**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF NEW YORK**

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| In re | Chapter 11 |
| LONG BEACH MEDICAL CENTER, et al., | Case No. 14-70593 (AST) |
| Debtors. | (Jointly Administered) |

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**MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED JOINT PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE OF LONG BEACH MEDICAL CENTER, ET AL.**

Dated: Great Neck, New York
August 11, 2017

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## PRELIMINARY STATEMENT

This Memorandum of Law (the "Memorandum") is submitted on behalf of Long Beach Medical Center ("LBMC") and Long Beach Memorial Nursing Home, Inc. d/b/a The Komanoff Center for Geriatric and Rehabilitative Medicine ("Komanoff" and collectively with LBMC, the "Debtors" or the "Plan Proponents", and each a "Debtor") in support of confirmation of *the First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al*., dated June 26, 2017 (as it may be amended, modified or supplemented, the "Plan"), pursuant to 11 U.S.C. § 1129.[1]

The Plan represents a successful and, most importantly, consensual conclusion to the Debtors' chapter 11 cases (the "Cases"). The proposed Plan is the culmination of extensive, arms-length negotiations throughout the Cases between the Debtors and various key constituencies to reach fair and equitable resolutions of the many complex business and legal issues presented by these Cases. The administration of these Cases has been, and continues to be, a collaborative effort between the Debtors and the Committee, the latter of which supports the Plan. Significantly, as a result of the efforts undertaken by the Plan Proponents in these Cases, the Debtors were able to ensure the continued provision of rehabilitation care for the Long Beach area, the preservation of employment for a significant portion of the Debtors' former employees, the preservation of significant asset value for the benefit of all creditors, and a dividend to the unsecured creditors in these cases.

As set forth in the *Declaration of Craig E. Johnson of Garden City Group, LLC Certifying the Methodology for the Tabulation of Votes and Results of Voting with Respect to the*

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in: (i) the *First Amended Disclosure Statement on First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al. Pursuant to Section 1125 of the Bankruptcy Code*, dated June 26. 2017 (the "Disclosure Statement"); (ii) the Plan; (iii) title 11 of the United States Code (the "Bankruptcy Code"); or (iv) the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), as applicable. Unless otherwise stated, all statutory references refer to the applicable sections of the Bankruptcy Code.

*First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al.* (the "Voting Declaration") [Docket No. 624], holders of Claims who submitted timely ballots voted to accept or reject the Plan as follows:

| **Voting Class** | **Accept** | | **Reject** | |
|---|---|---|---|---|
| | Amount | Number | Amount | Number |
| **LBMC 1 - Allowed PBGC Secured Claim** | $9,546,934.00<br>100% | 1<br>XX% | 0 | 0 |
| **LBMC 4 - Allowed FEMA Claims** | $6,275,037.61<br>100% | 6<br>100% | 0 | 0 |
| **LBMC 5 - Allowed General Unsecured Claims** | $2,396,119.58<br>96.69% | 89<br>95.70% | $82,068.62<br>3.31% | 4<br>4.30% |
| **LBMC 6 - Allowed PBGC Unsecured Claim** | $54,092,046.12<br>100% | 1<br>100% | 0 | 0 |
| **Komanoff 1 - Allowed PBGC Secured Claim** | $9,546,934.00<br>100% | 1<br>100% | 0 | 0 |
| **Komanoff 4 - Allowed FEMA Claims** | $25,446.39<br>100% | 5<br>100% | 0 | 0 |
| **Komanoff 5 - Allowed General Unsecured Claims** | $1,459,628.51<br>100% | 26<br>100% | 0 | 0 |
| **Komanoff 6 - Allowed PBGC Unsecured Claim** | $54,092,046.12<br>100% | 1<br>100% | 0 | 0 |

As evidenced by the voting results, the Voting Declaration, and the Declaration of Douglas Melzer, the Debtors' President, filed contemporaneously herewith, in support of the Plan (the "Melzer Declaration") [Docket No. ___], the Plan satisfies all applicable requirements of the Bankruptcy Code, including, without limitation, §§ 1122, 1123, 1125, 1126 and 1129, and is in the best interests of the Debtors' estates and their creditors. In addition, as will be further detailed in this Memorandum, the Plan has been proposed in good faith, is designed for swift confirmation and consummation and will enable the Debtors to concentrate their efforts towards winding up their remaining affairs, including the liquidation of any remaining assets, if any, for

the benefit of their creditors, resolving outstanding Claims against the Debtors' Estates, and preserving the funds available for distribution to the Debtors' creditors. Accordingly, the Plan Proponents respectfully submit that the Plan can and should be confirmed.

## I. STATEMENT OF FACTS

The facts relevant to confirmation of the Plan are set forth in the *Affidavit of Douglas Melzer Pursuant to Local Bankruptcy Rule 1007-4 and In Support of First Day Motions* [Docket No. 15], the Disclosure Statement, the Plan, the Plan Supplement, the Melzer Declaration, the Voting Declaration and any evidence presented or testimony that may be adduced or proffered at the Confirmation Hearing. These facts are incorporated by reference herein and, as necessary, will be referred to in connection with the discussion of applicable legal principles discussed below.

## II. CASE BACKGROUND

On February 19, 2014 (the "Petition Date"), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are continuing to administer their estates as debtors in possession pursuant to §§ 1107 and 1108.

On February 28, 2014, the Office of the United States Trustee appointed the Committee. The Committee engaged Klestadt Winters Jureller Southard Stevens, LLP as its bankruptcy counsel [Docket No. 92] and originally engaged Deloitte Transactions and Business Analytics LLP as its financial advisors [Docket No. 129]. Thereafter, the Committee retained Polsky Advisors LLC as its financial advisors from July 28, 2014 to September 30, 2014 [Docket No. 290] and Getzler Henrich & Associates LLC in the same capacity from October 1, 2014 to the present [Docket No. 294].[2]

[2] The retention of multiple financial advisors throughout the administration of these Cases is a result of Daniel Polsky, the individual advising the Committee, changing firms during the course of these Cases.

On May 17, 2017, the Plan Proponents filed the *Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al*. [Docket No. 592] and the *Disclosure Statement on Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al. Pursuant to Section 1125 of the Bankruptcy Code*. [Docket No. 591]). Subsequently, on June 26, 2017, the Debtors filed the *First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al*. [Docket No. 606] and the *First Amended Disclosure Statement on First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Long Beach Medical Center, et al. Pursuant to Section 1125 of the Bankruptcy Code* (the "Disclosure Statement") [Docket No. 605]. An Order Approving the Disclosure Statement was entered on June 29, 2017 [Docket No. 607] (the "Disclosure Statement Order").

## III. SUMMARY OF THE PLAN

The Plan provides, *inter alia*,[3]

(1) That each Holder of an Allowed Administrative Claim (other than of a Professional Fee Claim) shall receive an amount of Cash equal to the amount of such Allowed Administrative Claim: (1) on the Effective Date or, if not then due, when such Allowed Administrative Claim is due; (2) after the date on which an order of the Court Allowing such Administrative Claim becomes a Final Order; (3) in the ordinary course of business; (4) at such other time that is agreed to by the parties;

(2) that each Holder of an Allowed Priority Tax Claim shall receive payment in Cash from either Komanoff Remaining Cash or LBMC Remaining Cash, as applicable, in an amount equal to such Allowed Priority Tax Claim on or as soon as reasonably practicable after the later of (a) the Effective Date, or (b) the date on which such Claim becomes Allowed;

(3) that each Holder of an Allowed Professional Fee Claim shall be paid in Cash from Komanoff Remaining Cash or LBMC Remaining Cash, as applicable, in an amount equal to such Allowed Professional Fee Claim on

[3] The summary of the Plan is provided for the convenience of the Court and parties in interest. In the event of any inconsistency between the summary set forth in this Motion and the terms of the Plan, the terms of the Plan shall govern.

or as soon as reasonably practicable after the first Business Day following the date upon which such Claim becomes Allowed by Final Order, unless such Holder agrees to a different and less favorable treatment of such Claim;

(4) that the Holder of the LBMC Class 1 Claim shall receive, in Cash, from the proceeds of PBGC's Collateral up to $7,074,670.63 on the Effective Date, or as soon as thereafter practicable, or such other date as may be ordered by the Court or agreed to by the parties;

(5) that each Holder of an Allowed LBMC Class 2 Claim shall (a) be paid in full, in Cash, on (i) the Effective Date (ii) the date on which such LBMC Class 2 Claim becomes an Allowed Claim, or (iii) such other date as may be ordered by the Court; (b) shall receive the Collateral securing such LBMC Class 2 Claim; (c) receive such treatment that leaves unaltered the legal, equitable, and contractual rights to which the Holder of such Allowed LBMC Class 2 Claim is entitled; or (d) shall receive such other distribution as necessary to satisfy the requirements of § 1129 of the Bankruptcy Code;

(6) that each Holder of an Allowed LBMC Class 3 Claim shall be paid in full, in Cash, on (i) the Effective Date or as soon as practicable thereafter, (ii) if after the Effective Date, the date on which such Other Priority Claim becomes an Allowed Other Priority Claim, or (iii) such other date as may be ordered by the Court;

(7) that, in lieu of any distribution from LBMC Remaining Cash, the Holders of LBMC Class 4 Claims shall receive, in Cash, all amounts recoverable from FEMA and/or New York State, through the NYS FEMA Match Program, on account of their respective Claims;

(8) that each Holder of an Allowed LBMC Class 5 Claim shall be entitled to receive, in Cash:

(i) a pro-rata distribution of Net LBMC Proceeds up to 50% of the Tranche 1 Limit, plus, an amount of additional Net LBMC Proceeds equal to the difference, if any, between $750,000 (an amount equal to 50% of the Tranche 1 Limit) and any Distributable Value actually distributed to Holders of Allowed Komanoff Class 5 Claims; plus,

(ii) to the extent any Net LBMC Proceeds remain after the Debtors actually distribute Distributable Value, in the aggregate, up to the Tranche 1 Limit, a pro-rata distribution of Net LBMC Proceeds, to be shared pari-passu with the Holder of the LBMC Class 6 Claim, up to 50% of the Tranche 2 Limit, plus, an amount of additional Net LBMC Proceeds equal to the difference, if any, between

$625,000 (an amount equal to 50% of the Tranche 2 Limit) and any Distributable Value actually distributed to Holders of Komanoff Class 5 Claims; plus,

(iii) to the extent any Net LBMC Proceeds remain after the Debtors actually distribute Distributable Value, in the aggregate, up to the Tranche 2 Limit, and after PBGC receives full payment of the Subordination Amount, a pro-rata distribution of all remaining Net LBMC Proceeds, pari-passu with Holder of the LBMC Class 6 Claim;

(9) that, in exchange for full and final satisfaction, settlement, release, and discharge of the Allowed LBMC Class 6 Claim, PBGC and its successors, assigns, and affiliates shall be entitled to receive, in Cash:

(i) after the Debtors actually distribute Distributable Value up to the Tranche 1 Limit, a pro-rata distribution of Net LBMC Proceeds to be shared pari-passu with Holders of Allowed LBMC Class 5 Claims until the Debtors, in the aggregate, actually distribute Distributable Value up to the Tranche 2 Limit; plus,

(ii) after the Debtors, in the aggregate, actually distribute Distributable Value up to the Tranche 2 Limit, Net LBMC Proceeds up to the Subordination Amount; plus,

(iii) after the Debtors, in the aggregate, actually distribute Distributable Value up to the Tranche 2 Limit, and after PBGC receives full payment of the Subordination Amount, a pro-rata distribution of Net LBMC Proceeds pari-passu with Holders of Allowed LBMC Class 5 Claims;

(10) that the Holder of the Komanoff Class 1 Claim shall receive, in Cash, from the proceeds of PBGC's Collateral up to $7,074,670.63, less any payments by LBMC made pursuant to Section 4.1 of the Plan on account of the LBMC Class 1 Claim, on the Effective Date, or as soon as thereafter practicable, or such other date as may be ordered by the Court or agreed to by the parties;

(11) that, each Holder of an Allowed Komanoff Class 2 Claim shall (a) be paid in full, in Cash, on (i) the Effective Date, (ii)the date on which such Komanoff Class 2 Claim becomes an Allowed Claim, or (iii) such other date as may be ordered by the Court; (b) shall receive the Collateral securing such Komanoff Class 2 Claim; (c) shall receive such treatment that leaves unaltered the legal, equitable, and contractual rights to which the Holder of such Allowed Komanoff Class 2 Claim is entitled; or (d) shall receive such other distribution as necessary to satisfy the requirements of § 1129 of the Bankruptcy Code;

(12) that each Holder of an Allowed Komanoff Class 3 Claim shall be paid in full in Cash on (i) the Effective Date or as soon as practicable thereafter, (ii) if after the Effective Date, the date on which such Other Priority Claim becomes an Allowed Other Priority Claim, or (iii) such other date as may be ordered by the Court;

(13) that, in lieu of any distribution from Komanoff Remaining Cash, the Holders of Komanoff Class 4 Claims shall receive, in Cash, all amounts recoverable from FEMA and/or New York State, through the NYS FEMA Match Program, on account of their respective Claims.

(14) That each Holder of an Allowed Komanoff Class 5 Claim shall be entitled to receive, in Cash:

(i) a pro-rata distribution of Net Komanoff Proceeds up to 50% of the Tranche 1 Limit, plus, an amount of additional Net Komanoff Proceeds equal to the difference, if any, between $750,000 (an amount equal to 50% of the Tranche 1 Limit) and any Distributable Value actually distributed to Holders of Allowed LBMC Class 5 Claims; plus,

(ii) to the extent any Net Komanoff Proceeds remain after the Debtors actually distribute Distributable Value, in the aggregate, up to the Tranche 1 Limit, a pro-rata distribution of Net Komanoff Proceeds, to be shared pari-passu with the Holder of the Komanoff Class 6 Claim, up to 50% of the Tranche 2 Limit, plus, an amount of additional Net Komanoff Proceeds equal to the difference, if any, between $625,000 (an amount equal to 50% of the Tranche 2 Limit) and any Distributable Value actually distributed to Holders of LBMC Class 5 Claims; plus,

(iii) to the extent any Net Komanoff Proceeds remain after the Debtors actually distribute Distributable Value, in the aggregate, up to the Tranche 2 Limit, and after PBGC receives full payment of the Subordination Amount, a pro-rata distribution of all remaining Net Komanoff Proceeds, pari-passu with the Holder of Komanoff Class 6 Claim; and

(15) that, in exchange for full and final satisfaction, settlement, release, and discharge of the Allowed Komanoff Class 6 Claim, PBGC and its successors, assigns, and affiliates shall be entitled to receive, in Cash:

(i) after the Debtors actually distribute Distributable Value up to the Tranche 1 Limit, a pro-rata distribution of Net Komanoff Proceeds to be shared pari-passu with Holders of Allowed Komanoff Class 5 Claims until the Debtors, in the aggregate, actually distribute Distributable Value up to the Tranche 2 Limit; plus,

(ii) after the Debtors, in the aggregate, actually distribute Distributable Value up to the Tranche 2 Limit, Net Komanoff Proceeds up to the Subordination Amount; plus

(iii) after the Debtors, in the aggregate, actually distribute Distributable Value up to the Tranche 2 Limit, and after PBGC receives full payment of the Subordination Amount, a pro-rata distribution of Net Komanoff Proceeds pari-passu with Holders of Allowed Komanoff Class 5 Claims.

## IV. PROPOSED PLAN MODIFICATIONS

*United States Department of Health and Human Services*

In response to an informal objection received by the Debtors on behalf of the United States Department of Health and Human Services (the "HHS") concerning the potential impact of the Plan on HHS' enforcement, set off and/or recoupment rights, the Debtors have agreed to include certain language in the confirmation order (the "Confirmation Order") confirming that the Medicare Provider Agreement and Provider Number 33-5432 was transferred pursuant to and in compliance with the terms and conditions contained in the Medicare Provider Agreement and Medicare's statutes and regulations and policies incorporated by reference therein.

*Frozen Records*

As noted in the Disclosure Statement, certain records damaged during Superstorm Sandy were removed, frozen and stored (the "Frozen Records") by Northstar Recovery Services, Inc., or a subcontractor or affiliate thereof (collectively, "Northstar"). Subsequent to dissemination of the Disclosure Statement, the Debtors and Northstar continued working towards a long-term solution for the Frozen Records. It appears that the Debtors and Northstar have reached an agreement in principle regarding the Frozen Records, subject to agreement on language to include in the Confirmation Order, which will provide for, among other things, the continued storage and ultimate destruction of the Frozen Records.

## V. PLAN SOLICITATION AND VOTING RESULTS

On June 29, 2017, the Bankruptcy Court entered the Disclosure Statement Order [Docket No. 607], approving the Disclosure Statement [Docket No. 605] and establishing procedures for solicitation of the Plan (the "Solicitation Procedures"). Among other things, the Solicitation Procedures established a voting deadline of August 7, 2017 at 4:00 p.m.

Following the entry of the Disclosure Statement Order and in accordance therewith, the Debtors timely completed solicitation of votes on the Plan. Specifically, the Plan Proponents caused to be transmitted a solicitation package (the "Solicitation Package") containing a copy or conformed version of: (a) a written notice (the "Confirmation Hearing Notice") of (i) the approval of the Disclosure Statement, (ii) the website address to access the Disclosure Statement Order (without exhibits), as approved by the Court, the Disclosure Statement, and the Plan, (iii) contact information for parties wishing to request a hard copy of such documents from GCG; (iv) the date of the Confirmation Hearing, (v) the deadline and procedures for filing objections to confirmation of the Plan, (vi) the treatment of certain contingent, unliquidated and disputed claims for notice and voting purposes, and (vii) the voting deadline for receipt of ballots; and (b) an appropriate ballot with instructions attached thereto and postage prepaid, pre-addressed ballot return envelope, to all known holders of Claims as of June 29, 2017 in LBMC and Komanoff Classes 1, 4, 5, and 6, (the "Voting Parties"), which were the only Classes entitled to vote on the Plan. *See* Voting Declaration ¶ 7.

Additionally, as also required under the Disclosure Statement Order, the Plan Proponents caused to be transmitted to holders of Administrative Claims, Priority Tax Claims, Professional Fee Claims, LBMC Allowed Other Secured Claims (LBMC Class 2), LBMC Allowed Priority Non-Tax Claims (LBMC Class 3), Komanoff Allowed Other Secured Claims (Komanoff Class 2) and Komanoff Allowed Priority Non-Tax Claims (Komanoff Class 3), (collectively, the "Non-

Voting Parties") a notice (the "Non-Voting Notice") of: (i) the approval of the Disclosure Statement, (ii) the website address to access the Disclosure Statement Order (without exhibits), as approved by the Court, the Disclosure Statement, and the Plan (iii) contact information for parties wishing to request a hard copy of such documents from GCG; (iv) the date of the Confirmation Hearing, and (v) the deadline and procedures for filing objections to confirmation of the Plan. *See* Voting Declaration ¶ 8.

In addition to the foregoing, the Plan Proponents also timely published the Confirmation Hearing Publication Notice in *Newsday* on July 7, 2017, as further required by the Disclosure Statement Order. *See* Affidavit of Publication of Debra Wolther [Docket No. 618].

Pursuant to the Disclosure Statement Order, the deadline to return ballots accepting or rejecting the Plan was set as August 7, 2017 at 4:00 p.m. (prevailing Eastern Time), unless previously extended by the Plan Proponents. As set above, the Plan Proponents received overwhelming acceptance of the Plan from each Class of creditors entitled to vote on the plan. *See* Voting Declaration ¶ 23.

## VI. THE PLAN MEETS THE REQUIREMENTS FOR CONFIRMATION

To confirm the Plan, the Plan Proponents must demonstrate by a preponderance of the evidence that the Plan satisfies each of the requirements of § 1129. *See In re Sabine Oil & Gas Corp., 555 B.R. 180, 310 (Bankr. S.D.N.Y. 2016), motion to certify appeal denied, No. 16-CV-2561 (JGK), 2016 WL 6238616 (S.D.N.Y. Oct. 25, 2016), and appeal dismissed as moot, No. 16 CIV. 6054 (LAP), 2017 WL 477780 (S.D.N.Y. Feb. 3, 2017); In re Bally Total Fitness of Greater N.Y., Inc.*, No. 07-12395, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007). *See also*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648 (2d Cir. 1988) (plan must comply with § 1129(a) requirements). For the reasons described herein, and the Melzer Declaration, and as will

be demonstrated at the Confirmation Hearing, the Plan presented by the Plan Proponents satisfies all of the applicable requirements of § 1129. Accordingly, the Plan should be confirmed.

### A. THE PLAN MEETS EACH OF THE REQUIREMENTS UNDER SECTION 1129 OF THE BANKRUPTCY CODE

Section 1129(a) provides that a chapter 11 plan for a corporate debtor shall be confirmed if:

(1) The plan complies with the applicable provisions of title 11;

(2) The plan proponent has complied with the applicable provisions of title 11;

(3) The plan has been proposed in good faith and not by any means forbidden by law;

(4) Any payment made or to be made for services or for costs and expenses incurred in or in connection with the case or the plan has been approved by, or is subject to the approval of, the court as reasonable;

(5) The plan proponent has disclosed: (i) the identity and affiliations of any individual proposed to serve as an officer or director of the debtor(s) after confirmation (and the appointment to or continuance in such office by such individual is consistent with the interests of creditors and equity security holders and with public policy); and (ii) the identity of any insider that will be employed or retained by the reorganized debtor(s) and the nature of any compensation for such insider;

(6) [Not applicable][4];

(7) Each holder of a claim or interest in an impaired class has either 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 liquidated under chapter 7;

(8) Each class of claims or interests has either accepted the plan or is not impaired under the plan;

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that: (A) with respect

[4] Sections 1129(a)(6) (regarding changes in rates that require regulatory approval of any government agency), 1129(a)(13) continuation of retiree benefits, 1129(a)(14) (regarding domestic support obligations), and 1129(a)(15) (regarding individual debtors) are inapplicable to the Debtors.

to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of title 11, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (B) with respect to a class of claims of a kind specified in Section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of title 11, each holder of a claim of such class will receive (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and (C) with respect to a claim of a kind specified in Section 507(a)(8), the holder of such claim will receive on account of such claim regular installment payments in cash, as set forth in more detail in Section 1129(a)(9)(C);

(10) 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;

(11) Confirmation of the plan is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor;

(12) The plan provides for payment on or prior to the effective date of all fees payable under 28 U.S.C. § 1930;

(13) [Not Applicable][4];

(14) [Not Applicable][4];

(15) [Not Applicable][4]; and

(16) Transfers of property of the plan are to be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

*See* 11 U.S.C. § 1129(a)(1)-(16). Section 1129(b) provides, in pertinent part, that if a plan satisfies all of the requirements of § 1129(a) other than § 1129(a)(8), a plan may be confirmed if it does not discriminate unfairly, and is fair and equitable, with respect to each class of impaired claims that has not voted to accept the plan.[5]

[5] While the Debtors assert that §1129(a)(8) has been satisfied as to each of the respective Debtors, the Debtors reserve the right to rely upon §1129(b) to the extent it becomes necessary.

As set forth in the Disclosure Statement and the Melzer Declaration, and as demonstrated herein, the Plan satisfies each of the requirements, to the extent applicable, of §§ 1129(a) and therefore should be confirmed.

**1. Section 1129(a)(1) — The Plan Complies with the Applicable Provisions of Title 11**

Pursuant to § 1129(a)(1), a plan must comply "with the applicable provisions of [title 11]," and the plan proponent bears the burden of proving compliance with each statutory requirement for chapter 11 plans. *See In re RYYZ, LLC*, 490 B.R. 29, 39 (Bankr. E.D.N.Y. 2013); *In re Fur Creations by Varriale, Ltd*., 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995). Although broadly drafted, the legislative history of § 1129(a)(1) indicates that this provision is directed at compliance with §§ 1122 and 1123, which govern the classification of claims and the contents of a plan, respectively. *See H.R. Rep.* No. 95-595, at 412 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; S. Rep. No. 95-989, at 126 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; *see also In re Johns-Manville Corp*., 843 F.2d 636, 648-49 (2d Cir. 1988) (noting that it is "doubtful that violations of Code provisions unrelated to the form and content of a plan, such as voting procedures, implicate subsection 1129(a)(1) at all."); *In re Texaco Inc.*, 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988) ("In determining whether a plan complies with Section 1129(a)(1), reference must be made to Code §§ 1122 and 1123 with respect to the classification of claims and the contents of a plan of reorganization.") (citation omitted), *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1988). As demonstrated below, the Plan complies fully with the requirements of both §§ 1122 and 1123 and therefore satisfies § 1129(a)(1).

**a. Section 1122 of the Bankruptcy Code is Satisfied – Classification of Claims and Interests**

The plan complies with § 1122. Section 1122(a) provides that a plan may place a claim or interest in a particular class only if it is substantially similar to other claims or interests in the

class. *See* 11 U.S.C. § 1122(a). "Substantially similar" generally has been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests in a debtor. *See In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 714, 715-716 (Bankr. S.D.N.Y. 1992), *order aff'd*, 140 B.R. 347 (S.D.N.Y. 1992) ("*Drexel I*"). "[C]lassification is constrained by two straight-forward rules: Dissimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason". *In re Chateaugay,* 89 F.3d 942, 949 (2nd Cir 1996).

The Plan properly classifies all Claims filed against the Debtors. Article III of the Plan provides for the separate classification of such Claims into twelve distinct Classes, six for each Debtor, based upon differences in the legal nature or priority of those Claims: LBMC Allowed PBGC Secured Claim (LBMC Class 1); LBMC Allowed Other Secured Claims (LBMC Class 2); LBMC Allowed FEMA Claims (LBMC Class 3); LBMC Allowed Priority Non-Tax Claims (LBMC Class 4); LBMC Allowed General Unsecured Claims (LBMC Class 5); LBMC Allowed PBGC Unsecured Claim (LBMC Class 6); Komanoff Allowed PBGC Secured Claim (Komanoff Class 1); Komanoff Allowed Other Secured Claims Other Priority Claims (Komanoff Class 2); Komanoff Allowed FEMA Claims (Komanoff Class 3); Komanoff Allowed Priority Non-Tax Claims (Komanoff Class 4); Komanoff Allowed General Unsecured Claims (Komanoff Class 5); and Komanoff Allowed PBGC Unsecured Claim (Komanoff Class 6). The legal rights under the Bankruptcy Code of each of the holders of Claims within a particular Class are substantially similar to other holders of Claims within that Class.

The Classes established under the Plan are separately classified because each such Class comprises distinct types of Claims. LBMC and Komanoff Class 1 consist of the Allowed PBGC Secured Claim against each Debtor, which PBGC stipulated to modify. LBMC and Komanoff

Class 2 consist of Other Secured Claims against each Debtor, with each such Holder considered a separate sub-class. LBMC and Komanoff Classes 1 and 2 are properly classified separately, as PBGC's Secured Claim against each Debtor is subject to the terms of the PBGC Settlement approved earlier in these Cases while each Allowed Other Secured Claim is secured by their respective collateral with differing priority rights. LBMC and Komanoff Class 3 Claims consist of Allowed Priority Non-Tax Claims against each Debtor which are entitled to unique priority treatment pursuant to certain subsections of § 507 of the Bankruptcy Code. LBMC and Komanoff Class 4 consist of Allowed FEMA Claims which are to be repaid from third party sources, namely FEMA and the NYS FEMA Match Program. Moreover, unlike other creditors in these Cases, Holders of LBMC and Komanoff Class 4 Claims have, in most instances, already received a 90% distribution on account of their Claims. *See In re Hyatt*, 509 B.R. 707, 717 (Bankr. D.N.M. 2014) (holding that a third party source of payment or third party collateral securing a debt distinguishes such claims from other general unsecured claims and serves as a sufficient basis to include such claims in a separate class); *Cf. In re Johnston*, 21 F.3d 323, 328 (9th Cir.1994) (claim that is partially secured by collateral of a non-debtor is not substantially similar to other unsecured creditors and may be classified separately); *In re Loop 76, LLC*, 465 B.R. 525, 541 (9th Cir. BAP 2012) (under *Johnston*, a bankruptcy court may "consider the existence of a third-party source for payment, including a guarantor, when determining whether unsecured claims are substantially similar under § 1122(a).").[6] LBMC and Komanoff Class 5 consist of Allowed General Unsecured Claim against each Debtor, and LBMC and Komanoff Class 6 consist of the Allowed PBGC Unsecured Claim against each Debtor. Class 5 and Class 6 Claims have been separately classified due to the agreement of the PBGC to voluntarily

[6] A third party source of payment is distinguishable from a third party personal guarantee. See *In re 18 RVC, LLC*, 485 B.R. 492 (Bankr. E.D.N.Y. 2012) (denying separate classification of a deficiency claim solely on the existence of a personal guarantee by the debtor's principal.

subordinate a portion of its claim against each Debtor. The terms of that agreement have been incorporated into the Plan which has been voted on by the various constituents in these cases.

Overall, the Plan contains, as against each Debtor: (i) two Classes of Unimpaired Claims (LBMC and Komanoff Classes 2 and 3), (ii) four Classes of Impaired Claims (LBMC and Komanoff Classes 1, 4, 5, and 6). Accordingly, the Plan Proponents submit that the classification structure embodied in the Plan is both reasonable and appropriate under § 1122(a).

**b. Mandatory Contents of a Plan**

Section 1123(a) identifies eight mandatory requirements for the contents of a chapter 11 plan, seven of which are applicable to a corporate debtor. *See* 11 U.S.C. § 1123(a).[7] As set forth below, the Plan fully complies with each such requirement:

(i) Compliance with Section 1123(a)(1)

Section 1123(a)(1) provides, in relevant part, that a plan must "designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests." 11 U.S.C. § 1123(a)(1). In accordance with these requirements, Article III of the Plan designates six Classes of Claims against each Debtor, other than those specified in §§ 507(a)(2), (3), and (8). Administrative Claims and Priority Tax Claims are not classified but treated separately in Article II of the Plan. Thus, the Plan complies with § 1123(a)(1).

(ii) Compliance with Section 1123(a)(2)

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). Article III of the Plan specifies that LBMC and Komanoff Classes 2 and 3 are not impaired under the Plan and are thus conclusively presumed to have accepted the Plan. Therefore, the Plan complies with § 1123(a)(2).

[7] Section 1123(a)(8) is inapplicable as the Debtors are not individual debtors.

(iii) Compliance with Section 1123(a)(3)

Section 1123(a)(3) further requires that a plan must also "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article IV of the Plan specifies the treatment of the Impaired LBMC and Komanoff Class 1, 4, 5, and 6 Claims. Accordingly, the Plan complies with § 1123(a)(3).

(iv) Compliance with Section 1123(a)(4)

Section 1123(a)(4) requires that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). As reflected in the treatment set forth in Article IV of the Plan, the Plan provides for the same treatment for each Claim within a particular Class, unless the holder of a particular claim agrees to a less favorable treatment of such claim. Consequently, the Plan satisfies the requirements of § 1123(a)(4).

(v) Compliance with Section 1123(a)(5)

Section 1123(a)(5) requires that a plan must "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). On its Effective Date, the Plan will be implemented and consummated in accordance with the provisions of Article V of the Plan. Specifically, the Plan provides for, *inter alia:*

- the funding of required distributions under the Plan from, among other things, collections, the proceeds of sale of substantially all of the Debtors' assets, payments from third parties, including, without limitation FEMA and New York State, pursuant to the NYS FEMA Match Program or otherwise, and the proceeds of the liquidation or other disposition of the remaining Assets of the Debtors, if any;

- vesting of the Assets in the respective Debtors free and clear of all Claims, liens, encumbrances, charges interests and other rights and interests of Creditors arising on or before the Effective Date, but subject to the terms and conditions of the Plan and the Confirmation Order;
- the continued existence of the Debtors, after the Effective Date, for purposes of (i) winding up their affairs as expeditiously as reasonably possible, (ii) liquidating, by conversion to Cash or other methods, of any remaining Assets as expeditiously as reasonably possible, (iii) enforcing and prosecuting Causes of Action, interests, rights and privileges of the Debtors, (iv) resolving Disputed Claims, (v) administering the Plan, (vi) filing appropriate tax returns and (vii) performing all such other acts and conditions required by and consistent with consummation of the terms of the Plan and the wind down of their affairs;
- the appointment of a Plan Administrator, to act for the Debtors in a fiduciary capacity and with powers and duties including, inter alia, the power to withdraw and make distributions of Cash to holders of Allowed Claims, to pay taxes and other obligations of the Debtors incurred in connection with the wind-down of their Estates, to dispose of any remaining Assets, to ensure compliance with any accounting, finance and reporting obligations of the Debtors, to object to claims and to act on behalf of the Debtors in adversary proceedings and contested matters;[8] and

[8] For a comprehensive list of the Plan Administrator's powers and obligations, please refer to Section 5.7 of the Plan.

- the establishment of a Disputed Claims Reserve Account on the Effective Date to hold Cash for distributions to holders of Disputed Claims that subsequently become Allowed Claims.

Accordingly, for the foregoing reasons, the Plan provides adequate means for its implementation, thereby satisfying § 1123(a)(5).

(vi) Compliance with Section 1123(a)(6)

Section 1123(a)(6) provides, in relevant part, that a plan must provide for the inclusion in the charter of the debtor, if the debtor is a corporation, a provision (i) prohibiting the issuance of nonvoting equity securities, and (ii) an appropriate distribution of voting power among those securities possessing voting power. *See* 11 U.S.C. § 1123(a)(6). Section 1123(a)(6) is inapplicable because the Debtors are not-for-profit organizations and therefore have no securities. Moreover, the Debtors are liquidating under the Plan and will not be issuing any stock or other securities under the Plan.

(vii) Compliance with Section 1123(a)(7)

Section 1123(a)(7) provides that a plan must "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Pursuant to Section 5.6 of the Plan, on the Effective Date, the Debtors' boards shall be deemed to have resigned therefrom, and shall be relieved of all further responsibilities with the operation of the Debtors becoming the general responsibility of the Plan Administrator in accordance with the Plan. Specifically, under Section 5.7 of the Plan, and upon the consent of the Committee, the Plan Administrator shall be appointed in the Confirmation Order as the representative for the Debtors and their Estates for purposes of administering and consummating the Plan. Section 5.9 of the Plan provides for the

procedures to determine a successor to the Plan Administrator, in the case of the Plan Administrator's resignation, death or removal. The Plan therefore appropriately provides for the appointment of a representative of the Debtors, and the Debtors submit that this appointment (a) is wholly consistent with the interests of creditors and with public policy and (b) complies with the requirements of § 1123(a)(7).

**c. Permitted Contents of a Plan**

Section 1123(b) sets forth permissive provisions that may be incorporated into a Chapter 11 plan. *See* 11 U.S.C. § 1123(b). The Plan contains the following permissive provisions allowed by § 1123(b):

- In accordance with § 1123(b)(1), the Plan impairs or leaves unimpaired Classes of Claims (Plan, Articles III and IV);
- In accordance with § 1123(b)(2), the Plan provides for the rejection of the Debtors' executory contracts and unexpired leases not previously assumed or rejected under § 365 of the Bankruptcy Code (Plan, Article VIII);
- In accordance with § 1123(b)(3)(B), the Plan provides for the retention of Causes of Action, except those expressly released under the Plan (Plan, Section 5.11);
- In accordance with § 1123(b)(5), the Plan modifies the rights of holders of secured and unsecured claims in classes 1, 4, 5, and 6 of the respective estates and leaves unaffected those rights of holders of claims in classes 2 and 3 of the respective estates (Plan, Article IV); and
- Pursuant to § 1123(b)(6), the Plan "may include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). In accordance such provision, the Plan provides for various integral

components of the Debtors' proposed liquidation, including the appointment of The Plan Administrator and outlining of her powers and obligations, (Plan, Section 5); the establishment of procedures for resolving Disputed Claims and making distributions on account of such Disputed Claims once resolved (Plan, Section 9.2), and the retention of jurisdiction by the Bankruptcy Court over certain matters after the Effective Date (Plan, Section 12.1).

Additionally, the Plan is dated and identifies the names of the entities that have submitted the Plan, in compliance with Bankruptcy Rule 3016(a). These permissive provisions are consistent with § 1123(b) and other applicable provisions of the Bankruptcy Code.

Based upon the foregoing, the Plan fully complies with the requirements of §§ 1122 and 1123 and, thus, satisfies the requirements of § 1129(a)(1).

**2. Section 1129(a)(2) - The Plan Proponents Have Complied With Applicable Provisions of Title 11**

While §1129(a)(1) focuses on a plan's compliance with the Bankruptcy Code, § 1129(a)(2) focuses on the plan proponent's compliance. *See* 11 U.S.C. § 1129(a)(2). The legislative history of this provision indicates that its principal purpose is to ensure that the proponent complies with the disclosure and solicitation requirements set forth in §§ 1125 and 1126. *See* H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6369; S. Rep. NO. 95-989, at 126 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 ("Paragraph (2) [of section 1129(a)(1) requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re Johns-Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986) ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the

Code"), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.*, *In re Johns-Manville Corp*., 843 F.2d 636 (2d Cir. 1988).

The Plan Proponents have complied with § 1125 by obtaining approval of the Disclosure Statement as containing adequate information prior to soliciting votes on the Plan. In addition, as set forth above, and in the affidavit of service of Emily Young of GCG, Inc., sworn to on July 7, 2017 [Docket No. 612], all persons or entities entitled to receive notice of the Disclosure Statement, the Plan, and the Confirmation Hearing received timely, proper, and adequate notice, including all relevant deadlines relating to the submission of ballots and the filing of objections to the confirmation of the Plan. The Confirmation Hearing Publication Notice was also timely published. *See Affidavit of Publication* [Docket No. 618]. As such, the Plan Proponents have satisfied the requirements of § 1129(a)(2). *See In re Drexel Burnham Lambert*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (§ 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to the plan).

**3. Section 1129(a)(3) — The Plan Has Been Proposed in Good Faith**

Section 1129(a)(3) requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3); *see also In re Jandous Elec. Constr. Corp*., 115 B.R. 46, 51 (Bankr. S.D.N.Y. 1990). The good faith prong of this test requires that the plan be proposed "with honesty and good intentions." *In re Johns-Manville Corp*., 843 F.2d at 649 (citations omitted); *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 261 (Bankr. S.D.N.Y. 2014); *In re The Leslie Fay Companies, Inc.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997). In determining whether a plan has been proposed in good faith, courts have recognized they should avoid applying hard and inflexible rules, and instead should evaluate each case on its merits. *See In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994).

Additionally, the plan must be consistent with the objectives and purposes of the Bankruptcy Code. *See, e.g., In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002) ("A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the [Bankruptcy] Code."). Good faith for purposes of § 1129(a)(3) may also be found where the plan is supported by key creditor constituencies, or was the result of extensive arms-length negotiations with creditors. *See Leslie Fay,* 207 B.R. at 781 ("The fact that the plan is proposed by the committee as well as the Debtor is strong evidence that the plan is proposed in good faith.").

Here, the Plan has been proposed in good faith by Plan Proponents and is designed to effectuate the objectives and purposes of the Bankruptcy Code by providing for (a) the distribution of proceeds generated by the sale of the Debtors' assets in accordance with the practices dictated by the Bankruptcy Code (b) the liquidation of the Debtors' remaining assets, if any, and (c) the winding up of the Debtors' affairs, all so as to maximize recoveries to creditors. As set forth herein and further detailed in the Disclosure Statement, the Debtors have consummated the sale of substantially all of their assets in accordance with Orders of this Court approving such sales. The sale process itself was effectuated with the full involvement, input and support of the Committee and ultimately led to an increase in the purchase price from the original stalking horse bid, thereby enabling the Debtors to maximize distributions to creditors.

The Committee's involvement was also pervasive in the development of the Plan, as the Debtors engaged the Committee extensively while drafting. The Plan is the result of extensive litigation pursued together by the Debtors and the Committee and the joint resolution and/or settlement of complex issues which formed the construct of the Plan. Indeed, the litigation, negotiations and discussions that took place throughout these cases addressed, among other

things, (a) the resolution and settlement of Claims, (b) the treatment of Claims, (c) the means of implementing the Plan (e.g., the appointment of the Plan Administrator) (d) the separation of the Debtors' Estates, (e) the releases, injunctions, and exculpation provisions and (f) other specific provisions of the Plan. The Plan Proponents submit that the Plan provides the best means for maximizing the value of the Debtors' estates and the return to creditors and the Committee provided a letter in support of the Plan to all Creditors who were entitled to vote on the Plan. Accordingly, the Plan Proponents submit that the good faith requirement of § 1129(a)(3) is satisfied.

The second prong of § 1129(a)(3) requires that the plan not contravene any applicable non-bankruptcy law. *See In re Koelbl,* 751 F.2d 137, 139 (2d Cir. 1984). The Plan Proponents believe that the provisions of the Plan are also consistent with applicable non-bankruptcy law. In light of the foregoing, the Plan Proponents have satisfied all requirements of § 1129(a)(3).

**4. Section 1129(a)(4) - All Payments to Be Made By the Debtors in Connection With its Case Are Subject to the Approval of the Bankruptcy Court**

Section 1129(a)(4) requires, in relevant part, that all payments made by the debtor for services or for costs and expenses incurred in connection with its case or its plan be approved by the Bankruptcy Court as reasonable. *See* 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval as to their reasonableness by the Bankruptcy Court. *See Drexel,* 138 B.R. at 760; *Johns-Manville,* 68 B.R. at 632.

As set forth in Section 2.4(a) of the Plan, all Professionals requesting compensation or reimbursement of Professional Fee Claims for services rendered before the Effective Date of the Plan shall file an application for final allowance of compensation and reimbursement of expenses. Any Professional Fee Claim that is not asserted in accordance with this Section 2.4(a)

shall be deemed Disallowed under the Plan and the holder thereof shall be enjoined from commencing or continuing any Cause of Action, employment of process or act to collect, offset, recoup or recover such Claim against the Estates or any of their respective Assets or property. All compensation and reimbursement of expenses allowed by the Bankruptcy Court shall be paid to the applicable Professional on or as soon as reasonably practicable after the first Business Day following the date upon which such Professional Fee Claim becomes Allowed by Final Order *See* Plan, Section 2.4(b). Consequently, professional fees in the chapter 11 case are subject to the approval of the Bankruptcy Court for reasonableness. In addition, Section 12.1 of the Plan provides that the Bankruptcy Court will retain jurisdiction after the Effective Date to hear and determine all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan.

The foregoing procedures under the Plan concerning the Bankruptcy Court's review and ultimate determination of the pre-Effective Date professional fees and expenses to be paid by the Debtors comply with the requirements of § 1129(a)(4).

**5. Section 1129(a)(5) — The Plan Proponents Have Disclosed Required Information Regarding Post-confirmation Management and Insiders**

Section 1129(a)(5) provides that a chapter 11 plan may be confirmed only if the proponent discloses the identity of those individuals who will serve as post-confirmation management of the debtor, the identity of any insider to be employed or retained by the debtor post-confirmation and the nature of any compensation proposed to be paid to such insider. *See* 11 U.S.C. § 1129(a)(5). In addition, under § 1129(a)(5)(A)(ii), the appointment or continuation in office of management must be consistent with the interests of creditors, equity security holders and public policy. *Id*.

Because the Plan provides for the liquidation of the Debtors' remaining assets and given that the Debtors are no longer operating entities, there are no provisions included in the Plan for the appointment or continuation of the management for the Debtors, except that Lori Lapin Jones, at the selection of the Debtors, will be Plan Administrator pursuant to Section 5.7 of the Plan, as supplemented by the Plan Supplement. Section 5.7 of the Plan, together with the Plan Supplement, also sets forth the compensation to be paid to the Plan Administrator. The Plan Proponents submit that the appointment of the Plan Administrator, with the duties and powers set forth in Section 5.7 of the Plan, is consistent with the interests of the creditors and public policy. Accordingly, the Plan Proponents have satisfied the requirements of § 1129(a)(5).

**6. Section 1129(a)(6) — The Plan Does Not Provide for Any Rate Change Subject to Regulatory Approval**

Section 1129(a)(6) requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) is inapplicable to here because the Plan does not provide for any rate changes.

**7. Section 1129(a)(7) — The Plan is in the "Best Interests" of Creditors**

Section 1129(a)(7) requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such claim (a) has accepted the plan or (b) will receive or retain property of a value not less than what such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(7). This provision is commonly referred to as the "best interests" test.

The best interests test focuses on individual dissenting parties in each class rather than classes of claims. *See Bank of Am. Nat'l Trust & Say. Ass'n v. 203 N. LaSalle St. P'ship*, 526

U.S. 434, 441 n. 13 (1999). Accordingly, under this test, the Bankruptcy Court must find by a preponderance of the evidence that each dissenting creditor will receive or retain value that is not less than the amount it would receive if the debtor were liquidated under chapter 7. *Id*.; *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 228 (1996); *In re Adelphia Communications Corp.*, 361 B.R. 337, 364-65 (S.D.N.Y. 2007); *Leslie Fay*, 207 B.R. at 787; *Drexel*, 138 B.R. at 761.); *see also In re Adelphia Communications Corp.*, 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007) (listing the following factors, among others, to be taken into consideration under a liquidation analysis: (a) the additional administrative expense costs of a chapter 7 liquidating trustee or trustees; (b) the loss of value associated with losing the expertise of a debtor's employees and professionals; (c) increased claims against a debtor and the potential resulting delays in distribution; and (d) the loss of any beneficial settlement that would have been embodied in a plan).

Pursuant to § 1126(f), each holder of a Claim or interest in a Class that is not impaired is conclusively presumed to have accepted the Plan. As a result, the "best interests" test is not implicated with respect to Claims in LBMC and Komanoff Class 2 (Allowed Other Secured Claims) and Class 3 (Allowed Priority Non-Tax Claims) which are unimpaired and presumed to have accepted the Plan. Claims in LBMC and Komanoff Class 1 (Allowed PBGC Secured Claim), Class 4 (Allowed FEMA Claims), Class 5 (Allowed General Unsecured Claim), and Class 6 (Allowed PBGC Unsecured Claim) are impaired under the Plan. Accordingly, the "best interests" test applies to these classes.

Whether the Plan meets the best interests test for the creditors in the impaired classes requires a determination of the amount of proceeds that would be generated from the Debtors' liquidation in the context of chapter 7 liquidation, as opposed to the Plan's proposed chapter 11

liquidation. The Debtors have determined that due to the costs of a chapter 7 case, creditors in impaired classes will receive a distribution under the terms of the Plan which is not less than the distribution under a chapter 7 liquidation because the value of the Debtors' remaining assets would be eroded in a liquidation under chapter 7.

As set forth above, and more fully set forth in the Disclosure Statement, the Debtors have already sold substantially all of their assets. Minimal assets, if any, remain to be liquidated. Thus, there would be no potential for increased value which could be captured by any trustee appointed to administer the Debtors' estates in the context of a chapter 7 liquidation. To the contrary, the resulting increase in administrative costs would erode the dividend to unsecured creditors. *See* Melzer Declaration at ¶ 34. Further, the Plan provides for the appointment of a Plan Administrator — whom the Debtors, in consultation with the Committee, have already selected — to oversee and administer the completion of the Debtors' wind down and the Plan distributions to creditors. Assuming that the Plan is confirmed, the Plan Administrator is prepared to commence services immediately upon the Effective Date and understands the desire of the Plan Proponents to complete the wind down process promptly and in an efficient and cost effective manner. Thus, as is readily apparent the Debtors have already made substantial progress towards completing their wind down. The Plan provides the Debtors with the ability to complete their wind-down efforts without any undue delay, distraction or unnecessary expense.

A conversion to chapter 7, on the other hand, would only delay these proceedings, increase administrative costs, and further diminish distributions to creditors. *See* Melzer Declaration at ¶ 34. Among the additional costs that would be incurred include administrative fees and costs payable to a chapter 7 trustee or trustees, as well as the professional advisors to

such trustee.[9] Given the learning curve a chapter 7 trustee and his advisors would confront, these fees are likely to significantly exceed the proposed compensation payable to the Plan Administrator under the proposed Plan. In addition, such professional advisors would have a substantial learning curve and would be entitled to additional fees as they familiarize themselves on the nature and status of the Cases. *Id*. As a result of such additional fees, there would be corresponding and substantial increases in Claims which would be satisfied on an administrative priority basis thereby further reducing the funds available to unsecured creditors, and likely eradicating such funds with respect to Holders of Claims in LBMC Classes 5 and 6.

Thus, in light of the additional costs and potential delays associated with a chapter 7 conversion, the Debtors submit that each holder of a Claim in impaired classes will receive or retain under the Plan, on account of its respective Claim, property of a value that is not less than the amount that such holder would receive or retain if the Debtor was liquidated under chapter 7 of the Bankruptcy Code. The Plan thus satisfies the requirements of § 1129(a)(7).

**8. Section 1129(a)(8) —Acceptance by Impaired Classes**

Section 1129(a)(8) requires that "[w]ith respect to each class of claims or interests" such class either accepts, or is not impaired under, the chapter 11 plan. *See* 11 U.S.C. § 1129(a)(8). A class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half in the number of claims in the class vote to accept the plan, counting only those claims whose holders actually vote to accept or reject the plan. *See* 11 U.S.C. § 1126(c). A class of interests accepts a plan if the holders of at least two-thirds in amount of the interests in the class vote to accept the plan, counting only those interests whose holders actually vote to accept or

[9] *See* 11 U.S.C. § 326(a) (In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims).

reject the plan. *See* 11 U.S.C. § 1126(d). Whether a class of claims is impaired is governed by § 1124.

As indicated above, LBMC and Komanoff Classes 2 and 3 are not impaired under the Plan and are thus conclusively deemed to have accepted the Plan. LBMC and Komanoff Classes 1, 4, 5, and 6, the only impaired Classes under the Plan which were entitled to vote, each voted in favor of the Plan.[10]

In accordance with § 1126(c), creditors holding greater than two-thirds in dollar amount and greater than one-half in number of the Allowed Claims in LBMC and Komanoff Classes 1, 4, 5, and 6 have voted to accept the Plan. Accordingly, the Plan Proponents have satisfied the requirements of § 1129(a)(8) with respect to such Classes.

**9. Section 1129(a)(9) — The Plan Provides For the Payment of Administrative and Priority Claims**

Section 1129(a)(9) requires that certain administrative and priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments of a total value, as of the effective date of the plan, equal to the allowed amount of each such Claim. *See* 11 U.S.C. § 1129(a)(9). Specifically, pursuant to § 1129(a)(9)(A), holders of claims of a kind specified in §§ 507(a)(2) and (3) (e.g., administrative claims allowed under § 503(b)) must receive cash equal to the allowed amount of such claims on the effective date of the plan, unless such holders agree to different treatment. *Id*.

Section 1129(a)(9)(B) requires that each holder of a claim of a kind specified in §§ 507(a)(1) and (4) through (7) — generally, wage, employee benefit and deposit claims entitled to priority — must receive (a) if the class has accepted the plan, deferred cash payments of a value equal to the allowed amount of such claim or (b) if the class has not accepted the plan, cash equal

[10] Evidence concerning the tabulation of votes is presented in more detail in the Voting Declaration and will be supplemented, if required, at the Confirmation Hearing.

to the allowed amount of such claim on the effective date of the plan. *Id*. Section 1129(a)(9)(C) also provides that the holder of a claim of a kind specified in § 507(a)(8) (e.g., priority tax claims) must receive deferred cash payments within certain time frames, and on terms not less favorable then certain other non-priority claims.

The Plan provides that the Plan Administrator will pay to each holder of an Allowed Administrative Claim (subject to the provisions set forth in section 2.4 and 2.5 regarding Professional Fee Claims and U.S. Trustee Fees) an amount of Cash equal to the amount of such Allowed Administrative Claim: (1) on the Effective Date or, if not then due, when such Allowed Administrative Claim is due; (2) after the date on which an order of the Court Allowing such Administrative Claim becomes a Final Order; (3) in the ordinary course of business; (4) at such other time that is agreed to by the parties. *See* Plan, Section 2.2 (c).

Additionally, the Plan contains provisions providing that each holder of an Allowed Priority Tax Claim will receive Cash, in an amount equal to such Allowed Priority Tax Claim, on or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) the date on which such Claim becomes Allowed. *See* Plan, Section 2.3.

Finally, the Plan provides that each holder of an Allowed Priority Non-Tax Claim in LBMC or Komanoff Class 3 shall be paid in full, in Cash, on (i) the Effective Date, (ii) the date on which such Other Priority Claim becomes an Allowed Other Priority Claim, or (iii) such other date as may be ordered by the Court. *See* Plan, Sections 4.3 and 4.9.

Accordingly, the Plan satisfies the requirements set forth in § 1129(a)(9).

**10. Section 1129(a)(10) — The Plan Has Been Accepted By at Least One Impaired, Non-Insider Class**

Section 1129(a)(10) requires that the Plan be accepted by at least one class of claims that is impaired under the plan, determined without including the acceptance of the plan by any

insider. *See* 11 U.S.C. § 1129(a)(10). All impaired Classes under the Plan with the right to vote, have voted to accept the Plan. Accordingly, § 1129(a)(10) is satisfied.

**11. Section 1129(a)(11) — The Plan is Feasible**

Section 1129(a)(11) requires the Court to determine that:

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

11 U.S.C. § 1123(a)(11). As described below, and as will be demonstrated at the Confirmation Hearing, the Plan is feasible within the meaning of this provision.

The feasibility test set forth in § 1129(a)(11) requires a court to determine whether a plan is workable and has a reasonable likelihood of success. *See Leslie Fay*, 207 B.R. at 788; *Bernardez v. Pawlowski (In re Pawlowski)*, 428 B.R. 545, 552 (E.D.N.Y. 2010) (citing *Leslie Fay*); *In re Woodmere Investors Ltd. P'ship*, 178 B.R. 346, 361 (Bankr. S.D.N.Y. 1995); *Drexel Burnham*, 138 B.R. at 762; *Johns-Manville*, 68 B.R. at 635. The feasibility standard is greatly simplified when a plan of liquidation is tested against § 1129(a)(11). In the context of a liquidating plan, feasibility is established by demonstrating the debtor's ability to satisfy the conditions precedent to the effective date and otherwise have sufficient funds to meet its post-confirmation date obligations to pay for the costs of administering and fully consummating a plan and closing the Chapter 11 cases. *See, e.g.*, *In re Heritage Org., L.L.C.*, 375 B.R. 230, 311-12 (Bankr. N.D. Tex. 2007) (finding plan of liquidation feasible where evidence supported conclusion that sufficient funds to pay administrative and priority creditors existed and the litigation trust contemplated under the plan would be sufficiently funded); *In re Gulf Coast Holdings, Inc.*, No. 06-31695-BJH-11, 2007 WL 1340802, at *6 (Bankr. N.D. Tex. Apr. 30, 2007) (finding plan of liquidation feasible where debtor held sufficient cash "to pay all currently

due remaining and anticipated post-petition obligations [and had] sufficient funds to make a distribution to unsecured creditors").

The Plan provides for the orderly winding-down and liquidation of the Debtors' remaining assets and distributes them to creditors pursuant to the Plan and the Bankruptcy Code. As set forth in the Melzer Declaration at ¶¶ 39-42, the Debtors will have sufficient funds to administer and consummate the Plan and to close the Cases. Accordingly, the Debtors have satisfied the feasibility requirement of § 1129(a)(11).

**12. Section 1129(a)(12) — The Plan Provides for the Payment of Statutory Fees**

Section 1129(a)(12) requires that certain fees identified in 28 U.S.C. § 1930, which consist of fees due to the United States Trustee and the Clerk of the Bankruptcy Court, as determined by the Bankruptcy Court at the confirmation hearing, have been paid or will be paid on the effective date of the plan. *See* 11 U.S.C. § 1129(a)(12). All fees due to the Clerk of the Court have been paid upon commencement of these Cases and all quarterly fees payable by the Debtors (or the Plan Administrator after the Effective Date) to U.S. Trustee will be paid in accordance with Section 2.5 of the Plan. Accordingly, the Plan satisfies § 1129(a)(12).

**13. Section 1129(a)(13) — The Debtors Do Not Have Obligations to Pay Retiree Benefits**

Section 1129(a)(13) requires that a chapter 11 plan provide for the continuation, after the plan's effective date, of all retiree benefits at the level established by agreement or by court order pursuant to § 1114 at any time prior to confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits. *See* 11 U.S.C. § 1129(a)(13). The Debtors are not obligated to pay any retiree benefits pursuant to § 1114, and therefore, the requirements of § 1129(a)(13) are inapplicable to confirmation of the Plan.

**14. Sections 1129(a)(14) and (15) – Domestic Support and Individual Debtors are Not Applicable to the Debtor**

Section 1129(a)(14) only applies to debtors required to pay domestic support obligations and § 1129(a)(15) only applies to individual debtors. Accordingly, §§ 1129(a)(14) and (15) are not applicable to confirmation of the Plan.

**15. Section 1129(a)(16) — The Plan Provides for Transfers of Property to be Made in Accordance with Provisions of Non-bankruptcy Law**

Section 1129(a)(16) provides that applicable non-bankruptcy law will govern all transfers of property under a plan to be made by "a corporation or trust that is not a moneyed, business, or commercial corporation or trust." 11 U.S.C. § 1129(a)(16). The legislative history of § 1129(a)(16) demonstrates this section was intended to "restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust." H.R. Rep. 109-31(1), at 145 (2005), 2005 WL 832198, 121, 2005 U.S.C.C.A.N. 88, 203-04. According to the legislative history of § 1129(a)(16), "[n]othing in [§ 1126(a)(16)] may be construed to require the court to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property." *Id*.

Here, all transfers of the Debtors' property were made in compliance with applicable non-bankruptcy laws. Specifically, as required by New York state law, the Debtors obtained approval for the transfer of all or substantially all of their assets from the New York State Supreme Court and/or the New York State Attorney General in accordance with the provisions set forth in §§ 510 and 511 of the New York Not-for-Profit laws. Because the Debtors have transferred all or substantially all of their assets, any further transfer of the Debtors' assets is not subject to New York State Supreme Court and/or New York State Attorney General approval and, accordingly, § 1129(a)(16) is satisfied.

### B. THE PRINCIPAL PURPOSE OF THE PLAN IS NOT THE AVOIDANCE OF TAXES OR SECURITIES REGISTRATION REQUIREMENTS

Section 1129(d) provides that a chapter 11 plan may not be confirmed "if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. § 1129(d).

As described in this Memorandum, the Plan has been proposed in good faith and for the purpose of the liquidation of the Debtors' remaining assets for the benefit of creditors. No evidence has been presented – and, in fact, no party in interest has asserted – that the purpose of the Plan is either the avoidance of taxes by the Debtors, who are not-for-profit, tax-exempt entities, or avoidance of the application of § 5 of the Securities Act of 1933. Indeed, the Debtors are not issuing securities under the Plan; thus, this prohibition is inapplicable. Accordingly, the Plan complies with § 1129(d).

## VII. THE ASSUMPTION OR REJECTION OF THE EXECUTORY CONTRACTS AND UNEXPIRED LEASES UNDER THE PLAN SHOULD BE APPROVED

The Plan proposes that the Debtors will reject their executory contracts and unexpired leases that have not previously been assumed, rejected, or terminated pursuant to their own terms or previous Orders of the Bankruptcy Court. Pursuant to Section 8.1 of the Plan, all executory contracts and unexpired leases of the Debtors shall be rejected as of the Confirmation Date, except for those executory contracts and unexpired leases: (a) that have been specifically assumed or assumed and assigned by the Debtors on or before the Confirmation Date with the approval of the Court, (b) in respect of which a motion for assumption or assumption and assignment has been filed with the Court on or before the Confirmation Date, or (c) that is specifically designated as a contract to be assumed on a schedule to the Plan, which schedule, if any, shall be filed as part of the Plan Supplement. *See* Plan, Section 8.1. The Bankruptcy Court

will retain jurisdiction over the assumption or rejection of such agreements. *See* Plan, Section 12.1(a).

Section 365(a) provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). Courts routinely approve motions to assume, assume and assign, or reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. *See, e.g., NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984); *In re Riodizio, Inc.*, 204 B.R. 417, 424, 25 (Bankr. S.D.N.Y. 1997).

Courts generally will not second-guess a debtor's business judgment concerning the assumption or rejection of an executory contract or unexpired lease. *See Phar-Mor, Inc. v. Strouss Bldg. Associates,* 204 B.R. 948, 951-52 (N.D. Ohio 1997) ("Whether an executory contract is 'favorable' or 'unfavorable' is left to the sound business judgment of the debtor, Courts should generally defer to a debtor's decision whether to reject an executory contract."). The "business judgment" test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor's estate. Because the Debtors are liquidating their remaining assets and most of their remaining contracts or leases have no value to the Debtors in winding up their affairs, the Debtors made the determination that, except for the executory contracts previously assumed, all contracts should be rejected in their sound business judgment. The Debtors submit that the rejection of executory contracts or unexpired leases pursuant to the Plan should be approved.

## VIII. THE RELEASE, INJUNCTION, AND EXCULPATION PROVISIONS IN THE PLAN ARE APPROPRIATE AND SHOULD BE APPROVED

The Plan requests approval for various protective provisions including certain permanent injunctions, the release of certain causes of action by the Debtors and holders of Claims against

the Debtors, and the exculpation of certain parties for their acts during these Chapter 11 Cases. The extent to which these provisions may release certain claims and causes of action by third parties are entirely appropriate, because, among other things, these provisions played an integral part in obtaining the support of various constituencies for the Plan and are the product of arm's-length negotiations. Moreover, all release, exculpation and injunction provisions were included in the Plan and Disclosure Statement in bold typeface in order to draw attention to these provisions and ensure their due consideration by holders of Claims entitled to vote on the Plan. Significantly, and as evidenced by the voting results confirmed in the Voting Declaration, these provisions were approved by a substantial majority of holders of Claims voting on the Plan. Accordingly, the injunction, release, and exculpation provisions should be approved in all respects.

**A. The Releases**

**1. Debtors' Releases**

Section 13.2 the Plan releases the Debtors' Release Parties from certain claims that the Debtors, or any representative of the Debtors' Estates otherwise could assert, except for claims and causes of action based on fraud, willful misconduct, or gross negligence as determined by a Final Order. Furthermore such releases do not operate as a release by any Professional Persons of any Professional Fee Claims and do not limit or affect the Debtors' and/or the Plan Administrators obligations under the Plan.

**a. The Proposed Releases Are Permissible Under Second Circuit Standards**

The Debtors' releases are consistent with the Bankruptcy Code and established Second Circuit case law. Section 1123(b)(3) expressly provides that a chapter 11 plan may include "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). Additionally, it is well settled that debtors are authorized to settle or release their claims in a chapter 11 plan. *See, e.g.*, *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 309 (Bankr. S.D.N.Y. 2016), *motion to certify appeal denied*, No. 16-CV-2561 (JGK), 2016 WL 6238616 (S.D.N.Y. Oct. 25, 2016), *and appeal dismissed as moot*, No. 16 CIV. 6054 (LAP), 2017 WL 477780 (S.D.N.Y. Feb. 3, 2017) (holding a debtor may release its own claims); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 263 n.289 (Bankr. S.D.N.Y. 2007) (same); *In re Oneida Ltd.*, 351 B.R. 79, 94 n.21 (Bankr. S.D.N.Y. 2006) (same). Also, the Debtor's releases are similar to those approved by this Court and other courts in this district. *See, e.g.*, *In re Cengage Learning, Inc.*, Case No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014) [Docket No. 1225] (confirming chapter 11 plan that contained debtor releases for, among others, the debtors, the debtors' officers and directors, indenture agents and trustee, creditors' committee, creditors' committee members, lenders, noteholders, and the affiliates, subsidiaries, principals, employees, agents, attorneys, advisors, accountants and consultants of each); *In re Caritas Health Care, Inc.*, Case No. 09-40901 (CEC) (Bankr. E.D.N.Y. August 3, 2012) [Docket No. 1323] (confirming chapter 11 plan that contained debtor releases of debtor's trustees and officers); *In re General Maritime Corp.*, Case No. 11-15285 (MG) (Bankr. S.D.N.Y. May 7, 2012) [Docket No. 794] (confirming chapter 11 plan that contained debtor releases for the debtors, creditors' committee, lenders, plan sponsors, and the affiliates, officers, directors, and employees of each).

**b. The Debtors' Releases Represent an Appropriate Exercise of the Debtors' Business Judgment**

A plan that proposes to release a claim or cause of action belonging to a debtor is considered a "settlement" for purposes of satisfying § 1123(b)(3)(A). Settlements pursuant to a plan are generally subject to the same "reasonable business judgment" standard applied to

settlements under Bankruptcy Rule 9019.[11] Bankruptcy Rule 9019 provides: "after notice and a hearing, the court may approve a compromise or settlement." Fed R. Bankr. P. 9019(a). The legal standard for determining the propriety of a bankruptcy settlement is whether it is in the "best interests of the estate"[12] and does not "fall[ ] below the lowest point in the range of reasonableness.[13]

Based on their business judgment, the Debtors believe the Debtors' releases are reasonable and satisfy the applicable judicial standard. While the Debtors have not performed a formal investigation regarding the claims covered by the Debtors' releases, the Committee investigated potential causes of action the Debtor might pursue against its officers and trustees, but to date, has not identified any viable cause of action. Accordingly, there appears to be no basis for believing any valuable claims of the Debtors against the Debtors' Release Parties would be released under the Plan. Accordingly, the Debtors' releases are reasonable and represent a sound exercise of the Debtors' business judgment, and should be approved pursuant to § 1123(b) and Bankruptcy Rule 9019.

The Debtors' releases are also in the best interests of the Debtors' Estates. In the absence of any viable claims, pursuing litigation against the Debtors' Release Parties, many of whom are parties to indemnification agreements with the Debtors, would be a costly and futile exercise which could potentially deplete the Estates of valuable funds. The proposed releases by the

[11] *See In re Bally Total Fitness*, 2007 WL 2779438, at *12 ("To the extent that a release or other provision in the Plan constitutes a compromise of a controversy, this Confirmation Order shall constitute an order under Bankruptcy Rule 9019 approving such compromise."); *In re Spiegel, Inc.*, No. 03-11540, 2005 WL 1278094, at *11 (Bankr. S.D.N.Y. May 25, 2005) (approving releases pursuant to § 1123(b)(3) and Bankruptcy Rule 9019(a)).

[12] *In re Purofied Down Prods. Corp*., 150 B.R. 519, 523 (S.D.N.Y. 1993); *see also Plaza Equities LLC v. Pauker (In re Copperfield Invs., LLC)*, 401 B.R. 87, 91 (Bankr. E.D.N.Y. 2009); *Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chicago (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd sub nom. Sobchack v. Am. Nat'l Bank & Trust Co. of Chicago (In re Ionosphere Clubs, Inc.)*, 17 F.3d 600 (2d Cir. 1994).

[13] *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)), *cert. denied*, 464 U.S. 822 (1983); *see also In re Enron Corp*., No. 02 Civ. 8489 (AKH), 2003 WL 230838, at *2 (S.D.N.Y. Jan. 31, 2003) ("[A]pproval of the settlement lies within the sound discretion of the bankruptcy court."); *In re Purofied Down Prods. Corp*., 150 B.R. at 522 ("[T]he court need not conduct a 'mini-trial' to determine the merits of the underlying [dispute].").

Debtors will eliminate the potential for unanticipated and potentially sizeable claims arising from any indemnification rights. The proposed releases will also obviate any obligation on the part of the Debtors to obtain continued tail coverage for the Debtors' Release Parties. Further, particularly in relation to the Debtors' Board of Trustees, they have served in these Cases for many years, voluntarily and in cooperation with the Debtors' professionals, and are entitled to broad protection under New York State Not-For-Profit Law to the extent they acted within the scope of their responsibilities and judgment.

Accordingly, and based on the foregoing, the Debtors respectfully submit that the proposed releases by the Debtors are consistent with applicable law, represent a valid settlement of any potential claims the Debtors may have as against the Debtors' Release Parties pursuant to § 1123(b)(3)(A), represent a valid exercise of the Debtors' business judgment, and therefore, should be approved.

**2. Claim Holder Releases**

Section 13.2 of the Plan also provides that each holder of a Claim against the Debtors shall be deemed to have released each of Debtors, the Committee, the Patient Care Ombudsman and their respective directors, officers, trustees, agents, attorneys, advisors, members and employees (solely in their capacity as such) of and from any and all claims held by such parties, occurring from the beginning of time to and including the Effective Date, related in any way to, directly or indirectly, and/or arising out of and/or connected with, any or all of the Debtors and their Estates, or the Cases (the "Claim Holder Releases"). The proposed Third Party Releases do not however, release claims and causes of action based on any released party's fraud, willful misconduct, or gross negligence as determined by a Final Order.

**a. This Court has Jurisdiction to Approve the Claim Holder Releases**

The Second Circuit has held that when evaluating non-debtor releases, the threshold inquiry is whether the Bankruptcy Court has subject matter jurisdiction to grant such releases. "In assessing a court's jurisdiction to enjoin a third party dispute, the question is not whether the court has jurisdiction over the settlement, but whether it has jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party." *In re Dreier LLP*, 429 B.R. 112, 131 (Bankr. S.D.N.Y. 2010) (citing *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 695 (Bankr. S.D.N.Y 2010)). Bankruptcy court "related to" jurisdiction over nondebtor releases exists "where the subject of the third party dispute is property of the estate, or the dispute would have an effect on the estate." *Id*.; *see also Manville III*, 517 F.3d at 66 (bankruptcy court "only has jurisdiction to enjoin third-party non-debtor claims that directly affect the res of the bankruptcy estate"). Here, the Claim Holder Releases are limited to claims over which the Court has subject matter jurisdiction because such releases only cover claims involving property of the Estates or impacting the Estates' and the Debtors' liquidation.[14] *See In re Velo Holdings Inc.*, Case No. 12-11384 (MG) (Bankr. S.D.N.Y.) Confirmation Hr'g Tr. 39:17 – 40:17 Jan. 23, 2013 (in concluding court had proper subject matter jurisdiction to decide validity of non-debtor releases, court held the releases impacted res of the bankruptcy estate for various reasons, including that plan explicitly stated it would only release claims relating to matters central to administration of bankruptcy estates and bankruptcy cases, debtors' assets, incurrence of liabilities, and distributions to creditors).

[14] The Claim Holder Releases are limited to claims "related in any way to, directly or indirectly, and/or arising out of and/or connected with, any or all of the Debtors and their Estates, the Cases, the Debtors' pre-petition financing arrangements, the Debtors' financial statements, the Debtors' debtor in possession financing facility and/or the Debtors' cessation of operations."

**b. The Claim Holder Releases Are Permissible Under Second Circuit Standards**

Once this Court has established that it has jurisdiction to approve the Claim Holder Releases, it must still evaluate their propriety. Here, the Claim Holder Releases satisfy applicable Second Circuit standards and are an integral part of the Plan. Courts typically allow releases of third party claims against non-debtors where (i) there is an express or inferred consent of the party giving the release or (ii) other circumstances in the case justify giving the release such as a substantial contribution by the party receiving the release or the avoidance by the estate of potential indemnification or contributions claims. *See Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005). The Second Circuit has stated that "a court may enjoin a creditor from suing a third party, provided the release plays an important part in the debtor's reorganization plan. *JP Morgan Chase Bank, N.A. v. Charter Commc'ns Operating LLC (In re Charter Commc'ns)*, 419 B.R. 221, 258 (Bankr. S.D.N.Y. 2009) (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992)); *Metromedia*, 416 F.3d at 141; *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 266 (Bankr. S.D.N.Y. 2007) (same), *aff'd* 544 F.3d 420 (2d Cir.. 2008); *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (same).

Indeed, in this Circuit, it is well-settled that "[n]on-debtor releases may be tolerated if the affected creditors consent, "provided that adequate disclosure is provided to creditors voting on the Plan". *Metromedia*, 416 F.3d at 142; *accord Adelphia Commc'ns*, 368 B.R. at 266, 268 n. 307 (noting that "[i]n the Second Circuit, it has long been the law that third party releases are permissible under at least some circumstances" and specifically approving of consensual third-party releases by creditors where such releases were prominently disclosed) (citing *Metromedia*, 416 F.3d at 142); *In re Spiegel Inc.*, No. 03-11540 (BRL), 2006 WL 2577825, at *7 (Bankr.

S.D.N.Y. Aug. 16, 2006) (Lifland, J.) (non-debtor releases are consistent with the Bankruptcy Code if the creditors consent) (citing *Metromedia*, 416 F.3d at 142), *aff'd*, 269 F.App'x 56 (2d. Cir. 2008), *cert denied sub nom.*, *Stupakoff v. Otto*, 555 U.S. 825 (2008). Courts have held that consent is present when a party votes to accept a plan. *See Adelphia Commc'ns*, 368 B.R. at 268 (upholding releases with respect to those who voted in favor of plan).

The Claim Holder releases are warranted in these cases. The Debtors officers, directors and other relevant constituents have devoted significant time and energy in developing a consensual and feasible Plan. In the case of the Debtor's Directors in particular, they made such contributions and were never monetarily compensated. Moreover, the proposed releases will relieve the estate of numerous and potentially sizeable indemnification claims and tail coverage obligations which threaten to derail the entire plan process.

The Debtors thus submit that, in light of the integral nature of the releases by holders of claims to the Debtors' Plan and the bearing it has had on the Debtors' ability to achieve the compromise among numerous parties while avoiding significant administrative claims, that the Court should approve the Releases.

**B. <u>The Exculpation</u>**

The Plan also includes a customary exculpatory provision, which, with certain limitations, protects specified parties from liability that might arise from the administration of certain aspects of the Chapter 11 Cases. The Exculpation, among other things, augments the proposed injunctions (as discussed herein) and except as otherwise set forth in the Plan, none of (i) Garfunkel Wild, P.C., in its capacities as counsel to the Debtors or counsel to the Plan Administrator; (ii) Loeb and Trooper, in its capacity as the Debtors' auditor; (iii) the Debtors' trustees, in-house counsel, officers and directors (in their capacities as such); (iv) the Plan Administrator and her representatives (in their capacities as such); (v) the Committee and the

Post Effective Date Committee; (vi) the members of the Committee and the members of the Post Effective Date Committee, in their capacities as members of the Committee and as members of the Post Effective Date Committee; (vii) Klestadt Winters Jureller Southard & Stevens, LLP, in its capacities as counsel to the Committee and as counsel to the Post Effective Date Committee; (viii) Deloitte Transactions and Business Analytics LLP, Polsky Advisors LLC, and Getzler Henrich & Associates, LLC in their capacity as financial advisor to the Committee; (ix) Getzler Henrich & Associates, LLC in its capacity as financial advisor to the Post Effective Date Committee; (x) Laura W. Patt in her capacity as the Patient Care Ombudsman for Komanoff; (xi) Tarter Krinsky & Drogin LLP in its capacity as counsel to the Patient Care Ombudsman; or (xii) Vernon Consulting, Inc. in its capacity as medical operations advisor to the Patient Care Ombudsman, shall have or incur any liability for any act or omission in connection with, related to, or arising out of, the Cases, the formulation, preparation, dissemination, implementation, confirmation, or approval of the Plan, the administration of the Plan or the property to be distributed under the Plan, or any contract, instrument, release, or other agreement or document provided for or contemplated in connection with the consummation of the transactions set forth in the Plan (the "Exculpation Provision").

Notwithstanding anything in Section 13.3 of the Plan to the contrary, the provisions of Section 13.3 of the Plan do not limit the liability of any Person that would otherwise result from any action or omission to the extent that such action or omission is determined in a Final Order to have constituted willful misconduct, gross negligence or a failure to fully comply with Rule 1.8(h)(1) of the New York Rules of Professional Conduct. The Debtors submit that for the reasons that will be set forth herein, the Exculpation Provision contained in the Plan should be approved.

**1. The Exculpation Provision is Appropriately Tailored and Should Be Approved**

Pursuant to the Plan, the Debtors are seeking to exculpate only those parties that were instrumental to the Debtors during the course of the Chapter 11 Cases and the formulation of the Debtors' Plan. Limited exculpation provisions such as those set forth in Section 13.3 of the Plan - which exculpate certain parties instrumental in the administration of the Debtors' Chapter 11 Cases from liability for acts and omissions related to the chapter 11 case, other than liability arising from intentional fraud, gross negligence, willful misconduct, or breach of fiduciary duty - are viewed as "reasonable and customary" in this jurisdiction. Indeed, courts have recognized that, without the protections afforded by limited exculpation clauses, "negotiation of a [plan of reorganization in a Chapter 11 case] would not ... [be] possible." *In re Enron Corp*., 326 B.R. 497 (S.D.N.Y. 2005) (endorsing the findings of the bankruptcy court concerning the propriety and justification for the limited exculpation provision contained in Debtor's chapter 11 plan); *In re Oneida Ltd.*, 351 B.R. 79, 94 n. 22 (Bankr. S.D.N.Y. 2006) (exculpation provision contained in chapter 11 plan which provided for release of prepetition and postpetition claims related to various matters associated with confirmation of chapter 11 plan "sufficiently narrow to be unexceptionable.").

Courts in the Second Circuit evaluate the appropriateness of similar exculpation provisions based upon a number of factors, including whether the plan was proposed in good faith, whether the provision is integral to the plan, and whether the exculpation provision was necessary for plan negotiations.[15] Thus, courts have found that exculpation for participating in

[15] *See, e.g., In re Bally Total Fitness*, 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were necessary to successful reorganization and integral to plan); Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.), 326 B.R. 497, 501, 503-04 (S.D.N.Y. 2005) (affirming approval of exculpation provision where it was necessary to effectuate plan and excluded gross negligence and willful misconduct; also noting that excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

the plan and chapter 11 process is appropriate when the plan has been proposed in good faith and otherwise meets the requirements for plan confirmation, and plan negotiations could not have occurred without protection from liability for parties involved in those negotiations. *See Drexel III*, 960 F.2d at 293 (finding that where a debtor's plan of reorganization requires the settlement of numerous, complex issues, protection of third parties against legal exposure may be a key component of the settlement). Indeed, failing to include an exculpation provision in a chapter 11 plan could deter the critical participation of the debtor's management and advisors, as well as essential parties in interest and creditor groups from fully participating in the chapter 11 case and plan negotiations. *See id.*; *In re Enron Corp.*, 326 B.R. at 503 (finding that without such protection from liability, key constituents might not actively participate in plan process or might abandon efforts to help a debtor).

In general, the effect of an appropriate exculpation provision is to set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "exculpated party" for acts arising out of a debtor's restructuring. *See In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (holding an exculpation provision is "apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code"); *see also In re Enron Corp.*, 326 B.R. at 501 (finding exculpation provision was appropriate where such provision excluded gross negligence and willful misconduct).

Accordingly, exculpation provisions appropriately prevent collateral attacks against parties that have made substantial contributions to a debtor's chapter 11 case and have negotiated a chapter 11 plan that is ultimately confirmed by the court. Parties to be exculpated from liability may include those that are indemnified by a debtor or that provide substantial

contributions to the debtor and the chapter 11 cases. *See, e.g.*, *In re Borders Grp*., Case No. 11-10614 (MG) (Bankr. S.D.N.Y. Dec. 21, 2011) [Docket No. 2384]; *In re Uno Rest. Holdings Corp.*, Case No. 10-10209 (MG) (Bankr. S.D.N.Y. July 6, 2010) [Docket No. 559].

Based on this widely accepted precedent, the Exculpation Provision contained in Section 13.3 of the Plan is wholly justified, properly limited and should be approved. The Exculpation Provision is appropriately crafted so as to insulate those parties whose efforts have been instrumental in connection with the formulation and development, confirmation and consummation of the Plan, as well as the overall success of the Debtors' Chapter 11 Cases, from certain types of liability. Moreover, the Exculpation Provision, including its carve-out for gross negligence and willful misconduct, is entirely consistent with established practice in this circuit. *See, e.g., In re DBSD N. Am., Inc.*, 419 B.R. 179, 217-18 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV. 10156 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part*, 627 F.3d 496 (2d Cir. 2010); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 267 ((Bankr. S.D.N.Y. 2007), *appeal dismissed*, 371 B.R. 660 (S.D.N.Y. 2007), *aff'd*, 544 F.3d 420 (2d Cir. 2008) (same). Accordingly, the Exculpation Provision is reasonable, consistent with prior case law in this district, and should be approved.

### C. The Injunctions

Section 13 of the Plan includes certain injunction provisions (the "Injunctions") enjoining parties from pursuing certain Claims released under the Plan. The proposed Injunctions are necessary to preserve and enforce the Debtors' releases, the Claim Holder Releases and the Exculpation Provision. The proposed Injunctions are also narrowly tailored and well designed to achieve the limited purpose for which they are intended.

**1. General Injunction**

Section 13.1(a) of the Plan enjoins parties from pursuing claims released under the Plan (the "General Injunction"). Under Section 13.1 of the Plan, as of the Effective Date, all Persons that have held, currently hold or may hold a Claim against the Debtors, from taking any of the following actions against the Debtors, the Plan Administrator, the Committee or members thereof, the Post Effective Date Committee or members thereof, present and former directors, officers, trustees, agents, attorneys, advisors, members or employees of the Debtors, or any of their respective successors or assigns, or any of their respective assets or properties, on account of any Claim against the Debtors: (a) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind with respect to a Claim against the Debtors; (b) enforcing, levying, attaching, collecting or otherwise recovering in any manner or by any means, whether directly or indirectly, any judgment, award, decree or order with respect to a Claim against the Debtors; (c) creating, perfecting or enforcing in any manner, directly or indirectly, any lien or encumbrance of any kind with respect to a Claim against the Debtors; (d) asserting any setoff, right of subrogation or recoupment of any kind, directly or indirectly, against any Debt, liability or obligation due to the Debtors or their property or Assets with respect to a Claim against the Debtors; and (e) proceeding in any manner in any place whatsoever that does not conform to or comply with or is inconsistent with the provisions of the Plan.

The General Injunction is narrowly tailored and does not preclude any holder of a Claim from pursuing any applicable insurance after the Chapter 11 Cases are closed, or from seeking discovery in actions against third parties or from pursuing third-party insurance that does not cover Claims against the Debtors. Thus, while the proposed General Injunction prohibits the

pursuit of claims as against the Debtors' Estates, it does not extinguish rights of Claim Holders to otherwise pursue certain of their Claims.

As set forth above, the General Injunction is necessary to enforce the Debtors' releases, Claim Holder Releases, and Exculpation provisions. Absent the inclusion of the General Injunction, the proposed release and exculpation provisions would be rendered toothless. Moreover, under § 105, which permit a bankruptcy court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [title 11]", this Court is well within its authority to approve the General Injunction.

**2. The Injunctions are Appropriate, Consistent with Applicable Law and should be Approved in their Entirety**

Bankruptcy Courts are empowered to issue permanent injunctions against or authorize releases of claims against non-debtors under a chapter 11 plan pursuant to § 105(a).[16] *See Johns-Manville*, 68 B.R. 618 (permanent injunction in favor of settling insurance company); *see also, In re A.H. Robins Co., Inc*., 880 F.2d 694, 701 (4th Cir. 1989) (release and permanent injunction in favor of insurance company, executives and law firms), *cert. denied*, 493 U.S. 959 (1989); *In re Gaston & Snow*, 1996 WL 694421 (S.D.N.Y. December 4, 1996) (injunction precluding creditors who voted against the plan from asserting claims against third party non debtors who contributed substantial sums to the plan of reorganization); *In re Ionosphere Clubs Inc.*, 184 B.R. 648 (S.D.N.Y. 1995) (release of claims against individual signatories approved); *In re Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988) (finding that § 105(a) "has been construed liberally to enjoin suits that might impede the reorganization

[16] Section 105(a) authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]." 11 U.S.C. § 105(a). Under § 105(a), the Court has expansive equitable powers to fashion any order or decree that is in the interest of preserving or protecting the value of a debtor's assets and to facilitate the efficient administration of the Chapter 11 case. *See, e.g., In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994) ("It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.").

process," and thus upholding permanent injunction issued in favor of settling insurance company, and approving release of third parties over the objection of creditors); *Ionosphere,* 184 B.R. at 655 ("[C]ourts may issue injunctions enjoining creditors from suing third parties ... in order to resolve finally all claims in connection with the estate and to give finality to a reorganization plan.").

Courts have also upheld permanent injunctions against, or authorized releases of claims against, non-debtors under a chapter 11 plan for reasons independent of § 105(a). *See Clain v. International Steel Group, No*. 156 Fed. Appx. 398 (2d Cir. 2005) (finding enforceable a non-debtor release that enjoined equity security interests from pursuing claims against purchaser of the majority of debtor's assets; the non-debtor release played an important role in consummating the debtor's chapter 11 liquidation and the bankruptcy court had held the sale was "a prerequisite to the Debtor's ability to confirm and consummate a chapter 11 plan."). In the Second Circuit, bankruptcy courts previously have approved non-debtor releases and injunctions in situations where the releases and injunctions were an integral part of the chapter 11 plan, conferred material benefits on a debtor's estate and its creditors, or were necessary to effectuate the plan. *See In re Bally Total Fitness*, 2007 WL 2779438, at *8 (finding injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *Abel v. Shugrue (In re Ionosphere Clubs, Inc.),* 184 B.R. 648, 655 (S.D.N.Y. 1995) ("[C]ourts may issue injunctions enjoining creditors from suing third parties . . . in order to resolve finally all claims in connection with the estate and to give finality to a reorganization plan."). Similar injunction provisions have been approved by this Court and other courts in this Circuit. *In re Personal Communications Devices, LLC*, Case No. 13-74303 (AST) (Bankr. E.D.N.Y. April 11, 2014) [Docket No. 413] (approving general injunction of all claims related to

the administration of the chapter 11 cases or the plan); *In re Cengage Learning, Inc.*, Case No. 13-44106 (ESS) (Bankr. E.D.N.Y. March 14, 2014) [Docket No. 1225] (approving general injunction necessary to preserve and enforce releases, exculpation provisions, and compromises and settlements under the plan); *In re Saint Vincent's Catholic Medical Centers of New York* Case No. 10-11963 (CGM) (Bankr. S.D.N.Y. June 29, 2012) [Docket No. 3060] (approving general injunction of actions related to claims released under the plan or that would contradict plan provisions); *Drexel III*, 960 F.2d at 293 (bankruptcy court has jurisdiction and power to approve release and injunction in a plan, including the release of identified non-debtor third parties, where such releases play an important part in the plan of reorganization).

The Second Circuit re-articulated the standards for the injunction of direct, third-party claims against non-debtor parties in *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005). In that case, the court addressed the propriety of a release provision contained in a chapter 11 plan which purported to shield a non-debtor from a broad spectrum of liability, namely "any claims relating to the debtor, 'whether for tort, fraud, contract, violations of federal or state securities laws, or otherwise, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, fixed or contingent, matured or unmatured.'" *Id*. at 142. In light of the breadth of the proposed release provisions, the court expressed concern that such a provision arguably serves as "a device that lends itself to abuse [because] [b]y it, a nondebtor can shield itself from liability to third parties." *Id*. These concerns prompted the court to conclude that "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan ...." *Id.* at 143. Further, the court noted, the "unique concerns" which may justify approval of a non-debtor release include circumstances in which:

> the estate received substantial consideration; the enjoined claims were channeled to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the Debtor's reorganization by way of indemnity or contribution; and the plan otherwise provided for the full payment of the enjoined claims.

*Id*. at 142 (citations omitted).

In light of *Metromedia*, as subsequently revisited and expounded upon by the bankruptcy court in the Southern District of New York in *In re Adelphia Communications Corp.*, non-debtor releases may be approved in the Second Circuit, provided that "unusual circumstances" support the releases. *See In re Adelphia Communications Corp.*, 368 B.R. 140 (Bankr. S.D.N.Y. 2007) (observing that *Metromedia* "now limits the use of third-party releases to situations that can be regarded as unique" and that third-party releases or injunctions "are permissible if, but only if, there are unusual circumstances to justify enjoining a creditor from suing a non-debtor party."). As discussed in *Adelphia*, these "unusual circumstances" can be demonstrated where one of the following exists: (i) the Debtor's estate could be subject to indemnification claims by the released non-debtor; (ii) the non-debtor engaged in a unique transaction with the debtor, such as a large capital infusion; or (iii) the non-debtor release was consented to by those voting for the plan. *Id*. at 107-8.

Based on the relevant case law (including both *Adelphia* and *Metromedia*), and the facts and circumstances of the Debtors' Chapter 11 Cases, the Debtors respectfully submit that the Bankruptcy Court should grant the General Injunction. By voting in favor of the Plan, the voting parties effectively approved and consented to the provisions contained therein, including the proposed General Injunction. Accordingly, the General Injunction was consented to by an overwhelming majority of those voting on the Plan (parties with full knowledge of the releases and the General Injunction). Therefore, in light of the benefits that the Debtors and their estates

will receive from the General Injunction in Section 13.1 of the Plan, such injunction is reasonable and well justified an should be approved.

In sum, and as discussed above, the releases, exculpation, and injunction embodied in the Plan are entirely reasonable, in the best interests of the Debtors and all parties in interest and consistent with §§ 105, 1123, and 1129. The provisions were also set forth in bold as part of the Plan and the Confirmation Hearing Notice, giving all creditors and parties-in-interest ample notice of the provisions and opportunity to object to their inclusion in the Plan. By voting in favor of the Plan, all such parties have indicated their support for these provisions and clearly do not object to their inclusion. Consequently, the releases, exculpation, and injunction provisions should be approved in their entirety.

## IX. THE PLAN DOES NOT PROVIDE FOR SUBSTANTIVE CONSOLIDATION OF THE DEBTORS' ESTATES

While the Plan is a joint plan, it *does not* provide for substantive consolidation of the Debtors' Estates upon the Effective Date.

## CONCLUSION

For all of the foregoing reasons, the Plan Proponents submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and should be approved and confirmed by the Court.

Dated: Great Neck, New York
August 11, 2017

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