UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
Doral Financial Corporation, *et al.*[1]	:	Case No. 15-10573 (SCC)
Debtors.	:	Jointly Administered

PLAN PROPONENTS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF AMENDED PLAN OF REORGANIZATION PROPOSED BY DORAL FINANCIAL CORPORATION AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF DORAL FINANCIAL CORPORATION

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[1] The last four digits of the taxpayer identification number of the Debtors are: Doral Financial Corporation (2162); Doral Properties, Inc. (2283).

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. OVERVIEW OF THE PLAN 2

A. General Background 2

B. The Plan and Disclosure Statement 2

C. Plan Solicitation and Voting Results 4

III. ARGUMENT 5

A. Section 1129(a)(1): The Plan Complies with the Applicable Provisions of the Bankruptcy Code 7

1. The Plan Satisfies the Classification Requirements of Bankruptcy Code Section 1122 7

2. The Plan Satisfies the Requirements of Bankruptcy Code Section 1123 8

(a) Section 1123(a)(1): Designation of Classes of Claims and Equity Interests 8

(b) Section 1123(a)(2): Designation of Classes That Are Not Impaired by the Plan .. 9

(c) Section 1123(a)(3): Treatment of Impaired Classes Under the Plan 9

(d) Section 1123(a)(4): Equal Treatment Within Each Class 9

(e) Section 1123(a)(5): Adequate Means of Implementation 9

(f) Section 1123(a)(6): Debtor’s New Certificate of Incorporation 11

(g) Section 1123(a)(7): Directors and Officers 11

(h) Section 1123(b): The Discretionary Contents of the Plan Are Appropriate 12

(1) Section 1123(b)(1): The Plan Impairs and Leaves Unimpaired Classes of Claims and Interests 12

(2) Section 1123(b)(2): The Plan Provides for the Assumption, Rejection, or Assignment of Executory Contracts and Unexpired Leases 13

(3) Section 1123(b)(3)(A): The Plan Provides for the Settlement of Claims or Interests 13

(4) Section 1123(b)(3)(B): The Plan Provides for the Retention and Enforcement of Claims or Interests 14

(5) Section 1123(b)(5): The Plan Leaves Unaffected the Rights of Holders of Secured Claims 15

(6) The Plan Includes Other Appropriate Provisions 15

a. The Plan's Exculpation Provision Is Appropriate and Should Be Approved 15

b. The Plan's Injunction Provisions Are Permissible and Should Be Approved 16

B. Section 1129(a)(2): The Plan Proponents Comply with Applicable Provisions of the Bankruptcy Code 17

C. Section 1129(a)(3): The Plan Has Been Proposed in Good Faith and is Not Forbidden by Law 18

D. Section 1129(a)(4): The Payment for Certain Services and Expenses Is Subject to Court Approval 19

E. Section 1129(a)(5): Necessary Information Regarding Directors and Officers of the Debtor Under the Plan Has Been Disclosed 19

F. Section 1129(a)(6): The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission 20

G. Section 1129(a)(7): The Plan Is in the Best Interests of Creditors and Interest Holders. 20

H. Section 1129(a)(8): Acceptance by Impaired Classes 21

I. Section 1129(a)(9): The Plan Provides for the Payment in Full of All Allowed Priority Claims 23

J. Section 1129(a)(10): At Least One Class of Impaired Claims Has Accepted the Plan 23

K. Section 1129(a)(11): The Plan Meets the Feasibility Standard 24

L. Section 1129(a)(12): All Statutory Fees Have or Will Be Paid 25

M. Sections 1129(a)(13) through 1129(a)(16) Do Not Apply 25

N. Confirmation of Plan Over Non-Acceptance of Deemed Rejecting Classes 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999)....21

Hanson v. First Bank of South Dakota,
828 F.2d 1310 (8th Cir. 1987)....18

In re Adelphia Bus. Sols., Inc.,
341 B.R. 415 (Bankr. S.D.N.Y. 2003)....24

In re Bally Total Fitness of Greater New York, Inc.,
No. 07-12395, 2007 WL 2779438 (Bankr. S.D.N.Y. Sept. 17, 2007)....7, 16

In re Briscoe Enters., Ltd., II,
994 F.2d 1160 (5th Cir. 1993)....7

In re Bryson Props., XVIII,
961 F.2d 496 (4th Cir. 1992)....8

In re Calpine Corp.,
No. 05-60200 BRL, 2007 WL 4565223 (Bankr. S.D.N.Y. Dec. 19, 2007)....16

In re Cellular Info. Sys., Inc.,
171 B.R. 926 (Bankr. S.D.N.Y. 1994)....18

In re Chateaugay Corp.,
89 F.3d 942 (2d Cir. 1996)....8

In re Drexel Burnham Lambert Grp., Inc.,
960 F.2d 285 (2d Cir. 1992)....17

In re Drexel Burnham Lambert Grp., Inc.,
138 B.R. 714 (Bankr. S.D.N.Y.), *aff'd*, 140 B.R. 347 (S.D.N.Y. 1992)....7, 17, 24

In re Enron Corp.,
326 B.R. 497 (S.D.N.Y. 2005)....16

In re Holywell Corp.,
913 F.2d 873 (11th Cir. 1990)....8

In re Jandous Elec. Constr. Corp.,
115 B.R. 46 (Bankr. S.D.N.Y. 1990)....18

In re Purofied Down Prods. Corp.,
150 B.R. 519 (S.D.N.Y. 1993) 14

In re Texaco Inc.,
84 B.R. 893 (Bankr. S.D.N.Y. 1988) 18

Kane v. Johns-Manville Corp.,
843 F.2d 636 (2d Cir. 1988) 7

STATUTES

11 U.S.C. § 105 10

11 U.S.C. § 507(a)(2) 23

11 U.S.C. § 1107(a) 2

11 U.S.C. § 1108 2

11 U.S.C. § 1114 25

11 U.S.C. § 1122 .... 7, 9

11 U.S.C. § 1122(a) 7, 8

11 U.S.C. § 1123 .... 7, 8

11 U.S.C. § 1123(a) 8

11 U.S.C. § 1123(a)(1) 9

11 U.S.C. § 1123(a)(2) 9

11 U.S.C. § 1123(a)(3) 9

11 U.S.C. § 1123(a)(4) 9

11 U.S.C. § 1123(a)(5) 10, 11

11 U.S.C. § 1123(a)(6) 11

11 U.S.C. § 1123(a)(7) 11, 12

11 U.S.C. § 1123(b) 12, 15

11 U.S.C. § 1123(b)(1) 12, 13

11 U.S.C. § 1123(b)(2) 13

11 U.S.C. § 1123(b)(3)(A) 13

11 U.S.C. § 1123(b)(3)(B) 14, 15

11 U.S.C. § 1123(b)(5) 15

11 U.S.C. § 1123(b)(6) 15

11 U.S.C. § 1125 ..... 3, 17

11 U.S.C. § 1126 ..... 3, 22

11 U.S.C. § 1126(c) 22

11 U.S.C. § 1126(f) 21, 22

11 U.S.C. § 1126(g) 22

11 U.S.C. § 1129 ..... 2, 5, 7

11 U.S.C. § 1129(a) 5, 26

11 U.S.C. § 1129(a)(1) 5, 7

11 U.S.C. § 1129(a)(2) 5, 17, 18

11 U.S.C. § 1129(a)(3) 5, 18, 19

11 U.S.C. § 1129(a)(4) 5, 19

11 U.S.C. § 1129(a)(5) 6, 19, 20

11 U.S.C. § 1129(a)(6) 6, 20

11 U.S.C. § 1129(a)(7) 6, 21, 22

11 U.S.C. § 1129(a)(8) 6, 22, 26

11 U.S.C. § 1129(a)(9) 6, 23

11 U.S.C. § 1129(a)(9)(C) 23

11 U.S.C. § 1129(a)(10) 6, 23, 24

11 U.S.C. § 1129(a)(11) 6, 24, 25

11 U.S.C. § 1129(a)(12) 6, 25

11 U.S.C. § 1129(a)(13) 6, 25

11 U.S.C. § 1129(a)(14) 25

11 U.S.C. § 1129(a)(15) 25

11 U.S.C. § 1129(a)(16) 25, 26

11 U.S.C. § 1129(b) 22, 26

28 U.S.C. § 1930 .... 6, 25

31 U.S.C. § 3717 25

OTHER AUTHORITIES

Fed. R. Bankr. P. 9019 .... 13, 14

H.R. Rep. No. 95-595 (1977) 17

1. Doral Financial Corporation (the "**Debtor**") and the Official Committee of Unsecured Creditors (the "**Committee**" and, together with the Debtor, the "**Plan Proponents**") submit this memorandum of law in support of confirmation of the *Amended Plan of Reorganization Proposed by Doral Financial Corporation and the Official Committee of Unsecured Creditors of Doral Financial Corporation* [Docket No. 632] (as the same may be amended, modified, and/or supplemented, the "**Plan**").[2]

I. PRELIMINARY STATEMENT

2. Confirmation of the Plan is the culmination of extensive negotiations during the Debtor's bankruptcy case among the Debtor, the Committee, and the Indenture Trustees who represent the vast majority of the Debtor's creditors. The Debtor and the Committee have spent the last year of the Debtor's case winding down its affairs and monetizing assets. The Plan provides for the distribution of most of the Debtor's accumulated cash to unsecured creditors and provides a mechanism for the liquidation of the Debtor's remaining assets.

3. The broad creditor support for confirmation of the Plan is evidenced by the results of voting, as set forth in the *Declaration of Craig Johnson of Garden City Group, LLC Certifying the Methodology for the Tabulation of Votes on and Results of Voting with Respect to the Amended Plan of Reorganization Proposed by Doral Financial Corporation and the Official Committee of Unsecured Creditors of Doral Financial Corporation* [Docket No. 682] (the "**Voting Report**"). Following the solicitation of the Plan, 97.5% of the holders of General Unsecured Claims that submitted ballots voted to accept the Plan, representing approximately 99.89% of the total dollar amount of General Unsecured Claims held by holders that submitted ballots.

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

4. In further support of the relief requested herein, the Debtor filed contemporaneously herewith the *Declaration of Carol Flaton in Support of Confirmation of (I) Amended Plan of Reorganization Proposed by Doral Financial Corporation and the Official Committee of Unsecured Creditors of Doral Financial Corporation, and (II) Chapter 11 Plan of Liquidation for Doral Properties, Inc*. (the "**Flaton Declaration**").

5. As set forth below, the Plan satisfies each of the requirements for confirmation under section 1129 and other applicable provisions of the Bankruptcy Code.

II. OVERVIEW OF THE PLAN

A. General Background

6. On March 11, 2015 (the "**Petition Date**"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). Bankruptcy Code sections 1107(a) and 1108 authorize the Debtor to continue to operate its businesses and manage its properties as a debtor-in-possession. No request for the appointment of a trustee or examiner has been made in this chapter 11 case. On March 23, 2015, the Committee was appointed by the United States Trustee.

7. On April 28, 2016, the Plan Proponents filed the initial versions of the Plan [Docket No. 581] and related disclosure statement [Docket No. 582] (as the same may be amended, modified and/or supplemented, the "**Disclosure Statement**"). On June 1, 2016, the Plan Proponents filed the Plan and an amended Disclosure Statement [Docket No. 632].

B. The Plan and Disclosure Statement

8. The Plan Proponents structured the Plan to preserve potentially valuable tax attributes in the Reorganized Debtor and to liquidate the Debtor's remaining assets, while distributing the value of the Debtor's estate in an equitable manner that is consistent with applicable law.

9. The Plan provides, among other things, that: (i) each holder of a Secured Claim will be paid in full in cash or receive the collateral securing its claim; and (ii) each holder of a General Unsecured Claim will receive a pro rata share of the Debtor's cash remaining for distribution and a pro rata share of interests in the Creditors' Trust, which represents a right to receive further distributions from the Creditors' Trust.

10. On June 6, 2016, the Court entered an order [Docket No. 641] (the "**Disclosure Statement Order**") approving, among other things, (i) the Disclosure Statement, finding it contained adequate information within the meaning of Bankruptcy Code section 1125; (ii) the solicitation procedures, finding they provide for a fair and equitable voting process and are consistent with Bankruptcy Code section 1126; and (iii) the forms of ballots, master ballots, and notices, finding they adequately address the particular needs of this chapter 11 case. The Disclosure Statement Order also established various deadlines, including July 11, 2016 at no later than 5:00 p.m. (Prevailing Eastern Time) as the deadline for parties to file any responses or objections to confirmation of the Plan and the general deadline by which all ballots were to be received by the Voting Agent. As of the filing of this Memorandum, no objections to confirmation of the Plan have been filed and the objection deadline has passed. The Court also scheduled a hearing to consider confirmation of the Plan, which was subsequently adjourned with permission of the Court, and is scheduled to commence on August 9, 2016 at 2:00 p.m. (prevailing Eastern Time) (the "**Confirmation Hearing**").

11. In anticipation of the Confirmation Hearing, the Debtor has undertaken several important steps in furtherance of confirmation and implementation of the Plan, including the solicitation of votes to accept the Plan from the holders of General Unsecured Claims, the holders of claims in the only impaired class entitled to vote on the Plan.

12. On July 1, 2016, the Plan Proponents filed the Plan Supplement [Docket No. 672] and, on August 4, 2016, the Plan Proponents filed a supplement to the Plan Supplement [Docket No. 694] (collectively, including all exhibits thereto and as amended, modified, and/or supplemented from time to time, the "**Plan Supplement**"), which provides information regarding a variety of topics, including, among other things: (i) the form of Creditors' Trust Agreement; (ii) compensation to be paid to the Creditors' Trustee; (iii) the identity of the Creditors' Trustee and the Director of the Reorganized Debtor; (iv) the Expense Reserve; (v) executory contracts to be assumed and assigned to the Creditors' Trust; (vi) preserved causes of action; and (vii) the form of Reorganized Debtor Governing Documents.

C. Plan Solicitation and Voting Results

13. On or about June 13, 2016, the Debtor began soliciting votes on the Plan by distributing the Disclosure Statement and related materials to all known holders of claims as of May 25, 2016 in Class 2 (General Unsecured Claims), which was the only class of claims entitled to vote to accept or reject the Plan.

14. The Debtor received acceptance of the Plan from Class 2. *See* Voting Report, at ¶ 39. A summary of the results of voting on the Plan follows:

CLASS	ACCEPT THE PLAN		REJECT THE PLAN	
	Dollar Amount Voted/ Percentage of Total Dollar Amount	Number of Votes/ Percentage of Number of Votes	Dollar Amount Voted/ Percentage of Total Dollar Amount	Number of Votes/ Percentage of Number of Votes
2	$165,074,346.79 / 99.89%	117 / 97.50%	$184,770.55 / 0.11%	3 / 2.50%

15. In addition, as required by the Disclosure Statement Order, the Debtor transmitted to each holder of claims in Class 1 (Secured Claims) a notice indicating that such holders' claims are not impaired and, therefore, such holders are deemed to have accepted the Plan and are not

entitled to vote to accept or reject the Plan. The Debtor also transmitted to each holder of claims or equity interests in Class 3 (Intercompany Claims), Class 4 (Subordinated Claims), and Class 5 (Equity Interests) (the "**Deemed Rejecting Classes**") a notice indicating that such holders are not entitled to receive or retain any property on account of their claims or equity interests in the Debtor and, therefore, are deemed to have rejected the Plan and are not entitled to vote to accept or reject the Plan.

16. The Plan Proponents submit that the Plan satisfies all of the confirmation standards under Bankruptcy Code section 1129, is in the best interest of all creditors, and should be confirmed by the Court.

III. ARGUMENT

17. Bankruptcy Code section 1129 governs confirmation of a chapter 11 plan and sets forth the requirements that must be satisfied for a plan to be confirmed. Pursuant to Bankruptcy Code section 1129(a), the Court shall confirm a chapter 11 plan only if all of the following requirements are met:

i. The plan complies with the applicable provisions of title 11 (section 1129(a)(1));

ii. The proponent of the plan complies with the applicable provisions of title 11 (section 1129(a)(2));

iii. The plan has been proposed in good faith and not by any means forbidden by law (section 1129(a)(3));

iv. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable (section 1129(a)(4));

v. (A)(i) The proponent of the plan has disclosed 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, an affiliate of the debtor

participating in a joint plan with the debtor, or a successor to the debtor under the plan; and (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider (section 1129(a)(5));

vi. To the extent that the debtor is subject to the jurisdiction of any regulatory commission, any rate change provided for in the plan has been approved by, or is subject to the approval of, such regulatory commission (section 1129(a)(6));

vii. With respect to each impaired class of claims or interests, each holder of a claim or interest of such class either has accepted the plan or will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor were so liquidated under chapter 7 of the Bankruptcy Code on such date (section 1129(a)(7));

viii. Each class of claims or interests has either accepted the plan or is not impaired under the plan (section 1129(a)(8));

ix. The treatment of administrative expense and priority claims under the plan complies with the provisions of section 1129(a)(9);

x. If a class of claims is impaired under the plan, at least one impaired class of claims has accepted the plan, determined without including the acceptances by any insiders holding claims in such class (section 1129(a)(10));

xi. 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, except to the degree that such liquidation or reorganization is proposed in the plan (section 1129(a)(11));

xii. The plan provides for payment on the effective date of all fees payable under 28 U.S.C. § 1930 (section 1129(a)(12)); and

xiii. The plan provides for the continued payment of certain retiree benefits for the duration of the period that the debtor has obligated itself to provide such benefits (section 1129(a)(13)).

18. To confirm the Plan, the Court must find that the Plan Proponents have complied with the provisions of Bankruptcy Code section 1129 by a preponderance of the evidence. *In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993); *In re Bally Total Fitness of*

Greater New York, Inc., No. 07-12395, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007). The Plan Proponents have the burden of establishing that all requisite elements for confirmation of the Plan have been met. *Id*. The Plan Proponents will demonstrate by a preponderance of the evidence that all applicable provisions of Bankruptcy Code section 1129 have been satisfied.

A. Section 1129(a)(1): The Plan Complies with the Applicable Provisions of the Bankruptcy Code

19. Bankruptcy Code section 1129(a)(1) provides that the plan must "[comply] with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). The legislative history of subsection 1129(a)(1) suggests that the words "applicable provisions" mandate that the plan comply with provisions concerning the form and content of reorganization plans, namely, Bankruptcy Code sections 1122 and 1123. *Kane v. Johns-Manville Corp*., 843 F.2d 636, 648-49 (2d Cir. 1988). Bankruptcy Code sections 1122 and 1123 govern classification and contents of plans. *Id*. As detailed below, the Plan fully complies with the requirements of Bankruptcy Code sections 1122 and 1123.

1. The Plan Satisfies the Classification Requirements of Bankruptcy Code Section 1122

20. Bankruptcy Code section 1122(a) provides that "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. The "substantially similar" requirement does not require similar claims or interests be grouped together but merely that the claims designated to any particular group be homogenous. *In re Drexel Burnham Lambert Grp., Inc*., 138 B.R. 714, 715 (Bankr. S.D.N.Y.), *aff'd*, 140 B.R. 347 (S.D.N.Y. 1992). Section 1122 provides a debtor with a considerable degree of flexibility to structure its classification scheme to best facilitate its restructuring. *In re Chateaugay Corp*., 89 F.3d 942, 949-50 (2d Cir. 1996); *In re*

Bryson Props., XVIII, 961 F.2d 496, 502 (4th Cir. 1992) (noting section 1122 "grants some flexibility in classification of unsecured claims"); *In re Holywell Corp*., 913 F.2d 873, 880 (11th Cir. 1990) (stating that "the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case.").

21. The Plan provides for separate classification of interests and claims in the Debtor based on the differences in the legal nature and priority of each group. The Plan classifies the following five classes of claims and interests: Class 1 (Secured Claims), Class 2 (General Unsecured Claims), Class 3 (Intercompany Claims), Class 4 (Subordinated Claims), Class 5 (Equity Interests). Plan §§ 4.01-4.06. The Plan's classification scheme satisfies the requirements of section 1122(a) because each class contains only claims or interests substantially similar to each other, and the classifications are based on the similarities of such claims or interests to each other and not on any impermissible factor.

22. As each class consists solely of substantially similar claims and interests, the Court should approve the classification scheme set forth in the Plan as compliant with Bankruptcy Code section 1122(a).

2. The Plan Satisfies the Requirements of Bankruptcy Code Section 1123

23. Bankruptcy Code section 1123(a) provides seven mandatory requirements to be satisfied for plan confirmation. 11 U.S.C. § 1123(a). As detailed herein, the Plan filed by the Plan Proponents fully complies with each requirement of Bankruptcy Code section 1123(a).

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

24. Bankruptcy Code section 1123(a)(1) requires a plan to designate classes of claims and classes of interests, subject to the standards of Bankruptcy Code section 1122. 11 U.S.C. § 1123(a)(1). As detailed above, the Plan creates five classes of claims and interests, Plan §§ 4.01-

4.06, and such classification complies with Bankruptcy Code section 1122. The Plan thus satisfies the requirements of Bankruptcy Code section 1123(a)(1).

(b) Section 1123(a)(2): Designation of Classes That Are Not Impaired by the Plan

25. Bankruptcy Code section 1123(a)(2) requires that a plan must "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Section 4.01 of the Plan provides that the claims in Class 1 (Secured Claims) are unimpaired. Accordingly, the Plan complies with the requirements of Bankruptcy Code section 1123(a)(2).

(c) Section 1123(a)(3): Treatment of Impaired Classes Under the Plan

26. Bankruptcy Code section 1123(a)(3) provides that a chapter 11 plan must "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Sections 4.02-4.06 of the Plan set out the treatment for impaired claims, including Class 2 (General Unsecured Claims), Class 3 (Intercompany Claims), Class 4 (Subordinated Claims), and Class 5 (Equity Interests). The Plan thus satisfies the requirements of Bankruptcy Code section 1123(a)(3).

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

27. Bankruptcy Code section 1123(a)(4) requires a plan to "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Under the Plan, the treatment of each claim or interest within each class is the same as the treatment of each of the other claims in the same class. Plan §§ 4.01-4.06. Thus, the Plan satisfies the requirements of Bankruptcy Code section 1123(a)(4).

(e) Section 1123(a)(5): Adequate Means of Implementation

28. Bankruptcy Code section 1123(a)(5) requires that a plan provide "adequate means for the plan's implementation" and offers several examples of measures that may constitute

"adequate means." 11 U.S.C. § 1123(a)(5). Article 6 of the Plan provides the means of implementation, including the following:

i. taking all actions necessary pursuant to settlement agreements approved by the Court, *see* Plan § 6.01;

ii. authorizing corporation action to be taken in connection with the plan, *see* Plan § 6.02;

iii. continuing the corporate existence of the Reorganized Debtor, *see* Plan § 6.03;

iv. adopting the Reorganized Debtor Governing Documents, *see* Plan § 6.04;

v. the resignation of the Debtor's remaining officers and the members of its board of directors and the appointment of an initial board of directors of the Reorganized Debtor, *see* Plan § 6.05;

vi. issuing one share of Reorganized Debtor Common Stock to the Creditors' Trust for the benefit of the Creditors' Trust Beneficiaries, *see* Plan § 6.06;

vii. continuing operation of the Reorganized Debtor's business to implement the Plan, *see* Plan § 6.07;

viii. vesting of the Tax Attributes in the Reorganized Debtor and all other assets in the Creditors' Trust free and clear of all liens, claims, charges, and other encumbrances, *see* Plan § 6.08,

ix. deeming the Committee to be the estate's representative with respect to the D&O Claims and granting it standing in connection with matters relating to the D&O Claims, *see* Plan § 6.09;

x. providing that the confirmation of the Plan shall not affect the rights of any party with respect to insurance policies, and providing that the Debtor shall seek to have its current directors' and officers' liability policy reinstated and deemed assumed pursuant to Bankruptcy Code section 365, *see* Plan § 6.10;

xi. providing that all injunctions or stays in effect pursuant to Bankruptcy Code sections 105 or 362 shall remain in full force and effect, *see* Plan § 6.11;

xii. except as provided in connection with the Plan, (a) cancelling all notes, instruments, certificates and other documents evidencing claims or equity interests and providing that the holders of such documents shall have no rights against the Debtor, the Reorganized Debtor, or the Creditors' Trust arising from them, *see* Plan § 6.12(a); and (b) cancelling and discharging

the DFC Notes Indenture, the 2002 AFICA Trust Agreements, the CT Trust Agreements, and the 2002 Loan Agreement, except with respect to certain rights of the Indenture Trustee, *see* Plan § 6.12(b);

xiii. establishing a segregated account maintained by the Creditors' Trustee for payments incurred in connection with carrying out the Plan, *see* Plan § 6.13; and

xiv. authorizing the Reorganized Debtor and the Creditors' Trust to sell or enter into business transactions with respect to the Creditors' Trust Assets or the Reorganized Debtor's assets, and authorizing the Reorganized Debtor and the Creditors' Trust to incur obligations to provide funds for working capital or for uses otherwise permitted, *see* Plan § 6.14.

29. The implementation measures provided for in the Plan are designed to maximize the value of the Debtor's assets. The Plan provides the means for implementation as required by Bankruptcy Code section 1123(a)(5).

(f) Section 1123(a)(6): Debtor's New Certificate of Incorporation

30. Bankruptcy Code section 1123(a)(6) requires the inclusion in the charter of the Reorganized Debtor "a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes." 11 U.S.C. § 1123(a)(6). The Plan authorizes the Reorganized Debtor to issue one share of Reorganized Debtor Common Stock to the Creditors' Trust for the benefit of the Creditors' Trust Beneficiaries. As set forth in the Plan Supplement, the Reorganized Debtor Governing Documents prohibit the issuance of nonvoting equity securities and provide for the rights of the holder of the Reorganized Debtor Common Stock. Accordingly, the Plan satisfies the requirements of Bankruptcy Code section 1123(a)(6).

(g) Section 1123(a)(7): Directors and Officers

31. Bankruptcy Code section 1123(a)(7) provides that a plan may only contain provisions consistent with the interests of creditors and security holders as they relate to the selection of officers, directors, and trustees. 11 U.S.C. § 1123(a)(7). Pursuant to Section 6.05 of

the Plan, remaining officers and directors of the Debtor shall be deemed to have resigned and shall be released of responsibilities arising after the Effective Date. Section 6.05 of the Plan further provides that the initial board of directors of the Reorganized Debtor will consist of one person appointed by the Committee and identified in the Plan Supplement. The Plan Supplement identified Lauren Krueger of Drivetrain LLC as this person. The appointment of officers and directors provided for under the Plan is consistent with the interests of creditors and interest holders. Further, there have been no objections by parties in interest to the manner of selection of the directors or officers of the Reorganized Debtor. The Plan thus satisfies the requirements of Bankruptcy Code section 1123(a)(7).

(h) Section 1123(b): The Discretionary Contents of the Plan Are Appropriate

32. Bankruptcy Code section 1123(b) sets out provisions that may be incorporated into chapter 11 plans. 11 U.S.C. § 1123(b). As detailed below, the Plan complies with these provisions.

(1) Section 1123(b)(1): The Plan Impairs and Leaves Unimpaired Classes of Claims and Interests

33. Bankruptcy Code section 1123(b)(1) provides that a plan may “impair or leave unimpaired any class of claims, secured or unsecured, or of interests.” 11 U.S.C. § 1123(b)(1). Class 1 (Secured Claims) is unimpaired. Plan § 4.01. Class 2 (General Unsecured Claims), Class 3 (Intercompany Claims), Class 4 (Subordinated Claims), and Class 5 (Equity Interests) are impaired. Plan §§ 4.02-4.06. The Plan is thus appropriate under Bankruptcy Code section 1123(b)(1).

(2) Section 1123(b)(2): The Plan Provides for the Assumption, Rejection, or Assignment of Executory Contracts and Unexpired Leases

34. Bankruptcy Code section 1123(b)(2) allows a plan to "provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected." 11 U.S.C. § 1123(b)(2). Section 11.01 of the Plan provides that any executory contract or unexpired lease that (i) has not expired on its own terms prior to the Confirmation Date, (ii) has not been assumed, assumed and assigned, or rejected with Bankruptcy Court approval prior to the Confirmation Date, (iii) is not the subject of a motion to assume or reject which is pending at the time of the Confirmation Date, or (iv) is not listed in the Plan to be assumed, shall be deemed rejected on the Effective Date. Exhibit B to the Plan lists the executory contracts and unexpired leases to be assumed. The Debtor reserves the right prior to the Effective Date to amend Exhibit B to delete any contract or lease listed and thus provide for its rejection, or add any executory contract or unexpired lease and thus provide for its assumption. Plan § 11.03. The Plan accordingly provides for the assumption, rejection, or assignment of executory contracts and unexpired leases and thus is compliant with Bankruptcy Code section 1123(b)(2).

(3) Section 1123(b)(3)(A): The Plan Provides for the Settlement of Claims or Interests

35. Bankruptcy Code section 1123(b)(3)(A) provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Under section 6.01 of the Plan, pursuant to Bankruptcy Rule 9019, the provisions of the Plan constitute a good faith compromise of all claims, equity interests and controversies relating to the contractual, legal, and subordination rights that a holder of a claim may have with respect to any Allowed claim or equity interest, or any distribution to be made on

account of such Allowed claim or equity interest. Plan § 6.01. Entry of a Confirmation Order shall constitute the Bankruptcy Court's approval of the settlement. *Id*.

36. Bankruptcy Rule 9019(a) provides: "[A]fter notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019. The standard for determining if a bankruptcy settlement is appropriate is whether the settlement is in the "best interests of the estate." *In re Purofied Down Prods. Corp*., 150 B.R. 519, 523 (S.D.N.Y. 1993) (internal quotation marks omitted).

37. Here, the proposed settlements are valid and appropriate settlements of claims with respect to any Allowed claim or equity interest, or any distribution to be made on account of such. The proposed settlements are in the best interest of the estate and well within the Debtor's business judgment.

(4) Section 1123(b)(3)(B): The Plan Provides for the Retention and Enforcement of Claims or Interests

38. Bankruptcy Code section 1123(b)(3)(B) provides that a plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest." 11 U.S.C. § 1123(b)(3)(B). Section 7.01 of the Plan provides that the Creditors' Trust shall be established for, among other things, prosecuting, settling, adjusting, retaining, and enforcing any Litigation Claims that the Debtor may have. Plan § 7.01. On the Effective Date, the rights and powers of the Debtor's estate applicable to the Creditors' Trust Assets shall vest in the Creditors' Trust. In addition, Section 6.09 of the Plan provides that, on the Effective Date, the Committee shall be deemed the estate's representative with respect to the D&O Claims and, among other things, shall have the right to prosecute, settle, abandon or compromise any D&O Claims. Plan § 6.09. Accordingly, the Plan satisfies Bankruptcy Code section 1123(b)(3)(B).

(5) Section 1123(b)(5): The Plan Leaves Unaffected the Rights of Holders of Secured Claims

39. Bankruptcy Code section 1123(b)(5) provides that a plan may "modify the rights of holders of secured claims, . . . or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1123(b)(5). The Plan modifies or leaves unaffected, as the case may be, the rights of holders of claims in each class.

(6) The Plan Includes Other Appropriate Provisions

40. Bankruptcy Code section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. 11 U.S.C. § 1123(b)(6). In accordance with Bankruptcy Code section 1123(b)(6), the Plan contains exculpation and injunction provisions consistent with the Bankruptcy Code. The Court should approve these provisions as appropriate, as they are reasonable, essential to the reorganization of Debtor's estate, and consistent with section 1123(b) and other applicable Bankruptcy Code provisions.

a. The Plan's Exculpation Provision Is Appropriate and Should Be Approved

41. Section 15.07 of the Plan provides for exculpation to the fullest extent permitted by law for the Debtor, the Committee, the Indenture Trustees, and related parties for acts or omissions arising out of or in connection with (i) acts occurring after the Petition Date relating to the Debtor or the Debtor's bankruptcy case, (ii) the formulation, negotiation, confirmation or consummation of the Plan, (iii) solicitation of acceptances of the Plan, (iv) administration of the Plan or property to be distributed under the Plan, or (v) the enforcement of the terms of the Plan, except for acts that are the result of fraud, criminal conduct, gross negligence or willful misconduct. Plan § 15.07.

42. Exculpation provisions are evaluated based upon a number of factors, including whether they "are each necessary for the Debtors' successful reorganization and are integral to the structure of the Plan." *In re Bally*, 2007 WL 2779438 at *8. Courts in this district have found exculpation provisions appropriate when they do not include gross negligence and willful misconduct and are narrow in scope. *In re Enron Corp*., 326 B.R. 497, 504 (S.D.N.Y. 2005); *In re Calpine Corp*., No. 05-60200 BRL, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007).

43. The scope of the proposed exculpation provision in the Plan is narrowly targeted and appropriately limited to acts related to the Debtor's restructuring efforts. *See* Flaton Declaration, at ¶¶ 16-17. The provision explicitly does not include fraud, criminal acts, grossly negligent conduct, or willful misconduct. Accordingly, the proposed exculpation provision is appropriate and the Plan Proponents respectfully request that the Court approve the exculpation provision set forth in Section 15.07 of the Plan.

b. The Plan's Injunction Provisions Are Permissible and Should Be Approved

44. Section 14.01 of the Plan provides that on and after the Confirmation Date, subject to the Effective Date, all persons are permanently enjoined from commencing any action or proceeding respecting any claim, debt, right, or cause of action of the Debtor for which any of the Debtor, the Reorganized Debtor, the Committee, the Creditors' Trustee, or the Creditors' Trust retains sole and exclusive authority to pursue in accordance with the Plan. Plan § 14.01. Section 14.02 of the Plan further provides that, upon entry of the Confirmation Order, all holders of claims and equity interests and other parties in interest are enjoined from taking any actions to interfere with implementation or consummation of the Plan. Plan § 14.02.

45. The Plan's injunction provisions are necessary to effectuate the Plan and to ensure that the Reorganized Debtor, the Committee, the Creditors' Trustee, and the Creditors' Trust can effectively fulfill their responsibilities, as contemplated in the Plan. The Second Circuit has held that in bankruptcy cases, courts may enjoin creditors from suing third parties if the injunction plays "an important part in the debtor's reorganization plan." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (citations omitted). The Plan's injunction provisions are an essential component of the Debtor's reorganization.

46. As the injunction provisions are essential to implement the Plan, are narrowly tailored to achieve that purpose, and are an integral component of the Debtor's reorganization, the Debtor respectfully requests that the Court approve the injunction provisions set forth in sections 14.01 and 14.02 of the Plan.

B. Section 1129(a)(2): The Plan Proponents Comply with Applicable Provisions of the Bankruptcy Code

47. Bankruptcy Code section 1129(a)(2) requires that the proponents of the Plan comply with applicable provisions of title 11. 11 U.S.C. § 1129(a)(2). The legislative history of section 1129(a)(2) reveals that this provision's intention is to encompass disclosure and solicitation requirements under Bankruptcy Code sections 1125 and 1126. *See* H.R. Rep. No. 95-595, at 412 (1977); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 759 (noting that the provision's legislative history "explains that this provision embodies the disclosure and solicitation requirements" under sections 1125 and 1126.). Following this Court's approval of the Disclosure Statement, the Debtor solicited votes. By soliciting votes on the Plan following the approval of the Disclosure Statement, the Plan Proponents have complied with the disclosure and solicitation requirements of sections 1125 and 1126, and thus the requirements of Bankruptcy Code section 1129(a)(2) have been satisfied.

C. Section 1129(a)(3): The Plan Has Been Proposed in Good Faith and is Not Forbidden by Law

48. Bankruptcy Code section 1129(a)(3) requires that a plan "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The good faith test requires the plan to be proposed "with honesty and good intentions" and with "a basis for expecting that a reorganization can be effected." *Johns-Manville*, 843 F.2d at 649. A plan proponent satisfies the good faith test "if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code." *In re Texaco Inc.*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988), citing *Hanson v. First Bank of South Dakota*, 828 F.2d 1310, 1315 (8th Cir. 1987). Courts have recognized that in determining whether a plan has been proposed in good faith, courts should evaluate each case "in light of the totality of the circumstances surrounding confirmation." *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994), citing *In re Jandous Elec. Constr. Corp.*, 115 B.R. 46, 52 (Bankr. S.D.N.Y. 1990).

49. The Plan's purpose and contents are honest, legitimate, and viable. The paramount objective of the Plan is preserving potentially valuable tax attributes and liquidating the Debtor's other remaining assets while distributing the value of the Debtor's estate in an equitable manner that is consistent with applicable law. The Plan satisfies this objective and in no way is an attempt to abuse the judicial process or delay the legitimate efforts of creditors to enforce their rights. The Plan is the product of arm's-length negotiations among the Debtor and its key creditor constituencies, including the Committee, which is a co-proponent of the Plan. The good faith negotiation, formation, and proposal of the Plan is further demonstrated by the fact that no party in interest has filed an objection to confirmation. *See* Flaton Declaration, at ¶ 4. For these reasons, the Plan satisfies the requirements of Bankruptcy Code section 1129(a)(3).

D. Section 1129(a)(4): The Payment for Certain Services and Expenses Is Subject to Court Approval

50. Bankruptcy Code section 1129(a)(4) requires that any postpetition payment "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, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). To date, all payments made to professionals for services to the Debtor and the Committee rendered after the Petition Date have been subject to approval by this Court pursuant to the terms of the compensation procedures outlined in the *Order Establishing Procedures for Interim Monthly Compensation and Reimbursement of Professionals* [Docket No. 72] and the various orders authorizing the Debtor's and the Committee's retention of professionals.

51. Section 2.03 of the Plan provides that professionals entitled to fees and expenses from the estate of the Debtor incurred prior to the Effective Date shall be paid by the Creditors' Trustee only after an order approving the allowance of such compensation becomes final, unless the compensation is pursuant to the Ordinary Course Professionals Order. Plan § 2.03. Section 13.01(c) of the Plan retains jurisdiction for the Bankruptcy Court to hear and determine any and all applications for allowance of compensation and reimbursement of expenses. Plan § 13.01(c). All compensation for services rendered after the Effective Date will be paid in the ordinary course and will not be subject to Court approval. Plan § 2.03. The Plan therefore complies with the requirements of Bankruptcy Code section 1129(a)(4).

E. Section 1129(a)(5): Necessary Information Regarding Directors and Officers of the Debtor Under the Plan Has Been Disclosed

52. Bankruptcy Code section 1129(a)(5) provides (i) the proponent of the plan must disclose the identity and affiliations of any individual proposed to serve as a director, officer, voting trustee of the debtor, an affiliate participating in a joint plan, or a successor to debtor

under the plan; (ii) that the appointment of such individuals is consistent with the interests of creditors, equity security holders, and with public policy; and (iii) that the proponent of the plan must disclose the identity of insiders that will be employed by the Reorganized Debtor and information about the compensation of these insiders. 11 U.S.C. § 1129(a)(5).

53. Pursuant to Section 6.05 of the Plan, upon the Effective Date, the Debtor's remaining officers and members of its board of directors will be deemed to have resigned if they had not already done so. Plan § 6.05. The initial board of directors of the Reorganized Debtor will consist of Lauren Krueger of Drivetrain LLC, who was appointed by the Committee and identified in the Plan Supplement. *Id.* The Debtor satisfied the requirements of 1129(a)(5) with the disclosure in the Plan Supplement. The selection of officers and directors for the Reorganized Debtor is consistent with the interests of creditors, equity security holders, and public policy in accordance with Bankruptcy Code section 1129(a)(5).

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

54. Bankruptcy Code section 1129(a)(6) provides that a plan may be approved only if "[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). Bankruptcy Code section 1129(a)(6) is inapplicable to the Plan because the Debtor's business does not, and the Reorganized Debtor's business will not, involve rates established, approved by, or subject to any governmental regulatory commission.

G. Section 1129(a)(7): The Plan Is in the Best Interests of Creditors and Interest Holders

55. Bankruptcy Code section 1129(a)(7) sets out a "best interests" test requiring that each holder of a claim or interest in an impaired class either (i) accept the plan, or (ii) receive or

retain property that is not worth less than the amount that the holder of the claim or interest would receive or retain as of the effective date of the plan if the debtor were liquidated under chapter 7. 11 U.S.C. § 1129(a)(7). The "best interests" test applies if there is not unanimity within a class of claims or interests regarding whether to accept a plan, even if the class as a whole has voted to accept the plan. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 n.13 (1999). The "best interests" test is generally satisfied by a liquidation analysis demonstrating that impaired classes will receive no less under the plan than in a chapter 7 liquidation.

56. Pursuant to Bankruptcy Code section 1126(f), each holder of a claim or interest in a class that is unimpaired is conclusively presumed to have accepted the Plan. Therefore, with respect to Class 1 (Secured Claims), Bankruptcy Code section 1129(a)(7) is not implicated because the creditors in Class 1 are unimpaired and are conclusively presumed to have accepted the Plan. Claims and interests in all other classes are impaired under the Plan; therefore, the "best interests" test must be applied to those classes.

57. To demonstrate compliance with Bankruptcy Code section 1129(a)(7), the Debtor has prepared a detailed liquidation analysis (the "**Liquidation Analysis**"), which estimates and compares proceeds under the Plan and a hypothetical chapter 7 liquidation. *See* Disclosure Statement, Exhibit B; Flaton Declaration, at ¶¶ 5-12. The Liquidation Analysis demonstrates that the estimated recovery under the Plan available to holders of impaired claims and interests is equal to or exceeds the estimated recovery available in a hypothetical chapter 7 liquidation. *See id*. Therefore, the Plan satisfies Bankruptcy Code section 1129(a)(7).

H. Section 1129(a)(8): Acceptance by Impaired Classes

58. Subject to Bankruptcy Code section 1129(b), section 1129(a)(8) mandates that each class of claims and interests has either accepted the plan or is not impaired under the plan.

11 U.S.C. § 1129(a)(8). Pursuant to Bankruptcy Code section 1126(c), a class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half of the number of claims in the class vote to accept the plan, counting only those claims whose holders participate in voting. 11 U.S.C. § 1126(c). A class that is unimpaired under a plan and each holder of a claim or interest in that class is conclusively presumed to have accepted the plan and solicitation of acceptances is not required with respect to such classes. 11 U.S.C. § 1126(f). A class is deemed to not accept a plan if the plan provides that the holders of such claims or interests do not receive or retain any property under the plan. 11 U.S.C. § 1126(g).

59. Holders of claims in Class 1 (Secured Claims) are unimpaired under the Plan and are therefore deemed to have accepted the Plan. 11 U.S.C. § 1126(f). In addition, Class 2 (General Unsecured Claims) has voted to accept the Plan within the meaning of Bankruptcy Code section 1126.

60. Holders of claims or interests in the Deemed Rejecting Classes are impaired and are not expected to receive any distribution pursuant to the Plan. Accordingly, the Deemed Rejecting Classes are deemed to have rejected the Plan under 11 U.S.C. § 1126(g). Because the Plan has not been accepted by the Deemed Rejecting Classes, the Plan Proponents seek confirmation under Bankruptcy Code section 1129(b) rather than Bankruptcy Code section 1129(a)(8). Thus, although section 1129(a)(8) has not been satisfied with respect to the Deemed Rejecting Classes, the Plan is confirmable because the Plan does not discriminate unfairly and is fair and equitable with respect to the Deemed Rejecting Classes and thus satisfies Bankruptcy Code section 1129(b) with respect to each such Class as described further below.

I. Section 1129(a)(9): The Plan Provides for the Payment in Full of All Allowed Priority Claims

61. Bankruptcy Code section 1129(a)(9) provides that unless the holder of a claim has agreed to different treatment, holders of claims under Bankruptcy Code sections 507(a)(2) or 507(a)(3) must receive cash equal to the amount of the claim. 11 U.S.C. § 1129(a)(9).

62. Pursuant to section 2.01 of the Plan, holders of Allowed Administrative Claims shall receive either cash equal to the unpaid portion of the claim or payment as agreed between the holder of the claim and the Debtor or the Creditors' Trustee. Pursuant to section 2.03 of the Plan, fees of professionals shall be paid as soon as practicable after a Final Order is entered approving the allowance of such compensation or reimbursement of expenses. Pursuant to section 2.04 of the Plan, each holder of an Allowed Priority Tax Claim shall receive payment in accordance with Bankruptcy Code section 1129(a)(9)(C) or payment as agreed between the holder of the claim and the Debtor or the Creditors' Trustee. Pursuant to section 2.05 of the Plan, each holder of an Allowed Priority Claim shall receive cash equal to the unpaid portion of the claim or payment as agreed between the holder of the claim and the Debtor or the Creditors' Trustee. Therefore, the Plan complies with Bankruptcy Code section 1129(a)(9).

J. Section 1129(a)(10): At Least One Class of Impaired Claims Has Accepted the Plan

63. Bankruptcy Code section 1129(a)(10) requires, "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). Class 2 (General Unsecured Claims) is the only impaired class under the Plan that was entitled to vote, and Class 2 has voted in favor of the Plan. Therefore, the requirements of Bankruptcy Code section 1129(a)(10) are satisfied.

K. Section 1129(a)(11): The Plan Meets the Feasibility Standard

64. Bankruptcy Code section 1129(a)(11) provides that a plan will only be confirmed if "[c]onfirmation 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 is commonly known as the "feasibility" standard and requires that the plan has "a reasonable likelihood of success" and is "workable." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. at 762. In making a feasibility determination, "a bankruptcy court does not need to know to a certainty, or even a substantial probability, that the plan will succeed. All it needs to know is that the plan has a reasonable likelihood of success." *In re Adelphia Bus. Sols., Inc.*, 341 B.R. 415, 422 (Bankr. S.D.N.Y. 2003).

65. The Plan provides for the Creditors' Trust and the Reorganized Debtor to continue doing essentially what the Debtor has been doing to date: liquidating the assets of the Debtor's estate in an orderly manner so as to maximize value for creditors. On the Effective Date, the Debtor's existing preferred and common stock will be cancelled and replaced with one new share of stock in the Reorganized Debtor issued to the Creditors' Trust for the benefit of the Creditors' Trust Beneficiaries. Plan §§ 6.06, 6.12. A new board of directors will be appointed for the Reorganized Debtor to continue the Debtor's limited operations and the orderly liquidation of the few assets not transferred to the Creditors' Trust (principally the Tax Attributes). Plan §§ 6.05, 6.08. This is basically the same model the Debtor has employed with success during the Chapter 11 Case. *See* Flaton Declaration, at ¶ 13. The Plan Proponents submit that the Plan satisfies the feasibility standard required by Bankruptcy Code section 1129(a)(11).

L. Section 1129(a)(12): All Statutory Fees Have or Will Be Paid

66. Bankruptcy Code section 1129(a)(12) provides that a court may confirm a plan only if "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). Pursuant to section 2.02 of the Plan, the outstanding fees due to the U.S. Trustee pursuant to 28 U.S.C. § 1930 and any applicable interest pursuant to 31 U.S.C. § 3717 shall be paid in full on or before the Effective Date. Plan § 2.02. The Plan therefore complies with Bankruptcy Code section 1129(a)(12).

M. Sections 1129(a)(13) through 1129(a)(16) Do Not Apply

67. Bankruptcy Code section 1129(a)(13) requires that a "plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of [the Bankruptcy Code] . . . for the duration of the period the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). Section 1129(a)(13) is not applicable because the Debtor is not obligated to provide retiree benefits.

68. Bankruptcy Code section 1129(a)(14) relates to the payment of domestic support obligations. 11 U.S.C. § 1129(a)(14). As the Debtor is not subject to any domestic support obligations, this section of the Bankruptcy Code does not apply.

69. Section 1129(a)(15) applies only in cases in which the Debtor is an "individual" as defined in the Bankruptcy Code. 11 U.S.C. § 1129(a)(15). As the Debtor is not an individual, Bankruptcy Code section 1129(a)(15) does not apply.

70. Bankruptcy Code section 1129(a)(16) provides that property transfers by a corporation or trust that is not a moneyed, business or commercial corporation or trust be made in accordance with the applicable provisions of non-bankruptcy law. 11 U.S.C. § 1129(a)(16).

As Debtor is a moneyed, business, or commercial corporation, section 1129(a)(16) is not applicable.

N. Confirmation of Plan Over Non-Acceptance of Deemed Rejecting Classes

71. The Plan satisfies the requirements of Bankruptcy Code section 1129(b). Notwithstanding the fact that the Deemed Rejecting Classes have not accepted the Plan, the Plan may be confirmed because: (a) the Voting Class voted to accept the Plan; (b) the Plan satisfies all requirements of Bankruptcy Code section 1129(a) other than section 1129(a)(8); and (c) the Plan does not discriminate unfairly and is fair and equitable with respect to the Deemed Rejecting Classes because there is no Class of equal priority receiving more favorable treatment than the Deemed Rejecting Classes and no Class that is junior to the Deemed Rejecting Classes is receiving or retaining any property on account of their Claims or Equity Interests. *See* Flaton Declaration, at ¶¶ 14-15. The Plan may therefore be confirmed even though not all Impaired Classes have voted to accept the Plan.

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CONCLUSION

For all of the foregoing reasons, the Plan Proponents respectfully submit that the Plan fully satisfies all applicable requirements under the Bankruptcy Code for confirmation of a chapter 11 plan and respectfully request that the Court enter the Confirmation Order.

Dated: August 4, 2016
New York, NY

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