UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
HOMER CITY GENERATION, L.P.	:	**Case No. 17-10086 (MFW)**
Debtor.[1]	:	**Re: Docket Nos. 9, 10, 138, 140 & 147**

DEBTOR'S RESPONSE TO THE OBJECTIONS TO PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION

Homer City Generation, L.P., as debtor and debtor in possession in the above-captioned Chapter 11 Case ("**Homer City**" or the "**Debtor**"),[2] submits this response (the "**Response**") to the objections to confirmation of its prepackaged plan of reorganization by the Office of the United States Trustee for the District of Delaware (Docket No. 140) (the "**UST**," and its objection, the "**UST Objection**") and Cleveland Brothers Equipment Co. (Docket No. 138) ("**Cleveland Brothers**," and its objection, the "**Cleveland Brothers Objection**"). In support of this Response, the Debtor incorporates the declaration of John R. Boken in support of confirmation of the Plan, filed contemporaneously herewith (the "**Confirmation Declaration**"), which addresses the confirmation factors under section 1129 of the Bankruptcy Code and sets forth a factual basis for, *inter alia*, the Plan releases. The Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. This Chapter 11 Case has been a success story. The struggles that the Debtor encountered pre-petition were documented in the *Declaration of John R. Boken in Support of the*

[1] The last four digits of the Debtor's federal tax identification number are 3693. The location of the Debtor's principal place of business is 1750 Power Plant Road, Homer City, Pennsylvania 15748.

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

Debtor's Chapter 11 Petition and First Day Relief (Docket No. 17). But through the restructuring embodied in the Plan, the Debtor was able to:

- Get its noteholders to agree to convert all of their secured debt into equity.
- Have unsecured creditors be paid in full in the ordinary course of business, even though secured creditors are receiving a significant haircut on their claims.
- Get GE (the indirect equity sponsor and substantial noteholder) to take a large reduction on its *pro rata* share of the recovery afforded to Noteholders under the Plan, plus contribute $3M in cash, plus provide transitional services, all while receiving nothing on account of its equity interests.
- Renegotiate key contracts with its primary coal supplier, Consol Pennsylvania Coal Company, LLC, and its operations and maintenance provider, NRG Homer City Services LLC.
- Allow every executory contract to be assumed.
- Line up a $150M Term B exit facility with Morgan Stanley as lead arranger.

2. Given these tremendous achievements, it is no surprise that the market has applauded the Debtor's efforts. An unusually high percentage of Noteholders voted on the plan—almost 96.5%. Despite the fact that the Noteholders are the only constituency not receiving payment in full under the Plan (other than intercompany claims and equity, which are deemed to reject the Plan), 100% of the Noteholders who voted have voted in favor of the Plan. In addition, notwithstanding that all unsecured creditors in this case (unlike most cases) are unimpaired under the Plan and are deemed to accept the Plan, all such unsecured creditors were provided with a notice that explained that by filing a pleading with the court they could opt out of giving a third party release. Only one unsecured creditor, Cleveland Brothers, exercised this right. After receiving the Cleveland Brothers Objection, the Debtor and Cleveland Brothers (which actually had been paid in full before it objected) fully resolved the Cleveland Brothers Objection, which includes the Debtor honoring the opt out.

3. In keeping with its pattern of seeking to resolve matters consensually during the course of this case (the Court can take judicial notice of the fact that it heard only one contested matter in this entire case—a motion to shorten the notice period of an assumption motion), the Debtor also has worked diligently to resolve the UST Objection. Indeed, the Debtor spent considerable time over the course of about two weeks with the UST to satisfy the UST's concerns with the Plan, and exchanged multiple revised drafts with the UST. The resulting *First Amended Prepackaged Plan of Reorganization of Homer City Generation L.P.* (Docket No. 147) (the "**Plan**"), filed on February 10, 2017, shows the numerous concessions that the Debtor made at the request of the UST, thereby significantly narrowing the issues in dispute at the upcoming confirmation hearing. It also includes changes requested by many other parties that resolved potential objections before they were filed, such as those of the Environmental Protection Agency, the Pennsylvania Department of Environmental Protection, Chubb Group of Insurance Companies, XTO Energy, Inc., and others.

4. As a result of these efforts, the objections that remain before the Court involve two narrow issues[3]:

- Given the substantial consideration the Released Parties have provided to the Debtor and its estate, should the Released Parties receive releases not only from those who sent in ballots that voted in favor of the Plan, or from those that rejected the Plan and did not opt out of the releases (of which there are none), but also from those creditors in Class 3 who failed to submit a ballot and those in Class 4 who received a notice stating that they could opt out by filing a pleading but did not?

- Can the Disbursing Agent be exculpated for performing its duties in accordance with the Plan, subject to typical limitations for gross negligence, willful misconduct and fraud, as well as malpractice?

[3] The Debtor's understanding is that it has fully resolved Cleveland Brother's objection, subject to Cleveland Brother's review of the confirmation order..

5. The Debtor respectfully submits that these narrow issues should be resolved in the Debtor's favor given the unique context and factual background of this case.

BACKGROUND

6. On January 9, 2017, the Debtor, the Consenting Noteholders and GE (the "**RSA Parties**") entered into a Restructuring Support Agreement (the "**RSA**") with respect to the Plan. At that time, the Consenting Noteholders and GE together held approximately 86% of the secured debt of the Company. On January 11, 2017 (the "**Commencement Date**"), the Debtor filed its voluntary petition under chapter 11 of the Bankruptcy Code, commencing this Chapter 11 Case.

7. Prior to the Commencement Date, the Debtor (through its Voting Agent, Epiq Bankruptcy Solutions, LLC) commenced solicitation of the Plan and the Disclosure Statement. Class 3 (Notes Claims) is the only Class entitled to vote under the Plan and therefore the only class that was solicited. Other Priority Claims, Other Secured Claims and even General Unsecured Claims (collectively, the "**Unimpaired Classes**") are unimpaired under the Plan.

8. Each Unimpaired Class will be paid in the ordinary course unless such holder agrees otherwise, pursuant to various provisions of the Plan. Indeed, pursuant to a prior order of the Court, the *Final Order Authorizing the Debtor to Pay Prepetition Claims of General Unsecured Creditors in the Ordinary Course of Business Pursuant to Sections 105(a), 362(d), 363(b), and 503(b)(9) of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004* (Docket No. 117) (the "**All Trade Order**"), the Debtor has been paying pre-petition claims in the ordinary course of business throughout this case. As a result, the number of creditors that remain in Class 4 (General Unsecured Claims) is very small for a case of this size. The Debtor estimates that only 47 prepetition general unsecured creditors remain unpaid at this time. Confirmation Declaration ¶ 11.

9. Section 10.6 of the Plan sets forth the parameters for the releases granted under the Plan. With respect to Impaired Claims that are not themselves receiving releases, holders of such claims or interests will grant a third party release unless they vote to reject the Plan and also check a box on their ballot indicating they opt out of the release. With respect to holders of Unimpaired Claims, such holders that do "not timely object to the releases provided for in the Plan" shall be deemed to release the Released Parties from all claims, causes of action and all other matters described therein. Plan § 10.6(b).

10. Although the Unimpaired Classes were not formally solicited, every holder of an Unimpaired Claim (as well as every other creditor listed on the Debtor's creditor matrix) received the Confirmation Hearing Notice,[4] which provided clear instructions, in an offset text box and capitalized font, for opting out of the releases:

> PLEASE BE ADVISED THAT IF YOUR CLAIM IS UNIMPAIRED UNDER THE PLAN, YOU WILL BE DEEMED TO HAVE GRANTED THE RELEASES CONTAINED IN SECTION 10.6(b) OF THE PLAN UNLESS YOU FILE AN OBJECTION AS DESCRIBED IN PARAGRAPH 6 HEREOF.

Confirmation Hearing Notice at 7.

11. The Solicitation Period ended on February 6, 2017. The Plan was accepted by 100% of Noteholders who voted. In turn, Noteholders who voted collectively hold 96.47% of the outstanding principal amount of the Notes. In other words, nearly everyone voted, and all those who voted have accepted the Plan. *See Declaration of Jane Sullivan on Behalf of Epiq Bankruptcy Solutions, LLC Regarding Service of Solicitation Packages and Tabulation of Ballots Cast on the Prepackaged Chapter 11 Plan of Reorganization of Homer City Generation, L.P.* (Docket No. 137) (the "**Voting Declaration**").

[4] "**Confirmation Hearing Notice**" means the *Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code -and- Summary of Chapter 11 Plan and Notice of Hearing to Consider (A) Adequacy of Disclosure Statement and Solicitation Procedures; (B) Confirmation of Prepackaged Plan of Reorganization; and (C) Related Materials* (Docket No. 54).

12. On February 8, 2017, Cleveland Brothers filed its objection to the Plan, which included an objection to the third party release, thereby automatically opting out of giving such a release. The Debtor believes it fully settled that objection the very next day. The UST filed its objection on February 9, 2017.

ARGUMENT

13. The Court should overrule the UST Objection (and, to the extent not settled, the Cleveland Brothers Objection) because (A) the Third Party Releases satisfy the *Zenith* standard and, contrary to the UST's position, are fully consensual; and (B) the limited exculpation of the Disbursing Agent is appropriate.

A. The Third Party Releases Should Be Approved.

14. The UST objects to the release provision contained in Plan Section 10.6(b) (the "**Third Party Release**"), characterizing such Third Party Release as lacking affirmative consent. It is important, before undertaking the analysis, to strip the rhetoric from this characterization and be precise about what is at issue in the Third Party Release. 96.5% of the only impaired class voted in favor of the Plan, and no one argues that affirmative consent has not been obtained from this 96.5%. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004) (finding that voting in favor of a plan of reorganization that provides for a third-party release indicates consent to the release, even without an explicit election opting to accept the third-party release provision). Similarly, if anyone had voted to reject and exercise an opt-out, no one would have argued that the Third Party Release should be forced on such parties. None did. Thus, what the UST rhetorically categorizes as non-consensual third party releases are only the following categories: (a) the 3.5% of the Noteholders who received a notice that said unless they opted out they would be deemed to give the Third Party Release, yet failed to mail in a ballot; and (b) general unsecured creditors—who are entitled to no distribution in this case due to the

absolute priority rule, but nevertheless are receiving a 100% recovery—who received a specific, clear notice that provided information on how to opt out of the Third Party Release, but (other than Cleveland Brothers) did not do so.

15. Thus, calling the Third Party Release "non-consensual"—implying that creditors are being forced against their will to give such release, is misleading. As shown below, the UST's argument may be appropriate in other cases, but is misplaced here.

16. In assessing the propriety of third party releases, courts will often begin by applying the *Zenith* Factors. Courts will also assess whether such releases are consensual. *See, e.g.*, *First Fid. Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993) (noting that a consensual third party release is no different from any other settlement or contract and does not implicate section 524(e)); *Indianapolis Downs*, 486 B.R. at 305 (collecting cases); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (acknowledging "that a third party release may be included in a plan if the release is consensual"). The Third Party Release in this case satisfies both criteria.

1. The *Zenith* Factors Support Granting the Third Party Release.

17. Application of the *Zenith* Factors supports granting the Third Party Release. These factors are:

1) The identity of interest between the debtor and the third party;

2) Whether the non-debtor has made a substantial contribution to the debtor's reorganization;

3) Whether the release is essential to the debtor's reorganization;

4) Whether there is agreement by a substantial majority of creditors to support the release; and

5) Whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release.

In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999); *see also Indianapolis Downs, 2*86 B.R. at 303; *In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011); *Spansion*, 426 B.R. at 143 n.47. The *Zenith* factors are neither "exclusive nor conjunctive requirements" the Court is bound to follow; they only provide a roadmap for the Court for its determination of the fairness of the release at issue. *Wash. Mut.*, 442 B.R. at 346.

18. Courts have approved releases where only one or two factors are present. *See, e.g.*, *In re Caribbean Petroleum Corp.*, 512 B.R. 774, 778 (Bankr. D. Del. 2014) (finding "no question" that release of debtor's claims was proper because non-debtor "provided Debtors with substantial consideration in exchange for the releases, providing the justification for the Court approving the releases"); *Spansion*, 426 B.R. at 143 (approving release where releasees were actively involved in negotiating plan and four of five creditor classes voted overwhelmingly in favor thereof). However, all five *Zenith* factors are satisfied here.

19. ***First***, an identity of interest exists between the Debtor and each of the Released Parties. In this District, an identity of interest exists between a debtor and a non-debtor where each released entity shares the common goal of achieving a reorganization of the debtor. *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) (debtors and certain prepetition lenders "share[d] the common goal of confirming" the debtors' plan); *Coram*, 315 B.R. at 335 (certain noteholders who contributed funds to the reorganized entity held an identity of interest with the debtors because they "share[d] a common goal of achieving a reorganization of the [d]ebtors"); *Zenith*, 241 B.R. at 110 (plan sponsor and ad hoc committee of bondholders "shared an identity of interest with [the debtor] in seeing that the [p]lan succeed and the company reorganize").

20. Here, each Released Party shares the common goal of the Debtor's successful reorganization. The RSA Parties have shared this goal since negotiations began on the RSA six

months ago. The other Released Parties also share this goal, as shown by their key role in the bankruptcy process, and by committing, where applicable, to facilitating the Debtor's exit from chapter 11. *See* Confirmation Declaration ¶¶ 38–39.

21. Moreover, most of the Released Parties are ones the Debtor would be required to indemnify if a claim were brought against them—either by statute/limited partnership agreements, like the directors and officers, or by contract, such as the RSA Parties and Morgan Stanley. In some cases that come before this Court, if the indemnification claim were an out-of-the money unsecured claim, that might not provide for a full identity of interests. But this case is different. Because unsecured claims are unimpaired under the Plan, a successful claim against a party the Debtor indemnifies (or even an unsuccessful one which causes the indemnitee to rack up attorneys' fees) might as well be a claim against the Debtor, as the Debtor would be required to pay 100% of the judgment and costs.

22. ***Second***, as described in detail in the Confirmation Declaration, each Released Party has made a substantial contribution to this case. *Id.* For example, agreeing to waive or compromise claims against the estate constitutes substantial contribution. *See, e.g.*, *Zenith*, 241 B.R. at 111 (finding substantial contribution by creditor who funded plan and agreed to compromise claims against estates); *In re 710 Long Ridge*, Case No. 13-13653, 2014 WL 886433, at *16 (Bankr. D.N.J. 2014) (finding that a waiver of claims held by certain non-debtor affiliates, among other things, constituted a substantial contribution because such waiver allowed for "enhanced distribution to general unsecured creditors."); *In re: Residential Capital*, Case No. 12-12020 (MG), at 28 (Bankr. S.D.N.Y. Dec. 11, 2013) (Docket No. 6065) (finding that giving up of shared rights by released parties constituted substantial consideration); *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 272 (Bankr. S.D.N.Y. 2014) (finding that certain creditors made a substantial contribution where, among other things, they forewent consideration

"to which they would otherwise be entitled" and provided "a distribution of warrants to existing equity holders").

23. As the Disclosure Statement shows, the Noteholders have agreed to a 36.7%–46.5% recovery on account of their Notes Claims, yet General Unsecured Claims are unimpaired and will receive a 100% recovery. GE agreed to the same reduced recovery on its Notes Claims, plus an additional reduction of 33%. It is also contributing $3 million to the Reorganized Debtor, and will provide transitional services to the Reorganized Debtor to ease the transfer of ownership to the Noteholders. The Prepetition Trustee, *i.e.* the indenture trustee for the Notes, worked and cooperated with the Debtor during the case, and going forward will assist in converting the Notes into the Newco Interests. Confirmation Declaration ¶ 39(a). Under the Debtor's pre-petition limited partnership agreement, Metlife Insurance Company's ("**Metlife**") consent was needed to authorize certain corporate events. Metlife will receive no distributions under the Plan, and its equity interests in the Debtor will be cancelled. *Id.* ¶ 39(d). Each of the Exit Arranger, Exit Lenders and Exit Agents are responsible for certain facets of the exit financing, without which the Plan would not be feasible. *Id.* ¶ 39(f)–(h). Finally, it is appropriate to grant a release to the agents, affiliates and other related parties of the foregoing because all activities from which they will be released are on account of duties they performed for the benefit of the Debtor, and because of the indemnification obligations described *supra* at ¶ 21.

24. ***Third***, the Third Party Releases are essential to the reorganization. In applying this *Zenith* Factor, courts look to the circumstances of the bankruptcy case, inquiring whether the releases were a necessary component to building consensus on the plan. *See, e.g.*, *710 Long Ridge*, 2014 WL 886433, at *16 ("Simply put, without releases, there is no chance of reorganization or recovery for any creditor."); *see also* Hr'g Tr. at 75, *In re PNG Ventures*, *Inc.*,

No. 09-13162 (CSS) (Bankr. D. Del. Mar. 5, 2010) (Docket No. 368) (approving third-party release where "plan would not happen" in their absence).

25. During the course of negotiations with the Consenting Noteholders and GE, it was clear that the substantial contributions described above were conditioned on the inclusion of the releases contained in the Plan. Simply put, without providing such releases, the Debtor would not have been able to provide a 100% recovery to General Unsecured Claims in this case. Neither would the Debtor have been able to secure the cooperation of Metlife, which stands to receive nothing on account of its equity interests, nor could it have secured the participation of the institutions coordinating the Debtor's exit financing; indeed, Morgan Stanley insisted on indemnification as part of its contract, which now has been assumed. Confirmation Declaration ¶ 39(f).

26. ***Fourth***, a substantial majority of creditors support the Third Party Releases. As set forth in the Voting Declaration, Class 3 (Notes Claims), the class most affected by the Third Party Release, voted overwhelmingly in favor of the Plan. Indeed, 96.5% actually voted, and 100% of those who voted have accepted the Plan. In addition, all potentially affected creditors received notice of the releases, and other than Cleveland Brothers, no creditor or interest holder has objected to them.

27. ***Fifth***, the Plan provides for meaningful recoveries for all classes affected by the releases. The concessions offered by the Noteholders and GE will result in a *full recovery* to holders of General Unsecured Claims. This 100% recovery was by no means guaranteed. As demonstrated by the liquidation analysis, the Debtor's secured indebtedness, approximately $607 million, is more than ten times the liquidation value of the company, meaning that holders of other claims would receive nothing in a liquidation scenario. And based upon the going concern valuation also set forth in the Disclosure Statement, a strict absolute priority rule plan would

have provided General Unsecured Claims with no recovery because the secured Noteholders would receive significantly less than a 100% recovery. Thus, without the deal embodied in the Plan, and the compromises it reflects, all of the creditors holders of lower priority than Notes Claims would have received nothing on account of their Claims. Instead, they will receive 100% under the Plan.

28. In summary, before the Court is a prepackaged chapter 11 plan that has the overwhelming support of virtually all of the Debtor's creditors and interest holders. By providing ideal treatment to all creditors and laying the groundwork for a smooth exit from chapter 11, the Plan and Third Party Releases reflect a sound exercise of the Debtor's business judgment and satisfy the *Zenith* Factors.

2. The Third Party Release Is Consensual.

29. The UST argues that the Third Party Release is a "non-consensual" release and that as a matter of law, releases must be consensual. This Court, however, has specifically held that "no such hard and fast rule applies." *Indianapolis Downs*, 486 B.R. at 306. In any event, stripped of the "label" one gives it, as described above, the real issues is whether those provided with a notice who chose not to respond should be deemed to give a release. The reported case law in this District (and elsewhere) shows that the answer is yes.

30. A release is "consensual" if the releasing party was provided with an opt-out ballot *or* other clear instructions on how to withhold the release. As this Court wrote in *Indianapolis Downs*:

> As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots.

286 B.R. at 306; *see also In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (release permissible even though it bound unimpaired classes not entitled to opt out).

31. The UST argues that this Court's ruling in *Washington Mutual* requires affirmative consent to releases of third parties by non-debtors, and that only checking a box to opt into a release constitutes affirmative consent. *See* UST Objection ¶ 25 (citing *Wash. Mut., Inc.*, 442 B.R. at 355). But *Washington Mutual* was a very different case. In *Washington Mutual*, this Court denied confirmation because "even parties who thought they were opting out of the releases by checking the box on their ballot would be bound by the releases" given other provisions of the plan. *Indianapolis Downs*, 286 B.R. at 305 (distinguishing *Washington Mutual*). There is neither any attempt to force a release on those opting out, nor a risk from contradictory instructions or confusion here. The Plan and Confirmation Hearing Notice make clear that those creditors who opted out of the Third Party Release, such as Cleveland Brothers, will not be giving such release.

32. Moreover, the UST's argument that the release is problematic as to unsecured creditors because they did not receive a ballot with a check-the-box opt out notice is misplaced. Rather, this Court has upheld releases as to an unimpaired class because such creditors "are being paid in full and have therefore received consideration for the releases." *Id.* at 306; *see also Spansion*, 426 B.R. at 144; Confirmation Hr'g. Tr. at 26:9–18, *In re: Am. Gilsonite Co.*, Case No. 16-12316 (CSS) (Bankr. D. Del. Dec. 8, 2016) (Docket No. 164) (overruling UST objection to deemed releases by unimpaired creditors, observing that "All the effective creditors have voted unanimously to approve the plan, those that voted. Unsecured creditors and other creditors are riding through . . . . I find, here, that [the release] is appropriate."). This is especially true where, as here, the unimpaired class was provided detailed instructions for how to withhold its consent to the Third Party Release. *See, e.g.*, *Indianapolis Downs*, 286 B.R. at 306 ("As for

those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots.").

33. Here, the Noteholders received ballots allowing them to opt-out of the Third Party Release simply by checking the appropriate box and returning the ballot to the Voting Agent. With respect to the Unimpaired Classes, such classes have received full consideration for their releases—they are receiving a 100% recovery on their Claims. They also received the Confirmation Hearing Notice by mail, and the notice was published in *USA Today* on January 18, 2017.[5] The Confirmation Hearing Notice provided each member of an Unimpaired Class with clear, unambiguous instructions on how to opt out of the Third Party Release: simply file an objection to the Plan. This language appeared in two distinct locations: (1) in the bulleted list of entities who would be deemed to grant releases of the Released Parties and (2) in a distinct box written in all-capitalized font which expressly stated that all holders of Unimpaired Claims shall be deemed to have granted the Releases unless such holder files an objection. Confirmation Hearing Notice at 6–7. Indeed, Cleveland Brothers did just that.

34. The UST argues that this procedure "turns due process on its head," and suggests that there is a possibility that a creditor's notice may have been "delivered to the wrong address." UST Objection ¶¶ 25–26. But this is an argument for *perfect process*, not *due process*, and ignores the fact in addition to mailing the Confirmation Hearing Notice, the Debtor also published it in a newspaper with national circulation. The UST goes on to suggest that

[5] *See Affidavit of Publication of Toussaint Hutchinson for USA Today Regarding Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code–and Summary of Chapter 11 Plan and Notice of Hearing to Consider (A) Adequacy of Disclosure Statement and Solicitation Procedures; (B) Confirmation of Prepackaged Plan of Reorganization; and (C) Related Materials, dated January 24, 2017* (Docket No. 91).

"presuming consent . . . based on silence is inappropriate," but such sentiments are the *exact opposite* of what the case law in this District holds with respect to unimpaired classes. As the Court stated in *Spansion*:

> [T]he silence of the unimpaired classes on this issue is persuasive. This aspect of the Third Party Release is not over-reaching. The unimpaired classes are being paid in full and have received adequate consideration for the release. I will overrule the objection to the extent that the UST opposes applying the Third Party Release to those parties who are 'deemed' to have accepted the Plan.

In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010).

35. In addition, even if the UST's argument might be persuasive in other cases, the facts of this case are very different and render the argument to be irrelevant here. This case is not *Washington Mutual*. There are not tens of thousands of general unsecured creditors with small claims who might not have received the Confirmation Hearing Notice. The Debtor (a) was current on its trade payables heading into this Chapter 11 Case because this is a prepackaged restructuring of institutional debt, and (b) has been paying its unsecured creditors during the course of the case pursuant to the authority afforded in the All Trade Order. Thus, the Debtor estimates that it only has approximately 47 prepetition general unsecured creditors left. Confirmation Declaration ¶ 11. Most of those the Debtor has done business with very recently. *Id.* Thus, the risk of having the wrong address information for notice purposes is exceedingly low.

36. Furthermore, the UST's suggestion that there should be a *carte blanche* rule against the ability to receive a release from a creditor who is unimpaired on the ground that unimpaired creditors don't vote also would be bad policy. Such a rule would discourage secured creditors from doing what they did here – leaving money on the table by allowing out-of-the-money unsecured creditors to receive a 100% recovery. If secured creditors knew that they could get a release by providing a 10% recovery to unsecured creditors but could not get a

release if they provide a 100% recovery, they would have a significant incentive not to provide the 100% recovery. No public policy supports that result.

37. In short, the UST Objection clings to axioms while ignoring the reality of this case—this is a prepackaged case that promises to pay unsecured creditors in full and has the overwhelming support of all constituencies. The UST's concerns were addressed, exhaustively, in the amendments to the Plan, and the Court should overrule the UST Objection.

3. Alternatively, the Court Should Approve the Third Party Release Even if it Determines that it is Non-Consensual.

38. In the alternative, if this Court determines that the Third Party Release is non-consensual in nature, it should nevertheless approve such release given the unique circumstances of this case.

39. Non-consensual third-party releases may be approved where doing so is fair and necessary to the reorganization. *In re Cont'l Airlines*, 203 F.3d 203, 214 (3d Cir. 2000). Courts will look to the *Genesis* Factors, which consider whether "(i) the non-consensual release is necessary to the success of the reorganization; (ii) the releasees have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors." *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001).

40. In *Spansion*, this Court applied the *Genesis* Factors to overrule the UST on the same arguments it is asserting in this case:

> The United States Trustee objects to the Third Party Release to the extent it binds parties who have not taken affirmatively any action to accept the release (including those who are "deemed" to have accepted the Plan and all other entities who hold Claims or Interests).

In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010). This Court overruled the objection, observing that "[t]he unimpaired classes are being paid in full and have received adequate consideration for the release." *Id.*

41. Here, each of the Genesis Factors favors approving the Third Party Release. The Third Party Release was a crucial component of the negotiations leading up to execution of the RSA, and the Consenting Noteholders and GE would not have agreed to their significant impairment under the Plan while leaving General Unsecured Claims unimpaired absent the protections afforded by the Third Party Release. *See* Confirmation Declaration ¶¶ 41–43. GE additionally contributed by reducing its recovery by an additional 33%, and also agreed to provide $3 million in cash and transitional services to the Reorganized Debtor. *See* Plan § 1.54. These contributions are crucial to the very structure of the Plan. Without them, the Debtor would not be able to smoothly transition its business to its new owners (the Noteholders), and in turn, the new owners would have been unwilling to accept a reduced recovery on their Claims in order to unimpair the other Classes. Accordingly, even if the Court determines that the Third Party Release is non-consensual nature, it is still appropriate pursuant to *Continental* and *Genesis*.

B. The Exculpation of the Disbursing Agent Is Appropriate.

42. Without any support, the UST argues that the Plan's exculpation of the Disbursing Agent "is inappropriate." UST Objection ¶ 38. Yet it is well established in the Third Circuit that exculpation is appropriate for those individuals and entities acting in a fiduciary capacity on behalf of a debtor's estate. *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *Wash. Mut.*, 442 B.R. at 350–51.

43. Here, the Plan defines the Disbursing Agent as "any Entity (including the Debtor if it acts in such capacity) in its capacity as a disbursing agent under Article VI of the Plan." The Disbursing Agent will be tasked with making distributions under the Plan to holders of Claims.

This is a fiduciary role. The Disbursing Agent needs to oversee the issuance of equity interests to the Noteholders, which is not a simple task; and also will take estate funds, and use those funds to make distributions under the Plan.

44. The Plan is very specific about what actions are exculpated: only "with respect to acts in conformity with its obligation under this Plan." Plan § 6.5. Moreover, the exculpation is far more limited than most. It of course contains the standard carveouts (*i.e.* fraud, willful misconduct, and gross negligence), but goes further and even carves out malpractice. That makes this provision very limited: it only protects the Disbursing Agent if it is doing what it is supposed to do and is not committing malpractice or worse. The fact that the Debtor, or Reorganized Debtor, may act as the Disbursing Agent is of no moment, and the UST has not cited a single case or other authority for its position. Accordingly, because the Disbursing Agent is an estate fiduciary and will only be exculpated in such capacity, the Court should reject the UST's argument.

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CONCLUSION

WHEREFORE, the Debtor respectfully requests that the UST Objection (and, to the extent not resolved, the Cleveland Brothers Objection) be overruled and that the Plan be confirmed.

Dated: February 13, 2017
Wilmington, Delaware

/s/ Russell C. Silberglied
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