Confirmation Hearing: February 6, 2018 at 10:00 a.m.
Objection Deadline: January 30, 2018 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
ADVANCE SCIENCE TECHNOLOGIES, INC., and FS-IP LLC,	:	Case No. 17-13668 (SMB) (Jointly Administered)
Debtors. [1]	:	

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF (I) APPROVAL OF (A) DISCLOSURE STATEMENT, (B) SOLICITATION OF VOTES AND VOTING PROCEDURES, AND (C) FORM OF BALLOTS, AND (II) CONFIRMATION OF DEBTORS' JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION

Advance Science Technologies, Inc. ("***AST***") and FS-IP LLC ("***FS-IP***"), as debtors and debtors-in-possession (collectively, the "***Debtors***"), respectfully represent:

[1] The Debtors in these cases, along with the last four digits of each Debtors' federal tax identification number, are: Advance Science Technologies, Inc. (6977); and FS-IP LLC (5674). The Court has entered an order respecting joint administration of the Debtors' bankruptcy cases. Docket No. 23.

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PRELIMINARY STATEMENT

These chapter 11 cases are "prepackaged Chapter 11 case[s]" within the scope and definition set forth in Part II of the Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York (the "***Guidelines***")[2] as the Debtors, contemporaneously with the filing of their respective chapter 11 petitions, filed, among other documents, the *Debtors' Joint Prepackaged Plan of Reorganization* (as amended, modified, and/or supplemented from time to time, including the Plan Supplement filed concurrently herewith, the "***Plan***") [Dkt. No. 9], *Notice of Filing Information and Disclosure Statement* (the "***Disclosure Statement***") [Dkt. No. 10], and *Debtors' Motion for Order Establishing Confirmation Schedule, Including Combined Hearing, etc.* [Dkt. No. 8]. All classes of creditors and shareholders entitled to vote accepted the Plan prior to the Petition Date (as defined herein).[3] All other claims, if any, and equity interests are not impaired under the Plan.

As set forth in detail in this Memorandum and in the Confirmation Declaration (as defined below), the Debtors have complied in all respects with the requirements of solicitation and confirmation of the Debtors' Plan.

ARGUMENT

This Memorandum is divided into four parts. Part I provides a brief overview of the background leading to the filing of these bankruptcy cases. Part II addresses the Disclosure Statement and Solicitation Procedures and their satisfaction of the requirements of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. Part III addresses the requirements for confirmation of the Plan under section 1129 of the Bankruptcy Code, and

[2] Part II of Guidelines provides that "a 'prepackaged Chapter 11 case' is one in which the Debtor, substantially contemporaneously with the filing of its Chapter 11 petition, files a Confirmation Hearing Scheduling Motion for Prepackaged Plan in substantially the form annexed [to the Guidelines] as Exhibit A and satisfying the criteria set forth in Part III.A. below, Prepackaged Plan, disclosure statement (or other solicitation document) and voting certification."

[3] Capitalized terms used but not otherwise defined herein shall have the meanings given to such terms in the Plan.

demonstrates the satisfaction of each requirement and achievement of the objectives of chapter 11. Part IV requests a waiver of any stay of the Proposed Confirmation Order so that such order will be effective immediately upon entry.

In support of the Disclosure Statement and the Plan, the Debtors have filed contemporaneously herewith the *Declaration of Sean Sullivan in Support of Debtors' Request for (I) Approval of (A) Disclosure Statement, (B) Solicitation of Votes and Voting Procedures, and (C) Form of Ballots, and (II) Confirmation of Debtors' Joint Prepackaged Plan of Reorganization* (the "***Confirmation Declaration***").

I. BACKGROUND.

On December 29, 2017 (the "***Petition Date***"), the Debtors each commenced with this Court a voluntary case (collectively, the "***Chapter 11 Cases***") under chapter 11 of title 11 of the United States Code (the "***Bankruptcy Code***"). The Debtors are authorized to continue to operate their businesses and manage their assets as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee of creditors has been appointed in these chapter 11 cases.

Prior to the Petition Date, the Debtors commenced and completed the solicitation of votes on the Plan (the "***Solicitation Procedures***") by distributing copies of the Disclosure Statement, Plan and form of ballot with voting instructions (collectively, the "***Solicitation Package***"). Under the Plan, there are two impaired classes of creditors and interest holders entitled to vote on the Plan – Class 3, Senior Secured Creditors (Goldman Sachs Specialty Lending Holdings, Inc.) and Class 6, Interest Holders (Fortior Solutions, Inc., formerly known as SureID Inc. ("***Fortior***")). As set forth in the *Declaration of Matthew Pierce re Plan Voting* [Dkt. No. 17] (the "***Voting Certification***"), the two impaired classes of creditors and interest holders submitted ballots in favor of the Plan. *Id.*, ¶ 5.

Pursuant to the *Order (I) Establishing Confirmation Schedule, Including Combined Hearing to Consider (A) Approval of Disclosure Statement, (B) Approval of Solicitation Procedures, and (C) Confirmation of Prepackaged Chapter 11 Plan; and (II) Extending Time re: (A) Section 341 Meeting and (B) Schedules and Statements of Financial Affairs* (the "***Scheduling Order***") [Dkt. No. 24], the Debtors served a *Notice of Commencement of Chapter 11 Cases of Advance Science Technologies, Inc. and FS-IP, LLC and Notice of Combined Hearing to Consider (I) Approval of the Disclosure Statement, Approval of Solicitation Procedures, and (III) Confirmation of the Prepackaged Plan and Related matters* (the "***Combined Notice***") upon all of the Debtors' known creditors and equity interest holders, including the notice parties identified in the Scheduling Order, the SEC, the IRS and the shareholders of Fortior, all in compliance with the Scheduling Order

Additional factual background regarding the Debtors, including their business operations, corporate and capital structure, and the events leading to these chapter 11 cases, is set forth in the *Declaration of Sean Sullivan Pursuant to Local Bankruptcy Rule 1007-2, in Support of First Day Pleadings* (the "***First Day Declaration***").

II. THE DISCLOSURE STATEMENT, ALONG WITH DEBTORS' SOLICITATION AND VOTING PROCEDURES, SHOULD BE APPROVED.

To determine whether a prepetition solicitation of votes to accept or reject a plan should be approved, this Court must determine whether the solicitation complied with sections 1125(g) and 1126(b) of the Bankruptcy Code, Bankruptcy Rules 3017(d) and (e), Bankruptcy Rules 3018(b) and (c), and Local Rules 3017-1, 3018-1, and 3018-2. As explained below, the Plan fully complies with each of the above requirements for approval.

A. The Debtors' Prepetition Solicitation Complied with the Requirements of Bankruptcy Code Sections 1125(g) and 1126(b).

Sections 1125(g) and 1126(b) of the Bankruptcy Code govern the solicitation and acceptance of a plan of reorganization by a holder of a claim or interest prior to the commencement of a chapter 11 case. Section 1125(g) provides:

> an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

Section 1126(b) of the Bankruptcy Code provides:

> a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case . . . is deemed to have accepted or rejected such plan . . . if:
>
> i. the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or
>
> ii. if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

The Debtors' solicitation of votes prior to commencement of these chapter 11 cases has complied with both of these requirements.

1. The Solicitation and Acceptance of the Plan Comply With Applicable Nonbankruptcy Law And Are Exempt From Federal and State Securities Registration Requirements and Proxy Rules.

The Debtors' prepetition solicitation of Class 3 and Class 6 votes on the Plan (the "***Solicitation***") complied with applicable nonbankruptcy law as required by sections 1125(g) and 1126(b) of the Bankruptcy Code. Specifically, to the extent that the Solicitation constitutes an offer of new securities, it fully complies with applicable securities law because it is exempt from registration pursuant to section 1145 of the Bankruptcy Code (as discussed further below in Section III.G hereof) and pursuant to section 4(a)(2) and Regulation D of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (as amended from time to time, the "***Securities Act***"), which create an exemption from registration for certain transactions that do not involve a "public offering." 15 U.S.C. § 77d(a)(2).

Here, the Solicitation was made only to holders of Class 3 (Senior Secured Claims) and Class 6 (Interests) who are "Accredited Investors" (within the meaning of rule 501(a) of

Regulation D of the Securities Act). Therefore, the Solicitation satisfies the requirements of section 1126(b)(1) of the Bankruptcy Code . Prepetition solicitations that rely on the exemption in section 4(a)(2) of the Securities Act have been approved in other prepackaged chapter 11 cases in this Court. *See, e.g., In re Sbarro,* LLC, Case No. 14-10557 (MG) (Bankr. S.D.N.Y. May 19, 2014) (ECF No. 238); *In re Eagle Bulk Shipping Inc.*, Case No. 14-12303 (SHL) (Bankr. S.D.N.Y. Sept. 22, 2014) (ECF No. 112); *In re Lodgenet Interactive Corp.*, Case No. 13-10238 (SCC) (Bankr. S.D.N.Y. Mar. 7, 2013) (ECF No. 220); *In re Bally Total Fitness of Greater N.Y., Inc.*, Case No. 07-12395 (BRL), 2007 WL 2779438, at *11 (Bankr. S.D.N.Y. Sept. 17, 2007).

In addition, even though the Debtors' Solicitation was exempt from the securities registration and proxy solicitation requirements of nonbankruptcy laws, rules, and regulations, to the extent that the Solicitation constituted an offer of securities, such Solicitation nevertheless is subject to the antifraud provisions of section 17 of the Securities Act, and to the extent that such Solicitation involves the sale of securities, it is subject to the anti-fraud and anti-manipulation provisions of section 10(b) of, and Rule 10b-5 promulgated under, the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"). The Disclosure Statement and the Debtors' Solicitation comply with the requirements of section 10(b) and Rule 10b-5. The Debtors disclosed all material facts and are not aware of any untrue statement of material fact in the Disclosure Statement or any related documents or communications. The Disclosure Statement does not omit any material fact. Moreover, the Debtors had no intention of making any untrue statement or omitting any material fact.

Accordingly, the Debtors have satisfied sections 1125(g) and 1126(b) of the Bankruptcy Code.

2. The Disclosure Statement Contains Adequate Information Within the Meaning of Bankruptcy Code Section 1125(a)(1).

Even if the Court were to determine that the Disclosure Statement does not comply with applicable nonbankruptcy law (which it does, as described above), the Court should still approve

the Disclosure Statement because it discloses "adequate information" prior to the solicitation of votes on a plan of reorganization pursuant to section 1126(b)(2). *See* Section 1126(b), quoted above. Section 1125(a)(1) of the Bankruptcy Code defines "adequate information as follows:

> "[A]dequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.

Thus, a disclosure statement must, as a whole, provide information that is reasonably practicable to permit an informed judgment by impaired creditors or equity interest holders entitled to vote on a plan of reorganization. *See In re BGI, Inc.*, 772 F.3d 102, 105 (2d Cir. 2014), *reh'g denied* (Aug. 8, 2014), *cert. denied sub nom. Beeman v. BGI Creditor's Liquidating Trust*, 136 S. Ct. 155 (2015); *Cadle Co. II, Inc. v. PC Liquidation Corp.* (*In re PC Liquidation Corp.*), 383 B.R. 856, 866 (E.D.N.Y. 2008) (holding that a disclosure statement was adequate where it "enable[d] a reasonable creditor to make an informed judgment about the[p]lan"); *see also In re Adelphia Commc'ns Corp.*, 352 B.R. 592, 600 (Bankr. S.D.N.Y. 2006) (explaining that "an adequate disclosure determination requires a bankruptcy court to find not just that there is enough information, but also that what is said is not misleading"); *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) (adequacy of disclosure statement "is to be determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties").

The Court has broad discretion in examining the adequacy of the information contained in a disclosure statement. *See Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694, 696 (4th Cir. 1989) (noting that adequacy of information is made on a "case by case basis"); *Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) (same); *see also In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994)

(affirming bankruptcy court's use of equitable powers when debtors failed to engage in "full and fair" disclosure).

This grant of discretion was intended to facilitate effective reorganization of a debtor in the broad range of businesses in which chapter 11 debtors engage and the broad range of circumstances that accompany chapter 11 cases. *See* H.R. Rep. No. 95-595, at 409, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6365 (1977). "In reorganization cases, there is frequently great uncertainty. Therefore the need for flexibility is greatest." *Id*. Accordingly, the determination of whether a disclosure statement contains adequate information is to be made on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See In re PC Liquidation Corp.*, 383 B.R. at 866; *In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001).

In that regard, courts generally examine a number of factors to determine whether the disclosure statement contains adequate information. *See, e.g., In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988) (listing factors); *see also In re Source Enters., Inc.*, Case No. 06-11707 (AJG), 2007 WL 7144778, at *2 (Bankr. S.D.N.Y. July 31, 2007) (similar list). The factors are not meant to be comprehensive; nor must a debtor provide information on all factors. Rather, the bankruptcy court must decide what is appropriate in each case. *See In re Ferretti*, 128 B.R. 16, 18-19 (Bankr. D. N.H. 1991) (noting that not every debtor needs to provide information on each factor); *see also Phoenix Petroleum*, 278 B.R. at 393 (making use of a list of factors but cautioning that "no one list of categories will apply in every case").

The Disclosure Statement contains adequate information necessary to enable all parties in interest to make an informed judgment with respect to the Plan as required by section 1125 of the Bankruptcy Code, including, but not limited to, a discussion of:

i. Special Notice Regarding Federal and State Securities Laws (Disclosure Statement, p. 1);

ii. An overview of the Company's operations and key events leading to the commencement of these chapter 11 cases (Disclosure Statement, Part I);

iii. Alternatives to confirmation and consummation of the Plan (Disclosure Statement, Part I);

iv. Voting procedures and requirements related to the Plan (Disclosure Statement, Part II);

v. Anticipated events during the chapter 11 case, including first day motions, retention of professionals, and a timetable for the chapter 11 case (Disclosure Statement, Part IV);

vi. Requirements for confirmation of the Plan (Disclosure Statement, Part IV);

vii. A summary of the Plan and information regarding Claims and Interests addressed under the Plan (Disclosure Statement, Part IV);

viii. Certain risk factors to be considered in evaluating the Plan (Disclosure Statement, Part V);

ix. Information regarding Claims and Interests addressed under the Plan (Disclosure Statement, Part VI);

x. Tax consequences of the Plan (Disclosure Statement, Part VIII); and

xi. Financial information and projections of the Company's business (Disclosure Statement, Exs. M-P).

The Disclosure Statement also contains:

i. A copy of the Cash Collateral Use Term Sheet (Disclosure Statement, Ex. A);

ii. A copy of the Plan Restructuring Milestones (Disclosure Statement, Ex. D);

iii. A copy of the Exit Term Sheet (Disclosure Statement, Ex. H);

iv. A copy of the Plan (Disclosure Statement, Ex. K);

v. A copy of the Restructuring Support Agreement (Disclosure Statement, Ex. L);

vi. A liquidation analysis (Disclosure Statement, Ex. M)

The Disclosure Statement was also disseminated to Fortior shareholders in connection with the solicitation of their consents to the transactions contemplated by the proposed restructuring and recapitalization. Although this Court need not find that the Disclosure Statement contains "adequate information" as applied to the Fortior shareholders, a review of the

Disclosure Statement demonstrates that indeed it does comply with any conceivable standard for such information. The Fortior shareholders, as well as the impaired Classes under the Plan, received adequate information to provide informed votes.

Accordingly, the Disclosure Statement satisfies the requirements of section 1125 of the Bankruptcy Code and should be approved.

B. Solicitation of Classes Presumed to Accept the Plan and Classes Deemed to Reject the Plan is Not Required.

The holders of Claims in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Claims) and Class 5 (Intercompany Claims), if any, are unimpaired by the Plan.[4] As such, the holders of Claims in the aforementioned classes are conclusively presumed to have accepted the Plan and are not entitled to vote to accept or reject the Plan. The Bankruptcy Code does not require the solicitation of votes from such holders. Specifically, section 1126(f) of the Bankruptcy Code provides:

> Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

Accordingly, pursuant to section 1126(f), the holders of Claims in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Claims), and Class 5 (Intercompany Claims) are conclusively presumed to accept the Plan and have not been solicited.

C. The Debtors' Solicitation Package, Ballots, and Solicitation Procedures Complied with Requirements of Bankruptcy Rules 3017(d) and 3018(c).

Bankruptcy Rule 3017(d) sets forth the materials that must be provided to holders of claims and equity interests for the purpose of soliciting their votes and providing adequate notice of the hearing on confirmation of a plan of reorganization:

> Upon approval of a disclosure statement,—except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders—the debtor in

[4] The Debtors believe there are no claims in any of these Classes. As explained above, to the extent there are claims in the Classes deemed to accept the Plan, solicitation is not required under the Bankruptcy Code.

> possession, trustee, proponent of the plan, or clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,
>
> (1) the plan or a court-approved summary of the plan;
>
> (2) the disclosure statement approved by the court;
>
> (3) notice of the time within which acceptances and rejections of the plan may be filed; and
>
> (4) any other information as the court may direct, including any court opinion approving the disclosure statement or a court-approved summary of the opinion.
>
> In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan.

Fed. R. Bankr. P. 3017(d).

Bankruptcy Rule 3017(d) also provides, in relevant part, as follows:

> If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation.

Fed. R. Bankr. P. 3017(d).

Bankruptcy Rule 3018(c) provides that "[a]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form." Fed. R. Bankr. P. 3018(c). In addition, Bankruptcy Rule 2002(l) permits a court to "order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice." Fed. R. Bankr. P. 2002(l).

1. Solicitation Package.

As required by Bankruptcy Rule 3017(d), the materials provided to members of impaired Classes (the "***Solicitation Package***") included the Disclosure Statement (with numerous exhibits thereto including the Plan, the Restructuring Support Agreement, and voluminous financial information). The Solicitation Package was transmitted to all members of impaired Classes, as well as to the Fortior shareholders. Concurrently with filing this Memorandum, the Debtors filed their Plan Supplement and served the Plan Supplement on, among others, the members of the impaired Classes by electronic mail.

The Solicitation Packages and the Plan Supplement satisfy Bankruptcy Rule 3017(d) and Local Rule 3017-1.

2. Combined Notice.

In addition to dissemination of the entire Solicitation Package, the Debtors distributed the Combined Notice to, among others, all of the Debtors' known creditors and equity interest holders in compliance with the Scheduling Order. The Combined Notice provided that copies of the Plan and the Disclosure Statement (as well as other documents filed in these bankruptcy cases) could be obtained at the Office of the Clerk of the Bankruptcy Court, by accessing the Bankruptcy Court's website, by e-mail request to the Debtors' voting agent, Matthew Pierce (the "***Voting Agent***") or by accessing the case website free of charge at https://www.perkinscoie.com/en/advance-sciencetechnologies-inc-and-fs-ip-llc.html. The Combined Notice set forth the date, time, and place of the Combined Hearing to consider approval of the Disclosure Statement and confirmation of the Plan. The Combined Notice also described the procedures and deadline for submitting an objection to the Disclosure Statement, the Solicitation Procedures, or confirmation of the Plan.

The Solicitation Procedures, including service of the Combined Notice, afforded parties in interest ample notice of these proceedings. As such, the Debtors request that the Solicitation Procedures be approved.

3. Ballots.

Bankruptcy Rules 3017(d) and 3018(c) require a form of ballot substantially conforming to Official Form No. 14. The forms of the Ballot disseminated and received, annexed as Exhibit B to the Voting Certification, were based on Official Form No. 14, but were modified to address the particular circumstances of these chapter 11 cases. The Ballots therefore satisfy Bankruptcy Rules 3017(d) and 3018(c) and should be approved.

D. The Solicitation Period Was Reasonable under Bankruptcy Rule 3018(b).

Bankruptcy Rule 3018(b) provides, in relevant part, that (i) the plan must have been transmitted to substantially all creditors and equity security holders of the same class, (ii) the period of time prescribed for such creditors and equity security holders to accept or reject the plan must not have been unreasonably short, and (iii) the solicitation must have been in compliance with section 1126(b) of the Bankruptcy Code. Fed. R. Bankr. P. 3018(b). The Debtors' solicitation satisfied the standards set forth in Bankruptcy Rule 3018(b) and section 1126(b) of the Bankruptcy Code.

Part VII.A of the Guidelines provides that "under ordinary circumstances" a court will approve as reasonable a "twenty-one (21) day voting period, measured from the date of commencement of mailing" with respect to the solicitation of votes of holders of "securities listed or admitted to trading on the New York Stock Exchange or American Stock Exchange or any international exchanges quoted on NASDAQ, and for securities publicly traded on any other national securities exchange[]." The Debtors complied with Part VII.A of the Guidelines as they afforded the holders of Claims in Class 3 and Class 6 more than twenty-one (21) days after dissemination of the Solicitation Package to submit a completed Ballot to the Voting Agent. All such Ballots were returned on a timely basis.

Accordingly, the solicitation period in this case complied with applicable law, including the twenty-one (21) day presumptive voting period in Part VII.A of the Guidelines, thereby complying with section 1125(g) of the Bankruptcy Code and Bankruptcy Rule 3018, respectively.

E. The Debtors Have Disseminated the Solicitation Package to All Required Creditors and Interestholders.

As set forth in Sections A and B above, the only impaired Classes under the Plan, and thus the only Classes entitled to receive the Solicitation Package, are Class 3 (Senior Secured Creditors) and Class 6 (Equity Interests – Fortior). Both such Classes received the Solicitation Package, and both voted in favor of the Plan. Pierce Declaration, ¶ 5 and Ex. B. Indeed, both Classes are parties to the Restructuring Support Agreement.

In addition to the distribution required under the Bankruptcy Code, the Debtors disseminated the Plan and Disclosure Statement to all Fortior shareholders as part of the prepetition corporate approval process. *See* Dkt. No. 3 (Sullivan First Day Declaration, ¶ 20). Further, the Debtors have made the Disclosure Statement and the Plan available at no cost on the following website: https://www.perkinscoie.com/en/advance-sciencetechnologies-inc-and-fs-ip-llc.html.

The Debtors have complied with all applicable requirements respecting dissemination of the Disclosure Statement to parties in interest.

F. The Debtors' Solicitation Procedures Should be Approved under Bankruptcy Rule 3017(e).

Bankruptcy Rule 3017(e) requires that this Court "consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to the beneficial holders of stock, bonds, debentures, notes, and other securities, determine the adequacy of [such] procedures, and enter any orders the court deems appropriate." The Debtors caused the Solicitation Package, including the Disclosure Statement, to be distributed to the holders of Claims and Interests in Class 3 and Class 6 to solicit votes to accept or reject the Plan as described in the Voting Certification. For the reasons set forth above, *supra* Part II.B-D, the Solicitation Procedures were appropriate and should be approved.

Accordingly, the Disclosure Statement, Solicitation Package and Solicitation Procedures should be approved by this Court, as they satisfy all applicable requirements: sections 1125 and 1126(b) of the Bankruptcy Code and Bankruptcy Rules 3017(d) and (e) and 3018(b) and (c).

III. THE PLAN SATISFIES THE CONFIRMATION REQUIREMENTS OF BANKRUPTCY CODE SECTION 1129 AND SHOULD BE APPROVED.

To achieve confirmation of the Plan, the Debtor must demonstrate, by a preponderance of the evidence, that the Plan satisfies section 1129(a) of the Bankruptcy Code. *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd. II* (*In re Briscoe Enters., Ltd. II*), 994 F.2d 1160, 1165 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown."); *see also In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010); *In re Young Broad. Inc.*, 430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010); *JPMorgan Chase Bank N.A. v. Charter Commc'ns Operating, LLC* (*In re Charter Commc'ns*), 419 B.R. 221, 223-24 (Bankr. S.D.N.Y. 2009), appeal dismissed, 449 B.R. 14 (S.D.N.Y. 2011); *In re Kent Terminal Corp.*, 166 B.R. 555, 561 (Bankr. S.D.N.Y. 1994). The Debtors have shown that the Plan carried its burden.

A. The Plan Satisfies Section 1129(a)(1) (Contents of Plan).

Under section 1129(a)(1), a plan must comply with the applicable provisions of the Bankruptcy Code. The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123, governing classification of claims and contents of the plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636, 648-49 (2d Cir. 1988); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992). The Plan fully complies with these requirements.

B. The Plan's Classification of Claims and Interests Complies with Section 1122.

Section 1122(a) provides:

> Except as provided in subsection (b) of this section, 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.

In total, there are six (6) Classes[5] of Claims against and Interests in the Debtor as follows:

i. Class 1 includes Claims entitled to priority under section 507(a), other than Administrative Expense Claims and Priority Tax Claims (which are not classified and are separately treated under Article II, Sections A. and C.).

ii. Class 2 includes Other Secured Claims, which are Claims secured by a lien or collateral or that are subject to a valid right of setoff in accordance with section 506 other than Administrative Expense Claims, Priority Tax Claims, or Senior Secured Claims.

iii. Class 3 includes Senior Secured Claims, which are Claims arising from or in connection with the Senior Secured Loan.

iv. Class 4 includes General Unsecured Claims, which are Claims that are neither secured by Collateral nor entitled to priority, other than the Intercompany Claims.

v. Class 5 includes Intercompany Claims, which are Claims against the Debtors held by a direct or indirect subsidiary of the Debtors.

vi. Class 6 includes Interests (AST and FS-IP Shareholder – Fortior), which are equity interests in the Debtors issued and outstanding as of the Petition Date.

Courts interpreting section 1122(a) generally uphold separate classification if a reasonable basis exists for the classification and all claims within a particular class are substantially similar. *See Aetna Cas. & Sur. Co.* v. *Chateaugay Corp*. (*In re Chateaugay Corp.*), 89 F.3d 942, 949 (2d Cir. 1996) ("[C]lassification is constrained by two straight-forward rules: Dissimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason."). Section 1122 "only prohibits the identical classification of dissimilar claims and does not require the same classification for claims sharing some attributes." *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549, at *203 (Bankr. S.D.N.Y. July 15, 2004) (citations omitted). Additionally, "[a] plan proponent is afforded significant flexibility in classifying claims under section 1122(a) provided that there is a reasonable basis for the

[5] The Debtors believe several of the Classes are empty. The analysis in the text is thus in many respects merely protective.

classification scheme and all claims within a particular class are substantially similar." *Id.* at *202.

The classification scheme of the Plan is rational and complies with the Bankruptcy Code. Generally, the Plan incorporates a "waterfall" classification and distribution scheme that strictly follows the statutory priorities prescribed by the Bankruptcy Code. All Claims and Interests within a Class have the same or similar rights against the Debtor. The Plan provides for the separate classification of Claims against and Interests in the Debtor based upon the differences in legal nature and/or priority of such Claims and Interests and to implement the restructuring contemplated by the Plan. Accordingly, the classification scheme of the Plan complies with section 1122 and should be approved.

C. The Plan Complies with Section 1123(a).

Section 1123(a) sets forth seven applicable requirements which the proponent of a chapter 11 plan must satisfy.[6] The Plan fully complies with each such requirement:

i. The Plan designates Classes of Claims and Classes of Interests as required by section 1123(a)(1). *See* Plan, Art. III.

ii. The Plan specifies whether each Class of Claims and Interests is impaired or unimpaired under the Plan and the treatment of each such impaired Class, as required by sections 1123(a)(2) and 1123(a)(3), respectively. *See* Plan, Art. III, Section B.

iii. Except as otherwise agreed to by a holder of a particular Claim or Interest, the treatment of each Claim or Interest in each particular Class is the same as the treatment of each other Claim or Interest in such Class, as required by section 1123(a)(4). *See* Plan, Art. III.

iv. The Plan provides adequate means for implementation of the Plan as required by section 1123(a)(5). This requirement is met by, among other things: (a) the contributions and support of the holder of the Senior Secured Claims and its affiliates, including a substantial reduction in debt, (b) corporate actions described in Article IV of the Plan, and (c) the provisions governing distributions under the Plan, *see* Plan, Art. VI.

[6] An eighth requirement, set forth in section 1123(a)(8), only applies in a case in which the debtor is an individual.

v. The certificate of incorporation, articles of incorporation, or similar governing document, of the Debtors have been or will be amended on or prior to the Effective Date to prohibit the issuance of non-voting equity securities, in accordance with section 1123(a)(6) of the Bankruptcy Code. The Plan provides that the Amended and Restated Articles of AST, the surviving Debtor entity after the post-confirmation merger of FS-IP into AST, will have that prohibition. Plan, Section IV-B-(f).

vi. The composition of the board of directors and the officers of the Debtor have been disclosed prior to the Confirmation Hearing in accordance with section 1129(a)(5). See Plan Supplement, Exhibit 4. Officers, directors, and managers of Fortior and the other surviving nondebtor affiliates are also disclosed, both in the Plan Supplement, Exhibit 5, and in the Disclosure Statement, Dkt. 10-1, p. 48.

vii. The Plan provisions governing the manner of selection of officers, directors, and managers are consistent with the interests of creditors and equity security holders and with public policy in accordance with section 1123(a)(7). The officers, directors, and managers of the Reorganized Debtors (AST after the postconfirmation merger of FS-IP into AST) have been selected by the Senior Secured Lenders and their affiliates, the owners of Reorganized AST.

D. The Plan Complies with Section 1123(b).

Section 1123(b) also sets forth permissive provisions that may be incorporated into a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b):[7]

i. As contemplated by section 1123(b)(1) and pursuant to section 1124, Article III of the Plan describes the treatment for the following Unimpaired Classes: Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Claims), and Class 5 (Intercompany Claims). Article III of the Plan also describes the treatment for the following Impaired Classes: Class 3 (Senior Secured Claims) and Class 6 (Interests).

ii. The Plan provides for the assumption of executory contracts and unexpired leases that have not been previously assumed or rejected or designated for rejection under section 365 of the Bankruptcy Code, as contemplated by section 1123(b)(2). *See* Plan, Art. V.

iii. As permitted by section 1123(b)(3)(A), Article VIII, Section C of the Plan provides for a release of Claims and Causes of Action owned by the Debtors, the Estates and the Reorganized Debtors. Moreover, as permitted

[7] The Plan does not provide for the sale, transfer, or assignment of all or substantially all of the Debtors' property and, therefore, section 1123(b)(4) is not applicable.

by section 1123(b)(3)(B), Article VIII of the Plan preserves for the Reorganized Debtors any rights, Claims, Causes of Action, rights of setoff or recoupment, or other legal or equitable defenses that the Debtors had immediately prior to the Effective Date, except as otherwise provided in the Plan.

iv. As permitted by section 1123(b)(5), the Plan modifies the rights of holders of Claims in Class 3 (Senior Secured Claims) and Class 6 (Interests) and leaves unaffected the rights of holders of Claims in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Claims), and Class 5 (Intercompany Claims).

v. Under section 1123(b)(6), a plan "may include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." In accordance with section 1123(b)(6), the Plan (i) contains certain release and exculpation provisions consistent with the applicable provisions of the Bankruptcy Code and Second Circuit law, which are discussed *infra*, and (ii) provides that, the offer, issuance, and distribution of the Reorganization Interests shall be exempt from registration, pursuant to section 1145 of the Bankruptcy Code, also discussed *infra*.

vi. As contemplated by section 1123(d), concurrently herewith the Debtors are filing and serving the Plan Supplement, which, among other things, sets forth a non-exclusive list of executory contracts and unexpired leases to be assumed by the Debtors. The Plan provides that the Debtors have paid or will pay cure amounts in cash on the Effective Date or in the ordinary course. To the extent the Debtor is unable to agree upon the amount necessary to cure any amounts due prior to assumption, the cure amount will be determined at the confirmation hearing or as soon as reasonably practicable thereafter as the Court may order.

E. The Plan Releases Should Be Approved.

The Plan provides for two categories of releases: (i) releases of claims held by the Debtors, the Estates and the Reorganized Debtors against a Released Party,[8] which may be

[8] Article I, Section A of the Plan defines "Released Party" as each of the following in its respective capacity as such: (a) the Senior Secured Lenders; (b) the Administrative Agent; (c) Goldman Sachs & Co., LLC, as holder of the Warrant and as a shareholder of Fortior resulting from the exercise of the Warrant; (d) the Debtors and the other Proponents; and (e) with respect to each of the persons and Entities in clauses (a), (b), (c) and (d), each such person's and Entity's current and former Affiliates and subsidiaries and each such person's, Entity's, Affiliate's, and subsidiary's respective current and former officers, directors, managers, managing directors, general partners, limited partners, members, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals; provided that the Non-Released Parties shall not be included as Released Parties.

approved if the Court finds that the decision to grant such releases is a valid exercise of the Debtors' business judgment, is fair and reasonable, and in the best interests of the Debtors, Estates, and the Reorganized Debtors (collectively, the "***Estate Release***"), *see* Plan, Article VIII, Section C, and (ii) consensual releases by the Senior Secured Creditors and their affiliates, as well as the Debtors and their affiliates, along with related Released Parties (the "***Releasing Parties***"), *see* id., Section D (the "***Consensual Releases***") (collectively with the Estate Release, the "***Plan Releases***"). The Plan Releases are integral components of the Restructuring Support Agreement and the Plan and the transactions embodied therein, are appropriate and necessary under the circumstances, are consistent with the Bankruptcy Code, and comply with applicable law.

Importantly, the Plan does not contemplate any non-consensual third-party releases and does not seek deemed releases from holders of unimpaired claims. The only releases of Fortior, a non-debtor affiliate of the Debtors, are granted by the Senior Secured Lenders and by the Debtors. Thus, all releases under the Plan are fully consensual.

Consistent with the consensual releases, before the Court is a prepackaged chapter 11 plan that has the support of all of the Debtors' stakeholders. The overwhelming support for the restructuring contemplated by the Plan by all parties in interest is compelling evidence that the Plan Releases should be approved. All potentially affected creditors, as well as Fortior's shareholders (who are not granting any releases under the Plan but have an equity interest in Fortior, which is giving certain releases under the Plan), received notice of the Plan Releases and their right to object to such releases. All parties in interest in this case, as well as the overwhelming body of Fortior Shareholders, voted in favor of the Plan including the Plan Releases. The Plan Releases are appropriate and should be approved.

i. The Estate Release Is Appropriate and Should Be Approved.

Section VIII-C of the Plan contains a release of certain claims or Causes of Action of the Debtors, the Reorganized Debtors, and the Estates against the Released Parties (the Estate

Release). The Estate Release does not release (i) any claims or Causes of Action arising after the Effective Date against any party or affect the rights of the Debtors or the Reorganized Debtors to enforce the terms of the Plan or any document, instrument or agreement executed to implement the Plan ("***Definitive Documents***") The Estate Release should be approved as it represents an appropriate exercise of the Debtors' business judgment and is in the best interest of the Debtors' Estates.

Claims held by a debtor against third parties are property of the estate and may be released in exchange for settlement. Section 541(a)(1); *see also In re Johns-Manville (Manville I)*, 837 F.2d 89, 91-92 (2d Cir. 1988). 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. *See In re Angelica Corp.*, Case No. 17-10870 (JLG), Aug. 29, 2017 Hr'g Tr. at 12:23-13:11 ("In cases like this one where there are no known claims against a party to receive a Release, Courts in this district approved Debtor Releases when they represent a valid exercise of the Debtors' business judgement and are in the best interest of the estate."); *In re Motors Liquidation Co.*, 447 B.R. 198, 220 (Bankr. S.D.N.Y. 2011) ("Releases by estates involve a give-up of potential rights that are owned by the estate, and are perfectly permissible in a plan, either as parts of plan settlements or otherwise, though the court must satisfy itself (at least if anyone raises the issue) that the give-up is an appropriate exercise of business judgment, and, possibly, in the best interests of the estate."); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009), *aff'd*, Case No. 90–13061 (REG), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part sub nom. DISH Network Corp. v. DBSD N. Am. Inc. (In re DBSD N. Am.)*, 634 F.3d 79 (2d Cir. 2011); *In re Charter Commc'ns*, 419 B.R. 221, 257-60 (Bankr. S.D.N.Y. 2009); *In re Bally Total Fitness of Greater N.Y., Inc.*, Case No. 0712395 (BRL), 2007 WL 2779438, at *12 (Bankr. S.D.N.Y. Sept. 17, 2007). Debtors have considerable leeway in issuing releases of their own claims, and such releases are considered "uncontroversial." *See In re Adelphia Commc'ns Corp.*, 368 B.R. 140, at 263 n. 289 (Bankr. S.D.N.Y. 2007).

The Estate Release is an essential component of the Plan and constitutes a sound exercise of the Debtors' business judgment. During the course of negotiations regarding the Plan and the Definitive Documents, it was clear that the Estate Release would be a necessary condition to entry into and consummation of the restructuring transaction embodied in the Plan. Without the Estate Release, the Debtors and their stakeholders would not have been able to secure the substantial benefits provided by the Plan, including, without limitation, the significant reduction of corporate debt at the Reorganized Debtor level and at the Fortior level. The Debtors note that they, the Estates and the Reorganized Debtors will receive reciprocal releases from potential claims and causes of action of the Released Parties by way of the Consensual Releases.

Moreover, the Debtors believe there are no causes of action and, therefore, there is nothing of value being released pursuant to the Estate Release. Further, the stakeholders' overwhelming support of the Plan is relevant in this context. There could be no better evidence as to the reasonableness and fairness of the Estate Release than the support of those creditors and interest holders who would be most affected by a release of estate claims or causes of action. *See In re Master Mortg. Inv. Fund, Inc*., 168 B.R. 930, 938 (Bankr. W.D. Mo. 1994) (creditor approval of a release is "the single most important factor" to determine whether a release is appropriate). Accordingly, there is ample justification for providing the Estate Release and it should be approved.

ii. The Consensual Releases Are Appropriate and Should Be Approved.

Article VIII, Section D of the Plan contains releases by stakeholders who voted in favor of the Plan: the Senior Secured Lenders, Fortior, Debtors and each of their related Released Parties (collectively, the "***Consensual Releasing Parties***") against the other Released Parties for liability relating to the Debtors, their affiliates, or these chapter 11 cases.

Courts typically approve releases of third-party claims against non-debtors where there is consent of the releasing party. *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005). Here, the Consensual

Releasing Parties have consented to the Consensual Releases. As set forth above, and in the Plan Supplement, all holders of Claims and Interests in the voting classes have voted to accept the Plan indicating their express consent to the Consensual Releases.

This is not a case in which the Debtors are requesting that releases by non-consenting creditors be ordered by the Court to be effective. There is no release of non-debtors by creditors of either the Debtors or creditors or shareholders of Fortior (other than the Senior Secured Creditors, who have specifically consented); those other creditors are unimpaired and retain all their rights against the Debtors and Fortior, as applicable. Through their approval of the restructuring plan, the Fortior shareholders have in fact already released all their claims against the same Released Parties. Disclosure Statement, Dkt. 10-1, page 49.

The Plan Releases are customary and enforceable. They should be approved.

F. The Plan Exculpation Provisions Should Be Approved.

In addition to the releases discussed above, Section VII-E of the Plan also contains an exculpation (the "***Exculpation Provision***") for each Debtor, each Reorganized Debtor, each Estate, and each Released Party (collectively, the "***Exculpated Parties***"). The Exculpated Parties are thus the entities who sponsored and supported the Plan, along with their representatives and agents. The exculpation is limited to any Claim, obligation, Cause of Action, or Liability for Exculpated Claims.[9] The Exculpation Provision carves out acts or omissions that are determined in a final order to have constituted fraud, willful misconduct or gross negligence.

Courts in this Circuit frequently approve similarly limited exculpation of estate fiduciaries and non-estate fiduciaries in circumstances similar to these. *See, e.g.*, *Genco*, Case No. 14-11108 (SHL), at ¶ 24(d), (Bankr. S.D.N.Y. July 2, 2014) (ECF No. 322) (approving exculpation provision in plan providing exculpation for non-estate fiduciaries); *In re Eastman*

[9] Article I, Section A defines "Exculpated Claim" to mean any Claim, Cause of Action, or any other right of action related to any act or omission in connection with, relating to, or arising out of the Plan, the Post-Petition Reorganization, the formulation, preparation, dissemination, or negotiation of any document in connection with the Plan, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Plan, the pursuit of Consummation, the administration and implementation of the Plan, or the distribution of property pursuant to the Plan.

Kodak Co., Case No. 12-10202 (ALG) (Bankr. S.D.N.Y. Aug. 23, 2013) (ECF No. 4966) (confirmation order overruling U.S. Trustee objection to exculpation of both estate fiduciaries and non-estate fiduciaries from liability for "any prepetition or postpetition act taken or omitted to be taken in connection with, or arising from or relating in any way to, the chapter 11 cases"); *In re Neff Corp.*, Case No. 10-12610 (SCC), at 42 (Bankr. S.D.N.Y. Sept. 20, 2010) (ECF No. 443) (chapter 11 plan providing that estate and non-estate fiduciaries "shall neither have, nor incur any liability to any Entity for any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating . . . the Plan"). In addition, the Plan makes clear that the parties to be exculpated are only those individuals or Entities who were acting on behalf of the Entities that are exculpated. Plan, Article VIII, Section E; *see also In re Fairway Group Holdings Corp., et al.*, Case No. 16-11241 (MEW) (Bankr. S.D.N.Y. June 8, 2016) (ECF No. 156) (approving similar exculpation for "related parties" in prepackaged chapter 11 plan).

Exculpation provisions are permissible when they are important to a debtor's plan or where the exculpated party has provided substantial consideration to a debtor's reorganization. *See In re Chemtura Corp.*, 439 B.R. 561, 610-11 (Bankr. S.D.N.Y. Oct. 21, 2010) (citing *In re DBSD*, 419 B.R. at 217); *see also Residential Capital*, Case No. 12-12020 (MG), at 26 (Bankr. S.D.N.Y. Dec. 11, 2013) (ECF No. 6065) (confirming plan that contained exculpations for Released Parties that were "instrumental to the successful prosecution of the Chapter 11 Cases or their resolution pursuant to the Plan, and/or provided a substantial contribution to the Debtors."). In determining whether to approve exculpation provisions, courts also consider whether the beneficiaries of the exculpation have participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan. *See In re BearingPoint, Inc.*, 453 B.R. 486, 494 (Bankr. S.D.N.Y. 2011) ("Exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get recoveries they desire; seek vengeance against other parties, or simply wish to second guess the decisionmakers[.]"); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009)

(same), *aff'd*, *In re DBSD N. Am., Inc.*, Case No. 09-10156, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part*, 634 F.3d 79 (2d Cir. 2011); *In re Bally Total Fitness*, 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan).

Courts have specified certain parties that generally are appropriate candidates for exculpation, including parties to a consensual plan or parties to unique transactions who "contribute substantial consideration to the reorganization." *See In re Residential Capital, LLC*, Case No. 12-12020 (MG), at 291 (Bankr. S.D.N.Y. Dec. 11, 2013) (ECF No. 6066) (approving exculpation of certain prepetition lenders who "played a meaningful role. . . in the mediation process, and through the negotiation and implementation of the Global Settlement and Plan"); *WorldCom*, 2003 WL 23861928, at *28 (approving exculpation provisions where "[t]he inclusion of the Exculpation Provision ... in the Plan [was] vital to the successful negotiation of the terms of the Plan in that without such provisions, the Covered Parties would have been less likely to negotiate the terms of the settlements and the Plan."); *Adelphia*, 368 B.R. at 268.

The support of the Exculpated Parties was essential to the successful negotiations of the Plan and the Definitive Documents, all of which were conducted in good faith and at arm's length. The protection afforded by the Exculpation Provision was essential to the promotion of good faith plan negotiations that might not otherwise have occurred had the negotiating parties faced the risk of future collateral attacks from other parties. The Exculpated Parties played meaningful roles in the development of the Plan and Definitive Documents and the successful execution of the restructuring, including the prepetition solicitation of the Plan. The Senior Secured Lenders' and their affiliates' willingness to (i) provide forbearances to the Debtors in order to implement the restructuring, (ii) restructure the secured obligations of the Debtors, and (iii) provide the debt forgiveness at the Fortior level, allowing for ongoing operations of that business, all was premised on the expectation that, among other things, they would receive protection in return for their substantial contribution.

Moreover, developing and executing the Debtors' reorganization strategy were extremely time-intensive and labor-intensive. The Exculpated Parties would not have assumed prominent roles in the Debtors' bankruptcy and negotiated the restructuring transaction that will inure to the benefit of all stakeholders of the Debtors and their affiliates had they expected to be exposed to what exculpation provisions have become commonplace for protecting against: "stakeholders [who] all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the chapter 11 case." *See In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009).

Furthermore, section 1125(e) of the Bankruptcy Code provides a safe harbor for all persons, not just estate fiduciaries, who act in good faith in connection with the solicitation of a plan:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith . . . in the offer, issuance . . . offered or sold under the plan . . . of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan . . . .

By its terms, section 1125(e) is not limited to "estate fiduciaries." Any "person" who "participates" in plan solicitation or in the offer or issuance of securities under a chapter 11 plan is protected. The Debtors are not seeking unrelated releases under the Exculpation Provision but for the most part are merely identifying and clarifying those parties whose actions fall within the ambit of section 1125(e) and the specific actions taken in connection with these chapter 11 cases that should be exculpated.

The Exculpation Provision is consistent with the Bankruptcy Code and complies with applicable case law. As such, the Exculpation Provision should be approved.

G. The Reorganization Securities May Be Issued in Reliance on Section 1145.

The issuance of the Reorganization Interests by AST and FS Holdings under the Plan qualifies for exemption under section 1145(a) of the Bankruptcy Code. Specifically, the statutory language of section 1145(a)(1) of the Bankruptcy Code exempts from registration under the Securities Act the offer or sale of securities of "the debtor [or] an affiliate participating in a joint plan with the debtor ." in exchange for an interest in the debtor or such affiliate. In interpreting that provision of the Bankruptcy Code, courts have applied the definition of "affiliate" from section 101(2) of the Bankruptcy Code. *In re Frontier Airlines, Inc.*, 20 C.B.C.2d 486, 495, 93 B.R. 1014, 1021 (Bankr. D. Colo. 1988) (applying definition of affiliate from § 101(2) to interpretation of § 1145(a)(1)). Accordingly, courts have affirmed application of section 1145(a)(1) to securities issued by a sister-subsidiary of a debtor, and the Securities and Exchange Commission has interpreted the section 1145(a)(1) exemption as extending to securities issued by non-debtor subsidiaries and securities issued by non-debtor parent companies. *See Id*. (shares issued by non-debtor sister subsidiary who was participating in plan were exempt under § 1145(a)(1)); *Lomas Fin. Corp.*, SEC No-Action Letter, 1992 SEC No-Act. LEXIS 103, at *4-8 (Jan. 29, 1992) (it is not necessary for purposes of §1145 for an issuer to be a plan proponent in order to fall within § 1145, and concluding shares issued by non-debtor subsidiary "participating" in plan were exempt under § 1145(a)(1)); *Lezak Group, Inc.*, SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2587, at *7 (Oct. 3, 1985) (opining that § 1145(a)(1) extended to shares issued by non-debtor parent company of the debtor).

Here, the Reorganization Interests to be issued under the Plan comprise securities issued by AST (a Debtor), as well as securities issued by FS Holdings (a non-debtor affiliate of the Debtors that is a proponent of and participant in the Plan) in exchange for interests of Fortior (a

non-debtor affiliate of the Debtors that is a proponent of and participant in the Plan)[10] and AST, respectively. Specifically, under Section III.B.7(b) of the Plan, upon the Effective Date of the Plan, FS Holdings will issue 100% of its equity shares to the current shareholders of Fortior (other than the Secured Lender Affiliate Shareholder) on account of such holders' ownership of AST equity shares. As described in Section IV.B of the Plan, prior to the issuance of FS Holdings stock, Fortior shareholders will have been issued or deemed to have been issued the AST equity in connection with the merger of Fortior and FS Merger Sub, Inc.. As a result, upon the Effective Date of the Plan, former shareholders of Fortior will own 100% of the outstanding shares of FS Holdings.

Accordingly, the issuance of the Reorganization Interests under the Plan qualifies for exemption under § 1145 of the Bankruptcy Code.

H. The Plan Satisfies Section 1129(a)(2) (Plan Proponents).

Section 1129(a)(2) requires that plan proponents comply with the applicable provisions of the Bankruptcy Code. The legislative history to section 1129(a)(2) indicates that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 412 (1977) ("Paragraph (2) [of § 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 PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000); *Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 759 (citations omitted). The Debtors' compliance with sections 1125 and 1126 is discussed above and, for the reasons stated, the Debtors have satisfied the requirements of section 1129(a)(2).

[10] Both FS Holdings and Fortior are signatories to the Restructuring Support Agreement and have agreed to take various actions in support of, and as necessary for, implementation of the Plan.

I. The Plan Has Been Proposed in Good Faith in Compliance with Section 1129(a)(3).

Section 1129(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." The Second Circuit has defined the good faith standard as "requiring a showing that the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (citations omitted). "Good faith is 'generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" *In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010) (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984)). "Whether a [chapter 11] plan has been proposed in good faith must be viewed in the totality of the circumstances, and the requirement of [s]ection 1129(a)(3) speaks more to the process of plan development than to the content of the plan." *Id.* (internal quotations and citations omitted).

In satisfaction of their fiduciary duties, the Debtors developed the Plan in close consultation with their primary stakeholders following months of diligence and negotiation. More specifically, the Debtors and their stakeholders conducted exhaustive reviews and analyses of Plan-related issues and the Companies' businesses to provide for the Reorganized Debtors' ongoing viability upon emergence—which is in the best interests of all stakeholders. The Plan (including all documents necessary to effectuate the Plan) is the result of months of discussions and negotiations among the Debtors, the Senior Secured Lenders, and the shareholders of Fortior, culminating in the execution of the Restructuring Support Agreement. The Debtors determined, and the Senior Secured Lenders agreed, that it was in the interests of all stakeholders to pursue a balance sheet restructuring that impairs the Senior Secured Creditors and Fortior, as the sole interest holder of the Debtors, while leaving all other potential creditors unimpaired under the Plan.

The Plan has, of course, been accepted unanimously by the holders of Class 3 Claims (Senior Secured Creditors) and Class 6 (Interests - Fortior). In addition, Fortior shareholders, acting in accordance with Oregon corporate law, authorized Fortior to vote in favor of the Plan. This confluence of support reflects the Plan's fairness and the good faith efforts of the parties to achieve the objectives of chapter 11. The Debtors have acted with the best intentions for stakeholders in proposing the Plan. The good faith requirement of section 1129(a)(3) is satisfied. *See In re Chemtura Corp.*, 439 B.R. at 608-09 (finding good faith requirement met because, among other things, the debtor negotiated and reached agreements with several parties in interest to put forward a chapter 11 plan which "in the aggregate...demonstrate a good faith effort on the part of the debtor to consider the needs and concerns of all major constituencies in this case").

J. The Plan Complies with Section 1129(a)(4) (Plan Payments).

Section 1129(a)(4) requires that "any payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." Section 1129(a)(4) has been construed to require that all payments of professional fees which are made from estate assets be subject to review and approval as to their reasonableness by the court. *See In re Journal Register Co.*, 407 B.R. 520, 537 (Bankr. S.D.N.Y 2009); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990); *In re Texaco Inc.*, 84 B.R. 893, 907-08 (Bankr. S.D.N.Y.), *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1988).

All payments for services provided to the Debtor during the chapter 11 case must be approved by the Court as reasonable. Specifically, Article II, Section B.2 of the Plan provides that all Fee Claims must be approved by the Court pursuant to final fee applications. Finally, the Plan provides that the Bankruptcy Court shall retain jurisdiction to "decide and resolve all matters related to granting and denying . . . any applications for allowance of compensation or reimbursement of expenses to professionals . . ." *See* Plan, Art. XII.

The Plan complies with the requirements of section 1129(a)(4).

K. The Debtors Have Complied with Section 1129(a)(5) (Officers and Directors).

Section 1129(a)(5) requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and, to the extent there are any insiders that will be retained or employed by the reorganized debtors, that there be disclosure of the identity and nature of any compensation of any such insiders.

The officers, directors and managers of the Reorganized Debtors have been selected in accordance with Article IV, Section D.1 of the Plan. Their identities and backgrounds are disclosed in the Plan Supplement. Upon the Effective Date, the new officers, directors, and managers will take office. Section 1129(a)(5) has been satisfied.

L. The Plan Does Not Contain Any Rate Changes (Section 1129(a)(6)).

Section 1129(a)(6) of the Bankruptcy Code provides that "**[**a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." The Plan does not provide for any rate changes by the Debtors, and, therefore, section 1129(a)(6) is inapplicable.

M. The Plan is in Best Interests of All Creditors of, and Equity Interest Holders in, the Debtors (Section 1129(a)(7)).

Section 1129(a)(7) requires that a plan be in the best interests of creditors and stockholders in the Debtor—commonly referred to as the "best interests" test. The best interests test focuses on potential individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 442 n.13 (1999). It requires that each holder of a claim or equity interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code.

Under the best interests test, "the court must measure what is to be received by rejecting creditors . . . under the plan against what would be received by them in the event of liquidation under chapter 7. In doing so, the court must take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation." *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007). The Court must evaluate the liquidation analysis cognizant of the fact that "[t]he hypothetical liquidation entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to chapter 7." *In re Affiliated Foods, Inc.*, 249 B.R. 770, 788 (Bankr. W.D. Mo. 2000) (citations omitted). As section 1129(a)(7) makes clear, the liquidation analysis applies only to non-accepting holders of impaired claims or equity interests. *See In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992) ("[T]he liquidation analysis applies only to non-accepting impaired claims or interests.").

The best interests test does not apply to the holders of Claims in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Claims), and Class 5 (Intercompany Claims), because holders in each such Class are Unimpaired under the Plan, deemed to accept the Plan, and will either receive payment in full, in Cash, be reinstated and paid in the ordinary course, or their legal, equitable, or contractual rights will otherwise not be altered. Accordingly, the holders of such Claims are receiving or retaining under the Plan the maximum recovery to which they are entitled and, as a result, could not receive greater recovery under chapter 7.

The best interests test is also satisfied with respect to Classes 3 (Senior Secured Creditors) and 6 (Interests – Fortior) because all members of those Classes have voted to accept the Plan. In any event, as demonstrated in the Liquidation Analysis, found as Exhibit M to the Disclosure Statement, Dkt. 10-1, page 358 *et seq.*, the best interests test is satisfied as to members of all holders of Claims against and Interests in the Debtor, and indeed the best interests test is satisfied as to holders of claims against or interests in Fortior.

The Debtors' Liquidation Analysis is sound and reasonable and incorporates justified assumptions and estimates regarding the Debtors' assets and claims. The assumptions and estimates in the Liquidation Analysis are appropriate in the context of these chapter 11 cases. Similar assumptions are typically taken into account in hypothetical liquidation analyses and have been approved by this Court. *See e.g.*, *In re Adelphia Commc'ns Corp.*, 368 B.R. at 251-59; *In re Uno Rest. Holdings Corp.*, Case No. 10-10209 (MG), 2010 Bankr. LEXIS 2931, at * 227 (Bankr. S.D.N.Y. May 11, 2010)e *(Order Confirming Second Amended Joint Consolidation Plan of Reorganization*, filed July 6, 2010, ECF. No. 559).

The estimates regarding the Debtors' assets and liabilities that are incorporated into the Liquidation Analysis are also based upon the knowledge and familiarity of the Debtors' advisors with the Company's business and their relevant experience in chapter 11 proceedings. The Debtors' Liquidation Analysis should be given deference. *See In re Charter Commc'ns*, 419 B.R. 221, 261-62 (Bankr. S.D.N.Y. 2009) (discrediting creditors' objection to liquidation analysis because it consisted of a "largely speculative exercise of listing possible incremental recoveries and offered no reliable opinions as to the likelihood that any of these identified sources of possible extra value would ever materialize.").

The Plan satisfies the requirements of section 1129(a)(7).

N. The Plan Has Been Accepted by or Is Conclusively Presumed to Have Been Accepted by All Impaired Classes. The Requirements of Section 1129(a)(8) Have Been Satisfied.

Section 1129(a)(8) requires that each class of impaired claims or interests accept the plan: "With 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." As set forth above, holders of Claims in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Claims), and Class 5 (Intercompany Claims) are not impaired under the Plan and are, therefore, conclusively presumed to have accepted the Plan pursuant to section 1126(f). As set forth in the Voting Certification, the Plan has been accepted by all holders of Claims in Class 3 (Senior

Secured Claims) and Class 6 (Interests). Thus, as to all Classes, the requirements of section 1128(a)(8) of the Bankruptcy Code have been satisfied.

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

Section 1129(a)(9) requires that persons holding allowed claims entitled to priority under section 507(a) receive specified cash payments under the plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) sets forth the treatment the plan must provide.

The Plan complies with section 1129(a)(9). The Plan provides that holders of allowed Administrative Expense Claims under section 503(b) of the Bankruptcy Code will be paid in full, in Cash, on the later of the Effective Date and the first Business Day after the date that is thirty (30) calendar days after the date such Claim becomes Allowed, unless such holder agrees to less favorable treatment. *See* Plan, Art. II, Section A. Moreover, the Plan provides that, unless a holder agrees to less favorable treatment, holders of Allowed Priority Non-Tax Claims under section 507(a) of (excluding Priority Tax Claims under section 507(a)(8), as described below) will be paid in full in Cash. *See* Plan, Art. II. The Plan, therefore, satisfies the requirements of section 1129(a)(9)(A) and (B).

The Plan also satisfies the requirements of section 1129(a)(9)(C) regarding the treatment of Priority Tax Claims. Pursuant to Article II, Section C of the Plan, except as otherwise may be agreed, holders of Allowed Priority Tax Claims will be treated in accordance with the terms set forth in section 1129(a)(9)(C).

The Plan satisfies the requirements of section 1129(a)(9).

P. The Plan Satisfies Section 1129(a)(10) (Impaired Class Acceptance).

Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). Here, all of the Classes entitled to vote on the Plan—Class 3 (Senior Secured Claims) and Class 6 (Interests)—are impaired and have accepted

the Plan. While Class 6 may be composed of insiders (Fortior is the sole shareholder of the Debtors), Class 3 is composed of the Senior Secured Creditors, who are not insiders. Accordingly, the Plan satisfies section 1129(a)(10).

Q. The Plan Is Feasible (Section 1129(a)(11)).

Section 1129(a)(11) requires that the Court determine the Plan is feasible as a condition precedent to confirmation. Specifically, it requires that confirmation is not likely to be followed by liquidation of the debtor, unless such liquidation is proposed in the plan. The feasibility test set forth in section 1129(a)(11) requires the Bankruptcy Court to determine whether the Plan may be implemented and has a reasonable likelihood of success. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 843 F.2d 636, 649 (2d Cir. 1988).

The Plan is feasible within the meaning of this provision. The key element of feasibility is whether there is a reasonable probability that the provisions of the plan can be performed. The purpose of the feasibility test is to protect against visionary or speculative plans. As noted by the Ninth Circuit: "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Pizza of Haw., Inc. v. Shakey's, Inc.* (*In re Pizza of Haw., Inc.*), 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted). Clearly, the Plan does not contain any visionary scheme but is a rational plan for the continued viability of the Debtors' and their affiliates' businesses. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds. *See In re U.S. Truck Co.,* 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986).

The Debtors have analyzed their ability to fulfill their obligations under the Plan and have taken into consideration its estimated costs of administration. The Debtors and their advisors prepared financial projections for the fiscal years 2018 through 2020, as set forth in Exhibit P of the Disclosure Statement (the "***Projections***"). The Projections reflect the tens of millions of dollars in reduction of total debt of the Debtors. This material reduction will further reinforce

the Reorganized Debtors' ability to perform their obligations under the Plan and reorganized capital structure. Based upon the Debtors' Projections and prior course of conduct, the Debtors reasonably believe that they will be able to satisfy all payments and distributions as contemplated by the Plan.

The Plan satisfies the feasibility standard of section 1129(a)(11).

R. The Plan Complies with Section 1129(a)(12) (UST Fees).

Section 1129(a)(12) requires the payment of "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan[.]" Section XIII-C of the Plan provides that on the Effective Date, and thereafter as may be required, such fees, together with interest, if any, pursuant to section 3717 of title 31 of the United States Code, shall be paid by the Reorganized Debtors.

Section 1129(a)(12) has been satisfied.

S. Section 1129(a)(13) Is Satisfied (Retiree Benefits).

> Section 1129(a)(13) requires that:
> The plan provides for continuation after the effective date of payment of all retiree benefits . . . at the level established pursuant to section (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

If there are any employee compensation plans or benefit plans in effect, including benefit plans and programs subject to sections 1114 and 1129(a)(13) of the Bankruptcy Code, they are executory contracts. Pursuant to the Plan, any such executory contracts will be unimpaired and will be assumed by the Debtors unless called out for rejection in the Plan Supplement. *See* Plan Section V-A. No such employee compensation plans or benefit plans are on the Rejected Executory Contract and Unexpired Lease List. Plan Supplement, Exhibit 2. Accordingly, the Plan satisfies the requirements of section 1129(a)(13).

T. Sections 1129(a)(14), (15) and (16) Are Inapplicable.

Sections 1129(a)(14) through 1129(a)(16) of the Bankruptcy Code are inapplicable to the Debtors. Section 1129(a)(14) relates to the payment of domestic support obligations. The

Debtors are not subject to any such obligations. Section 1129(a)(15) applies only in cases in which the debtor is an individual and is thus inapplicable. Finally, section 1129(a)(16) applies only to a corporation or trust that is not a moneyed, business, or commercial corporation or trust and is similarly inapplicable.

U. There is No Need for a "Cramdown" under Section 1129(b).

Section 1129(b) provides a mechanism (known colloquially as "cramdown") for confirmation of a chapter 11 plan in circumstances where the plan is not accepted by all impaired classes of claims. Here, all impaired classes have accepted the Plan. While Debtors have reserved their rights in the event of changes, there is no need for a cramdown.

V. Conclusion.

Section 1129(a) describes the requirements that must be satisfied in order for the Court to confirm the Plan. Based upon the foregoing, the Plan complies fully with all such requirements. The Plan should be confirmed.

IV. CAUSE EXISTS FOR IMMEDIATE EFFECTIVENESS OF THE CONFIRMATION ORDER.

The Debtors respectfully request the Bankruptcy Court to direct that the Confirmation Order be effective immediately upon its entry, notwithstanding the 14-day stay presumptively imposed by operation of Bankruptcy Rule 3020(e): "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." As the Advisory Committee notes to Bankruptcy Rule 3020(e) state, "the court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately." Adv. Comm. Notes, 1999 Amend.

Under the circumstances, it is appropriate for the Bankruptcy Court to exercise its discretion and order that Rule 3020(e) is not applicable. The Debtors should be permitted to consummate the Plan and commence its implementation without delay after the entry of the

Confirmation Order.[11] The Debtors' prompt emergence from chapter 11 will enable the Debtors and their affiliates to get back to their ordinary course businesses, reduce the concerns of the Debtors' and their affiliates' key partners regarding the businesses, and reduce the administrative and professional costs inherent in the bankruptcy process. The Debtors, their advisors, and other key constituents are working to expedite the execution and consummation of the documents and transactions necessary to effectuate the Plan so that the Effective Date may occur as soon as possible after the entry of the Confirmation Order.

The requested waiver of the 14-day stay is in the best interests of the Estate and creditors and will not prejudice any parties in interest.

CONCLUSION

A. The Disclosure Statement and the Solicitation Procedures satisfy the requirements of sections 1125 and 1126(b) of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, and Local Rules 3017-1, 3018-1, and 3018-2 and should be approved.

B. The Plan complies with all of the requirements of section 1129 of the Bankruptcy Code and should be confirmed, with a waiver of the Rule 3020(e) stay.

Dated: January 24, 2018
New York, New York

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[11] At the time of preparation of this Confirmation Memo, the Debtors do not anticipate any objections to the Plan. If there are any such objections, the Court should of course consider them in exercising its discretion regarding waiver of Rule 3020(e), and the Debtors of course reserve their rights respecting such waiver notwithstanding any such objections.