UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

SOUND SHORE MEDICAL CENTER OF WESTCHESTER, et al.[1]	Chapter 11 Case No. 13-22840 (rdd)
Debtors.	(Jointly Administered)

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MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED PLAN OF LIQUIDATION OF SOUND SHORE MEDICAL CENTER OF WESTCHESTER, ET AL.

Dated: Great Neck, New York
October 29, 2014

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[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number include: Sound Shore Health System, Inc. (1398), Sound Shore Medical Center of Westchester (0117), The Mount Vernon Hospital (0115), Howe Avenue Nursing Home, Inc., d/b/a Helen and Michael Schaffer Extended Care Center (0781), NRHMC Services Corporation (9137), The M.V.H. Corporation (1514) and New Rochelle Sound Shore Housing, LLC (0117). There are certain additional affiliates of the Debtors who are not debtors and have not sought relief under Chapter 11.

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PRELIMINARY STATEMENT

This Memorandum of Law (the "Memorandum") is submitted on behalf of Sound Shore Medical Center of Westchester and its debtor affiliates (each a "Debtor" and together, the "Debtors"), as debtors and debtors in possession, in support of confirmation of the First Amended Plan of Liquidation of Sound Shore Medical Center of Westchester *et al.*, dated September 17, 2014 (as it may be amended, modified or supplemented, the "Plan"), pursuant to section 1129 of the Bankruptcy Code.[2]

The Plan represents a successful and, most importantly, consensual conclusion to the Debtors' chapter 11 cases (the "Chapter 11 Cases"). The proposed Plan is the culmination of extensive, arms-length negotiations between the Debtors and their key constituencies to reach a fair and equitable resolution of the many complex business and legal issues presented by these cases. The formulation of the Plan was a collaborative effort between the Debtor and the Official Committee of Unsecured Creditors (the "Committee"), with significant input from other relevant constituents. Significantly, as a result of the efforts undertaken by the Debtors and the Committee in these cases, the Debtors were able to ensure the continued provision of healthcare for the southern Westchester community, the preservation of employment for a majority of the Debtors' former employees and a dividend to the unsecured creditors in these cases. The Plan also provides much needed protection from potentially sizeable claims to the Debtors' former employees, physicians and other medical professionals (the "Covered Medical Professionals") many of whom remained committed during the Chapter 11 process and worked tirelessly to ensure patient care and continuity of operations. As a result of their efforts, significant asset

[2] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in: (i) the *First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, For First Amended Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Sound Shore Medical Center of Westchester, et al.*, dated September 17, 2014 (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.

value was preserved for the benefit of all creditors. Indeed without the contribution of these Covered Medical Professionals, the Debtors' ability to sell their assets as a going concern and achieve confirmation of a consensual Plan could have been severely compromised.

As set forth in the Declaration of Craig Johnson of GCG, Inc. Certifying Methodology for the Tabulation of Votes and Results of Voting with Respect to the First Amended Chapter 11 Plan of Liquidation of Sound Shore Medical Center, et al. (the "Voting Declaration"), 96.65% in number and 97.87% in dollar amount of holders of Claims in Class 3 (General Unsecured Claims) who voted on the Plan, the only impaired class under the Plan entitled to vote, have voted in favor of the Plan. While Class 4 is deemed to have rejected the Plan, and the Debtors are able to satisfy the requirements of section 1129(b) of the Bankruptcy Code.

As evidenced by the voting results, the Voting Declaration, and the Declaration of Monica Terrano, the Debtors' Wind Down Officer, filed contemporaneously herewith, in support of the Plan (the "Terrano Declaration"), the Plan satisfies all applicable requirements of the Bankruptcy Code, including sections 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 for the benefit of their creditors and preserving the funds available for distribution to the Debtors' creditors. Accordingly, the Debtors 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 John Spicer Pursuant to Local Bankruptcy Rule 1007-4 and In Support of First Day Motions [Docket No. 18], the Disclosure Statement, the Plan, the Plan Supplement, the Terrano 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

Procedural Background

On May 29, 2013, each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). The Debtors are continuing to administer their estates as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

On June 10, 2013, the Office of the United States Trustee appointed the Committee. The Committee has employed Alston & Bird LLP as its bankruptcy counsel [Docket No. 242] and Deloitte Financial Advisory Services LLP as its financial advisors [Docket No. 330] through December 28, 2013 and thereafter Deloitte Transactions and Business Analytics LLP [Docket No. 620].

On August 15, 2014, Sound Shore filed a Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Sound Shore Medical Center of Westchester, *et al.* [Docket No. 799] and the Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, for Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Sound Shore Medical Canter of Westchester, *et al.* [Docket No. 798]).

Subsequently, on September 17, 2014, the Debtors filed the First Amended Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Sound Shore Medical Center of Westchester, *et al.* [Docket No. 821] and the First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, for Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Sound Shore Medical Canter of Westchester, *et al.* (the "Disclosure Statement") [Docket No. 820]). An Order Approving the Disclosure Statement was entered on September 17, 2014 [Docket No. 822].

Sale Process

Prior to the filing of their Chapter 11 petitions, the Debtors conducted an extensive marketing process and search for a strong healthcare strategic partner, who might have an interest in coming into the downstate geographical market and the financial strength necessary to fund and improve the Debtors' operations. Following extensive negotiations with Montefiore Medical Center and certain of its affiliates (collectively, the "Buyers"), on May 29, 2013, the Debtors entered into a purchase agreement (the "Purchase Agreement") for the sale of substantially all of their real property and operating assets to Buyers (the "Acquired Assets"). The Purchase Agreement initially contemplated a competitive bidding process which designated the Buyers as the so-called stalking horse bidder, and provided for aggregate consideration to the Debtors' estates in the amount of $54,000,000, plus the appraised value of Furniture, Equipment and Inventory acquired by Buyers (the "Purchase Price").

Shortly after the Committee's formation, the Debtors and the Committee's professionals conferred on the proposed sale transaction, following which, the Committee made a proposal to the Buyers and the Debtors that the Purchase Price under the Purchase Agreement be increased in consideration for the Committee's agreement and support of a private sale of the Acquired

Assets to Buyers. After extensive negotiations, the parties agreed that the Acquired Assets would be sold by private sale (the "Sale") in exchange for an increase in the proposed purchase price to $58.75 million and certain other modifications. An Order approving the Sale (the "Sale Order") was thereafter entered on August 8, 2013 [Docket No. 259], as supplemented on October 15, 2013 [Docket No. 381]. The closing (the "Closing") of the Sale was concluded on November 6, 2013.

III. BRIEF SUMMARY OF THE PLAN

The Plan provides, *inter alia*,

(1) that each holder of an Allowed Administrative Claim, in full and final satisfaction release and settlement of such Allowed Claim, shall receive Cash in an amount equal to such Allowed Administrative 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 or otherwise payable, unless such holder shall agree to a different and less favorable treatment of such Claim;

(2) that each holder of an Allowed Priority Tax Claim, in full and complete satisfaction of such Allowed Claim, shall be paid Cash 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 and (b) the date on which such Claim becomes Allowed;

(3) that each holder of an Allowed Professional Fee Claim shall be paid in Cash in an amount equal to such Allowed Professional Fee Claim on 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 each holder of an Allowed Class 1 Secured Claim shall receive one of the following alternative treatments, at the election of the Plan Administrator: (a) payment in full in Cash on or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) the date the Claim becomes due and payable by its terms; (b) the legal, equitable and contractual rights to which such Claim entitles the holder, unaltered by the Plan; (c) the treatment described in Section 1124(2) of the Bankruptcy Code; or (d) all collateral securing such Claim, without representation or warranty by or recourse against the Debtors;

(5) that each holder of an Allowed Class 2 Priority Claim shall receive Cash 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, unless such holder shall agree to a different treatment of such Claim;

(6) that each holder of an Allowed Class 3 General Unsecured Claim shall receive its Ratable Pro Rata Share of Cash from the Net Proceeds; and

(7) that no distribution will be made on account of Class 4 Interests.

IV. PROPOSED PLAN MODIFICATIONS

United States Attorney

In response to an informal objection received by the Debtors on behalf of the United States of America (the "United States"), the Debtors have agreed to include certain language in the confirmation order (the "Confirmation Order") to address concerns expressed by the United States with regards to the Plan's release provisions and the potential impact of such provisions on the United States' enforcement rights. Specifically, the United States had a requested a carve-out from the release provisions which preserves the United States' right to pursue any police or regulatory actions and any claims held against non-Debtor third parties. The Debtors have agreed and shall incorporate language in to the final Confirmation Order, as agreed upon with the United States, which preserves the United States' enforcement rights and also precludes the release or discharge of claims held by the United States as against any non-Debtor third parties.

Pension Benefit Guaranty Corporation

The Debtors also received an informal objection from the Pension Benefit Guaranty Corporation ("PBGC") requesting that any claims or causes of action arising under Title 1 of ERISA (the "ERISA Claims") for breach of fiduciary duty or relating to a prohibited transaction with respect to the MVH Pension Plan be excluded from the Plan's release provisions. The Debtors have agreed and shall include language in the Confirmation Order which excludes the ERISA Claims from being discharged, released or enjoined.

V. OBJECTIONS TO CONFIRMATION

The Debtors have received three objections to confirmation of the Plan as follows:

(1) Notice of Objection and Proposed Order by Ralph Oyague ("Oyague"), filed on October 20, 2014 (the "Oyague Objection") [Docket No. 880];

(2) Limited Objection to Confirmation of Plan of Liquidation (the "First Financial Objection") by First Financial Leasing, LLC *dba* First Financial Healthcare Solutions, and its related entities FFCSI Fund 6, LLC and FFCSI Fund 7, LLC (collectively, "First Financial"), filed on October 23, 2014 [Docket No. 873]; and

(3) Limited Objection of 3M Company ("3M") to Debtors' First Amended Plan of Liquidation Under Chapter 11 of the Bankruptcy Code of Sound Shore Medical Center of Westchester, et al. (the "3M Objection") [Docket No. 879].

Oyague Objection

The Oyague Objection, although not altogether clear, appears to assert that Oyague's claim against the Debtors (the "Oyague Claim") was improperly classified as a general unsecured claim and should instead have been classified as an 'Other Priority Claim' under the Plan. However, Oyague fails to provide any basis under section 507(a) of the Bankruptcy Code which would afford priority treatment to the Oyague Claim. To the contrary, the supporting documentation provided by Oyague in connection with the Oyague Claim and Oyague Objection, consisting largely of pre-petition medical records, confirms the treatment of the claim as a prepetition, general unsecured claim is appropriate.

Oyague further asserts that additional accommodations should be made to holders of third party claims with respect to available insurance. As indicated in Section 4.5 of the Plan, holders of medical malpractice and/or negligence claims may seek relief from the automatic stay imposed under section 362(a) and pursue recovery on such claims as against available insurance (if any) upon the filing of an appropriate stipulation lifting the stay. As to holders of claims against The Mount Vernon Hospital, pursuant to this Court's Order dated as of October 25, 2013

[Docket No. 402], mediation procedures have been implemented for the handling and resolution of all such claims. Thus, appropriate accommodations have been included for holders of such third party claims in the Plan. Accordingly, the Oyague Objection is meritless and should be overruled.

First Financial

First Financial objects to confirmation of the Plan on the basis that the Plan fails to provide adequate procedures for the return of certain equipment and other personal property (the "Equipment") leased to the Debtors by First Financial. Regardless of whether the First Financial lease is viewed as a true lease or treated a secured financing, appropriate mechanisms have been included in the Plan to address the return of the Equipment.

First, under Section 4.1 of the Plan, holders of secured claims are entitled to receive one of the following alternative treatments with respect to their property: (a) payment in full in Cash on or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) the date the Claim becomes due and payable by its terms; (b) the legal, equitable and contractual rights to which such Claim entitles the holder, unaltered by the Plan; (c) the treatment described in Section 1124(2) of the Bankruptcy Code; or (d) all collateral securing such Claim. As indicated in the First Financial Objection, the Debtors have advised First Financial of their intent to return the Equipment to First Financial and indeed have been working with the Buyers and First Financial to effectuate such a return as promptly as possible. The Debtors and the Buyers intend to continue working with First Financial to properly identify and return the Equipment to First Financial as soon as reasonably practicable, and as required under the Plan[3].

[3] To the extent any or all of the Equipment is retained or sought to be purchased by the Buyers, it is anticipated that First Financial will be made whole on any resulting claim it may have as to any such Equipment, subject to the approval of the Debtors and the Committee.

Further, to the extent First Financial's lease is accepted as a true lease and treated as an executory contract, the Plan similarly includes adequate provisions for its treatment insofar as it provides that effective on and as of the Confirmation Date, all Executory Contracts, to the extent not previously assumed and assigned, will be deemed rejected. Counter-parties to the executory contracts are thereafter provided 45 days to file rejection claims against the Debtors' estates arising out of any such rejection of their agreement.

Thus, the Debtors submit that the Plan properly addresses and includes provisions for the return of the Equipment as well as the treatment of any related claims First Financial may have as against the Debtors' estates. Accordingly, the First Financial Objection should also be overruled.

3M Objection

3M filed an objection to confirmation based on the Debtors' alleged failure to pay outstanding administrative obligations (the "Unpaid Obligations") due to 3M. After discussions among the parties and counsel for Buyers, the parties determined that the Unpaid Obligations are, in substantial part, not owed by the Debtors and were incurred after the closing of the Sale to the Buyers. The Buyers have indicated a willingness to pay 3M for any amounts due for the post-closing period, subject to a proper reconciliation and review of the 3M invoices. The parties are continuing to work collaboratively to resolve the 3M's claim and anticipate the objection will ultimately be withdrawn.

VI. PLAN SOLICITATION AND VOTING RESULTS

On September 17, 2014, the Bankruptcy Court entered the Disclosure Statement Order [Docket No. 822], approving the Disclosure Statement [Docket No. 820] and establishing Plan confirmation procedures. Among other things, the Plan confirmation procedures established a voting deadline of October 23, 2014 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 Debtors caused to be transmitted: (a) written notice of the Confirmation Hearing, (b) a copy of the Disclosure Statement Order, (c) a copy of the Disclosure Statement (together with the Plan and related exhibits) and (d) an appropriate ballot with instructions attached thereto, along with a postage pre-paid, pre-addressed return envelope (collectively, the "Solicitation Package"), to all known holders of Claims as of September 17, 2014 in Class 3 (Unsecured Claims), which was the only Class entitled to vote on the Plan. *See* Voting Declaration ¶ 5 [Docket No. 884].

Additionally, as also required under the Disclosure Statement Order, the Debtors caused to be transmitted to holders of Administrative Claims, Priority Tax Claims, Professional Fee Claims, Secured Claims (Class 1), Other Priority Claims (Class 2) and Interests (Class 4), a copy of (i) the Confirmation Hearing Notice and (ii) a Notice of Non-Voting Status advising that the recipient was not entitled to vote on the Plan on account of such person's Claim or Interest. *See* Voting Declaration ¶ 4 [Docket No. 884]. A copy of: (i) Disclosure Statement (including Plan), (ii) Disclosure Statement Order and (iii) the Confirmation Hearing Notice was also served on parties comprising the Master Service List and General Service List. See Voting Declaration ¶ 6 [Docket No. 884]. In addition, a copy of the Confirmation Hearing Notice was served on all counterparties to executory contracts. *See* Voting Declaration ¶ 7 [Docket No. 884].

In addition to the foregoing, the Debtors also timely published the Confirmation hearing Notice in: (a) the *New York Times* and (b) *Pluma Libre*, as further required by the Disclosure Statement Order. *See* Affidavits of Publication of Andrew E. Weissman [Docket No. 893]

Pursuant to the Disclosure Statement Order, the deadline to return ballots accepting or rejecting the Plan was set as October 23, 2014 at 4:00 p.m. (prevailing Eastern Time), unless previously extended by the Debtors. As indicated in the Voting Declaration, 96.65% in number and 97.87% in dollar amount of holders of Claims in Class 3 voted in favor of the Plan. See Voting Declaration ¶ 17.

VII. THE PLAN MEETS THE REQUIREMENTS FOR CONFIRMATION

To confirm the Plan, the Debtors must demonstrate by a preponderance of the evidence that the Plan satisfies each of the requirements of section 1129 of the Bankruptcy Code. *See 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 section 1129(a) requirements). For the reasons described herein, and the Terrano Declaration, and as will be demonstrated at the Confirmation Hearing, the Plan presented by the Debtors satisfies all of the requirements of section 1129(a) of the Bankruptcy Code. Accordingly, the Plan should be confirmed.

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

Section 1129(a) of the Bankruptcy Code 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) To the extent that the debtor is subject to the jurisdiction of any regulatory commission, any rate change provided in the plan has been approved by, or is subject to the approval of, such regulatory commission;

(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 to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, 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), 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) The plan provides for the continued payment of certain retiree benefits for the duration of the period that the debtor has obligated itself to provide such benefits; and

(14) 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)-(13) and (16). Section 1129(b) of the Bankruptcy Code provides, in pertinent part, that if a plan satisfies all of the requirements of Section 1129(a) other than Section 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.

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

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

Pursuant to section 1129(a)(1) of the Bankruptcy Code, 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 Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995). Although broadly drafted, the legislative history of section 1129(a)(1) indicates that this provision is directed at compliance with sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan, respectively. *See H.R. Rep.* No. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6368; S. Rep. No. 95-989, at 126 (1978), reprinted in 1978

U.S.C.C.A.N. 5787, 5912; *see also In re Johns-Manville Corp.*, 843 F.2d 636, 649 (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 sections 1122 and 1123 of the Bankruptcy Code and therefore satisfies section 1129(a)(1) of the Bankruptcy Code.

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

The plan complies with Section 1122 of the Bankruptcy Code. Section 1122(a) of the Bankruptcy Code sets forth the basic rule governing the classification of claims and interests. Generally, a plan proponent is afforded significant flexibility in classifying claims, provided there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar. "[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 (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 four distinct Classes, based upon differences in the legal nature or priority of those Claims: Secured Claims (Class 1); Other Priority Claims (Class 2); General Unsecured Claims (Class 3); and Interests (Class 4). 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.

Furthermore, the Classes established under the Plan are separately classified because each comprises distinct types of Claims. Class 1 Secured Claims consist of all claims held by creditors asserting a valid lien, security interest, or other interest in property of the Debtors. Class 2 Other Priority Claims consists of unsecured claims of the Debtors that are entitled to priority status under section 507 of the Bankruptcy Code. Class 3 Unsecured Claims consists of all unsecured claims including, without limitation, Allowed Medical Malpractice/Personal Injury Claims which arose prior to the Petition Date, and are not an Administrative Claim, Priority Tax Claim, Professional Fee Claim, Secured Claim, or Other Priority Claim. Class 4 Interests are all legal, equitable, contractual and other ownership rights or interests in any Debtors, if any.

Overall, the Plan contains: (i) two Classes of unimpaired Claims (Classes 1 and 2), (ii) one Class of Impaired Claims that is entitled to receive distributions in accordance with the Plan (Class 3) and (iii) one Class of Impaired Claims that is not entitled to distributions (Class 4). Accordingly, the Debtor submits that the classification structure embodied in the Plan is both reasonable and appropriate under section 1122(a) of the Bankruptcy Code.

b. Mandatory Contents of a Plan

Section 1123(a) of the Bankruptcy Code identifies seven requirements for the contents of a chapter 11 plan for a corporation. *See* 11 U.S.C. § 1123(a). As set forth below, the Plan fully complies with each such requirement:

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

Section 1123(a)(1) of the Bankruptcy Code 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 four Classes of Claims, other than those specified in sections 507(a)(2), (3) and (8) of the

Bankruptcy Code. Administrative Claims and Priority Tax Claims are not classified but treated separately in Article II of the Plan. Thus, the Plan complies with section 1123(a)(1) of the Bankruptcy Code.

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

Section 1123(a)(2) of the Bankruptcy Code 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 Classes 1 and 2 are not impaired under the Plan and are thus conclusively presumed to have accepted the Plan. Therefore, the Plan complies with section 1123(a)(2) of the Bankruptcy Code.

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

Section 1123(a)(3) of the Bankruptcy Code 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 III of the Plan specifies the treatment of the Impaired Class 3 and Class 4 Claims. Accordingly, the Plan complies with section 1123(a)(3) of the Bankruptcy Code.

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

Section 1123(a)(4) of the Bankruptcy Code 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 and Interest within a particular Class. Consequently, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

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

Section 1123(a)(5) of the Bankruptcy Code 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 alias*

(i) the funding of required distributions under the Plan from, among other things, collections, the proceeds of sale of substantially all of the Debtors' assets to date in the Chapter 11 Cases, and the proceeds of the liquidation or other disposition of the remaining Assets of the Debtors

(ii) vesting of the Assets in the Debtors free and clear of all Claims, liens, encumbrances, charges and other interests, except as expressly provided in the Plan or Confirmation Order;

(iii) the continued existence of the Debtors, after the Effective Date, for purposes of winding up their affairs, liquidating any remaining Assets, enforcing and prosecuting any Causes of Action, interests, rights and privileges of the Debtors, resolving Disputed Claims, administering the Plan and filing appropriate tax returns.

(iv) 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.

(v) 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 section 1123(a)(5) of the Bankruptcy Code.

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

Section 1123(a)(6) of the Bankruptcy Code 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 with voting power. 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) of the Bankruptcy Code 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). As indicated above, the Plan provides for the appointment of a Plan Administrator. 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 section 1123(a)(7) of the Bankruptcy Code.

c. Permitted Contents of a Plan

Section 1123(b) of the Bankruptcy Code 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 section 1123(b):

(i) the Plan impairs or leaves unimpaired Classes of Claims, as permitted by section 1123(b)(1) of the Bankruptcy Code (Plan, Articles III and IV);

(ii) the Plan provides for the rejection of executory contracts and unexpired leases of the Debtors not previously assumed or rejected under section 365 of the Bankruptcy Code, as contemplated by section 1123(b)(2) of the Bankruptcy Code (Plan, Article VIII);

(iii) the Plan provides for the retention of Causes of Action, except those expressly released under the Plan (Plan, Section 5.11);

(iv) as authorized by section 1123(b)(5) of the Bankruptcy Code, and as discussed above, the Plan sets forth the Debtor's proposed treatment of unsecured and secured Claims filed against the Debtor (Plan, Article IV); and

(v) pursuant to section 1123(b)(6) of the Bankruptcy Code, 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 with this section of the Bankruptcy Code, the Plan provides for various integral components of the Debtors' proposed liquidation, including 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 section 1123(b) and other applicable provisions of the Bankruptcy Code.

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

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

While section 1129(a)(1) focuses on a plan's compliance with the Bankruptcy Code, section 1129(a)(2) focuses on the 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 sections 1125

and 1126 of the Bankruptcy Code. *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 WorldCom, Inc.*, No. 02-13533, 2003 Bankr. LEXIS 1401, at *143-44 (Bankr. S.D.N.Y. Oct. 31, 2003); *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 Debtors have complied with Section 1125 of the Bankruptcy Code 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 Heather Montgomery of GCG, Inc., sworn to on September 26, 2014 [Docket No. 830], as supplemented on October 2, 2014 [Docket No. 833], all persons entitled to receive notice of the Disclosure Statement, the Plan and the Confirmation Hearing received timely, proper and adequate notice of the Confirmation Hearing including all relevant deadlines relating to the submission of ballots and the filing of objections to the confirmation of the Plan. The Confirmation Hearing Notice was also timely published. As such, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code. *See In re Drexel Burnham Lambert*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (section 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to plan).

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

Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 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 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) (same).

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 section 1129(a)(3) of the Bankruptcy Code 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 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 (b) the liquidation of the Debtors' remaining assets and (c) the winding up of the Debtors' affairs, 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 to the Buyers in accordance with the Sale Order. The sale

process itself was effectuated with the full involvement, input and support of the Committee. Indeed, as set forth above, the Committee's efforts in connection with the sale transaction ultimately led to a substantial increase in the Purchase Price from the original stalking horse bid submitted by the Buyers, thereby enabling the Debtors to provide a meaningful dividend to the unsecured creditors.

The Committee's involvement was also pervasive in the development of the Plan. Indeed the Plan is the product of lengthy discussions and negotiations between the Debtors and the Committee. These negotiations or discussions addressed, among other things, (a) the treatment of Claims, (b) the means of implementing the Plan (e.g., the appointment of the Plan Administrator) (c) the substantive consolidation the Debtors' estates, (d) the release injunction and exculpation provisions and (e) other specific provisions of the Plan. The Debtors submit that the Plan provides the best means for maximizing the value of the Debtors' estates and the return to creditors. Accordingly, the Debtors submit that the good faith requirement of section 1129(a)(3) is satisfied.

The second prong of section 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 Debtors believe that the provisions of the Plan are also consistent with applicable non-bankruptcy law. In light of the foregoing, the Debtors have satisfied all requirements of section 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) of the Bankruptcy Code requires that all payments made by the debtor (or by a person issuing securities or acquiring property under a plan), 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 no later than sixty (60) days after the Effective Date. 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 section 1129(a)(4) of the Bankruptcy Code.

5. Section 1129(a)(5) — The Plan Discloses Required Information Regarding Post-confirmation Management and Insiders

Section 1129(a)(5) of the Bankruptcy Code 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 section 1129(a)(5)(A)(ii) of the Bankruptcy Code, 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 Monica Terrano, who is the Debtors' Wind Down Officer will, at the selection of the Debtors and the Committee, be the Plan Administrator pursuant to Section 5.7 of the Plan. Section 5.7 also sets forth the compensation to be paid to Ms. Terrano as the Plan Administrator. The Debtors 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 satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

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

Section 1129(a)(6) of the Bankruptcy Code 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) of the Bankruptcy Code 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) of the Bankruptcy Code 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 section 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 Class 1 (Secured Claims) and Class 2 (Other Priority Claims) which are unimpaired and presumed to have accepted the Plan. Claims in Class

3 (Unsecured Claims) and Class 4 (Interests) 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 Class 3 and Class 4 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, the creditors in Class 3 and Class 4 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, 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* Terrano Declaration at ¶ 36. Further, the Plan provides for the appointment of a Plan Administrator — whom the Debtors, together 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 Debtors 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* Terrano Declaration at ¶ 36. 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. 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.

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 Class 3 and Class 4 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 section 1129(a)(7) of the Bankruptcy Code.

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

Section 1129(a)(8) of the Bankruptcy Code 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 reject the plan. *See* 11 U.S.C. § 1126(d). Whether a class of claims is impaired is governed by section 1124.

As indicated above, Classes 1 and 2 are not impaired under the Plan and are thus conclusively deemed to have accepted the Plan. Class 3, the only impaired Class under the Plan which was entitled to vote, voted in favor of the Plan.

The following table summarizes the votes by Class:[4]

Class	Dollar Amount Voted/ Percentage of Total Dollar Amount	Number of Votes/ Percentage of Number of Votes	Dollar Amount Voted/ Percentage of Total Dollar Amount	Number of Votes/ Percentage of Number of Votes
Class 3 (General Unsecured Claims)	$121,577,627.21 /97.87%	$2,647,261.70 /2.13%	173 / 96.65%	6 /3.35%

In accordance with section 1126(c) of the Plan, creditors holding greater than two-thirds in dollar amount and greater than one-half in number of the allowed claims in Class 3 have voted to accept the Plan. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(8) with respect to such class.

Holders of Interests, if any, in Class 4 will receive no distribution under the Plan on account of such interests and, therefore, Class 4 is deemed to have rejected the Plan. Accordingly, as to Class 4, Section 1129(a)(8) is not satisfied and the Debtors are therefore requesting confirmation of the Plan under Section 1129(b) of the Bankruptcy Code.

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

[4] 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.

Section 1129(a)(9) of the Bankruptcy Code 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. *See* 11 U.S.C. § 1129(a)(9). Specifically, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) and (3) of the Bankruptcy Code (e.g., administrative claims allowed under section 503(b) of the Bankruptcy Code) 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) of the Bankruptcy Code requires that each holder of a claim of a kind specified in sections 507(a)(1) and (4) through (7) of the Bankruptcy Code — 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 to the allowed amount of such claim on the effective date of the plan. *Id.* Section 1129(a)(9)(C) of the Bankruptcy Code also provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code (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 in Cash equal to such Allowed Administrative 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 or otherwise payable. *See* Plan, Section 2.2 (c).

Additionally, the Plan provides that each holder of an Allowed Priority Claim will receive an amount of Cash equal to the amount of such Allowed Priority Claim on or as soon as reasonably practicable after the later of (a) the Effective Date and (b) the date on which such Claim becomes Allowed. *See* Plan, Section 4.2.

Finally, the Plan contains provisions providing that each holder of an Allowed Priority Tax Claim will receive, in full satisfaction of its Claim: (a) Cash, 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 and (b) the date on which such Claim becomes Allowed. *See* Plan, Section 2.3(a).

Accordingly, the Plan satisfies the requirements set forth in section 1129(a)(9) of the Bankruptcy Code.

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

Section 1129(a)(10) of the Bankruptcy Code 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). Class 3, the only impaired class under the Plan with the right to vote, has voted to accept the Plan. Accordingly, section 1129(a)(10) of the Bankruptcy Code is satisfied.

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

Section 1129(a)(11) of the Bankruptcy Code 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 section 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 section 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 Terrano Declaration at ¶ 41, 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 section 1129(a)(11) of the Bankruptcy Code

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

Section 1129(a)(12) of the Bankruptcy Code 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, or be determined by the Bankruptcy Court at the confirmation hearing and have been paid or will be paid on the effective date of the plan. *See* 11 U.S.C. § 1129(a)(12). The fees payable by the Debtors (or the Plan Administrator after the Effective Date) to the U.S. Trustee or the Clerk of the Court, as provided under 28 U.S.C. § 1930, constitute Allowed Administrative Claims under the Plan, which, pursuant to the Plan, will be paid in full in their allowed amount on the Effective Date. As a result, the Debtors submit that the Plan complies with section 1129(a)(12) of the Bankruptcy Code.

13. Section 1129(a)(13) — The Debtor Does Not Have Obligations to Pay Retiree Benefits

Section 1129(a)(13) of the Bankruptcy Code 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 section 1114 of the Bankruptcy Code 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 section 1114 of the Bankruptcy Code, and therefore, the requirements of section 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

Sections 1129(a)(14) and (15) of the Bankruptcy Code only apply to debtors required to pay domestic support obligations and individual debtors. Accordingly, Sections 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) of the Bankruptcy Code 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 section 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 section 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, including without limitation the Sale, 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 in accordance with the provisions set forth in sections 510 and 511 of the New York Not-for-Profit laws. Further, the Plan provides for the Bankruptcy Court's approval of additional transfers of property, if any and such transfers will be made by the Plan Administrator in accordance with applicable law. Accordingly, section 1129(a)(16) is satisfied.

B. The Plan Should Be Confirmed Under Section 1129(b) Of The Bankruptcy Code Over The Deemed Rejection of Class 4

Section 1129(b) provides a mechanism for confirming a plan even though the plan has not been accepted by all impaired classes of claims and interests. Section 1129(b) provides in pertinent part:

> Notwithstanding section 510(a) of [the Bankruptcy Code], if all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Class 4 (Interests) is deemed to have rejected the Plan because members of the Class will not receive or retain property under the Plan. 11 U.S.C. § 1126(g). Accordingly, the Debtors request confirmation of the Plan under the so- called "cramdown" provision of the Bankruptcy Code. *See* Plan, Section 11.02.

Section 1129(b)(1) of the Bankruptcy Code provides that, if a plan of reorganization satisfies all of the requirements of section 1129(a) other than section 1129(a)(8) (requiring all impaired classes to accept the plan), a plan may be confirmed "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interest that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). As set forth below, the Plan satisfies both of these requirements as to Class 4.

1. The Plan Does Not Discriminate Unfairly With Respect to the Non-Accepting Classes

The Plan does not discriminate unfairly with respect to Class 4. Although Congress did not define unfair discrimination, under 11 U.S.C. § 1129(b)(1), a plan proponent may not segregate similar claims or interests into separate classes and provide disparate treatment for those classes. *See, e.g., In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986). ("[U]nfair discrimination' standard ...insures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes."), *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).

Moreover, the "unfair discrimination" standard of section 1129(b) does not prohibit all types of discrimination among holders of claims and interests; it merely prohibits unfair discrimination. *Leslie Fay*, 207 B.R. at 791 n.37. According to the *Leslie Fay* court, "[t]he section 1129(b)(1) test boils down to whether the proposed discrimination between classes has a reasonable basis and is necessary for the organization." *Id.* Here, Class 4 contains Interests which are distinct in nature and dissimilarly situated from the Claims of holders in Class 3. There are no other classes which contain Interests under the Plan and, accordingly, none of these similarly situated parties will be receiving any type of distribution under the Plan.

2. The Plan is Fair and Equitable With Respect To The Non-Accepting Class

In addition to not discriminating unfairly, the Plan must be fair and equitable with respect to non-accepting Classes. Unlike the unfair discrimination test, section 1129(b) of the Bankruptcy Code provides explicit guidance as to the meaning of "fair and equitable." *See Norwest Bank Worthington, et al. v. Ahlers*, 485 U.S. 197, 202 (1988) ("fair and equitable" means that a plan must "comply with the absolute priority rule"). As discussed below, the Plan satisfies both the codified and uncodified elements of the fair and equitable cramdown requirement.

The codified, minimum requirement of the fair and equitable standard with respect to a class of interests is found in section 1129(b)(2)(B) of the Bankruptcy Code (cramdown of unsecured claims), which permits the "cramdown" of non- assenting classes of unsecured claims so long as:

> the holder of any interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property....

11 U.S.C. § 1129(b)(2)(B)(ii). The Plan satisfies this requirement because no Class junior to Class 4 will receive or retain any property under the Plan.

Similarly, the Plan satisfies applicable uncodified aspects of the fair and equitable standard. Holders of Claims in Classes senior to Class 4 must not receive more than 100% of the value of their Claims. *See, e.g., In re MCorp Financial, Inc.*, 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992) ("If former stockholders' interests are eliminated, a valuation is required to make sure that the senior classes of claims are not being provided for more than in full."). This implicit requirement of the fair and equitable standard is satisfied because no holder of Claims in Classes senior to Class 4 will receive or retain property of a value, as of the Confirmation Date, that exceeds 100% of the value of such Claims against the Debtor, including post-petition interest, if entitled.

In sum, the Plan's treatment of the Class 4 Interests satisfies the cramdown requirements of the Bankruptcy Code, and the Plan may be confirmed notwithstanding non-compliance with section 1129(a)(8).

C. The Principal Purpose of the Plan is Not the Avoidance of Taxes or Securities Registration Requirements

Section 1129(d) of the Bankruptcy Code 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 section 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 section 1129(d) of the Bankruptcy Code.

VIII. 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 rejected or terminated pursuant to their own terms or Order 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.

IX. 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 and Interests in 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 arms-length negotiations. Moreover, the 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.[5] Accordingly, the injunction, release and exculpation provisions should be approved in all respects.

A. The Releases

1. Debtors' Releases

Under the provisions of Section 13.2 the Plan, the Debtors shall release the Debtors Release Parties from any and all claims held or assertable by the Debtors (the "Debtor Releases"), with the exception of (i) Avoidance Actions, (ii) D&O Claims which may have been asserted on or before the D&O Release Effective Date, and (iii) claims arising out of willful misconduct, gross negligence or failure to comply with Rule 1.8(h)(1) of the New York Code of Professional Conduct, as determined by a Final Order.

The Debtors believe the proposed Debtor Releases are appropriate and consistent with the Bankruptcy Code and applicable law. It is well-established that debtors are authorized to settle or release their claims in a chapter 11 plan. [6] Section 1123(b)(3)(A) of the Bankruptcy Code specifically provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." [7] A plan that proposes to release a claim or cause of action belonging to a debtor is considered a "settlement" for purposes of satisfying section 1123(b)(3)(A) of the Bankruptcy Code. Settlements pursuant to a plan are generally subject to the same "reasonable business judgment" standard applied to settlements

[5] In addition, while the Debtors did not receive any objections to the proposed release, exculpation and injunction provisions, they did receive requests for certain modifications and carve-outs from the U.S. Trustee's office, the Pension Benefit Guaranty Corporation, and the United States Attorney's Office. The Debtors incorporated certain language into the Plan prior to solicitation and are incorporating additional language modifying the Plan, which is discussed more fully in Section IV hereof.

[6] *See Adelphia*, 368 B.R. at 263 n.289 (holding that a debtor may release its own claims); *In re Oneida Ltd.*, 351 B.R. 79, 94 n.21 (Bankr. S.D.N.Y. 2006) (noting that a debtor's release of its own claims is permissible).

[7] 11 U.S.C. § 1123(b)(3)(A).

under Bankruptcy Rule 9019.[8] 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"[9] and does not "fall[ ] below the lowest point in the range of reasonableness.[10]

The Debtors, in conjunction with the Committee, have conducted a thorough investigation into the Debtors' finances and affairs, as they were immediately preceding the filings, to determine if any viable causes of actions exist which should be pursued, including actions against any of the Debtors' former officers and directors. To preserve any potential claims that may exist, the Plan does not release any of the Debtors Release Parties from any D&O Claim which is asserted by either the Debtors, the Plan Administrator, the Committee or the Post Effective Date Committee on or before the D&O Release Effective Date of November 6, 2014. Thus to the extent actionable claims may be asserted against any of the Debtors Release Parties, the Plan provides an appropriate mechanism for the continued pursuit of such claims, with any recovery on such claims being limited to available insurance. Accordingly, the Debtor Releases are reasonable and represent a sound exercise of the Debtors' business judgment, and should be approved pursuant to section 1123(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

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[8] *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 section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a)).

[9] *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).

[10] *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].").

The Debtor 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 Debtor Releases will eliminate the potential for unanticipated and potentially sizeable administrative and unsecured claims arising from any indemnification rights. The proposed releases will also obviate any obligation on the part of the Debtors to obtain costly tail coverage for the Debtors Release Parties, to which they might also be otherwise entitled.

The Debtors Releases are also similar in scope to those previously approved by courts in this district. *See, e.g., In re Saint Vincents Catholic Medical Centers of New York, et al.*, Chapter 11 Case No. 10-11963 (CGM) (Bankr. S.D.N.Y. June 29, 2012); *In re General Maritime Corp., et al.*, Case No. 11-15285 (MG) (Bankr. S.D.N.Y. May 7, 2012) [Docket No. 794] (confirming chapter 11 plan which contained debtor releases for the debtors, creditors' committee, lenders, plan sponsors, and the affiliates, officers, directors, and employees of each); *In re Almatis*, Case No. 10-12308 (MG); (Bankr. S.D.N.Y. Sept. 20, 2010) [Docket No. 444] (confirming chapter 11 plan that contained estate releases for directors, officers and employees as well as prepetition and postpetition lenders, committee members, and noteholders); *In re Uno Rest. Holdings Corp.*, Case No. 10-10209 (MG) (Bankr. S.D.N.Y. July 6, 2010) [Docket No. 559] (same); *In re Ion Media Networks, Inc.*, Case No. 09-13125 (Bankr. S.D.N.Y. Dec. 3, 2009) [Docket No. 453] (confirming plan that provided for releases by the debtor of the debtors' directors and officers in addition to parties to a global settlement, including the creditors' committee and certain consenting first lien lenders); *In re DJK Residential LLC*, Case No. 08-10375 (Bankr. S.D.N.Y. May 7, 2008) [Docket No. 497] (finding that releases and discharges of claims and causes of

action by the Debtors were a valid exercise of the debtors' business judgment); *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y. Dec. 19, 2007) [Docket No. 7256] (same); *In re Tower Auto., Inc.*, No. 05-10578 (Bankr. S.D.N.Y. July 12, 2007) [Docket No. 2932] (finding that debtor releases represented a valid settlement of whatever claims Debtors may have against the debtor releasees).

Accordingly, and based on the foregoing, the Debtors respectfully submit that the proposed Debtor Releases 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 section 1123(b)(3)(A) of the Bankruptcy Code, 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 or Interest in the Debtors shall be deemed to have released each of Debtors, the Committee, the Patient Care Ombudsman and their respective present directors, officers, trustees, agents, attorneys, advisors, members and employees (solely in their capacity as such) from any and all claims held by such parties, which are 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 "Third Party Releases"). The proposed Third Party Releases do not however, release claims and causes of action based on any released party's 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").

b. The Proposed Releases Are Permissible Under Second Circuit Standards

Once this Court has established that it has jurisdiction to approve the Third Party Releases, it must still evaluate their propriety. Here, the Third Party 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. *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). Court 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).

Moreover, in the Second Circuit, third-party releases are appropriate if the court finds that there are "unusual circumstances" that render the release terms "important" to the success of the plan. *Metromedia*, 416 F.3d at 143; *see also In re Charter Commc'ns*, 419 B.R. at 258. The factors identified in *Metromedia* include the following: "(i) the estate received substantial consideration; (ii) the enjoined claims were 'channeled' to a settlement fund rather than extinguished; (iii) the enjoined claims would indirectly impact the debtor's reorganization 'by way of indemnity or contribution'; and (iv) the plan otherwise provided for the full payment of the enjoined claims." *Metromedia*, 416 B.R. at 142 (citations omitted). Despite the Court's enumeration of indicative factors, the Second Circuit noted that no single factor was necessarily determinative, but that courts should consider the totality of the circumstances to determine whether the releases are important to the success of the plan. *Id.* at 142-43. As indicated above,

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 Second Circuit has further held that in bankruptcy cases "a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Gro., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992). As discussed above, the Debtors, the Plan Administrator, the Creditors' Committee and other relevant constituents have devoted significant time and energy in developing a consensual and feasible Plan. *Id.* The Plan is premised on and reflects the extensive cooperation among these parties and the Debtors. In formulating the Plan, the Debtor was fully cognizant of the need for and propriety of providing releases to each of the foregoing parties who, among other things, made significant contributions and compromises in furtherance of the proposed Plan.

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 has jurisdiction to approve the Releases.

B. The Exculpation

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 and except as otherwise set forth in the Plan, none of (i) the Debtors' counsel, (ii) the Debtors' financial advisors, (iii) the Debtors trustees, in-house counsel, officers and directors (acting in their capacity as such), (iv) the Plan Administrator and its representatives (in their capacity as such), (v) the Committee and the Post Effective Date Committee, (vi) the

individual members of the Committee and Post Effective Date Committee (acting in their capacity as members of the Committee), (vii) counsel to the Committee and the Post Effective Date Committee, (viii) financial advisors to the Committee and Post Effective Date Committee, (ix) the Patient Care Ombudsman and/or (x) the Patient Care Ombudsman's professionals, shall have or incur any liability for any action taken or omitted to be taken 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.

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. In addition, nothing contained in Section 13.3 of the Plan shall exculpate any of the Debtors Release Parties from any D&O Claim asserted by either the Debtors, the Plan Administrator, the Committee or the Post Effective Date Committee on or before the D&O Release Effective Date, provided that the recovery on any such Claim shall be limited to the proceeds of available insurance. The Debtors submit that for the reasons that will be set forth herein, the Exculpation provisions contained in the Plan should be approved.

1. <u>The Exculpation Is Appropriately Tailored and Should Be Approved</u>

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, including the Sale. 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 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 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 the Debtors' restructuring. *See In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (holding that an exculpation provision is "apparently a commonplace provision in Chapter 11 plan, [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 that the exculpation provision was appropriate where such provision excluded gross negligence and willful misconduct.)

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).

In addition, courts have found that exculpation for participating in the plan process and chapter 11 cases is appropriate where 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*, 960 F.2d 285, 293 (2d Cir. 1992) (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 clause in a chapter 11 plan could chill the critical participation of the debtor's management and advisors, as well as essential creditor groups, in the process of formulating and negotiating consensual chapter 11 plans. *See, e.g., 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 abandon efforts to help a debtor follow through on plan and wind up its affairs). 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 Almatis, B.V.*, Case No. 10-12308 (MG) (Bankr. S.D.N.Y. Sept. 20, 2010) [Docket No. 444]; *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 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 jurisdiction. *See, e.g., In re DBSD N. Am., Inc., 419 B.R.* 179, 217-18 (Bankr. S.D.N.Y. 2009); *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 Debtor Releases, 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 hold a Claim against or Interest in the Debtors will be permanently enjoined 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, the Committee or members thereof, the Post-Effective Date Committee or members thereof, the Plan Administrator, or any of their respective successors or assigns, or any of their respective assets or properties, on account of any such Claim or Interest: (1) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding with respect to a Claim against or Interest in the Debtors; (2) enforcing, levying, attaching, collecting or otherwise recovering in any manner any judgment, award, decree or order with respect to a Claim against the Debtors; (3) creating, perfecting or enforcing any lien or encumbrance with respect to a Claim against or Interest in the Debtors; (4) asserting a setoff, right of subrogation or recoupment of any kind with respect to a Claim against or Interest in the Debtors, the assets or other property of the Estates; and (5) proceeding in any manner in any place whatsoever that does not comply with or is inconsistent with this 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 Debtor 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 section 105 of the Bankruptcy Code, 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. Covered Medical Professional Injunction

Section 13.1(b) of the Plan further enjoins all Persons from commencing or continuing any medical malpractice or related action against any Covered Medical Professional and/or from enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order with respect to a claim that would entitle a Covered Medical Professional to an Indemnification Claim (the "Covered Medical Professional Injunction"). The definition of Covered Medical Professional under the Plan is limited to any doctor, intern, resident, fellow, nurse or other employee of the Debtors to the extent any such person has a right of indemnification from, or another Claim against, any Debtor with respect to claims of medical malpractice alleged to have occurred during the scope of their services to any of the Debtors. In similarity to the General Injunction, the Covered Medical Professionals Injunction does not limit claimants from pursuing recoveries against any available insurance or otherwise compromise or release the obligations of any insurance company to defend a Covered Medical Professional under an otherwise applicable insurance policy.

In exchange for the injunction, the Covered Medical Professional shall be deemed to waive any indemnification or related tail coverage claims against the Debtors which could otherwise give rise to significant administrative and unsecured claims against the Debtors. The magnitude of the potential claims that might arise absent the Covered Medical Professional

Injunction is considerable and could very well jeopardize the confirmation process and the anticipated distribution to unsecured creditors.

The Covered Medical Professional Injunction also obviates the need to procure costly tail coverage on behalf of the Medical Professionals. The expense that would be associated with obtaining suitable tail coverage for the Covered Medical Professionals runs into the millions and clearly would derail these cases. *See* Terrano Declaration ¶21. Further, an *ad hoc* committee (the "*Ad Hoc* Committee") has already been formed by certain of the Covered Medical Professionals to ensure their interests are adequately protected under the Plan with respect to potential claims that might be asserted against them as a result of any medical services they may have provided on behalf of the Debtors. While formal claims have not yet been filed on behalf of the members of the *Ad Hoc* Committee, the Committee's time to file such claims has not yet expired and was extended through December 8, 2014 at 4:00 p.m. [Docket No. 807] Thus, to the extent insufficient mechanisms are included in the Plan for protecting these professionals from future liability, the members of the *Ad Hoc* Committee have indicated they will file claims for tail coverage and indemnification. Moreover, the Ad Hoc Committee has asserted that the majority of its members' claims are entitled to administrative expense priority. While the Debtors reserve all rights, claims and defenses with respect thereto, as indicated above, any additional unsecured and/or administrative obligations incurred by the filing of such claims, which could potentially be sizeable, would jeopardize the debtors' ability to effectuate the Plan and would further reduce the dividend to unsecured creditors. As such, the Covered Medical Professional Injunction is also critical to the success and implementation of the proposed Plan.

3. 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 section 105(a) of the Bankruptcy Code.[11] *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 section 105(a) "has been construed liberally to enjoin suits that might impede the reorganization 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 section 105(a) of the bankruptcy code. *See Clain v. International Steel Group, No.* 156 Fed. Appx. 398 (2d Cir. 2005)

[11] 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 section 105(a) of the Bankruptcy Code, 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.").

(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; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (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 permanent injunctions described in the Plan, including without limitation, the General Injunction and the Covered Medical Professional Injunction. As indicated above, the Debtors' estates would be subject to potential indemnification claims from

the Covered Medical Professionals because the injunctions in Section 13.(b) relate to Claims against the Debtors, which could result in contribution or indemnification claims if the non-debtor third parties are also sued on Claims against the Debtors. The approval of the proposed Injunctions, including the Covered Medical Professionals Injunction, will thus resolve and avoid the filing of potentially sizeable administrative and unsecured claims against the Debtors' Estates.

Second, the Injunctions were consented to by an overwhelming majority of those voting on the Plan (parties with full knowledge of the Releases and Injunctions): approximately 96.65% in number and 97.78% in dollar amount of holders of Class 3. By voting in favor of the Plan, the voting parties also effectively approved and consented to the provisions contained therein, including the proposed Injunctions. Therefore, in light of the benefits that the Debtors and their estates will receive from the injunctions in Section 13.1 of the Plan, such injunctions are reasonable and well justified an should be approved.

In sum, and as discussed above, the Releases, Exculpation and Injunctions embodied in the Plan are entirely reasonable, in the best interests of the Debtors and all parties in interest and consistent with sections 105, 1123, and 1129 of the Bankruptcy Code. 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 Release, Exculpation and Injunction provisions should be approved in their entirety.

X. SUBSTANTIVE CONSOLIDATION OF THE DEBTORS' ESTATES IS WARRANTED

The Plan provides for substantive consolidation of the Debtors' Estates upon the Effective Date. Accordingly, on the Effective Date: (a) all Assets (and all proceeds thereof) and liabilities of each Debtor shall be deemed merged or treated as though they were merged into and with the assets and liabilities of the other Debtors, (b) no distributions shall be made under the Plan on account of intercompany Claims among the Debtors and all such Claims shall be eliminated, (c) all guarantees of the Debtors of the obligations of any other Debtor shall be deemed eliminated and extinguished so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint and several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors, (d) each and every Claim filed or to be filed in any of the Chapter 11 Cases shall be deemed filed against the consolidated Debtors, and shall be deemed one Claim against and obligation of the consolidated Debtors, and (e) for purposes of determining the availability of the right of set-off under Section 553 of the Bankruptcy Code, the Debtors shall be treated as one entity so that, subject to the other provisions of Section 553 of the Bankruptcy Code, debts due to any of the Debtors may be set-off against the debts of the other Debtors. The substantive consolidation of the Debtors shall not (other than for purposes related to the Plan) affect the legal and corporate structures of the Debtors.

Substantive consolidation is an equitable remedy designed to carry out the chief purpose of the Bankruptcy Code – the equitable treatment of all creditors. Substantive consolidation involves the pooling and merging of the assets and liabilities of the affected debtors. All of the debtors in the substantively consolidated group are treated as if they were a single corporate and economic entity. Consequently, a creditor of one of the substantively consolidated debtors is

treated as a creditor of the substantively consolidated group of debtors and issues of individual corporate ownership of property and individual corporate liability on obligations are ignored. Substantive consolidation of two or more debtors' estates generally results in the deemed consolidation of the assets and liabilities of the debtors, the deemed elimination of intercompany claims, multiple and duplicative creditor claims, joint and several liability claims and guaranties, and the payment of allowed claims from a common fund.

Substantive consolidation of the Debtors' Estates is warranted in these cases. Under controlling authority, substantive consolidation is appropriate where one of the following two factors exists: (1) creditors transacted with affiliated entities as a single economic unit and did not rely on their separate identity in extending credit or (2) the affairs of affiliated entities are so entangled that consolidation will benefit all creditors of those entities. *See Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988); *see also In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). The facts and circumstances of Debtors' business operations and insolvency proceedings satisfy both alternative factors of this test.

First, many of the Debtors' creditors effectively dealt with the Debtors as a single economic entity. In many instances, services rendered on behalf of one or more Debtor were subject to compensation under arrangements involving on or more of the other Debtors. Frequently, payments were transferred from one Debtor to another to fund payment of necessary services without regard to the responsible Debtor entity under the parties' agreement. Alternatively, payments were made directly by one Debtor on behalf of the other based on available cash flow.

Further, certain of the assets and liabilities of the Debtors and the various intercompany transfers were so hopelessly entangled that it would be virtually impossible, not to mention incredibly time consuming, to attempt to unwind the transactions. At no time did the Debtors allocate expenses or costs of administration among the various entities. Instead, all such expenses were paid primarily by SSMC without regard to its actual allocable share. The Debtors' DIP financing arrangement was also treated as a single facility loan. Although the facility was supported by security from multiple Debtors, there was no meaningful allocation of the collateral in relation to the funds provided to each such Debtor thereunder. The sale process also envisioned the Debtors as a single operating unit with no allocation of either the purchase price or assumed liabilities being made as to each individual Debtor.

Moreover, the potential costs to each of the Debtors' Estates for the professionals conducting diligence on, much less pursuing, the unwinding of such transactions and any related litigation would be enormous. The potential dividend to unsecured creditors is limited in these cases. By incurring additional administrative costs in pursuing a reallocation of expenses and liabilities to the various debtor entities, meaningful dollars would be stripped from the Debtors' estates. In addition, there would be a limited return differential to creditors from the filing of separate Plans. Indeed any potential for an upside to some creditors would be extinguished by the related costs that would be incurred in undertaking such a task.

Substantive consolidation on the other hand will maximize dividends to creditors and enhance the efficiencies of administration by limiting administrative costs, reducing delay and eliminating the potential for lengthy, burdensome and costly litigation over intercompany claims. The authority to order substantive consolidation of several debtors' estates is derived from Sections 105 and 1123(a)(5) of the Bankruptcy Code. Section 105 of the Bankruptcy Code

provides in relevant part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105 (a). In view of the limited funding available to unsecured creditors and the expense that would necessarily be involved in unraveling the Debtors' affairs, the recovery to unsecured creditors of under a consolidated Plan will, at best, be maximized, and at worst, be largely unaffected by consolidating each of the Debtors' assets. No creditor or group of creditors will be deprived of their rights if the proposed substantive consolidation is allowed. Accordingly, under applicable legal standards, substantive consolidation of the assets and liabilities of the Debtors is appropriate and necessary to ensure the equitable treatment of the Debtors' creditors.

CONCLUSION

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

Dated: New York, New York
October 29, 2014

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