IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CB HOLDING CORP., et al.,[1]	)	Case No. 10-13683 (MFW)
	)	
	)	Jointly Administered
Debtors.	)	
	)	

MEMORANDUM IN SUPPORT OF CONFIRMATION OF DEBTORS' MODIFIED FIRST AMENDED JOINT PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

[1] The other Debtors, and the last four digits of each of their tax identification numbers, are: 1820 Central Park Avenue Restaurant Corp. (5151); Bugaboo Creek Acquisition, LLC (4629); Bugaboo Creek Holdings, Inc. (0966); Bugaboo Creek of Seekonk, Inc. (1669); CB Holding Corp. (8640); CB VII, Inc. (9120); CB VIII, Inc. (1468); Charlie Brown North (6721); Charlie Brown's Acquisition Corp. (8367); Charlie Brown's at Clifton, Inc. (7309); Charlie Brown's Mark Corp. (3569); Charlie Brown's Montclair, Inc. (4223); Charlie Brown's 1981, Inc. (7781); Charlie Brown's of Allentown, L.L.C. (8420); Charlie Brown's of Alpha, Inc. (9083); Charlie Brown's of Berwyn, LLC (3347); Charlie Brown's of Blackwood, L.L.C. (5698); Charlie Brown's of Bloomsburg, LLC (3326); Charlie Brown's of Brielle, Inc. (8115); Charlie Brown's of Carlstadt, Inc. (6936); Charlie Brown's of Chatham, Inc. (2452); Charlie Brown's of Commack LLC (4851); Charlie Brown's of Denville, Inc. (1422); Charlie Brown's of East Windsor, LLC (2747); Charlie Brown's of Edison, Inc. (8519); Charlie Brown's of Egg Harbor Twp, LLC (none); Charlie Brown's of Franklin, LLC (5232); Charlie Brown's of Garden City, LLC (7440); Charlie Brown's of Hackettstown, L.L.C. (7493); Charlie Brown's of Harrisburg, LLC (1085); Charlie Brown's of Hillsborough, Inc. (0344); Charlie Brown's of Holtsville, LLC (0138); Charlie Brown's of Jackson, LLC (3478); Charlie Brown's of Lacey, L.L.C. (6282); Charlie Brown's of Lakewood, Inc. (0156); Charlie Brown's of Langhorne, LLC (3392); Charlie Brown's of Lynbrook LLC (2772); Charlie Brown's of Maple Shade, Inc. (0404); Charlie Brown's of Matawan, Inc. (8337); Charlie Brown's of Middletown LLC (7565); Charlie Brown's of Oradell, Inc. (0348); Charlie Brown's of Pennsylvania, Inc. (6918); Charlie Brown's of Piscataway, LLC (8285); Charlie Brown's of Reading, LLC (1214); Charlie Brown's of Scranton, LLC (9817); Charlie Brown's of Selinsgrove, LLC (6492); Charlie Brown's of Springfield, LLC (9892); Charlie Brown's of Staten Island, LLC (1936); Charlie Brown's of Tinton Falls, Inc. (6981); Charlie Brown's of Toms River, LLC (5492); Charlie Brown's of Union Township, Inc. (8910); Charlie Brown's of Trexlertown, LLC (6582); Charlie Brown's of Wayne, Inc. (4757); Charlie Brown's of West Windsor, Inc. (0159); Charlie Brown's of Williamsport LLC (8218); Charlie Brown's of Woodbury, Inc. (0601); Charlie Brown's of York, LLC (0980); Charlie Brown's of Yorktown, LLC (7855); Charlie Brown's Restaurant Corp. (7782); Charlie Brown's Steakhouse Fishkill, Inc. (9139); Charlie Brown's Steakhouse Woodbridge, Inc. (1906); Charlie Brown's, Inc. (4776); Jonathan Seagull Property Corp. (7248); Jonathan Seagull, Inc. (9160); The Office at Bridgewater, Inc. (3132); The Office at Cranford, Inc. (3131); The Office at Keyport, Inc. (1507); The Office at Montclair, Inc. (3128); The Office at Morristown, Inc. (3127); The Office at Ridgewood, Inc. (2949); The Office at Summit, Inc. (3126); and What's Your Beef V, Inc. (4719). The Debtors' address is 1450 Route 22 West, Mountainside, NJ 07092.

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through their undersigned attorneys, respectfully submit this memorandum in support of confirmation of their proposed *Modified First Amended Joint Plan of Liquidation under Chapter 11 of the Bankruptcy Code*, dated January 4, 2012 [ECF No. 1157] (as the same may be further amended, modified, and/or supplemented, the "Plan"),[2] and refer to the *Declaration of Chief Restructuring Officer Gary Lembo in Support of the Plan* (the "Lembo Declaration") and the *Declaration of Jeffrey S. Stein of the Garden City Group, Inc. Certifying the Methodology for the Tabulation of Votes on and Results of Voting with Respect to Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Stein Declaration"), which will be filed contemporaneously herewith.[3]

BACKGROUND

After having successfully sold their three restaurant chains and the majority of any remaining liquor licenses pursuant to Bankruptcy Code § 363 sales that generated proceeds in excess of $20 million (the "Sales"), the Debtors have submitted the Plan in order to resolve and wind-down these Chapter 11 Cases. The Debtors thus believe that the Plan, and the creation of the Liquidating Trust contemplated thereby represent the best possible outcome in these Chapter 11 Cases for the Debtors, their Estates, their creditors, and other parties-in-interest.

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

3 The Debtors have resolved the objection to the Plan filed by the Internal Revenue Service by agreeing to add certain language with respect thereto in the proposed Confirmation Order, and the IRS has filed a notice of withdrawal of its objection [ECF No. 1213]. Two other Plan objections were filed: one by Sysco Atlanta, LLC, Sysco Boston, LLC, Sysco Central Pennsylvania, LLC, Sysco Connecticut, LLC, and Sysco Metro New York, LLC [ECF No. 1207], and the other by the United States Trustee [ECF No. 1212]. The Debtors intend to work with these parties to attempt to resolve such objections prior to the Confirmation Hearing, and if they are unable to do so, the Debtors will respond to any remaining objections at the Confirmation Hearing. To that effect, the Debtors have made several revisions to the proposed Confirmation Order in an attempt to respond to certain of the objections raised by the United States Trustee regarding the exculpation, release, and injunction provisions in the Plan. Any rights relating to all such remaining objections are reserved by the Debtors.

Lembo Declaration, ¶ 14. The Plan is the result of extensive negotiations during these Chapter 11 Cases between the Debtors, the Pre-Petition Lenders, the DIP Facility Lender, and the Creditors Committee, among other parties. Accordingly, the Plan represents a consensual means for finalizing these Chapter 11 Cases, as the primary creditor constituencies all support Confirmation of the Plan. Lembo Declaration, ¶ 13. Each of the Pre-Petition Lenders that voted on the Plan voted to accept the Plan. Id.

The Debtors and the Plan are described in greater detail in the *Debtors' Modified First Amended Disclosure Statement for the Debtors' Modified First Amended Joint Plan of Liquidation under Chapter 11 of the Bankruptcy Code*, dated January 4, 2012, which was approved by an order of this Court dated January 5, 2012 [ECF No. 1162] (the "Disclosure Statement Order"). For the convenience of the Court and other parties-in-interest, relevant portions of the Plan and the Debtors' solicitation procedures are summarized below.[4]

Brief Overview of the Plan

The Plan Incorporates Two Major Settlements

The Plan incorporates two settlements reached between the major creditor constituencies for the distribution of proceeds of the Sales and other litigation settlement proceeds. The first such settlement was initially set forth in the DIP Facility Order, which included an agreement and resolution (as described below, the "Lenders/Committee Resolution") among the Debtors, the Creditors Committee, the DIP Facility Lender, and the Pre-Petition Lenders, resolving the Creditors Committee's asserted objections to the DIP Facility and

[4] To the extent of any discrepancies between the summary set forth herein and the Plan, the terms of the Plan shall govern.

providing for the allocation of net proceeds of the Sales and other assets during these Chapter 11 Cases.

Specifically, as set forth in Paragraph 33 of the DIP Facility Order, and as memorialized and effectuated by the Plan, in exchange for the Creditors Committee's agreement to consent to the terms of the DIP Facility Order, under the Lenders/Committee Resolution, the DIP Facility Lender and the Pre-Petition Lenders agreed to share certain proceeds of the Sales and liquidation of the Debtors' Estates, as follows:

- $125,000 plus five percent (5%) of the net proceeds (after costs of sale) from the sale of The Office in excess of $2.5 million (the "Office Shared Proceeds") will be paid to the Estates (as opposed to the Pre-Petition Lenders or the DIP Facility Lender) to be distributed under the Plan to General Unsecured Creditors, and the first $125,000 of such proceeds will be distributed to Holders of Allowed General Unsecured Claims and will not be shared with the Pre-Petition Lenders on account of the Pre-Petition Lenders Deficiency Claim (the "Office Resolution Consideration");

- $125,000 (the "First $125,000") plus four percent (4%) of the net proceeds from the sale or liquidation of the Debtors' estates (other than (i) The Office Restaurants, (ii) the D&O Claim, and (iii) Avoidance Actions) in excess of $4 million (the amount over $4 million, the "Sharing Percentage Recovery") will be paid to the Estates to be distributed under the Plan, and the First $125,000 and the first $125,000 of the Sharing Percentage Recovery will be distributed to Holders of Allowed General Unsecured Creditors and will not be shared with the Pre-Petition Lenders on account of the Pre-Petition Lenders Deficiency Claim; and

- 50% of the net proceeds (after litigation fees, costs, and expenses) of the D&O Claim will be paid to the Estates to be distributed under the Plan (the "*D&O Shared Proceeds*"), with the first $1,000,000 of the D&O Shared Proceeds to be distributed under the Plan to General Unsecured Creditors and will not be shared with the Pre-Petition Lenders as Holders of General Unsecured Claims (the "D&O Resolution Consideration").

DIP Facility Order, ¶ 33.

The second settlement memorialized in the Plan fully resolved any issues between the Creditors Committee, on the one hand, and the DIP Lender and the Pre-Petition Lenders, on the other hand, related to funding distributions under the Plan. Lembo Declaration, ¶ 17. Such settlement provides, in pertinent part:

- 50% of the aggregate amount of (A) if, prior to the Effective Date, the Debtors' and the Creditors Committee's respective Professionals' fees and expenses, and (B) if on and after the Effective Date, the Liquidating Trustee's professionals' fees and expenses, and all other fees and expenses associated with pursuing the D&O Claims, Avoidance Actions, and other Transferred Causes of Action, to the extent not provided for in the Plan Fund, will be deducted from the amount of gross proceeds thereof before calculating the net amounts to be distributed on account thereof to the Holders of Allowed General Unsecured Claims pursuant to Plan Section III.B.4(b) as part of the Estate Shared Proceeds;

- (A) the payments required to satisfy (i) all Allowed Claims against the Estates under Bankruptcy Code § 503(b)(9), other than the Sysco 503(b)(9) Claims, as set forth on Exhibit C to the Disclosure Statement, and (ii) all Allowed Other Priority Claims, as set forth on Exhibit D to the Disclosure Statement, will be paid entirely (i.e., 100%) from the Plan Fund, and (B) the payments required to satisfy (i) any Allowed Sysco 503(b)(9) Claims against the Estates (after application of any applicable offsets for Avoidance Actions or other available offsets or defenses, in accordance with Plan Section IV.D.2(e) or otherwise) and (ii) all Allowed Priority Tax Claims will be paid entirely (i.e., 100%) from the Estate Shared Proceeds; and

- all other costs of the Liquidating Trust (including the fees of the Liquidating Trustee, the Oversight Committee, and all professionals retained or entities employed thereby and any indemnification claims under Plan Section IV.A(d)) will be allocated to, and paid from, the Estate Shared Proceeds.

Plan Section IV.D.2(h).

As a result of such settlements, the Creditors Committee and the Lenders support the Plan, and Classes 1 and 2 have voted to accept the Plan. Lembo Declaration, ¶ 18.

The Creation of the Liquidating Trust

The Plan is predicated upon the creation of the Liquidating Trust and the assignment of the Transferred Property thereto. Specifically, upon and after the Effective Date, the Liquidating Trust will hold the following Assets: (a) any and all Avoidance Actions and other Transferred Causes of Action and any products or proceeds thereof; (b) the Office Shared Proceeds; (c) the D&O Shared Proceeds (to the extent available); (d) the Sharing Percentage Recovery; (e) the Plan Fund;[5] and (f) all other remaining unliquidated property and Assets of the Debtors or the Estates (including any Preserved Collateral), subject to the limited exclusions set forth in the Plan. Lembo Declaration, ¶ 19; see also Plan Section I.137.

The Liquidating Trust is to be administered by the Liquidating Trustee, which initially will be CRG. The balance of the Assets of the Debtors will be held and managed by the Liquidating Trustee for the purposes of sale and/or other liquidation, resolution of Claims, and/or the pursuit of litigation. Lembo Declaration, ¶ 20; see also Plan Sections II.A, II.B, II.C, and IV.D(2)(h)(i). As of the Effective Date, the Liquidating Trust will also have the power and authority, pursuant to Plan Sections IV.D.1(c) and IV.D.1(d), to (a) wind down or continue to operate any remaining businesses and use or dispose of any remaining property and Assets that do not constitute Transferred Property and (b) take any such action, as necessary, to effectuate and implement the Plan, the Confirmation Order, and the Sale Orders. Lembo Declaration, ¶ 21.

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[5] In accordance with Plan Sections II.B. and III.B.1(b), on the Effective Date, the Plan Fund will be funded, and transferred to the Liquidating Trustee, from a combination of funds transferred to the Administrative Agent, funds currently held by the Debtors, including the Estate Shared Proceeds, or funds previously paid by the Debtors to, or otherwise received by, the Administrative Agent pursuant to any of the DIP Facility Order, one or more of the Sale Orders, or any other applicable order of the Bankruptcy Court, in an aggregate amount equal to $1,777,000 plus any budgeted amounts not paid prior to the Effective Date or such other amount that may be agreed to by the Debtors, the Administrative Agent, and the Creditors Committee at any time up until the Confirmation Date. Plan Section IV.B.

The Liquidating Trustee and the Liquidation Trust Professionals will receive reasonable compensation for services, reimbursement of reasonable out-of-pocket costs, and customary indemnification and exculpation, as set forth further in the Plan and the Liquidating Trust Agreement.[6] Lembo Declaration, ¶ 22; see also Plan Section IV.D.2 and the Liquidating Trust Agreement.

Treatment of the Various Classes under the Plan

The Plan provides for the payment in full, in Cash, or in a manner otherwise agreeable to the Holders of such Claims, of all Allowed Administrative Claims and Allowed Priority Tax Claims from either the Plan Fund or the Estate Shared Proceeds (as applicable). Lembo Declaration, ¶ 23; see also Plan Sections II.A and II.C. In full and final satisfaction of all Allowed DIP Facility Claims, all funds in the possession of the Debtors other than any amounts that have been specifically earmarked and set aside for other purposes in these Chapter 11 Cases (including with respect to the Plan Fund, the Office Shared Proceeds, the Sharing Percentage Recovery, and the D&O Shared Proceeds), that constitute the proceeds of the collateral of the DIP Facility Lender will be distributed to the Administrative Agent for subsequent distribution to the Holders of Allowed DIP Facility Claims. Lembo Declaration, ¶ 23; see also Plan Section II.B.

The Plan provides for the payment in full in Cash of all Holders of Other Priority Claims, classified in Class 3, from (a) the Plan Fund or (b) any other escrows that may be established for the payment of any particular remaining unpaid Allowed Other Priority Claims,

[6] The form of the Liquidating Trust Agreement was filed with the Bankruptcy Court on February 10, 2012, as part of the Plan Supplement. See Supplement to the Debtors' Modified First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, Ex. C [ECF No. 1204].

equal to the unpaid portion of such Allowed Other Priority Claim. Lembo Declaration, ¶ 24; see also Plan Section III.B.3.

Four Classes of Claims and one Class of Equity Interests are Impaired under the Plan. Initially, with respect to Senior Creditor Claims in Class 1, the Administrative Agent will distribute, in accordance with the DIP Facility Order, the Financing Agreement, the Plan, and the Confirmation Order, all remaining sums (after the payment in full by the Administrative Agent of (a) all Allowed DIP Facility Claims and (b) all amounts required to fully fund the Plan Fund) to the Holders of Allowed Pre-Petition Lenders Secured Claims as of the Distribution Record Date, until all Allowed Pre-Petition Lenders Secured Claims have been satisfied in full. To the extent the Allowed Pre-Petition Lenders Secured Claims are not thereby, or have not otherwise previously been, satisfied in full, the Holders of such Claims as of the Distribution Record Date will receive, in full satisfaction, settlement, and release of and in exchange for such Allowed Claims, a distribution of, in the aggregate, (A) 96% of the net proceeds (after costs of sale, as determined pursuant to Plan Section IV.D.2(h)) from the sale or liquidation of the remaining Preserved Collateral and (B) all net proceeds realized from the D&O Claims other than the D&O Shared Proceeds, in each instance as and when such net proceeds are generated or otherwise become available in the manner provided in the Plan and the Liquidating Trust Agreement, until all such Allowed Claims have been satisfied in full. In accordance with the Unsecured Creditor Settlement, the Second Lien Noteholders will be deemed to have waived any right to a recovery under the Plan or otherwise from the Debtors, the Estates, or the Liquidating Trust on account of the Second Lien Note Claims. Lembo Declaration, ¶ 25; see also Plan Section III.B.1.

Allowed Other Secured Claims, if any, classified in Class 2, except to the extent the Holder agrees to a less favorable or different treatment, will receive the property securing such Allowed Claim. Lembo Declaration, ¶ 24; see also Plan Section III.B.2.

Allowed General Unsecured Claims, classified in Class 4, will receive a Pro Rata share of the Transferred Property (or the proceeds thereof), which distribution will be made in the manner set forth in the Liquidating Trust Agreement and Article IV of the Plan. Lembo Declaration, ¶ 26; see also Plan Section III.B.4.

Pursuant to the Plan, all existing Intercompany Claims, classified in Class 5, will be reviewed and will be adjusted or cancelled, as applicable. All Holders of Equity Interests, classified in Class 6, will not participate in any distributions on account of their interests, and all such Equity Interests will be cancelled. Lembo Declaration, ¶ 28; see also Plan Sections III.B.5 and III.B.6

The Plan contemplates, and is predicated upon, the substantive consolidation of the Debtors' Estates for the purposes of all actions associated with Confirmation and consummation of the Plan, including, but not limited to, voting, and distribution. Lembo Declaration, ¶ 29; see also Plan Section IV.A(a).

The Solicitation Process and Voting Results

On January 5, 2012, the Bankruptcy Court entered an order (the "Disclosure Statement Order") [ECF No. 1162], (i) approving the Disclosure Statement, (ii) scheduling the Confirmation Hearing, (iii) establishing a deadline for objecting to the Plan, (iv) approving the forms of Ballots and other solicitation forms, (v) approving the Voting Deadline, the Solicitation Procedures, and the Tabulation Procedures, and (vi) approving the form and manner of related notices. In the Disclosure Statement Order, among other things, the Bankruptcy Court found that

the Disclosure Statement contained adequate information under Bankruptcy Code § 1125; that the Solicitation Procedures, the Voting Procedures, and the Tabulation Procedures were fair, reasonable, and necessary under the circumstances, and provided for a fair and equitable process of voting on the Plan consistent with Bankruptcy Code § 1126; and that the Ballots (including the instructions thereto) address the particular needs of these Chapter 11 Cases.

The Disclosure Statement Order (a) fixed January 5, 2012, as the Voting Record Date for the purposes of determining which creditors are entitled to vote on the Plan and to receive solicitation and other related forms, (b) established February 14, 2012, at 4:00 P.M. (prevailing Eastern Time) (the "Voting Deadline"), as the date and time by which all Ballots were required to be received by the Balloting Agent in order to be counted as acceptances or rejections of the Plan, and (c) authorized the Debtors, on an individual, case-by-case basis, to extend or waive the period during which votes would be accepted by them.

In accordance with the Disclosure Statement Order, on or before January 13, 2012, the Balloting Agent caused one or more of the following, as applicable and appropriate, to be mailed to (a) counsel to the Debtors; (b) counsel to the Creditors Committee; (c) the Office of the United States Trustee; (d) counsel to the Administrative Agent; (e) the Internal Revenue Service; (f) all other relevant taxing authorities in jurisdictions in which the Debtors operate; (g) all persons or entities that have (prior to service of the Confirmation Hearing Notice) served and filed notices of appearance in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002; and (h) all creditors, interest holders, and other parties that have filed proofs of claims or are listed in the creditors database maintained by the Balloting Agent: the Confirmation Hearing Notice, the Disclosure Statement, the Plan, a Ballot, and/or the Notification of Non-Voting Status or Notification of Deemed Rejection. Stein Declaration, ¶ 4; *Affidavit/Declaration of Service of*

Jeffrey S. Stein [ECF No. 1191]; *Affidavit/Declaration of Service of Barbara Kelley Keane* [ECF No. 1166].

The Balloting Agent implemented the procedures for the tabulation of acceptances and rejections of the Plan in accordance with the Disclosure Statement Order, the Bankruptcy Code, and the Bankruptcy Rules. Stein Declaration, ¶ 9. Classes 1, 2, and 4 submitted votes with respect to the Plan. Classes 1 and 2 voted to accept the Plan, without including any acceptance by insiders, if any, in such Classes, and Class 4 voted to reject the Plan.

Specifically, each Holder of a Class 1 Claim that voted on the Plan voted to accept it (representing approximately $21,410,704.92 in Claims). Stein Declaration, ¶ 13. Thus, 100% in number and 100% in amount of Claims in Class 1 of the Plan that voted on the Plan voted to accept the Plan. Id.

Similarly, both Holders of Class 2 Claims that voted on the Plan voted to accept it (representing a total stated amount of $87,929.32 in Claims). Stein Declaration, ¶ 13. Thus, 100% in number and 100% in amount of Claims in Class 2 of the Plan that voted on the Plan voted to accept the Plan. Id.

In contrast, 28 Holders of Class 4 Claims voted to reject the Plan (representing a total stated amount of $10,213,587.38 in Claims), while 150 Holders of Class 4 Claims voted to accept it (representing a total stated amount of $7,129,193.36 in Claims). Stein Declaration, ¶ 13. Thus, out of those Holders in Class 4 that voted on the Plan, approximately 15.73% in number and 58.89% in amount of Claims voted to reject the Plan, and approximately 84.27% in number and 41.11% in amount of Claims voted to accept the Plan. Id.

THE PLAN SATISFIES CONFIRMATION REQUIREMENTS OF BANKRUPTCY CODE § 1129

The Plan Complies with Bankruptcy Code § 1129(a)(1).

According to Bankruptcy Code § 1129(a)(1), a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history explains that Bankruptcy Code § 1129(a)(1) is focused on Bankruptcy Code §§ 1122 and 1123, which govern the classification of claims and the contents of a plan. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); see also In re Johns-Manville Corp., 68 B.R. 618, 629-30 (Bankr. S.D.N.Y. 1986) (noting that confirmation objections under Bankruptcy Code § 1129(a)(1) usually concern the alleged failure to satisfy either Bankruptcy Code §§ 1122(a) or 1123), aff'd sub nom, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); In re Economy Cast Stone Co., 16 B.R. 647, 650 (Bankr. Va. 1981).

As demonstrated below, the Plan fully complies with all of the applicable requirements of Bankruptcy Code §§ 1122 and 1123.

1. The Plan Complies with the Classification Requirements of Bankruptcy Code § 1122.

Although authorizing the designation of multiple classes of claims, Bankruptcy Code § 1122 requires that each claim within a specific class be substantially similar to all other claims within that class. Specifically, Bankruptcy Code § 1122 provides, in pertinent part, that: "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

Under the Plan, each Class of Claims or Equity Interests contains only such Claims or Equity Interests that are substantially similar to the other Claims or Equity Interests within such Class. Specifically, the Plan separately classifies Class 1 as containing Senior

Creditor Claims; Class 2 as containing Other Secured Claims; Class 3 as containing Other Priority Claims; Class 4 as containing General Unsecured Claims; Class 5 as containing Intercompany Claims; and Class 6 as containing Equity Interests. Lembo Declaration, ¶ 33; see also Plan Article III.

This classification of Claims and Equity Interests complies with the requirements of Bankruptcy Code § 1122 because all Claims or Equity Interests within a particular Class are substantially similar to the other Claims or Equity Interests in that Class. Lembo Declaration, ¶ 33.

2. The Plan Complies with the Requirements Set Forth in Bankruptcy Code § 1123(a)(1)-(7).

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

- Section 1123(a)(1). As required under Bankruptcy Code § 1123(a)(1), Article III of the Plan sets forth the classification of Claims and Equity Interests. Lembo Declaration, ¶ 34.

- Section 1123(a)(2) and (3). Article III identifies the Classes of Claims that are not Impaired by the Plan, as required by Bankruptcy Code § 1123(a)(2), and specifies the treatment of Impaired Classes of Claims and Equity Interests, as required under Bankruptcy Code § 1123(a)(3). Lembo Declaration, ¶ 34.

- Section 1123(a)(4). Bankruptcy Code § 1123(a)(4) requires that each holder of a Claim in a particular class receive the same treatment. In re Adelphia Commc'ns Corp., 361 B.R. 337, 363, 364; In re Dow Corning Corp., 244 B.R. 634, 666 (Bankr. E.D. Mich., 1999), aff'd 255 B.R. 445 (E.D. Mich. 2000); see also 7 Lawrence P. King, Collier on Bankruptcy § 1123(a)(4) (16th ed. 2011). As required by Bankruptcy Code § 1123(a)(4), the treatment under the Plan of each Holder of a Claim or Equity Interest in each particular Class is the same as the treatment of each other Holder of a Claim or Equity Interest in such Class. Lembo Declaration, ¶ 35.

- Section 1123(a)(5). In accordance with Bankruptcy Code § 1123(a)(6), Articles IV, V, VI, VII, X, XI, and XII, as well as various other provisions of the Plan, provide for the means to implement the Plan and satisfy the requirements thereof, including the establishment of the Liquidating Trust and the distribution of the Liquidating Trust Assets. Lembo Declaration, ¶ 36.

- Section 1123(a)(6). Because the Plan is a liquidating plan that provides for the dissolution of the Debtors, Bankruptcy Code § 1123(a)(6) is inapplicable. Lembo Declaration, ¶ 38.

- Section 1123(a)(7). Under Plan Section IV.F(a), Edmund Schwartz, the CFO, will continue as an officer for the Debtors that continue to own liquor licenses and will be authorized to negotiate and consummate purchase agreements for those remaining liquor licenses after Confirmation, which is consistent with the interests of creditors, interest holders, and public policy, in accordance with Bankruptcy Code § 1123(a)(7). Lembo Declaration, ¶ 37.

Thus, based on the foregoing, the Plan complies with the requirements of Bankruptcy Code § 1123(a)(1)-(7).[7]

3. The Rejection of Remaining Executory Contracts and Unexpired Leases Provided for Under the Plan Complies with Bankruptcy Code §§ 365 and 1123(b)(2).

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

Specifically, Bankruptcy Code § 1123(b)(2) 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." The Debtors' decisions regarding the rejection of any remaining Executory Contracts are based on, and are within, their sound

[7] Bankruptcy Code § 1123(a)(8) is not applicable because the Debtors are not individuals.

business judgment and take into account that the Debtors are liquidating.[8] Lembo Declaration, ¶ 39.

The requirements of Bankruptcy Code § 1123(b)(2) have been satisfied, and thus, based on the foregoing, the Plan satisfies Bankruptcy Code §1129(a)(1).

The Plan Complies with Bankruptcy Code § 1129(a)(2).

Bankruptcy Code § 1129(a)(2) requires that a plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history explains that Bankruptcy Code § 1129(a)(2) incorporates the disclosure and solicitation requirements of Bankruptcy Code §§ 1125 and 1126. See 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, e.g., In re PWS Holding Corp., 228 F.3d 224, 248 (3d Cir. 2000) ("§ 1129(a)(2) requires that the plan proponent comply with the adequate disclosure requirements of § 1125.").

As explained above, the Debtors have complied with all other applicable provisions of the Bankruptcy Code, including the provisions of Bankruptcy Code §§ 1125 and 1126 regarding disclosure, plan solicitation, and vote tabulation. As evidenced by prior orders of the Bankruptcy Court and the filings submitted by the Debtors in support of the Plan, the Debtors have complied with all of the provisions of the Bankruptcy Code, the Bankruptcy Rules, and the

[8] Plan Section VII.A states that, "[a]ny Executory Contracts that (i) have not expired or been terminated by their own terms on or prior to the Effective Date, (ii) have not been assumed, assumed and assigned, rejected, or deemed rejected and terminated pursuant to a Sale Order, any other order of the Bankruptcy Court, or letter agreement (including the Mountainside Letter Agreement) by and between the applicable Debtor and non-Debtor party thereto prior to the Confirmation Date, or (iii) are not the subject of a motion by the Debtors to either assume and assign or to reject such Executory Contract that is pending on the Confirmation Date, will be deemed rejected by the Debtors as of the Confirmation Date, subject to the occurrence of the Effective Date, and the entry of the Confirmation Order by the Bankruptcy Court will constitute approval of the rejections of such Executory Contracts pursuant to Bankruptcy Code §§ 365(a) and 1123 or otherwise."

Local Rules governing notice and related matters in connection with the Plan, the Disclosure Statement, and all other matters considered by the Bankruptcy Court in these Chapter 11 Cases. Lembo Declaration, ¶ 40.

Also, among other things, as required by the Disclosure Statement Order, and as evidenced by the certificates of service submitted in relation to the Disclosure Statement, the Debtors have provided good, adequate, and sufficient notice of the Confirmation Hearing, the Objection Deadline, and the Voting Deadline. See Stein Declaration, ¶ 4; Disclosure Statement Certificate of Service; *Affidavit/Declaration of Service of Jeffrey S. Stein* [ECF No. 1191]; *Affidavit/Declaration of Service of Barbara Kelley Keane* [ECF No. 1166].

Moreover, the Debtors have properly solicited votes with respect to the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order. Id.

Thus, the Debtors have satisfied the requirements of Bankruptcy Code § 1129(a)(2).

The Plan Complies with Bankruptcy Code § 1129(a)(3).

Bankruptcy Code § 1129(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." PWS Holding, 228 F.3d at 242. Courts in this Circuit have stated that "[f]or purposes of determining good faith under § 1129(a)(3) ... the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." Id. (quoting In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150 n. 5 (3d Cir. 1986)).

Although the Bankruptcy Code does not define good faith, this Circuit has described conduct that is not in good faith in the context of a Bankruptcy Code § 363 sale as

involving "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage." Abbot Dairies, 788 F.2d at 147-48. Thus, bad faith in an analogous context generally implies or involves "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." The Leslie Fay Cos., 207 B.R. 764, 781 (Bankr. S.D.N.Y. 2007) (quoting In re Resorts Int'l, Inc., 145 B.R. 412, 469 (Bankr. D.N.J. 1990)).

The Plan and the Disclosure Statement are the products of consensual and extensive negotiations among the Debtors, the Creditors Committee, the Pre-Petition Lenders, the DIP Facility Lender, and others, each of whom support Confirmation of the Plan. The Plan also memorializes two settlements among these parties (as described above). Moreover, the release and exculpation provisions embodied in the Plan were heavily negotiated as part of these settlements, are fair and equitable, in the best interests of the Debtors, their estates, their creditors, and all other parties-in-interest, and consistent with Bankruptcy Code §§ 105, 1123, and 1129. Lembo Declaration, ¶ 42.

Thus, the Debtors have complied with the requirements of Bankruptcy Code § 1129(a)(3).

The Plan Complies with Bankruptcy Code § 1129(a)(4).

Bankruptcy Code § 1129(a)(4) 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, as reasonable. 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 otherwise be subject to approval. See In re River Vill. Assocs., 161 B.R. 127, 141 (Bankr. E.D. Pa. 1993).

Plan Section XII.8 provides, among other things, for the retention of jurisdiction by the Bankruptcy Court to hear and determine all applications under Bankruptcy Code § 330, 331, 503(b), or otherwise for awards of Professional Fees or the compensation for services rendered and reimbursement of expenses incurred prior to the Confirmation Date. Moreover, Plan Section II.A(b) establishes a 30-day deadline from the Effective Date for the filing of final applications for allowance of Professional Fees with the Bankruptcy Court. Also, the Plan provides for the establishment of the Plan Fund (see Plan Section IV.B) and for the Liquidating Trustee and the Liquidating Trustee Professionals to be compensated as set forth in the Plan and the Liquidating Trust Agreement. See Plan Section IV.D.2(b). Lastly, the Plan provides under Plan Section IV.D.1(e), that all costs and expenses associated with the winding down of the Estates, the administration of the Liquidating Trust, and all other actions referenced in Plan Sections IV.D, IV.E, and IV.F will be the responsibility of, and paid for by, the Liquidating Trustee in accordance with the Plan from the Plan Fund or from any other cash of the Liquidating Trust on hand that does not otherwise constitute Transferred Property or is not to be distributed to any Holder of an Allowed Claim pursuant to the Plan (including any Allowed Pre-Petition Lenders Claims), the DIP Facility Order, the Sale Orders, or any other order of the Bankruptcy Court.

Payments made or to be made by the Debtors to Professionals for services or costs and expenses incurred in connection with these Chapter 11 Cases, or in connection with the Plan and incident to these Chapter 11 Cases, have been approved by, or are subject to the approval of,

the Bankruptcy Court, and thus, the Debtors have complied with Bankruptcy Code § 1129(a)(4). Lembo Declaration, ¶ 44.

Bankruptcy Code § 1129(a)(5) is Inapplicable.

Bankruptcy Code § 1129(a)(5) addresses the roles of the proposed officers and directors of the reorganized debtor. The requirements of Bankruptcy Code § 1129(a)(5) are inapplicable in these Chapter 11 Cases because the Plan is a liquidating plan that provides for the dissolution of the Debtors and the resignation of their boards of managers.[9] There will be no "reorganized debtor" for any presently existing officer or manager to service after the Effective Date. Lembo Declaration, ¶ 45. Therefore, Bankruptcy Code § 1129(a)(5) is not applicable to the Plan.

The Debtors note, however, that the Plan provides for the appointment of CRG as the initial Liquidating Trustee. See Plan Section IV.D.2(a). In addition, it is anticipated that the following individuals will be designated by the Administrative Agent or the Committee, in accordance with Plan Section IV.D.1(g)), as the initial members of the Oversight Committee: Steven Brown of Ally Commercial Finance, LLC, which is the DIP Facility Lender, Administrative Agent, and one of the Pre-Petition Lenders; and Brad Boe of Performance Food Group, Inc. and Ronald Tucker of Simon Property Group, Inc., each of whom has been a member of the Committee since its formation.

[9] It is contemplated, however, that Edmund Schwartz, the CFO, will continue to serve as an officer for those Debtors that continue to own any liquor licenses, and the Liquidating Trustee will serve as the sole director, officer, and/or manager of CB Holding and of the applicable Affiliate Debtors for which all Sales have Closed, until certificates of cancellation, dissolution, or merger for those Debtors are filed in accordance with Plan Section IV.F(a). See Plan Section IV.A(b).

Bankruptcy Code § 1129(a)(6) is Inapplicable.

Bankruptcy Code § 1129(a)(6) 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 requirements of Bankruptcy Code § 1129(a)(6) are inapplicable in these Chapter 11 Cases because the Plan is a liquidating plan that provides for the dissolution of the Debtors.

In any event, to the extent such requirements are applicable, the Plan does not provide for the change of any rates controlled by a governmental regulatory commission, and the Debtors were never subject to any such commissions. In addition, no governmental regulatory commissions have to date objected to the Plan. Lembo Declaration, ¶ 48. Therefore, Bankruptcy Code §1129(a)(6) is not applicable to the Plan.

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(7).

Bankruptcy Code § 1129(a)(7) requires that a plan be in the "best interests" of creditors and interest holders. Specifically, § 1129(a)(7) provides:

> With respect to each impaired class of claims or interests -
>
> (A) each holder of a claim or interest of such class -
>
> (i) has accepted the plan; or
>
> (ii) 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 so receive or retain if the debtor were liquidated under chapter 7 of this title on such date ...

Under the "best interests" test, a court must find that, with respect to each impaired class of creditors, each holder of an allowed claim in such class has either accepted the plan or would receive under the plan property of a value, as of the effective date, that is not less

than the amount the holder would receive or retain if the debtor was liquidated under Chapter 7. See Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 n. 13 (1999). Under this "best interests" test, the "Court must contrive a hypothetical chapter 7 liquidation conducted on the effective date of the plan." In re Lason, Inc., 300 B.R. 227, 232 (Bankr. D. Del. 2003), and then determine whether "a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization." Id. (quoting In re Sierra-Cal, 210 B.R. 168, 171-172 (Bankr. E.D. Cal. 1997)).

Here, the "best interests" test is satisfied as to each Holder in all of the Impaired Classes of Claims and Interests. As set forth in greater detail above, as calculated by the Balloting Agent in accordance with the Disclosure Statement Order, the Bankruptcy Code, and the Bankruptcy Rules, of the Holders of Claims in Class 1 of the Plan that voted, 100% in number and 100% in amount voted to accept the Plan, and of the Holders of Claims in Class 2 of the Plan that voted, 100% in number and 100% in amount voted to accept the Plan. Thus, Classes 1 and 2 under the Plan have met the statutory voting thresholds required to accept the Plan. Stein Declaration, ¶ 13. In contrast, of the Holders of Claims in Class 4 of the Plan that voted, approximately 15.73% in number and 58.89% in amount voted to reject the Plan, and approximately 84.27% in number and 41.11% in amount voted to accept the Plan, and as such, Bankruptcy Code § 1129(a)(7)(A)(ii) will need to be satisfied as to Class 4, as described below.

Moreover, a Chapter 7 liquidation would have a negative effect on potential distributions to creditors. Therefore, Confirmation of the Plan would provide each Holder of an Allowed Claim with a recovery that is not less than such Holder would receive pursuant to liquidation of the Debtors under Chapter 7. Lembo Declaration, ¶ 50.

Specifically, because of, among other things, (i) the increased costs and expenses of liquidation under Chapter 7 arising from any fees payable to a bankruptcy trustee (up to three percent (3%) of total proceeds) and the attorneys and other professionals such trustee might retain, (ii) the erosion of the value of the Debtors' assets in the context of an expedited liquidation required under Chapter 7 and the "fire sale" atmosphere that would prevail, especially in connection with any as yet unsold liquor licenses that could expire or potentially be terminated in Chapter 7, and (iii) the time and expenses that would be incurred in order for any Chapter 7 trustee to acquire the same expertise and familiarity that the Liquidating Trustee (i.e., CRG, which has served as the Debtors' restructuring advisors and provided the Debtors' Chief Restructuring Officer during these Chapter 11 Cases) already possesses, the Debtors believe that the net liquidation proceeds that will be generated by the Liquidating Trustee should exceed those generated in Chapter 7. Accordingly, the Debtors have determined that Confirmation of the Plan will provide each Holder of a Claim or Equity Interest in an impaired Class with a recovery that is greater than or equal to what such Holder would receive pursuant to a Chapter 7 liquidation of the Debtors. Lembo Declaration, ¶ 51.

Thus, as set forth in greater detail in Section VII.B of the Disclosure Statement, a Chapter 7 liquidation of the Debtors' Estates would adversely affect the value of the ultimate proceeds available for distribution to the creditors in these Chapter 11 Cases. The information set forth in the hypothetical distribution analysis prepared by the Debtors and CRG, attached as Exhibit B to the Disclosure Statement and incorporated herein by reference, provides a summary of the estimated liquidation values of the Debtors' assets, on a consolidated basis. Lembo Declaration, ¶ 52.

Based upon the hypothetical distribution analysis and the discussion of the "best interests" test described in Section VII.B of the Disclosure Statement and on Exhibit B thereto and in the Lembo Declaration, and as further set forth herein, each Holder in all of the Impaired Classes under the Plan will receive at least as much under the Plan as it would in a Chapter 7 liquidation. See Lembo Declaration, ¶ 53.

Thus, the Plan satisfies the requirements of Bankruptcy Code § 1129(a)(7).

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(8).

Bankruptcy Code § 1129(a)(8) provides that, with respect to each class of impaired claims or impaired interests, a plan cannot be confirmed unless "[w]ith respect to each class of claims or interests - (A) such class has accepted the plan; or (B) such class is not impaired under the plan."

Classes 1 and 2 are Impaired, were entitled to vote on the Plan, and voted to accept the Plan. Lembo Declaration, ¶ 55; Stein Declaration, ¶ 13. As to these Classes, the requirements of § 1129(a)(8) have been satisfied.

In contrast, Class 4 is Impaired and was entitled to vote on the Plan, but voted to reject the Plan. Moreover, Classes 5 and 6 are also Impaired, but pursuant to Bankruptcy Code § 1126(g), because Holders of Claims or Equity Interests in such Classes will not receive or retain any property under the Plan on account of such Claims or Equity Interests, they are deemed to have rejected the Plan and were not entitled to vote thereon. The Plan does not satisfy Bankruptcy Code § 1129(a)(8) as to Classes 4, 5, and 6, and therefore, compliance with Bankruptcy Code § 1129(b) is required.

For the reasons set forth below, the Plan satisfies Bankruptcy Code § 1129(b). Lembo Declaration, ¶ 56.

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(9).

Bankruptcy Code § 1129(a)(9) requires that, unless the holder of a particular claim agrees to a different treatment of such claim, persons holding claims entitled to priority under Bankruptcy Code § 507 shall receive payments under the plan as follows:

> 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 [the Bankruptcy Code], 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)(l), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of [the Bankruptcy Code], 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;
>
> (C) with respect to a claim of a kind specified in Section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash
>
> (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
>
> (ii) over a period ending not later than 5 years after the date of the order for relief under Section 301, 302, or 303; and
>
> (iii) in a manner not less favorable than the most favored nonpriority unsecured claims provided for by the plan (other than cash payments made to a class of creditors under Section 1122(b)); and
>
> (D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under Section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

In accordance with Bankruptcy Code § 1129(a)(9)(A) and (B), Plan Section II.A provides that all Allowed Administrative Claims will be paid in full, in Cash, except to the extent that the Holder of such Claim has agreed to a less favorable treatment thereof in a manner otherwise agreeable to the Holders of such Claims. Lembo Declaration, ¶ 57.

Moreover, Plan Section II.B provides, in pertinent part, that the Administrative Agent will distribute to the Holders of Allowed DIP Facility Claims the amount required to satisfy in full all then outstanding Allowed DIP Facility Claims. Lembo Declaration, ¶ 55.

In addition, as required by Bankruptcy Code § 1129(a)(9)(C), Plan Section II.C provides that all Allowed Priority Tax Claims would either (i) be paid in Cash from the Estate Shared Proceeds equal to the unpaid portion of such Allowed Priority Tax Claim or (ii) receive such other treatment as to which the Debtors and such Holder have agreed upon. Lembo Declaration, ¶ 59.

Based upon the foregoing, the Plan satisfies the requirements of Bankruptcy Code § 1129(a)(9).[10]

Finally, Plan Section III.B.3 provides that all Allowed Other Priority Claims will receive in full satisfaction, settlement, and release of, and in exchange for, such Allowed Other Priority Claim, Cash from (a) the Plan Fund or (b) any other escrows that may be established for the payment of any particular remaining unpaid Allowed Other Priority Claims, equal to the unpaid portion of such Allowed Other Priority Claim. Lembo Declaration, ¶ 60.

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[10] Notwithstanding anything to the contrary in the Plan, the applicable Purchaser will pay or otherwise satisfy any Priority Tax Claim, including any Claim that could have otherwise potentially constituted an Allowed Priority Tax Claim against the Debtors but for the terms of the applicable Sale Order, Asset Purchase Agreement, or management or other agreement that it has agreed to pay under such order and/or agreement in the time and manner set forth therein or that otherwise became the obligation of a particular Purchaser upon the closing of the underlying Sale (or portion thereof). See Plan Section II.C.

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(10).

The Plan satisfies Bankruptcy Code § 1129(a)(10) because Classes 1 and 2 have accepted the Plan, without including any acceptance by insiders, if any, in such Class. Lembo Declaration, ¶ 61; see supra p. 7.

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(11).

Bankruptcy Code § 1129(a)(11) 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.

As the Plan is a liquidating plan to be implemented through the Liquidating Trust, the Plan complies with Bankruptcy Code § 1129(a)(11). Lembo Declaration, ¶ 62.

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(12).

Bankruptcy Code § 1129(a)(12) requires that either all fees payable under 28 U.S.C. § 1930, as determined by the court at the confirmation hearing, have been paid or that the proposed plan provides for the payment of all such fees on the effective date. Plan Section XI.B provides that all fees payable pursuant to 28 U.S.C. § 1930 will be paid on or before the Effective Date, to the extent required by applicable law, or if not required to be paid on or prior to the Effective Date, by the Debtors or the Liquidating Trustee as soon as practicable following the Effective Date, as and when such fees become due and payable in accordance with applicable law. Lembo Declaration, ¶ 63.

Thus, the Plan satisfies the requirements of Bankruptcy Code § 1129(a)(12).

The Plan Complies with the Requirements of Bankruptcy Code § 1129(a)(13).

Bankruptcy Code § 1129(a)(13) requires that a plan provide for the continuation of certain retiree benefits after it becomes effective. Because the Debtors are liquidating and their employees have already been terminated, there are no such retiree benefits that the Debtors would be obligated to continue after the Effective Date. Lembo Declaration, ¶ 64.

Thus, the Plan satisfies the requirements of Bankruptcy Code § 1129(a)(13).

Bankruptcy Code § 1129(a)(14) - (16) are Inapplicable.

Bankruptcy Code § 1129(a)(14) and (15) apply only to individual debtors, and Bankruptcy Code § 1129(a)(16) applies only to transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. See In re Cypresswood Land Partners, I, 409 B.R. 396, 433 (Bankr. S.D. Tex. 2009).

These requirements are not applicable to the Debtors (which are neither individuals nor corporations or trusts that are not a moneyed, business, or commercial corporation or trust) or the Plan. Lembo Declaration, ¶ 65.

The Plan Complies with Bankruptcy Code § 1129(d).

Bankruptcy Code § 1129(d) states that "the 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 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, but is instead to effectuate the liquidation and distribution of the Debtors' remaining assets and the winding down of any remaining affairs of the Debtors, in each instance through the establishment of the Liquidating

Trust. No governmental unit has requested that the Bankruptcy Court deny Confirmation on the basis that the principal purpose of the Plan is the avoidance of taxes. Lembo Declaration, ¶ 67.

Thus, the Plan satisfies the requirements of Bankruptcy Code § 1129(d).

THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS OF BANKRUPTCY CODE § 1129(b) WITH RESPECT TO CLASSES 4, 5, AND 6

Bankruptcy Code § 1129(b) provides the mechanism for the confirmation of a plan even if the plan is not accepted by all impaired classes of claims and interests. This mechanism, known colloquially as "cram down", provides in pertinent part:

> [I]f all of the applicable requirements of [Bankruptcy Code Section 1129(a)] other than [the requirement contained in Section 1129(a)(8) of acceptance of a plan 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.

(emphasis added). Thus, under Section 1129(b), this Court may "cram down" a plan over the dissenting vote or deemed rejection of an impaired class or classes of claims or interests, so long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the dissenting class or classes. See Corestates Bank, N.A. v. United Chemical Technologies, Inc., 202 B.R. 33, 47 (E.D. Pa. 1996).

In these Chapter 11 Cases, Class 4 voted to reject the Plan, and Classes 5 and 6 were deemed to reject the Plan under Bankruptcy Code § 1126(g) because they will receive no distributions thereunder. Nonetheless, for the reasons set forth below, the Debtors submit that the Plan can be confirmed under Bankruptcy Code § 1129(b). Lembo Declaration, ¶ 72.

The Plan Does Not Discriminate Unfairly.

Bankruptcy Code § 1129(b)(1) does not prohibit discrimination among classes; instead, it requires that treatment of one class must be consistent with the treatment of other classes with similar legal claims against the debtor. See Corestates Bank, 202 B.R. at 47; see also 7 COLLIER ON BANKRUPTCY § 1129.03[3][b] (16th ed. 2010); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 416 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6372 (noting that where impaired, objecting class receives less than full value under the plan, unfair discrimination does not exist "if the [objecting] class is not unfairly discriminated against with respect to equal classes and if junior classes will receive nothing under the plan").

Unfair discrimination occurs when creditors that are similarly situated regarding legal rights and priority are treated unequally. Correspondingly, a plan "which 'protects the legal rights of a dissenting class in a manner consistent with treatment of other classes whose legal rights are intertwined with those of the dissenting class ... does not discriminate unfairly with respect to the dissenting class.'" Corestates Bank, 202 B.R. at 47 (quoting In re Martin, 66 B.R. 921, 929 (Bankr. D. Mont. 1986)).

Based upon the foregoing standards, the Plan does not "discriminate unfairly." Class 4 includes the claims of all Holders of any General Unsecured Claims of any of the Debtors. Inasmuch as Class 4 represents the only General Unsecured Claims classified under the Plan, the Plan does not "discriminate unfairly" as between any Holders of General Unsecured Claims in Class 4. Lembo Declaration, ¶ 69. Class 5 includes the claims of all Holders of any Intercompany Claims of any of the Debtors. Inasmuch as Class 5 represents the only Intercompany Claims classified under the Plan, the Plan does not "discriminate unfairly" as between any Holders of Intercompany Claims in Class 5. Lembo Declaration, ¶ 70. Class 6

includes the interests of all Holders of Equity Interests. Inasmuch as Class 6 represents the only Equity Interests classified under the Plan, and there are no other Classes of interests that are impaired any differently, the Plan does not discriminate unfairly as between any Holders of Equity Interests in Class 6. Lembo Declaration, ¶ 71.

The Plan is Fair and Equitable.

Bankruptcy Code § 1129(b)(2) establishes the "absolute priority rule" and defines "fair and equitable" as follows:

(a) As to Secured Creditors: (i) each impaired secured creditor retains its liens securing its secured claim and receives on account of its secured claim deferred cash payments having a present value equal to the amount of its allowed secured claim, (ii) each impaired secured creditor retains the right to credit bid in connection with a sale free and clear of their liens, pursuant to Bankruptcy Code § 363(k), of the assets securing each impaired secured creditors' claim or (iii) each impaired secured creditor realizes the "indubitable equivalent" of its allowed secured claim.

(b) As to Unsecured Creditors: Either (i) each impaired unsecured creditor receives or retains under the plan property of a value equal to the amount of its allowed claim or (ii) the holders of claims and interests that are junior to the claims of the dissenting class will not receive any property under the plan.

(c) As to Interest Holders: Either (i) each holder of an Equity Interest will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled or the value of the interest or (ii) the holder of an interest that is junior to the nonaccepting class will not receive or retain any property under the plan.

The treatment under the Plan is "fair and equitable" because Holders of certain Claims and Equity Interests, as applicable, that are senior to Class 4 General Unsecured Claims, Class 5 Intercompany Claims, and Class 6 Equity Interests would not be paid in full or would not receive more than 100% of their Claims under the Plan. Specifically, Holders of Allowed Senior Creditor Claims in Class 1 are all Impaired and would all receive less than 100% of their Claims.

Moreover, Holders of Allowed Other Priority Claims in Class 3, while unimpaired, will only receive 100% of their Claims (and not more on account of such claims).[11] In addition, Holders of Allowed Other Secured Claims, if any, in Class 2, will receive the property securing such Allowed Claim (and not more on account of such Claims). Lembo Declaration, ¶ 72. Moreover, there are no Classes of Claims or Equity Interests, as applicable, junior to Classes 4, 5, and 6 that are receiving any distribution on account of such Claims or Equity Interests. Lembo Declaration, ¶ 72.

Thus, the Plan complies with Bankruptcy Code § 1129(b)(2)(C) as to Classes 4, 5, and 6, and based on the foregoing, the Plan satisfies the "cram down" requirements of Bankruptcy Code § 1129(b).

[11] As set forth in the Disclosure Statement, under the Plan, Holders of Senior Creditor Claims will receive between 20% and 23%, and Holders of General Unsecured Claims will receive between .01% and 1.1%, of their respective Allowed Claims, subject to unanticipated expenses and/or additional Claims, which could result in actual recoveries less than the estimations. See Disclosure Statement, p. 5.

CONCLUSION

Accordingly, for the reasons set forth herein, the Debtors respectfully request that the Bankruptcy Court enter the Confirmation Order, substantially in the form filed with the Court prior to the Confirmation Hearing, and grant such other and further relief as may be just and proper under the circumstances of these Chapter 11 Cases.

Dated: February 21, 2012
Wilmington, Delaware

Respectfully submitted,

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