UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
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Hearing Date:
March 14, 2020 at 10:00 a.m.

Chapter 11

BAYRIDGE LOK HOLDINGS LLC,

Case No.21-43128 (JMM)

Debtor.
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DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF FIRST AMENDED DISCLOSURE STATEMENT AND CONFIRMATION OF FIRST AMENDED PLAN OF REORGANIZATION OF BAYRIDGE LOK HOLDINGS LLC

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PRELIMINARY STATEMENT

A. Introduction & Background Facts

1. Bayridge LOK Holdings LLC ("Bayridge" or "Debtor"), as debtor and debtor in possession in the above-captioned case, submits this Memorandum of Law (this "Memorandum") in support of final approval of the *First Amended Disclosure Statement for First Amended Plan of Reorganization of Bayridge LOK Holdings LLC* dated March 8, 2022 ("Disclosure Statement")[ECF Doc. No. 41], and confirmation of the *First Amended Plan of Reorganization of Bayridge LOK Holdings LLC,* dated March 8, 2022, [ECF Doc. No. 37] (as it has been or may be subsequently amended or modified in accordance with its terms and the Bankruptcy Code, the "Plan"),[1] pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code"). In further support of final approval of the Disclosure Statement and confirmation of the Plan, Debtor has filed or will be filing: (the Declaration of Pearl Schwartz in Support of Confirmation of First Amended Plan of Reorganization of Bayridge LOK Holdings LLC (hereinafter, "Schwartz Decl.") and 699 92nd Street LLC ('699") has filed or will be filing: (ii) the Declaration of Marvin Rubin (hereinafter, "Feasibility Decl.").

2. Debtor is pleased to present the Court with the Plan, which was finalized and filed after extensive, lengthy, good-faith negotiations between and

[1] Capitalized terms used but not defined herein have the meanings ascribed to such terms in either (i) the Plan, (ii) the Disclosure Statement, or (iii) the Order Scheduling Hearing on Final Approval of Disclosure Statement and Confirmation of Debtor's Plan of Reorganization ("Scheduling Order") [ECF Doc. No. 40].

among Debtor, Sunset LG Realty LLC ("Sunset"), the seller of the real property located at 699 92nd Street, Brooklyn, New York 11228 and 9012 7th Avenue, Brooklyn, New York 11228 ("Property"), 699, the purchaser of the Property and the Office of the United States Trustee all in order to achieve a consensual plan. As of the filing of this memorandum, Debtor has not received any objections to confirmation of the Plan.[2]

3. On December 1, 2021, the Debtor and Sunset entered into an Agreement for Purchase and Sale of Real Property ("Sunset Contract") pursuant to which Sunset would sell the Property to the Debtor for a purchase price of $153,000,000. Pursuant to the Sunset Contract, Sunset currently holds a $3,000,000 deposit, which the Debtor borrowed from Bordeaux Capital LLC pursuant to a demand promissory note secured by the Debtor's interest in the Sunset Contract ("Bordeaux Note"). The Sunset Contract contains a "time of the essence" closing deadline of March 29, 2022.

4. The Debtor's filing was precipitated by its need for new financing to pay off the Bordeaux Note after Bordeaux demanded repayment and to avoid forfeiture of the Debtor's rights under the Sunset Contract. While the Debtor was seeking financing sufficient to close on the Sunset Contract, the Debtor was approached with offers to purchase the Property. One such purchaser was 699, who offered to purchase the property for $160,000,000, a purchase price that is

[2] The Scheduling Order fixed March 11, 2022 at 5:00 p.m.as the deadline to object to confirmation of the Plan. The Scheduling Order also permits opposition to be stated at the March 14, 2022 Confirmation Hearing. No written objections were filed by the March 11th deadline.

$7,000,000 more than what the Debtor is paying for the Property under the Sunset Contract. In February 2022, Debtor and 699 entered into the Agreement for Purchase and Sale of Real Property and Escrow Instructions between the Debtor as seller and 699 as purchaser ("699 Contract") and 699 made a $4,000,000 good faith deposit which is being held by the escrow agent under the 699 Contract. 699 has procured a financing commitment from Dwight Mortgage Trust for $128,000,000. The balance of the purchase price will be funded from the equity required under the 699 financing commitment as well as a $7,000,000 note ("Debtor Note"). Pursuant to Section 11.32 of the 699 Contract, the Debtor Note shall contain the same interest rate as the loan obtained by 699 to finance the 699 Closing under the 699 Contract. To the extent there is a cash shortfall at the Sunset Closing and 699 Closing, such shortfall will be funded by The PJS 2021 Family Trust Trust

5. The Plan effectuates a reorganization that provides for the Debtor to close on the Sunset Contract and the 699 Contract simultaneously, and thereafter utilizing the Sale Proceeds to satisfy Plan payments, resulting in a 100% recovery to holders of Allowed Claims against the Debtor's estate, with interest, where applicable.

6. On or before March 29, 2022, the Debtor shall close on the Sunset Contract and then close on the 699 Contract such that both closings will occur at the same time. The Sale Proceeds from the 699 Contract will be used by the Debtor and will fund the payments needed to assume, in accordance with section 365 of the Bankruptcy Code, the Sunset Contract and for the Debtor to acquire title to the

Property. The Debtor will immediately thereafter transfer title to the Property pursuant to the Plan to the Purchaser in accordance with the terms and conditions of the 699 Contract. The cash proceeds from the sale under the 699 Contract, after assumption of the Sunset Contract, as set forth in Exhibit F to the Disclosure Statement, will be utilized to pay the Debtor's creditors and fund payment of Administrative Expenses including United States Trustee fees and Fee Claims or fund reserves for such expenses as required under the Plan.

7. 699 has procured a financing commitment from Dwight Mortgage Trust for $128,000,000. The balance of the purchase price will be funded by the equity required under the financing commitment as well as a $7,000,000 note ("Debtor Note"). To the extent there is any Cash shortfall in the amount the Debtor is required to fund under the Plan, such Cash shortfall will be funded by The PJS 2021 Family Trust Trust. (Schwartz Decl. ¶40.) The basic economic terms of the classified Claims under the Plan are as follows:

(a) **Class 1 – Bordeaux Secured Claim:** The holder of the Bordeaux Secured Claim shall receive Cash from the Sale Proceeds in the amount of the Bordeaux Note plus interest at the rate of eight (8%) percent per annum as provided for in the Bordeaux Note, payable at the Sunset Closing, in full and final satisfaction of the Allowed Bordeaux Secured Claim.

(b) **Class 2 – General Unsecured Claims:** Except to the extent that a holder of an Allowed General Unsecured Claim against the Debtor has agreed to less favorable treatment of such Claim, each holder of an Allowed General Unsecured Claim shall receive on the Effective Date, Cash in the amount of such Allowed General Unsecured Claim plus interest at the federal judgment rate payable from the Sale Proceeds at the 699 Closing in full and final satisfaction of such Allowed General Unsecured Claim.

(c) **Class 3 – Insider Claims:** Except to the extent that a holder of an Allowed Insider Claim against the Debtor has agreed to less favorable treatment of such Claim, after payment in full to all holders of Allowed Claims, each holder of an Allowed Insider Claim shall receive on the Effective Date, Cash in the amount of such Allowed Insider Claim plus interest at the federal judgment rate payable from the Sale Proceeds at the 699 Closing in full and final satisfaction of such Allowed Insider Claim.

(d) **Class 4 -- Interests:** On the Effective Date, or as soon thereafter as is reasonably practicable, except to the extent that a holder of an Interest agrees to less favorable treatment, the holder of such Allowed Interest shall receive the remaining Sale Proceeds after payment in full to all holders of Allowed Claims.

8. This Memorandum, the Schwartz Declaration, the Feasibility Declaration, the Disclosure Statement, and any additional evidence presented or testimony that may be adduced at the Confirmation Hearing (i) demonstrate that the Plan complies with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules for the Eastern District of New York and (ii) provide the legal and evidentiary basis necessary for this Bankruptcy Court to confirm the Plan pursuant to Bankruptcy Code § 1129.

B. Procedural Background; Solicitation and Tabulation

9. On March 2, 2022, Debtor moved for entry of an Order Shortening Notice ("Motion to Shorten Time") [ECF Doc No. 30] on the Debtor's Motion for Order (I) Preliminarily Approving Disclosure Statement and (II) Scheduling Hearing on the Debtor's Motion for an Order Approving Disclosure Statement and Confirming Debtor's Plan of Reorganization (the "Combined Hearing Motion") [ECF Doc. No. 29]. On March 2, 2022, the Bankruptcy Court entered Order Shortening

Notice and Scheduling Hearing on the Combined Hearing Motion [ECF Doc. No. 33]. A hearing on the Combined Hearing Motion took place on March 7, 2022. On March 8, 2022, the Bankruptcy Court entered the Scheduling Order preliminarily approving the Disclosure Statement and scheduling the hearing to consider final approval of the Disclosure Statement followed by the confirmation hearing [ECF Doc. No. 40].

10. The Scheduling Order established March 14, 2022 as the date to consider Debtor's request for final approval of the Disclosure Statement and for confirmation of the Plan (the "Confirmation Hearing"), and (ii) fixed March 11, 2022 at 5:00 p.m., as the date and time by which any objections to final approval of the Disclosure Statement and the Plan were to be filed and served (the "Objection Deadline"). The Scheduling Order also permits opposition to be stated at the Confirmation Hearing.

11. In accordance with the Scheduling Order, and as evidenced by the Certificates of Service filed with the Bankruptcy Court [ECF Doc. Nos. 42 and 43], on March 8, 2022, the Disclosure Statement, the Plan, and the Scheduling Order, were served on all Holders of Claims and Interests, and other parties in interest.

12. As discussed in this Memorandum, the Disclosure Statement contains adequate information as that term is defined in Section 1125 of the Disclosure Statement and should be approved on a final basis. As further discussed in this memorandum, the Plan clearly satisfies each of the requirements for confirmation set forth in the Bankruptcy Code. (Schwartz Decl. ¶10.) The Plan has been

proposed in good faith, is feasible, serves the best interests of Debtor's estate and its creditors, and is fair and equitable. (Schwartz Decl. ¶¶10, 30, 34, 39, 40, 41, 44, 48,; See also, Feasibility Decl.) Accordingly, Debtor respectfully submits that the Bankruptcy Court should confirm the Plan. (Schwartz Decl. ¶48.)

ARGUMENT

13. To obtain confirmation of the Plan, the Debtor must establish by a preponderance of the evidence that the Plan satisfies the requirements set forth under section 1129 of the Bankruptcy Code. *See, e.g.*, *In re Charter Commc'ns*, 419 B.R. 221, 243 (Bankr. S.D.N.Y. 2009) (plan proponent bears burden of establishing compliance with factors set forth in section 1129 by a preponderance of evidence); *see also Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under both § 1129(a) and in a cram down."); *In re Young Broad., Inc.*, 430 B.R. 99, 128 (Banker. S.D.N.Y. 2010) (same); *In re Hawkeye Renewables, LLC*, No. 09-14461 (KJC), 2010 WL 2745975, at *3 (Bankr. D. Del. June 2, 2010) ("The Debtors have the burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence."); *In re Spiegel, Inc.*, No. 03-11540, 2005 WL 1278094, at *4 (Bankr. S.D.N.Y. May 25, 2005) ("The Debtors, as proponents of the Plan, have met their burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence.").

Debtor respectfully submits that the Plan complies with, and satisfies, each of the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence, and thus should be confirmed.

I. THE PLAN COMPLIES WITH SECTION 1129(A)(1) OF THE BANKRUPTCY CODE.

14. Pursuant to section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history to section 1129(a)(1) explains that this provision is focused on 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. 595, 95th Cong., 1st Sess. 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; *see also In re Johns-Manville Corp.*, 68 B.R. 618, 629-30 (Bankr. S.D.N.Y. 1986) (noting that confirmation objections under section 1129(a)(1) of the Bankruptcy Code usually concern the failure to satisfy either sections 1122(a) or 1123 of the Bankruptcy Code), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *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.").

15. As demonstrated below, the Plan complies fully with the requirements of sections 1122 and 1123 of the Bankruptcy Code.

A. The Plan Complies with the Classification Requirements of Section 1122 of the Bankruptcy Code.

16. Under section 1122(a) of the Bankruptcy Code, "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." "Substantially similar" has been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests in a debtor. *See In re Drexel Burnham Lambert Grp.*, 138 B.R. 714, 715-16 (Bankr. S.D.N.Y. 1992). While claims or interests within a given class must be "substantially similar" to the other claims or interests in the class, claims of a similar legal nature may be placed in separate classes provided a rational basis exists for doing so. *See Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd Ltd. P'ship)*, 21 F.3d 477, 483 (2d Cir. 1994) (finding that courts cannot prohibit separate classification of equal priority claims); *Chateaugay Corp. v. LTV Steel Co. (In re Chateauguay Corp.)*, 10 F.3d 944, 956-57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (finding that plan proponent "has considerable discretion to classify claims and interests according to the facts and circumstances of the case"); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177-78 (Bankr. S.D.N.Y. 1989) (allowing classification of claims of same rank in different classes).

17. The Plan properly classifies all Claims and interests as required under section 1122(a) of the Bankruptcy Code. Under the Plan, each Class of Claims contains only such Claims as are substantially similar to the other Claims within

such Class. Specifically, the Plan separately designates Classes and interests as follows: Class 1 (Bordeaux Secured Claim); Class 2 (General Unsecured Claims); Class 3 (Insider Claims); and Class 4 (Interests). (*See* Plan §§ 3 & 4.)

18. Valid business, factual, and legal reasons exist for separately classifying the various Claims and Interests under the Plan, and such Classes and interests do not unfairly discriminate among holders of Claims or prejudice the rights of holders of such Claims. (*See* Schwartz Decl. ¶¶13, 14, 18, 44, 48.) For example, the Plan separately classifies Classes 1, 2, 3, and 4. (*See* Schwartz Decl. ¶¶13, 14, 15.) This separate classification is driven by legitimate factual and legal reasons. (*Id.*) The obligations that form the basis of the Bordeaux Secured Claim arise from a pre-petition secured loan whereas General Unsecured Claims arise primarily from pre-petition agreements or obligations for vendors rendering services to Debtor on an unsecured basis. (*Id.* ¶¶ 3, 13, 14, 15.) These agreements give rise to different creditor rights and remedies resulting in their different classification.

19. The classification of Claims in the Plan is reasonable and necessary to implement the Plan and satisfies the requirements of section 1122 of the Bankruptcy Code.

B. The Plan Complies with the Requirements Set Forth in Sections 1123(a)(1)-(7) of the Bankruptcy Code.

20. Section 1123(a) of the Bankruptcy Code sets forth seven provisions that every chapter 11 plan must contain. As described below, the Plan fully complies with each requirement.

21. Section 1123(a)(1) of the Bankruptcy Code requires the Plan to

designate Classes of Claims and equity interests subject to section 1122 of the Bankruptcy Code. As required by section 1123(a)(1) of the Bankruptcy Code, in addition to Administrative Expense Claims, Fee Claims, Priority Tax Claims, and statutory fees (including all United States Trustee quarterly fees), which need not be classified, Section 3 of the Plan designates three (3) Classes of Claims and one Class of Interests.

22. Section 1123(a)(2) of the Bankruptcy Code requires the Plan to specify which Classes of Claims or equity interests are unimpaired under the Plan. Sections 3 and 4 of the Plan specifies that Allowed Claims in Classes 1, 2 and 3 and Allowed Interests in Class 4 are unimpaired by the Plan, thereby satisfying the requirements of section 1123(a)(2) of the Bankruptcy Code.

23. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan specify how Impaired Classes of Claims or equity interests will be treated under the Plan. No Class of Claims or Interests is impaired under the Plan. (*See* Plan §§ 3 and 4.) Thus, section 1129(a)(3) does not apply.

24. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan provide the same treatment for each Claim or equity interest against Debtor within a particular Class unless such Claim holder agrees to receive less favorable treatment than other Class members. The Plan complies with this requirement, as it provides for the same treatment for each Claim against the Debtor in each respective Class unless the holder of a particular Claim has agreed to less favorable treatment on account of such Claim, thereby satisfying the requirements of section

1123(a)(4) of the Bankruptcy Code.

25. Section 1123(a)(5) of the Bankruptcy Code requires that a chapter 11 plan provide adequate means for its implementation. The Plan provides for its implementation through the contemporaneous closings on the Sunset Contract and the 699 Contract.

26. Specifically, on or before March 29, 2022, the Debtor shall close on the Sunset Contract and then close on the 699 Contract such that both closings will occur at the same time. The Sale Proceeds from the 699 Contract will be used by the Debtor to fund the payments needed to assume, in accordance with section 365 of the Bankruptcy Code, the Sunset Contract and for the Debtor to acquire title to the Property. The Debtor will immediately thereafter transfer title to the Property pursuant to the Plan to the Purchaser in accordance with the terms and conditions of the 699 Contract. The cash proceeds from the sale under the 699 Contract will be utilized to pay the holders of Allowed Claims against the Debtor and fund payment of Administrative Expense Claims, including United States Trustee fees, and Fee Claims, or reserves for such expenses, all as required under the Plan.

27. 699 has procured a financing commitment from Dwight Mortgage Trust for $128,000,000. The balance of the purchase price will be funded by the $37,498,000 equity required under the financing commitment as well as a $7,000,000 note ("Debtor Note"). To the extent there is any Cash shortfall in the amount the Debtor is required to fund under the Plan, such Cash shortfall will be funded by The PJS 2021 Family Trust Trust. (Schwartz Decl. ¶40.) The Plan also

contains other miscellaneous provisions to aid in its implementation, such as the request for an exemption under Section 1146 of the Bankruptcy Code from any transfer taxes and/or mortgage recording taxes, including any instrument of transfer or mortgage under the Plan as confirmed by the Bankruptcy Court and in furtherance of the Sunset Contract, the 699 Contract, or the 699 Financing, which would otherwise be imposed in connection with or in furtherance of the transactions contemplated by the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(5) of the Bankruptcy Code.

28. Section 1123(a)(6) of the Bankruptcy Code requires the plan of a corporate debtor to provide that the debtor's charter prohibits the issuance of nonvoting equity securities and, as to the Classes of securities possessing voting power, provide an appropriate distribution of such power among such Classes. No equity securities will be issued under the Plan. (Schwartz Decl. ¶20.) Thus, section 1123(a)(6) of the Bankruptcy Code is not applicable in this case.

29. Lastly, section 1123(a)(7) of the Bankruptcy Code provides that chapter 11 plans must set forth provisions for the selection of officers and directors for the reorganized entities consistent with the interests of creditors and equity security holders and with public policy. Consistent with section 1123(a)(7), Section 6.1 of the Plan provides that Debtor shall continue in existence post-Confirmation as the Reorganized Debtor and continue to be managed by Pearl Schwartz, trustee of the PJS 2021 Family Trust Trust and managing member of Prospect Bayridge LLC, the Debtor's sole member. Thus, the requirements of section 1123(a)(7) of the

Bankruptcy Code are satisfied.

30. Based on all of the foregoing, the Plan complies with the requirements of sections 1123(a)(1)-(7) of the Bankruptcy Code.

C. The Plan Includes Provisions That Are Permissible Under Section 1123(b) of the Bankruptcy Code.

31. Section 1123(b) of the Bankruptcy Code sets forth provisions that may be incorporated into a chapter 11 plan, and each non-mandatory provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

1. Impairment/Unimpairment of Classes of Claims Is Consistent with Section 1123(b)(1) of the Bankruptcy Code.

32. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may impair or leave Unimpaired any Class of Claims. Sections 3 and 4 of the Plan lists Classes 1, 2, 3 and 4 as unimpaired, and is therefore consistent with section 1123(b)(1) of the Bankruptcy Code.

2. The Assumption of Executory Contracts and Unexpired Leases Provided for Under the Plan Complies with Sections 365 and 1123(b)(2) of the Bankruptcy Code.

33. Section 1123(b)(2) of the Bankruptcy Code provides that a plan may "provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section." Under section 365 of the Bankruptcy Code, a debtor may assume an executory contract or unexpired lease if (i) outstanding defaults under the contract or lease have been or will promptly be cured under section 365(b)(1) of the Bankruptcy Code and (ii) the debtor's decision to assume such executory contract or unexpired lease is supported by a valid business justification. *See In re Child World, Inc.*, 147 B.R. 847, 850

(Bankr. S.D.N.Y. 1992) ("The standard to be applied [when evaluating the assumption and/or rejection of an executory contract] hinges on the exercise of the debtor's business judgment.").

34. 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. Assocs.*, 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."); *In re Riodizio*, Inc., 204 B.R. 417, 424-25 (Bankr. S.D.N.Y. 1997) ("a court will ordinarily defer to the business judgment of the debtor's management.").

35. 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. *See Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc. (In re Allied Tech., Inc.)*, 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982) (stating "[a]s long as assumption of a lease appears to enhance a debtor's estate, Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code").

36. In accordance with section 1123(b)(2) of the Bankruptcy Code, Section 9 of the Plan provides that on the Effective Date, the Debtor shall be authorized to assume the Sunset Contract in accordance with Section 365 of the Bankruptcy Code

and shall satisfy any reasonable cure costs attendant thereto, which are approximately $10,000.00. At the Sunset Closing, the balance of the purchase price shall be paid to the Seller as set forth in the Sunset Contract with funds from the Sale Proceeds.

37. Assumption of the Sunset Contract and the simultaneous closings on the Sunset Contract and 699 Contract are the means for the Plan's implementation and the manner by which Plan payments are made. Assumption of the Sunset Contract is based upon and within the Debtor's sound business judgment and reflects Debtor's consideration and recognition of its need to assume the Sunset Contract in order to be able to implement the Plan and is therefore in the best interests of Debtor and its estate. (*See* Schwartz Decl. ¶¶8, 9, 11, 19, 24.) Based on the 699 Financing, the Debtor can and will tender the balance of the purchase price to Sunset and satisfy any reasonable cure costs attendant thereto at the closing. (Schwartz Decl. ¶¶8, 9,11, 39, 40); *see also* Feasibility Decl.)

38. Accordingly, the Plan satisfies the requirements of section 1123(b)(2) of the Bankruptcy Code.

3. The Plan Includes Provisions That Are Permissible Under Section 1123(b)(6) of the Bankruptcy Code.

39. Section 1123(b)(6) of the Bankruptcy Code is a catchall provision which permits inclusion of any appropriate provision as long as it is consistent with applicable provisions of the Bankruptcy Code. For example, Section 12 of the Plan provides that, among other things, the Bankruptcy Court shall retain jurisdiction as to all matters involving the Plan and the Claims allowance and distribution process. Case law establishes that a bankruptcy court may retain jurisdiction over

the debtor or the property of the estate following confirmation. *See Universal Oil Ltd. v. Allfirst Bank (In re Millennium Seacarriers, Inc.)*, 419 F.3d 83, 96 (2d Cir. 2005) ("A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization.") (quotation and citation omitted). Accordingly, the continuing jurisdiction of the Bankruptcy Court is consistent with applicable law and therefore permissible under section 1123(b)(6) of the Bankruptcy Code.

40. In addition, in accordance with section 1123(b)(6) of the Bankruptcy Code, the injunction, limitation of liability, and release provisions in sections 11.6, 11.7 and 11.8 of the Plan are fair and reasonably given for valuable consideration, are necessary, and are in the best interests of Debtor and its estate.

41. Additionally, the Plan is dated March 8, 2022, and identifies the names of the entity that has submitted the Plan, in compliance with Bankruptcy Rule 3016(a).

42. 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.

II. THE PLAN COMPLIES WITH SECTION 1129(A)(2) OF THE BANKRUPTCY CODE.

43. Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history provides that section 1129(a)(2) is intended to encompass the disclosure and solicitation requirements contained in sections 1125 and 1126 of the Bankruptcy Code. *See In re Johns-Manville Corp.*, 68 B.R. at 630; *In re Toy &*

Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984); S. Rep. No. 989, 95th Cong. 2d Sess., 126 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Texaco Inc.*, 84 B.R. at 906-07 (the "principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of Section 1125 in the solicitation of acceptances to the plan").

44. The Scheduling Order preliminarily approved the Disclosure Statement. The Plan, the Disclosure Statement, and the Scheduling Order were provided by overnight mail, and if available, electronic mail, to all Debtor's creditors, interest holders, and other interested parties in this case. (Schwartz Decl. ¶¶7, 12, 28.)

45. Debtor has complied with all orders of the Bankruptcy Code. (Schwartz Decl. ¶¶ 26, 27, 29.)

III. THE PLAN COMPLIES WITH SECTION 1129(A)(3) OF THE BANKRUPTCY CODE.

46. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed 'in good faith and not by any means forbidden by law.'" *Kane*, 843 F.2d at 649. Courts in the Second Circuit have found that the good faith standard requires "a showing that 'the plan [was] proposed with honesty and good intentions and with a basis for expecting that a reorganization can be effected.'" *In re Granite Broad. Corp.*, 369 B.R. 120, 128 (Bankr. S.D.N.Y. 2007) (citation omitted); *see also Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg., S.A. (In re Bd. of Dirs. of Telecom Arg.,*

S.A.), 528 F.3d 162, 174 (2d Cir. 2008).

47. "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985). "[A] plan is considered proposed in good faith 'if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'" *Texaco*, 84 B.R. at 907 (citation omitted). Although the Bankruptcy Code does not define good faith, "bad faith has been defined as 'the opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not promoted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.'" *In re The Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (quoting *In re Resorts Int'l, Inc.*, 145 B.R. 412, 469 (Bankr. D.N.J. 1990)).

48. Additionally, good faith is to be determined in light of the totality of the circumstances surrounding formulation of the plan. *See In re Oneida Ltd.*, 351 B.R. 79, 85 (Bankr. S.D.N.Y. 2006) ("Good faith should be evaluated 'in light of the totality of the circumstances surrounding confirmation.'"); *In re Lionel L.L.C.*, 2008 Bankr. LEXIS 1047, 1615-16 (Bankr. S.D.N.Y. Mar. 31, 2008) (looking to the totality of the circumstances in order to determine a plan was proposed in good faith under section 1129(a)(3)).

49. Here, Debtor is the proponent of the Plan with respect to its estate,

and the record in this case is clear that Debtor has met its good faith obligation under the Bankruptcy Code. Debtor has proposed and negotiated the Plan and related documents in good faith and not by any means forbidden by law. (*See* Schwartz Decl. ¶¶10, 30.) It seeks confirmation of the Plan for the purpose of accomplishing the real estate transactions contained in the Sunset Contract and 699 Contract, maximizing value for its estate, and expeditiously distributing such value to its creditors through the distribution of the Sale Proceeds as set forth in the Plan.

50. The Plan and related documents are the result of arm's length negotiations among Debtor and the parties in interest, and their respective advisors and counsel, leading to the Plan's formulation. (*See* Schwartz Decl. ¶¶7, 30.) Consistent with the overriding purpose of chapter 11 of the Bankruptcy Code, the Plan is designed to allow Debtor to satisfy its obligations to the extent possible in accordance with the Bankruptcy Code's priority scheme. Moreover, the sufficiency of disclosure and the arm's length negotiations leading to the formulation of the Plan provide independent evidence of Debtor's good faith in proposing the Plan. The second prong of section 1129(a)(3) of the Bankruptcy Code requires that the plan not contravene any applicable non-bankruptcy law. *See In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984). Debtor believes that the provisions of the Plan are consistent with applicable non-bankruptcy law.

51. Accordingly, the Plan satisfies section 1123(a)(3) of the Bankruptcy Code.

IV. THE PLAN COMPLIES WITH SECTION 1129(A)(4) OF THE BANKRUPTCY CODE.

52. Section 1129(a)(4) of the Bankruptcy Code requires that payments for services or for costs and expenses in or in connection with a chapter 11 case, or in connection with the plan and incident to the case, have either been approved, or are subject to approval, by the Bankruptcy Court as reasonable. See *In re WorldCom, Inc.*, No. 02-13533, 2003 WL 23861928, at *54 (Bankr. S.D.N.Y. Oct. 31, 2003); *see also In re Johns-Manville Corp.*, 68 B.R. at 632 (Bankr. S.D.N.Y. 1986); *In re Drexel Burnham Lambert Grp.,* 138 B.R. 723, 760 (section 1129(a)(4) requires that all payments of professional fees made from estate assets must be subject to review and approval as to their reasonableness by the Bankruptcy Court).

53. In essence, any and all fees promised or received in connection with or in contemplation of a chapter 11 case must be disclosed and approved or be subject to approval. *See WorldCom, Inc.*, 2003 WL 23861928, at *54; *see also In re 20 Bayard Views, LLC*, 445 B.R. 83, 97-98 (Bankr. E.D.N.Y. 2011).

54. Section 12 of the Plan provides for the retention of jurisdiction by the Bankruptcy Court to hear and determine all applications under sections 330, 331, and 503(b) of the Bankruptcy Code for awards of compensation for services rendered and reimbursement of expenses incurred before the Confirmation Date. In addition, Section 2.2 of the Plan establishes that all Professionals shall file final applications for professional fees with the Bankruptcy Court no later than thirty (30) days after the Effective Date. Payments to all professionals will be subject to review and approval by the Bankruptcy Court upon final application under applicable

provisions of the Bankruptcy Code. (*See* Schwartz Decl. ¶31.)

55. Such typical procedures, which provide the Bankruptcy Court with an opportunity to review and ultimately determine the reasonableness of fees and expenses incurred prior to the Confirmation Date, satisfy the objectives of section 1129(a)(4) of the Bankruptcy Code.

V. THE PLAN COMPLIES WITH SECTION 1129(A)(5) OF THE BANKRUPTCY CODE.

56. Section 1129(a)(5) of the Bankruptcy Code requires that: (i) the plan proponent disclose the identity and affiliations of the proposed officers, directors or trustees of the reorganized debtor or any successor to the original debtor; (ii) the appointment of such officers, directors and trustees be consistent with the interests of creditors and equity security holders and with public policy; and (iii) the plan proponent disclose the identity and compensation of any insiders to be retained or employed by the reorganized debtor.

57. As discussed above, Section 6.1 of the Plan provides that Debtor shall continue in existence post-Confirmation as the Reorganized Debtor and continue to be managed by Pearl Schwartz, trustee of the PJS 2021 Family Trust Trust and managing member of Prospect Bayridge LLC, the Debtor's sole member. (*See* Schwartz Decl. ¶¶21, 32.)

58. Based on the foregoing, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

VI. SECTION 1129(A)(6) OF THE BANKRUPTCY CODE IS INAPPLICABLE.

59. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory

commission having jurisdiction over the rates charged by the reorganized debtor in the operation of its business approve any rate change provided for in the plan. The Plan does not provide for any changes in the rates that require regulatory approval by any governmental agency. (Schwartz Decl. ¶33.) Therefore, section 1129(a)(6) of the Bankruptcy Code is not applicable to the Plan.

VII. THE PLAN COMPLIES WITH SECTION 1129(A)(7) OF THE BANKRUPTCY CODE.

60. Section 1129(a)(7) of the Bankruptcy Code, known as the "best interests" test, requires that each holder of a claim or interest in an impaired class either (a) accept the plan or (b) receive or retain property of a value, as of the effective date of the plan, not less than what such holder would receive or retain if the debtor were liquidated under Chapter 7 of the Bankruptcy Code on that date. *See In re Madison 92nd St. Assocs. LLC*, 472 B.R. 189, 200 (Bankr. S.D.N.Y. 2012); *In re GSC, Inc.*, 453 B.R. 132, 162, n.40 (Bankr. S.D.N.Y. 2011); *In re Jennifer Convertibles, Inc.*, 447 B.R. 713, 724 (Bankr. S.D.N.Y. 2011); *In re Quigley Co., Inc.*, 437 B.R. 102, 143-44 (Bankr. S.D.N.Y. 2010); *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999). "The best interests test focuses on individual creditors rather than classes of claims." *In re Drexel Burnham Lambert Grp.*, 138 B.R. at 761; *see also Toy & Sports Warehouse*, 37 B.R. at 150.

61. The best interests test is applicable to holders of Claims under the Plan that are Impaired and that have not accepted the Plan. As there are no impaired Classes of Claims or Interests under the Plan as the Plan provides for

payment in full to Allowed Claims in Classes 1, 2 and 3, the best interests test does not apply to these Classes of Claims.

62. Regardless, however, the Plan meets the best interests test. The Plan provides for payment in full, with interest where applicable, to each Class of Claims. Plan payments will be made at or immediately after the closing of Sunset Contract and the 699 Contract and funded from the Sale Proceeds.

63. Debtor's most significant assets are the Sunset Contract and 699 Contract. If Debtor cannot assume the Sunset Contract and thereafter close on the Sunset Contract and 699 Contract, on or before the "time of the essence" closing date of March 29, 2022, the Sunset Contract would terminate and the Debtor would be unable to implement the Plan. In this circumstance, the Debtor's estate would have no assets to monetize for distribution to creditors. Accordingly, Debtor believes that the Plan provides creditors with at least as much as they would be entitled to receive in a chapter 7 liquidation. Therefore, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

VIII. THE PLAN COMPLIES WITH SECTION 1129(A)(8) OF THE BANKRUPTCY CODE.

64. Section 1129(a)(8) requires that each Class of impaired Claims or impaired equity interests has either accepted the Plan or is not impaired under the Plan.

65. Classes 1, 2, 3, and 4 are unimpaired by the Plan, and accordingly, holders of Claims and Interests in these Classes are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Thus, as to

Classes 1, 2, 3, and 4, section 1129(a)(8) of the Bankruptcy Code has been satisfied.

IX. THE PLAN COMPLIES WITH SECTION 1129(A)(9) OF THE BANKRUPTCY CODE.

66. The Plan complies with section 1129(a)(9) of the Bankruptcy Code. Specifically, section 1129(a)(9) requires that a plan provide for persons holding allowed claims entitled to priority under section 507(a) to receive specified cash payments under the plan, unless the holder of a particular claim agrees to a different treatment with respect to such claim. 11 U.S.C. § 1129(a)(9). Consistent with section 1129(a)(9) of the Bankruptcy Code, the Plan provides for, among other things, the payment in full of certain expenses of administering Debtor's estate and other Claims entitled to statutory priority, each subject to the provisions of the Plan with respect to Disputed Claims.

67. Pursuant to Section 2.1 of the Plan, in connection with Priority Claims and Administrative Expense Claims, except to the extent that a holder of an Allowed Administrative Expense Claim and the Debtor agree to different treatment, the Debtor shall pay to each holder of an Allowed Administrative Expense Claim, Cash in an amount equal to such Claim (plus statutory interest on such claim, if applicable), on or as soon thereafter as is reasonably practicable, the later of (a) the Effective Date and (b) the first Business Day after the date that is thirty (30) calendar days after the date such Administrative Expense Claim becomes an Allowed Administrative Expense Claim; provided that Allowed Administrative Expense Claims representing liabilities incurred in the ordinary course of business by the Debtor shall be paid by the Debtor in the ordinary course of business,

consistent with past practice and in accordance with the terms and subject to the conditions of any agreements governing, instruments evidencing or other documents relating to such transactions. (*See* Plan § 2.1); *see also, e.g.*, *In re 20 Bayard Views, LLC,* 445 B.R. 83, 99 (Bankr. E.D.N.Y. 2011) (holding that the debtors had established by a preponderance of the evidence that the plan met the requirements of section 1129(a)(9) because the plan provided that the administrative claims would be paid in full "on (i) the [e]ffective date or (ii) the [d]istribution [d]ate immediately following the date on which the [a]dministrative [c]laim becomes [allowed].").

68. Moreover, the Plan provides that holders of Allowed Priority Claims shall be paid in Cash in full on the Effective Date. However, no Priority Claims have been filed against the estate and the bar date has already passed. Thus, no Allowed Priority Claims exist that need to be paid under the Plan.

69. Furthermore, Section 2.3 of the Plan provides that, except to the extent that a holder of an Allowed Priority Tax Claim agrees to a different treatment, each holder of an Allowed Priority Tax Claim shall receive Cash in an amount equal to such Allowed Priority Tax Claim on, or as soon thereafter as is reasonably practicable, the later of the Effective Date, the first Business Day after the date that is thirty (30) calendar days after the date such Priority Tax Claim becomes an Allowed Priority Tax Claim, and the date such Allowed Priority Tax Claim is due and payable in the ordinary course. (*See* Plan § 2.3.)

70. Based upon the foregoing, the Plan satisfies the requirements of

section 1129(a)(9) of the Bankruptcy Code.

X. SECTION 1129(A)(10) OF THE BANKRUPTCY CODE IS INAPPLICABLE.

71. Section 1129(a)(10) of the Bankruptcy Code requires that at least one impaired Class of Claims, excluding acceptances of insiders, accept the Plan. No Classes of Claims or interests are impaired by the Plan and thus no Class of Claims or interests were solicited to vote on the Plan. Because there are no impaired Classes of Claims or Interests, all Classes of Claims or Interests are deemed to have accepted the Plan.

72. Thus, section 1129(a)(10) is not applicable.

XI. THE PLAN COMPLIES WITH SECTION 1129(A)(11) OF THE BANKRUPTCY CODE.

73. Section 1129(a)(11) of the Bankruptcy Code requires a finding that the Plan is feasible. Specifically, the Bankruptcy Court must determine that:

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

11 U.S.C. § 1123(a)(11). As described below, and in the Schwartz Declaration and the Feasibility Declaration, and in the Disclosure Statement, the Plan is feasible.

74. The feasibility test requires the Bankruptcy Court to make an independent determination as to whether the Plan is workable and has a reasonable likelihood of success. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *Johns-Manville Corp.*, 68 B.R. at 635. The purpose of the feasibility test is to protect against visionary or speculative plans. It does not

require certainty of success. *See In re Adelphia Bus. Sol., Inc.*, 341 B.R. 415, 421-22 (Bankr. S.D.N.Y. 2003) ("In making determinations as to feasibility . . . a bankruptcy court does not need to know to a certainty, or even a substantial probability, that the plan will succeed. All it needs to know is that the plan has a reasonable likelihood of success."); *In re WorldCom,* No. 02-13533, 2003 Bankr. LEXIS 1401, at *170 (Bankr. S.D.N.Y. Oct. 31, 2003). ("Just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds."); *In re One Times Square Assocs. Ltd. P'ship*, 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993) ("It is not necessary that the success be guaranteed, but only that the plan present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success.") (internal quotations and citations omitted). Indeed, "there is a relatively low threshold of proof necessary to satisfy the feasibility requirement." *In re Eddington Thread Mfg. Co., Inc.*, 181 B.R. 826, 832-33 (Bankr. E.D. Pa. 1995).

75. In determining feasibility, courts consider (i) the adequacy of the capital structure; (ii) the earning power of the business; (iii) economic conditions; (iv) the ability of management; (v) the probability of the continuation of the same management; and (vi) any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. *See, e.g.*, *In re Young Broad., Inc.,* 430 B.R. at 129.

76. Here, the Plan has more than a reasonable likelihood of success and

thus is feasible. As set forth in more detail below and in the accompanying declarations, Debtor will be able to assume the Sunset Contract and close on the Sunset Contract and the 699 Contract, pay the claims asserted against it in the bankruptcy case, and pay Administrative Claims, Fee Claims and United States Trustee Fees.

77. Debtor's analysis as set forth in the Sources and Uses of Cash attached to the Disclosure Statement and the 699 Financing, the equity commitment required under the 699 Financing, the Debtor Note, and the commitment of the PJS 2021 Family Trust Trust to fund any cash shortfall, all demonstrate that the Debtor will be able to close on the Sunset Contract and 699 Contract and fulfill all of its obligations under the Plan (*See* Feasibility Decl.; Schwartz Decl. ¶¶ 8, 9, 11, 39, 40.)

78. Debtor has estimated the total amount of distributions and payments due under the Plan, and will have sufficient liquidity from the Sale Proceeds, and if necessary, the commitment of the PJS 2021 Family Trust Trust to fund any shortfall, to fund these payments as they become due. (*See* Schwartz Decl. ¶¶ 39 and 40; Feasibility Decl.)

79. Based upon the foregoing, there is more than a reasonable likelihood that Debtor and Reorganized Debtor will be able to consummate the Plan, and that confirmation of the Plan is not likely to be followed by the liquidation or need for further financial reorganization of the Reorganized Debtor. Therefore, the Plan satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code.

XII. THE PLAN COMPLIES WITH SECTION 1129(A)(12) OF THE BANKRUPTCY CODE.

80. Section 13.1 of the Plan provides that all fees and charges assessed under 28 U.S.C. § 1930 and accrued interest thereon shall be paid in cash in full as required by statute until the earlier of closing, conversion or dismissal of the bankruptcy case. Accordingly, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

XIII. SECTIONS 1129(A)(13) THROUGH (15) OF THE BANKRUPTCY CODE ARE INAPPLICABLE.

81. Section1129(a)(13) of the Bankruptcy Code states that a plan shall provide for the "continuation after its effective date of payment of all retiree benefits . . . for the duration of the period the debtor has obligated itself to provide such benefits." There are no existing retiree benefits that require funding by the Reorganized Debtor. (*See* Schwartz Decl. ¶43.) Accordingly, section 1129(a)(13) of the Bankruptcy Code is inapplicable in this Chapter 11 case.

82. Section 1129(a)(14) of the Bankruptcy Code addresses domestic support obligations of a debtor. Debtor is not required by a judicial or administrative order, or by statute, to pay any domestic support obligations.

83. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in this Chapter 11 Case.

84. Section 1129(a)(15) of the Bankruptcy Code pertains to cases in which the debtor is an individual. Debtor is not an individual. Accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in this Chapter 11 case.

XIV. SECTION 1129(A)(16) OF THE BANKRUPTCY CODE IS INAPPLICABLE.

85. 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." Section 1129(a)(16) does not apply in this case.

XV. THE PLAN COMPLIES WITH SECTION 1129(C) OF THE BANKRUPTCY CODE.

86. Section 1129(c) of the Bankruptcy Code provides that the Bankruptcy Court may confirm only one plan. Because no other chapter 11 plan of reorganization has been confirmed or proposed in this Chapter 11 case, and indeed the current Plan is the only chapter 11 plan presently scheduled for confirmation, the Plan does not violate the requirements of section 1129(c) of the Bankruptcy Code.

XVI. THE PLAN COMPLIES WITH SECTION 1129(D) OF THE BANKRUPTCY CODE.

87. Section 1129(d) of the Bankruptcy Code states that "a court may not confirm a plan 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." The record in this case is clear that the principal purpose of the Plan is not the avoidance of taxes or the avoidance of the requirements of section 5 of the Securities Act of 1933, and no party in interest has suggested that confirmation should be denied on this basis. While the sale of the Property under a plan confirmed will result in exemption of the requirement to pay transfer taxes and mortgage recording taxes, the Plan was

not proposed to avoid payment of these obligations, but was proposed for the purpose of accomplishing the real estate transactions contained in the Sunset Contract and 699 Contract and the Debtor requests that the Confirmation Order contain such a finding.

XVII. SECTION 1129(E) OF THE BANKRUPTCY CODE IS INAPPLICABLE.

88. Section 1129(e) of the Bankruptcy Code is applicable to small business cases. This Chapter 11 case is not a small business case, as that term is defined in the Bankruptcy Code, nor is Debtor a small business debtor. Accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

THE RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS OF THE PLAN SHOULD BE APPROVED

89. Sections 11.6, 11.7 and 11.8 of the Plan set forth the Plan's injunction, limitation of liability and release provisions. As discussed below, these provisions are fair and reasonable, and each provision is integral to the Plan and necessary to its implementation. (*See* Schwartz Decl. ¶25.) These provisions are well within the parameters of applicable Second Circuit precedent, and should be approved.

I. DEBTOR'S RELEASES SHOULD BE APPROVED.

90. Claims held by a debtor against third parties are property of the estate which may be released by a debtor if the decision to release such claims is within Debtor's reasonable business judgment. *Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*, 68 F.3d 26, 33 (2d Cir. 1995); *In re Mesa Air Grp., Inc.*, 2011 Bankr. LEXIS 189, at *33 (Bankr. S.D.N.Y. Jan. 20, 2011); *In re Neff Corp.*, 2010 Bankr. LEXIS 6159, at *57 (Bankr. S.D.N.Y. Sept. 21, 2010); *In re Drexel Burnham*

Lambert Grp., 138 B.R. at 758-60.

91. Debtor may settle and release its own claims against third parties. *See* 11 U.S.C. § 1123(b)(3)(A). Further, a debtor may release claims that could be asserted on its behalf, or that are derivative of its rights. Claims subject to release, therefore, encompass all claims belonging to an estate or that may be brought by a debtor, including shareholder or creditor derivative actions, fraudulent conveyance claims, preference actions, and other similar types of actions subject to settlement by the debtor. *See, e.g., In re PWS Holding Corp.*, 303 F.3d 308, 315 (3d Cir. 2002), *cert. denied*, 538 U.S. 924 (2003); *Texaco*, 84 B.R. at 900.

92. A plan that proposes to release a debtor's claim is considered a "settlement" for purposes of satisfying section 1123(b)(3)(A) of the Bankruptcy Code. *In re Best Prods. Co.*, 68 F.3d 26, 33 (2d Cir. 1995) (the release and injunction provisions of the plan were deemed submitted for approval of the court pursuant to section 1123(b)(3)(A) and Bankruptcy Rule 9019(a)). When considering releases by a debtor of non-debtor third parties pursuant to section 1123(b)(3)(A), the appropriate standard is whether the release is a valid exercise of the debtor's business judgment and is fair, reasonable, and in the best interests of the estate. Claims held by a debtor against third parties are property of the estate and may be released in exchange for settlement. *See* 11 U.S.C. § 541(a)(1); *see also MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville) (Manville I),* 837 F.2d 89, 91-92 (2d Cir. 1988). Debtor has "considerable leeway in issuing releases" of its own claims, and such releases are considered "uncontroversial." *See In re Adelphia*

Commc'ns Corp., 368 B.R. 140, 263 n.289 (Bankr. S.D.N.Y. 2007). Here, Debtor is assuming the Sunset Contract and closing on the Sunset Contract and 699 Contract and satisfying Plan payments from the Sale Proceeds. Thus, closing on the Sunset Contract and 699 Contract and distributing the Sale Proceeds to satisfy Allowed Claims, the Debtor is resolving any existing potential claims.

II. THE EXCULPATORY PROVISIONS SHOULD BE APPROVED.

93. Section 11.7 of the Plan (the "Exculpation") provides that none of the Exculpated Parties nor any of their respective officers, directors or employees (acting in such capacity), nor any professionals employed by them shall have or incur any liability related to actions taken or omitted to be taken in connection with the Chapter 11 case. The Exculpation (i) does not apply to fraud, willful misconduct, gross negligence, malpractice, breach of fiduciary duty, criminal conduct, unauthorized use of confidential information that causes damages, or other *ultra vires* acts, and (ii) does not limit the liability of professionals of Debtor/ Reorganized Debtor pursuant to Rule 1.8(h)(1) of the New York State Rule of Professional Conduct.

94. As recognized by the Second Circuit, 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. *See In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 293 (2d Cir. 1992); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (excising similar exculpation provision would "tend to unravel the entire fabric of

the Plan and would be inequitable to all those who participated in good faith to bring it into fruition"). Furthermore, the Exculpation is appropriately limited to a qualified immunity for acts of negligence but does not relieve any party of liability for gross negligence, willful misconduct, or fraud. *See In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (similar exculpation provision reflecting Bankruptcy Code's limitation of liability did not violate third party release prohibition of section 524(e)).

95. The Plan provides a customary exculpation for the Exculpated Parties, which includes Debtor, the Seller and the Purchaser, and Debtor's present officers, directors, employees, and any professionals retained by them. (*See* Plan § 11.7.)

96. The Exculpation is appropriately tailored to protect the Exculpated Parties from inappropriate litigation and does not relieve any party of liability for gross negligence, willful misconduct, or fraud. (*See* Plan § 11.7.) Such exculpatory provisions are typical in consensual chapter 11 plans and should be approved here. During this Chapter 11 case, the Exculpated Parties have contributed substantial value to Debtor, the management of this case, and the negotiation and formulation of the Plan. The Exculpated Parties' efforts in negotiating and ultimately formulating the Plan enabled Debtor to file and hopefully obtain confirmation of the Plan, which will preserve Debtor's ability to close on the Sunset Contract and 699 Contract and provide meaningful recoveries to all creditor constituencies. As noted above, the Plan's implementation as negotiated by the key constituencies in this Chapter 11 case will result in a 100% recovery to holders of Allowed Claims.

97. Here, the scope of the Exculpation, the composition of the Exculpated Parties, and the role that those parties played in this Chapter 11 case, are entirely consistent with the exculpations routinely approved in this District. See, e.g., *In re Gen. Mar. Corp.*, No. 11-15285 (MG) (Bankr. S.D.N.Y. May 7, 2012) [ECF Doc. No. 794]; *In re Borders Grp., Inc.*, No. 11-10614 (MG) (Bankr. S.D.N.Y. Dec. 21, 2011) [ECF Doc. No. 2384]; *In re Citadel Broad. Corp.*, No. 09-17442 (BRL) (Bankr. S.D.N.Y. May 19, 2010) [ECF Doc. No. 369]; *In re The Reader's Digest Ass'n*, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Jan. 19, 2010) [ECF Doc. No. 574]; *In re DBSD N. Am., Inc.*, No. 09-13061 (REG) (Bankr. S.D.N.Y. Nov. 23, 2009) [ECF Doc. No. 547]; *In re Charter Commc'ns, Inc.*, No. 09-11435 (JMP) (Bankr. S.D.N.Y. Nov. 17, 2009) [ECF Doc. No. 921]; *In re Veteran Holdings NY LLC*, Case No. 22-40052 (Bankr. E.D.N.Y. Feb. 25, 2022) (ECF Doc. No. 56); *In re 123 Grand*, Case No. 18-45824 (Bankr. E.D.N.Y. Nov. 26, 2018) (ECF Doc. No. 31); *In re Ditech Holding Corp.*, 606 B.R. 544 (Bankr. S.D.N.Y. 2019), *In re LSC Communications, Inc.*, Case No. 20-10950 (Feb. 23, 2021) (ECF Doc. No. 1243); *In re Frontier Communications Corp.*, Case No. 20-22478 (Aug. 27, 2020) (ECF Doc. No. 1005-1); *In re Windstream Holdings, Inc.*, Case No. 19-22312 (Bankr. S.D.N.Y. June 26, 2020) (ECF Doc. No. 2243).

98. Accordingly, the Exculpation should be approved.

III. THE DISCHARGE AND RELATED INJUNCTIVE RELIEF SHOULD BE GRANTED.

99. Sections 1141 and 524 of the Bankruptcy Code grant a chapter 11 debtor a discharge of all Claims. Section 11.5 of the Plan provides for a comprehensive discharge and injunction. These provisions are necessary to implement the Plan, allow Debtor to reorganize and to continue to exist as the Post-

Effective Date entitled to collect on the Debtor Note and, to the extent applicable, the Value Add payment, unencumbered by its pre-petition debts. The discharge and injunction are tailored, however, to the limits of section 1141 of the Bankruptcy Code. Accordingly, because they are reasonable, necessary, and customary, such provisions should be approved.

CONCLUSION

For the reasons set forth herein, Debtor respectfully requests that this Court approve the Disclosure Statement on a final basis and enter the Confirmation Order, substantially in the form filed prior to the Confirmation Hearing, confirming the Plan and granting such other and further relief as may be just and proper under the circumstances.

Dated: New York, New York
March 11, 2022

Respectfully submitted

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