah, that will be -- well we subrogate the trade creditors.

THE COURT: Okay.

MR. COLLINS: So that may be good for us as well. And those are my comments, Your Honor. Thank you.

THE COURT: All right. Thank you.

MS. MCCOLLUM: Good morning, Your Honor, Hannah

McCollum, the Office of the United States Trustee. We did not file as you noted a formal objection. We have had some informal discussions with the debtors' counsel. And I do very much do appreciate their incorporating my comments and the comments of the U.S. Trustee into the order.

And I rise simply to say that I share in the comments of the committee which is that notwithstanding that I am not objecting and that I have signed off on this form of order, the U.S. Trustee has serious concerns with the disclosure statement and the plan, especially in the form that they are in right now. And especially because as I'm looking at the disclosure statement right now, it says that the debtors do not seek approval of master restructuring agreement. So, I think that all the statements saying, you know, the plan is going to incorporate the MRA and the terms of the MRA, that's not, as far as I read it, what the plan says right now. But I wait with baited breath for the amended plan which will hopefully replace all the empty brackets that are in the current plan.

And just again reserve all rights to object to confirmation because I do agree with Your Honor that many of the issues if I were to stand here and object to the MRA they would be confirmation issues that I would be raising, and this is not I don't think the time to do that. So, I'm going to reserve my rights for confirmation. Thank you.

THE COURT: Thank you.

Mr. Martin, I'll give you the last word if you'd like it.

MR. MARTIN: Yeah, just a couple of things. I want to make sure that the record is clear as to what is in the MRA, and how creditors will be treated.

And I wanted to point the Court to two provisions, three provisions in the MRA. The first is in article VII on page both 88 and 89. And it talks about agreeing to implement the relevant terms of the restructuring agreement with respect to go forward chapter 11 companies pursuant to a chapter 11 plan. That's at 7.1.1

In 7.1.3, it then talks about (a)(2), this is on page 89 of the MRA, that with respect to liquidating companies that are non-go forward chapter 11 proceedings to implement plans at liquidation pursuant to chapter 11 of the Bankruptcy Code as reasonably practicable, in any event within 120 days of the signing date.

Then the next provision that I wanted to point the Court to deals with this how creditors will be treated. And I wanted to make sure that there was clarity there. The master restructuring agreement for Spanish creditors essentially says, standard restructuring terms which is a 97 percent write-off, a ten-year payment of that 3 percent remaining claim at no interest. However, you can elect the alternate restructuring terms which entitles you to 30 percent claim rather than 3 and

some additional consideration.

What 3.1.4 on page 50 and 51 says is that the viability plan which is a Spanish document that sets forth how the plan intends to reorganize for the Abengoa group, that the following terms would apply, the standard restructuring terms. It then actually lists the various places around the world as to what the write-off would be. And it says in subparagraph (l) "that in the case of what are essentially the go forward chapter 11 entities that the write off will be described in the relevant disclosure statement. That upon the finalization of that write-off, we would notify the restructuring agent."

So, to the extent that there is a concern that people are going to be treated differently in the U.S. than in Spain, our hope is that that concern is misguided because we might be able to in negotiations with the committee have less of a write-off for U.S. creditors.

So, I didn't want to record to leave that we're simply going to provide the standard restructuring terms for everyone. I also don't want creditors to think that they have the right in the U.S. to elect the alternate restructuring terms because that's not the way this is written. But what it does do --

THE COURT: Well, presumably the disclosure statement will spell that out clearly.

MR. MARTIN: Yes. Yes, and I think that in light of

today's hearing we probably need a little bit more work on that so that people understand it. And we certainly will do so. But I didn't want to leave today's hearing with there being any impression that it's whatever the value is in Spain is the same value that everyone here. I didn't want there to be any confusion over that.

What I think that shows is that the master restructuring agreement was in fact written to accomplish what we've set forth in this order, and that the complaints of the objecting parties really add up to their dissatisfaction with the treatment in the Spanish process. And certainly, there's nothing in this order that restricts their rights to go forward in the process. And there's nothing in this order that restricts their rights to assert new value, fair and equitable treatment objections to confirmation.

So, as Mr. Donoho said, I think we struck the right balance. I think that by agreeing that we won't sign it until after confirmation we've actually answered the question that Your Honor indicated was good one which is, "what do creditors lose if you enter this order?" And I think by saying that we're going to condition this all on confirmation, the creditors in fact today are losing nothing and therefore we would ask the Court to overrule those objections and enter the form of order that we have proposed today.

THE COURT: Thank you. I will and do now overrule an

of the remaining objections, but I will require, Mr. Martin, that the form of order, the proposed form of order be amended to say in plain English that this Court by virtue of the order is not approving the MRA or it's efficacy with respect to any of the U.S. debtors.

And secondly, that the order is without prejudice to any party who has standing to do so to raise a confirmation objection. And I'd like you to circulate that order and submit it under certification.

MR. MARTIN: Certainly, Your Honor. The only thing I ask is that in paragraph 2, we already have something that says, "nothing herein shall restrict or prohibit any party from making any objections to a disclosure statement or plan in these cases." So, I think we may already have the second point that Your Honor is requesting.

THE COURT: I think you do.

MR. MARTIN: Certainly we can add the first clause that Your Honor requested.

THE COURT: Okay. Now, is there anything else that the parties think we need to address today? All right. I hear no response.

So, let me make some comments about the disclosure hearing. I'm sorry -- yes?

MR. PROUGH: Excuse me, Your Honor, I apologize, I have one additional comment on the proposed form of order just

based on an exchange we had, which is, add a provision that the preamble in paragraph one are not intended to be findings that bind the parties until or unless the plan confirmation --

THE COURT: Well, there's simply a preamble to the reasons the Court is granting the relief. And I think it's incumbent upon the Court to give reasons for the relief its granted. So, I'm not going to ask that that be changed. I know what it means.

MR. PROUGH: And that's fine. I mean one issue on plan confirmation is obviously best interest of creditors and that's, the concern is that that --

THE COURT: You're not prejudiced. Listen, listen -- you know, this is not the first hotly contested case I've had in my time on the bench. Parties sometimes think its important to make an objection every time they can, for whatever reason: merit; slow the debtor down; gain a negotiating advantage -- pick one of those or more. I don't need the preview. Okay? And that leads very nicely into the comment that I was going to make about the disclosure hearing.

I'm told there's a Judge, it's not me, who says disclosure hearings ought to take about ten minutes, okay, it's only about language. Now, if you must, and you think you have a reason for objecting to the disclosure statement because the plan is patently unconfirmable, I suppose you'll feel compelled to make it. I have in my time on my bench sustained an

objection only once. And it was a situation in which an insider of the debtor proposed to take control of the actions against him. I thought that plan was unconfirmable.

So, and if you want to, I often tell people that if you want to argue a confirmation objection, I'll give you the chance to argue it once, either at the disclosure statement or the confirmation hearing. You can't argue it twice. It's not a good use of your time or my time.

So, I'd like to hope that the parties here will take those admonitions to heart. I don't know what else to say. Okay. Well, with that I will adjourn this hearing. Thank you all. And we stand in recess.

(Proceedings concluded at 12:05 PM)

I N D E X

RULINGS

CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

AAERT Certified Electronic Transcriber CET00650**

Theresa Pullan

Veritext

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EXHIBIT B

Debtors' Responses to Objection
[to be filed]