**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re: | ) | Chapter 11 |
| PES HOLDINGS, LLC, *et al.*,[1] | ) | Case No. 19-11626 (KG) |
| Debtors. | ) | (Jointly Administered) |
| | ) | **Re: Docket Nos. 463, 464, 506, 508, 556, 615, 621, 646** |

**DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF INFORMATION IN THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this reply (this "Reply") to the objections[2] to the relief requested by the Debtors in the *Debtors'*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PES Holdings, LLC (8157); North Yard GP, LLC (5458); North Yard Logistics, L.P. (5952); PES Administrative Services, LLC (3022); PES Energy Inc. (0661); PES Intermediate, LLC (0074); PES Ultimate Holdings, LLC (6061); and Philadelphia Energy Solutions Refining and Marketing LLC (9574). The Debtors' service address is: 1735 Market Street, Philadelphia, Pennsylvania 19103.

[2] In full, the following objections were filed, and all but the UST Objection and the EPA Objection (each as defined herein) have been resolved: (a) *Objection of Nooter Construction Company's to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 506] (the "Nooter Objection"); (b) *Joinder of L-M Service Co., Inc. to Objection of Nooter Construction Company to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 508] (the "L-M Joinder"); (c) *Belcher Roofing Corporation's Joinder to Objection of Nooter Construction Company to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 556] (the "Belcher Joinder"); (d) *The Chubb Companies' (I) Limited Objection to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates; and (II) Reservation of Rights with Respect to the Debtors' Motion for Entry of an Order (A) Establishing Bidding Procedures, (B) Approving Bid Protections, and (C) Granting Related Relief* [Docket No. 615] (the "Chubb Objection"); (e) *United States Trustee's Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, and (V) Granting Related Relief* [Docket No. 621] (the "UST Objection"); and (f) *United States' Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of*

*Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 464] (the "Motion").[3] In support of this Reply, and in further support of approval of the Disclosure Statement and entry of the Order (as defined in the Motion), the Debtors respectfully state as follows:

## Preliminary Statement

1. Since the Petition Date, the Debtors have engaged in a multi-faceted process to maximize the value of the Debtors' estates for their stakeholders. Now that the Debtors have achieved some stability and made progress in their sale process past the second round of bidding, in addition to advancing other sources of value for their estates—namely, efforts to recover proceeds under the Business Interruption and Property Damage Insurance Policies— the Debtors believe that now is the time to advance the Disclosure Statement and Plan process. The Debtors believe it is particularly important to commence solicitation at this time due to the fact that cost of

*Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 646] (the "EPA Objection," and together with the Nooter Objection, the L-M Joinder, the Belcher Joinder, the Chubb Objection, and the UST Objection, collectively, the "Objections," and the objecting parties, collectively, the "Objectors"). Specific responses to the Objections are summarized in the objection chart attached hereto as **Exhibit A** (the "Objection Chart"). The Debtors' responses in the Objection Chart are incorporated into this Reply as though fully set forth herein. ICBC Standard Bank, Plc also filed the *ICBC Standard Bank PLC's Reservation of Rights Regarding the Debtors' Plan and Disclosure Statement* [Docket No. 635].

[3] On October 10, 2019, the Debtors filed the *Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 462] and the *Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 465]. On November 26, 2019, the Debtors filed the Liquidation Analysis as Exhibit C to the Disclosure Statement [Docket No. 613]. In connection herewith, the Debtors intend to file (a) the *First Amended Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* and (b) the *Disclosure Statement for the First Amended Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates*. Capitalized terms used but not defined herein shall have the meanings ascribed to them as set forth in the Motion, the Plan, or the Disclosure Statement, as applicable.

these chapter 11 cases is enormously expensive—approximately $15 million per month—and the Debtors' liquidity is limited and is unlikely to extend very far into 2020.

2. Accordingly, the Debtors have successfully proposed a Plan and Disclosure Statement that establish a framework pursuant to which stakeholders may obtain recoveries from the Debtors' estates. That framework is simple and can be distilled as follows: it contemplates a sale or equitization "toggle" pursuant to which the Debtors may either sell all or substantially all of their assets or equity or reorganize around a going-concern entity through the equitization of their existing debt. While the Debtors are not able to determine which path is value maximizing at this time—and the Equitization Restructuring may not even be available—the Debtors believe that this mechanic provides sufficient information for voting creditors to make an informed decision on whether to vote to accept or reject the Plan. Therefore, the Disclosure Statement satisfies the standards of section 1125 of the Bankruptcy Code and should be approved.

3. The voting creditors overwhelmingly agree, as none of them are objecting to the commencement of solicitation. In fact, the Creditors' Committee supports approval of the Disclosure Statement, with only one minor modification to the Disclosure Statement Order, to which the Debtors agree, reserving the Creditors Committee's right in the event the Debtors and the Creditors Committee's efforts at providing supplemental information ahead of the Voting Deadline do not result in an agreement.

4. There are only two unresolved Objections. The U.S. Trustee objects to the lack of a quantitative liquidation analysis or indication of the selected transaction at this time, along with premature objections to specific Plan provisions that are more appropriately addressed in connection with confirmation of the Plan. The United States of America, on behalf of the Environmental Protection Agency (the "EPA") objects because the Debtors have not agreed to

establish a reserve for certain asserted obligations, though the Debtors acknowledge that the EPA's rights to argue that a reserve must be established in connection with confirmation are fully reserved. Each of these Objections should be overruled.[4]

5. As further explained below, the Disclosure Statement contains a wealth of information that satisfies the requirements of section 1125 of the Bankruptcy Code. With respect to the first category of remaining Objections, the Debtors intend to continue to work towards consensual resolutions and, if applicable, provide additional disclosures, in advance of the Court's hearing on December 11, 2019 (the "Disclosure Statement Hearing"). But, with respect to requests that are outside the scope of what "a hypothetical investor typical of the holders of claims or interests in the case" would need to make an informed decision on the Plan at hand, the Debtors respectfully submit that such disclosure is not necessary under the Bankruptcy Code. *See* 11 U.S.C. § 1125(b). More specifically, the Objectors object to the adequacy of the Disclosure Statement on the basis that the Debtors have not provided a quantitative liquidation analysis or projected recoveries to Holders of Claims and Interests. But that is not the standard that is required under the Bankruptcy Code for approval of a disclosure statement. In fact, courts in this District and others have approved disclosure statements where the liquidation analysis, as here, is qualitative.[5]

6. The Disclosure Statement provides as much specificity as the Debtors can provide at this time, as the sale and insurance recovery processes are ongoing. In fact, taking a public

[4] The Debtors have modified the Plan and Disclosure Statement to resolve various Objections, all as further discussed herein and in the Objection Chart annexed hereto as **Exhibit A**. The Objection Chart is subject to change based on additional discussions among the various parties and based upon any supplemental edits incorporated in the Disclosure Statement.

[5] *See, e.g.*, *In re Source Home Entertainment, LLC* (KG) (Bankr. D. Del. 2014); *In re Amicus Wind Down Corp. (f/k/a Friendly Ice Cream Corp.)* (KG) (Bankr. D. Del. 2011); *see also In re Mission Coal Wind Down Co, LLC (f/k/a Mission Coal Company, LLC)* (TM) (Bankr. N.D. Ala. 2018); *In re Cobalt International Energy, Inc.* (MI) (Bankr. S.D. Texas 2017).

position as to the amount of proceeds realized in either process would clearly undermine the Debtors' efforts to obtain higher bids from prospective purchasers or greater recoveries from the insurers, which would reduce recoveries for the Debtors' creditors. Fortunately, this is not required. Rather than forcing the Debtors to compromise recovery efforts or wait until these processes are concluded—at the cost of approximately $15 million per month—the Bankruptcy Code provides an avenue for the Debtors to solicit plans of reorganization if they provide ***adequate*** information. The Debtors believe they have met that burden. Moreover, as additional information becomes available, both by way of selection of potential stalking horse bidder or successful bidder, and with respect to execution of the Equitization Restructuring or Asset Sale Restructuring, the Debtors intend to notify voting creditors of such additional information in advance of the Voting Deadline, so that a creditor's vote is informed by such additional information to the extent available. However, commencing solicitation now is the only manner by which the Debtors synchronize their Plan confirmation and sale timelines, keep administrative costs to a minimum, and maximize value for all stakeholders. Fortunately, the Disclosure Statement provides adequate information for Holders of Claims entitled to vote on the Plan to make an informed judgment on whether to accept or reject the Plan, has the support of the Creditors' Committee, and no voting creditor is objecting to the commencement of solicitation.

7. The U.S. Trustee and the EPA have also launched a series of confirmation-related Objections, which do not preclude approval of the Disclosure Statement. To succeed on a confirmation-related objection at this stage in the chapter 11 cases, the Objectors would need to demonstrate that the Plan is patently unconfirmable—*i.e.*, that confirmation of the Plan is ***impossible***. The Objectors have not made—and cannot make—such a showing. Far from

impossible, there is ample reason to think that confirmation of the Plan is probable, even over the parties' Objections.

8. For the reasons set forth herein, in the Motion, and in the Objection Chart (which is incorporated by reference herein), and as will be further shown at the hearing on the Disclosure Statement, the Debtors respectfully submit that the Disclosure Statement provides adequate information for voting Holders to make an informed judgment to accept or reject the Plan, in satisfaction of section 1125 of the Bankruptcy Code. Accordingly, the Debtors respectfully request that the Court overrule the Objections and enter the Order.

## Argument

### I. The Disclosure Statement Meets the Applicable Standards for Approval Under Section 1125 of the Bankruptcy Code.

9. Pursuant to section 1125 of the Bankruptcy Code, a plan proponent must provide parties voting on the plan with "adequate information" to make an informed judgment as to the plan. Section 1125 of the Bankruptcy Code defines "adequate information" as:

> [I]nformation 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 reasonable investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the Court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a)(1).

10. "Adequate information" has been interpreted as information that is "reasonably practicable" to permit an "informed judgment" by creditors and interest holders, if applicable, to vote on a plan of reorganization. *See In re Lower Buck Hosp.*, 571 Fed. Appx. 139, 142 (3d Cir.

2014). In interpreting section 1125 of the Bankruptcy Code, courts have identified categories of information that generally should be included in a disclosure statement. *See In re Phoenix Petroleum*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2006) (listing categories of information); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (S.D. Ohio 1988) (same). Courts also acknowledge that disclosure of all of the information suggested in these cases is not always necessary. *See Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case."); *Phoenix Petroleum*, 278 B.R. at 393 ("[I]t is . . . well understood that certain categories of information which may be necessary in one case may be omitted in another; no one list of categories will apply in every case.").

11. On the other hand, however, "overburdening a proponent's disclosure statement with information significant and meaningful to lawyers alone may result ultimately in reducing the disclosure statement to an overlong incomprehensible, ineffective collection of words to those whose interests are to be served by disclosure." *In re Stanley Hotel, Inc.*, 13 B.R. 926, 933–34 (Bankr. D. Colo. 1981) ("Thus, compounding a disclosure statement for the sake of a lawyer's notion of completeness, or because some additional information might enhance one's understanding, may not always be necessary or desirable, and the length of a document should not be the test of its effectiveness."); *see also In re Applegate Prop., Ltd.*, 133 B.R. 827, 829–30 (Bankr. W.D. Tex. 1991) ("[A] disclosure statement need not meet the extensive disclosure requirements of the securities laws for registration statements and the like."); *In re Waterville Timeshare Grp.*, 67 B.R. 412, 413 (Bankr. D.N.H. 1986) ("[O]verly technical and extremely numerous additions to a disclosure statement suggested by an objecting party may themselves be

self-defeating in terms of the resulting clarity and understandability of the document to the average investor.").

12. As demonstrated in the table below and consistent with findings of courts in this and other districts, the Disclosure Statement contains those categories of information necessary for creditors to make an informed decision:

| **Information Category** | **Corresponding Disclosure Statement Provisions** |
|---|---|
| Events leading to the filing of a bankruptcy petition | Article VII |
| Events of the chapter 11 cases | Article VIII |
| Sources of considerations to fund the Plan | Article IV.I |
| Requirements for Confirmation of the Plan | Article XI |
| Source of information stated in the Disclosure Statement | Sources of information are cited throughout the Disclosure Statement |
| Present condition of the Debtors while in Chapter 11 | Article VIII |
| Information regarding potential claims against the Estates | Article IV.K |
| Plan summary | Article III |
| Treatment of Claims | Article IV |
| Solicitation and Voting Procedures | Article IV and Article X |
| Information relevant to the risks posed to creditors under the Plan | Article IX |
| Tax consequences of the Plan | Article XIII |
| Relationship of the Debtors and their affiliates | Article VI.A and Exhibit B |
| Recommendation by the Debtors that Holders of Claims vote to accept the Plan | Article XIV |

13. The Disclosure Statement contains all the information necessary for it to be meaningfully understood by Holders entitled to vote on the Plan. It makes sense and advises parties-in-interest of their treatment under the Plan as required by this Court. Indeed, the Debtors have included all relevant and available information in the Disclosure Statement to ensure that creditors are adequately informed. *See In re Walker*, 198 B.R. 476, 479 (Bankr. E.D. Va. 1996) (holding that, in evaluating the sufficiency of a disclosure statement, "[a] debtor cannot be

expected to unerringly predict the future, but rather must provide information on all factors *known to him at the time* that bear upon the success or failure of the proposals set forth in the plan." (emphasis added)). The only information allegedly lacking from the Disclosure Statement—relating to financial projections and projected creditor recoveries—is not information that the Debtors are withholding or omitting, but information that is currently unknown given that the marketing process for the Debtors' assets and the Debtors' recovery efforts with respect to the June 21 Insurance Proceeds are still ongoing. However, the Debtors believe the mechanic proposed provides sufficient information for voting creditors to make an informed decision on whether to vote to accept or reject the Plan. Further, the Debtors intend to provide additional information, to the extent available, to the voting classes in the Plan Supplement in advance of the Voting Deadline.

14. A substantial number of the issues raised in the Objections relate to confirmation of the Plan as opposed to the narrow question of whether the Disclosure Statement satisfies the "adequate information" standard of section 1125 of the Bankruptcy Code. The remaining issues relate to information that is either already accounted for or is now included in the Disclosure Statement, or, as discussed above, that are unavailable and that will be disclosed in the Plan Supplement in advance of the Voting Deadline. To the extent that any of the points raised in the Objections are not addressed by specific changes to the Disclosure Statement, the Debtors respectfully submit that the Objections should be overruled. Although many of the Objections are addressed in the Objection Chart, the Debtors have addressed a few of the Objections below.

**A. The Timing of Filing of the Plan Supplement is Appropriate, and the Information Contained Therein Need Not Be Disclosed Now.**

15. Certain of the Objections raised by the U.S. Trustee focus on the lack of disclosure regarding specific information, namely, estimates or the amount of claims in each category and

projected percentage of recovery, a liquidation analysis, and future projections. (*See* UST Obj. ¶¶ 24–27). The Liquidation Analysis was filed on November 26, 2019, and the projected percentage of recovery and future projections, to the extent applicable, will be included in the Plan Supplement. As is typical in larger chapter 11 cases, the Plan Supplement will provide additional information in advance of the Voting Deadline and the Plan Objection Deadline, including, among other things: (a) a description of the bids received and/or the tentative successful bid or stalking horse, as applicable; (b) a chart detailing the projected creditor recoveries following the auction (to the extent applicable, based on the tentative successful bid); and (c) any additional information the Debtors deem material to the creditors' decision to vote to accept or reject the Plan (including financial projections if the Equitization Restructuring is pursued).

16. As described in the Disclosure Statement, the Debtors will file the Plan Supplement no later than January 16, 2020, or 14 days in advance of the proposed Confirmation Hearing and 7 days in advance of the Voting Deadline. *See* Disclosure Statement Art. IV.S. This timing for filing the Plan Supplement provides the Objectors—and all creditors entitled to vote—with adequate time to formulate an informed view prior to casting their Ballots on the Plan. Disclosure of projected recoveries or financial projections based on preliminary expressions of interest or bids could have a chilling effect on the sale process and/or materially misinform stakeholders. Accordingly, any objection based on the lack of recovery information in the Disclosure Statement should be overruled because the creditors will be provided with such information in advance of the Voting Deadline and to include estimates based on preliminary expressions of interest or bids could severally mislead creditors.

**B. The Debtors' Disclosures Regarding Other Secured Claims Are Sufficient**.

17. The Disclosure Statement includes adequate information regarding Class 1 Other Secured Claims. The Nooter Objection, L-M Joinder, and Belcher Joinder assert that the Debtors'

disclosures are insufficient and request additional disclosures regarding Class 1 Other Secured Claims because the "the Court cannot determine whether the Class 1 Claims of Nooter or any other Holder of an Other Secured Claim is actually unimpaired." (Nooter Obj. ¶¶ 13–14) Specifically, these Objections object to the adequacy of the Disclosure Statement on the basis that the Debtors fail to disclose the amount of Other Secured Claims and the Other Secured Claims Reserve Amount, thereby preventing Holders from determining whether Holders of Other Secured Claims are actually Unimpaired under the Plan. But the Plan and Disclosure Statement expressly provide that Holders of Class 1 Other Secured Claims shall receive "payment in full in Cash, which may come from the Other Secured Claims Reserve" or "other treatment rendering such [Other Secured] Claim Unimpaired." *See* Plan Art. III.B.1. As such, Holders of Class 1 Other Secured Claims are Unimpaired.

18. Nevertheless, as reflected in the Disclosure Statement and summarized in the Objection Chart, the Debtors have modified the Disclosure Statement to provide, as requested in the Nooter Objection, L-M Joinder, and Belcher Joinder, enhanced disclosure to the extent practicable, to make clear that certain Holders of Other Secured Claims may be entitled to legal fees, expenses, and interest on account of claims, as applicable. As a result of this additional disclosure, the Debtors understand that these Objections have been addressed and are now resolved in their entirety.

**C. The Debtors' Disclosure Modifications Address the Objections**.

19. As reflected in the Disclosure Statement, the Debtors made numerous changes to the Disclosure Statement based on constructive dialogue with the U.S. Trustee and the Objectors. These modifications resolved both formal and informal issues regarding the adequacy of the Disclosure Statement. In addition to the revisions described above, the Debtors amended the Disclosure Statement and solicitation procedures to include:

- revisions to the Disclosure Statement, which includes the Plan confirmation timeline;
- clarification that the Plan Supplement shall be filed no later than 14 days before the Confirmation Hearing;
- revisions to disclosures whereby the identity and affiliation of the New Boards will be disclosed, to the extent known, in the Plan Supplement or prior to the Confirmation Hearing; and
- a Liquidation Analysis setting forth the reasons why the Debtors expect that the recoveries available to Holders of Allowed Claims under the Plan will be greater than the recoveries available in a chapter 7 liquidation.

Additional revisions are described in the Objection Chart annexed hereto. The Debtors continue to engage with their stakeholders, including the U.S. Trustee, and the EPA, to address ongoing concerns in advance of the Disclosure Statement Hearing.

**D. The Liquidation Analysis Provides Adequate Information.**

20. On November 26, 2019, the Debtors filed the Liquidation Analysis as Exhibit C to the Disclosure Statement. *See* Docket No. 613. The Liquidation Analysis sets forth the reasons why the Debtors expect that the recoveries available to Holders of Allowed Claims under the Plan will be greater than the recoveries available in a chapter 7 liquidation. The U.S. Trustee, however, objects to the adequacy of the Disclosure Statement on the basis that such Liquidation Analysis is inappropriate inasmuch as it "contains no financial information" and that "[w]ithout this information, there is an inadequate record to determine whether or not the Plan is feasible or if it will satisfy the best interests of creditor test." (*See* UST Obj. ¶ 24).

21. Under the best interests test, for each impaired class, each holder of a claim or interest in such class must either accept the plan or receive or retain under the plan on account of its claim or interest property of a value, as of the effective date of the plan, that is not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7. *See* 11 U.S.C. § 1129(a)(7)(A). For the reasons described in the Liquidation Analysis, the Plan satisfies

the best interests of creditors test because "the recoveries available to Holders of Allowed Claims under the Plan will be greater than the resources available in a chapter 7 liquidation." (*See* Liquidation Analysis). Moreover, the very definition of the best interests test demonstrates that it is a Plan confirmation issue: the best interests test applies only if the claim or interest holder votes against the Plan, which will not be determined until after creditors and equity interest holders have voted.

22. Despite the U.S. Trustee's assertion to the contrary, it is immaterial that the Liquidation Analysis does not contain financial information where, as here, proceeds to be distributed under the Plan cannot be quantified yet. Courts in this district and others have approved disclosure statements as adequate where the liquidation analysis, as here, set forth the reasons why recoveries in a chapter 7 would be lower than through a chapter 11 plan. *See, e.g.*, *In re Source Home Entertainment, LLC* (KG) (Bankr. D. Del. 2014); *In re Amicus Wind Down Corp. (f/k/a Friendly Ice Cream Corp.)* (KG) (Bankr. D. Del. 2011); *see also In re Mission Coal Wind Down Co, LLC (f/k/a Mission Coal Company, LLC)* (TM) (Bankr. N.D. Ala. 2018); *In re Cobalt International Energy, Inc.* (MI) (Bankr. S.D. Texas 2017).

## II. Objections Raising Confirmation Issues Are Premature and the Objectors Cannot Show that the Plan Is Patently Unconfirmable.

23. The remaining issues raised by the Objectors, whether explicitly flagged as a "patently unconfirmable" issue or not, relate to the confirmability of the Plan and are inappropriate at this juncture. It is well established that, unless the disclosure statement "describes a plan of reorganization which is so fatally flawed that confirmation is ***impossible***" (*i.e.*, the plan is patently unconfirmable), the Court should approve a disclosure statement that otherwise adequately describes the chapter 11 plan at issue. *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) (emphasis added); *see also In re Unichem Corp.*, 72 B.R. 95, 98 (Bankr. N.D. Ill.

1987) (courts should disapprove of the adequacy of a disclosure statement on confirmability grounds only "where it is ***readily apparent*** that the plan accompanying the disclosure statement could ***never*** be legally confirmed") (emphasis added). "A plan is patently unconfirmable where (1) confirmation defects [cannot] be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing." *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154–55 (3d Cir. 2012) (internal quotations and citation omitted) (alteration in the original).

24. The Debtors agree that the Plan must comply with the confirmation requirements set forth in section 1129 (as well as other applicable provisions) of the Bankruptcy Code, and are prepared to demonstrate as much at the appropriate time—the Confirmation Hearing. Indeed, courts emphasize that objections related to compliance with section 1129 of the Bankruptcy Code do ***not*** rise to the level of making a plan "patently unconfirmable." *See, e.g.*, *Cardinal Congregate I*, 121 B.R. at 763–64 (overruling objections to issues including treatment of claims and feasibility); *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987) (holding that objections bearing on confirmability must be limited to defects that could not be overcome by creditor voting results and must also concern matters upon which all material facts are not in dispute or have been fully developed). Thus, issues bearing on debtor and third party releases, exculpation, feasibility, and the scope of Bankruptcy Rule 9019 are not properly raised in opposition to the Disclosure Statement. *See In re Ellipso, Inc.*, No. 2012 WL 368281, at *2 (Bankr. D.D.C. Feb. 3, 2012) (finding that certain disclosure statement objections were confirmation issues "more appropriately dealt with at a confirmation hearing" including "(i) the contention that the classification of claims is improper; (ii) a claim that the Proponents do not have the means to fund the plan; (iii) an objection to the disclosure statement's admission that if [certain] claims are

allowed, there will be nothing left to pay the other creditors; and (iv) allegations that the plan is being proposed in bad faith.")

25. Further, courts routinely approve disclosure statements despite the existence of disputed issues related to confirmation, which may require an evidentiary hearing. *See, e.g., In re Quigley Co., Inc.*, 377 B.R. 110 (Bankr. S.D.N.Y. 2007) (approving the disclosure statement while acknowledging that settlements with the debtors' non-debtor former parent "implicate several confirmation issues" regarding the rights and incentives of certain claimants under the proposed plan); *In re Hyatt*, 509 B.R. 707, 711 (Bankr. D.N.M. 2014) (approving the disclosure statement and finding that the "proposed classification scheme does not render the Plan patently unconfirmable as a matter of law" despite the fact that the debtor's proposed classification scheme required "additional evidence that may be presented at a confirmation hearing"). Indeed, courts caution that "care must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988); *see also In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 n. 10 (Bankr. E.D. Pa. 1987) (stating that deciding confirmation issues before solicitation may have a disenfranchising effect because the disclosure statement itself is not mailed to all creditors until after court approval is obtained).

26. If a bankruptcy court exercises its discretion to consider threshold confirmation issues, such issues should not impede approval of the disclosure statement unless it is established that the plan of reorganization is "so fatally flawed that confirmation is impossible." *In re Cardinal Congregate I*, 121 B.R. at 764. Additionally, the "Court should view all inferences drawn from the underlying facts and matters contained in the Plan and the Disclosure Statement in a light most favorable to the Debtor." *In re Spanish Lake Assocs.*, 92 B.R. 875, 877 (Bankr. E.D. Mo. 1988).

27. The Objectors will have ample opportunity to prosecute their confirmation objections in connection with the Confirmation Hearing, to the extent these issues remain disputed. Nevertheless, to aid the Court's analysis, the Debtors briefly address certain confirmation issues raised in the Objections to eliminate any doubt that such issues would render the Plan patently unconfirmable.[6]

**A. The Third Party Release Is Consensual and Permissible**.

28. The third-party release is consensual. The U.S. Trustee argues that the third-party release is non-consensual and does not conform to applicable law. Courts in this jurisdiction routinely approve third party releases where, as here, they are consensual. *See In re Indianapolis Downs*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party release that applied to unimpaired holders of claims deemed to accept the plan as consensual); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (same); *Wash. Mut.*, 442 B.R. at 352 (observing that consensual third-party releases are permissible); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (approving non-debtor releases for creditors that voted in favor of the plan). Here, the third party release is consensual because the Plan expressly provides that any Holder of Claim or Interest may opt out of the releases. *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third Party Releases may be properly characterized as consensual and will be approved."). All parties in interest will have ample opportunity to evaluate and opt out

[6] For the avoidance of doubt, the Debtors reserve the right to respond to any and all objections asserted in the Objections in connection with confirmation of the Plan.

of the third party release by filing an objection with the Court. Courts in this district and others routinely approve consensual third-party releases with similar opt out mechanisms. *See, e.g.*, *EV Energy Partners, L.P.*, No. 18-10814 (CSS) (Bankr. D. Del. 2018) (approving third-party releases with objection "opt-out" mechanic); *In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Apr. 2, 2018) (same); *In re GenOn Energy, Inc.*, No. 17-33695 (Bankr. S.D. Tex. Dec. 12, 2017) (same); *In re Southcross Holdings, LP*, No. 16-20111 (Bankr. S.D. Tex. Apr. 11, 2016) (same); *see also In re U.S. Fidelis*, 481 B.R. 503, 517 (Bankr. E.D. Mo. 2012) (holding that a creditor must file an objection in order for the third-party release to be deemed non-consensual).

**B. The Debtor and Third-Party Releases are Reasonable**.

29. The Plan's release provisions are reasonable and appropriate. The U.S. Trustee argues that the Debtor release and third-party release are overly broad and contrary to applicable law. ***First***, the Debtor release and third party release easily meet the applicable standard because they are fair, reasonable, and in the best interests of the Debtors' estates. The breadth of the Debtor release and third-party release is consistent with those regularly approved in this jurisdiction and others, and is limited by the subject-matter limitation clearly contained in the releases. *See, e.g.*, *In re Blackhawk Mining LLC*, No. 19-11595 (LSS) (Bankr. D. Del. Aug. 29, 2019) (approving similar debtor and third-party release provisions including, among other categories, direct and indirect equity holders and professional and financial advisors); *In re VER Techs. HoldCo LLC*, No. 18-10834 (KG) (Bankr. D. Del. July 26, 2018) (same); *In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Apr. 2, 2018) (same); *In re Ultra Petroleum Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017).

30. ***Second***, the third-party releases form an integral part of the Plan. Each of the released parties, as stakeholders and critical participants in the Debtors' reorganization process, share a common goal with the Debtors in seeing the Plan succeed, and have afforded value to the

Debtors and aided in the reorganization process. The Debtors intend to establish the appropriateness of the releases at confirmation and, accordingly, the Court should overrule the Objections to the scope of the Debtor release and third-party release.

**C. The Plan's Exculpation Provisions are Appropriate**.

31. The U.S. Trustee raises concerns about the scope of the Plan's exculpation provision. Although such concerns are premature and more properly brought as objections to the Plan, the Debtors have revised the definition of the Exculpated Parties to remove direct and indirect equity security holders as follows:

> "*Exculpated Parties*" means, collectively, and in each case in its capacity as such: (a) the Debtors and Reorganized Debtors; (b) the Debtors' and Reorganized Debtors' current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, funds, portfolio companies, and management companies, and (c) with respect to each of the foregoing Entities in clauses (a) and (b), each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (with respect to clause (c), each solely in their capacity as such).

32. This change is reflected in the revised Plan. *See* Plan Art. I.A In any event, the Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtors, and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties.

33. Moreover, to the extent that the U.S. Trustee objects to the provision regarding the Exculpated Parties' entitlement to reasonably rely upon the advice of counsel, the scope of the provision is consistent with those regularly approved in this jurisdiction. *See, e.g.*, *In re One Aviation Corp.*, 18-12309 (CSS) (Bankr. D. Del. Sept. 18, 2019) (confirming plan provision stating that exculpated parties shall be entitled to rely upon the advice of counsel with respect to their

duties and responsibilities under the plan); *In re RMBR Liquidation, Inc.*, No. 19-10234 (KG) (Bankr. D. Del. June 12, 2019) (same); *In re ATD Corp.*, No. 18-12221 (KJC) (Bankr. D. Del. Dec. 19, 2018) (same); *In re VER Techs. HoldCo LLC*, No. 18-10834 (KG) (Bankr. D. Del. July 26, 2018) (same); *In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Apr. 2, 2018) (same).

**D. The Plan Is Feasible**.

34. The Debtors have provided sufficient information to satisfy the Bankruptcy Code's feasibility requirement. The U.S. Trustee argues that the Debtors have not provided sufficient evidence to demonstrate that the Plan is feasible as required under section 1129(a)(11) of the Bankruptcy Code based on the current absence of bidder for an Asset Sale or a Plan Sponsor for an Equitization Restructuring. In order to satisfy this standard, the Court must determine in connection with the Confirmation Hearing that confirmation of the Plan will not likely be followed by liquidation or an additional financial reorganization. *Id.* It is not necessary for a debtor to guarantee success. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re W.R. Grace & Co.*, 475 B.R. 34, 115 (D. Del. 2012) ("In order to find a reorganization plan worthy of confirmation, the bankruptcy court must make a specific finding as to the plan's feasibility. In making this finding, the bankruptcy court need not require a guarantee of success, but rather only must find that the plan presents a workable scheme of organization and operation from which there may be reasonable expectation of success.") (citation omitted); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012) (same); *see also In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd,* 800 F.2d 581 (6th Cir. 1986). Rather, a debtor must provide only a reasonable assurance of success. *Kane*, 843 F.2d at 649; *Flintkote*

*Co.*, 486 B.R. at 139; *W.R. Grace & Co.*, 475 B.R. at 115. Indeed, there is a relatively low threshold of proof necessary to satisfy the feasibility requirement. *See e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility") (internal quotation marks omitted).

35. The Debtors intend to provide additional information in advance of the Voting Deadline, the Plan Objection Deadline, and the Confirmation Hearing in the Plan Supplement including, among other things: (a) a description of the bids received and/or the tentative successful bid or stalking horse, as applicable; (b) a chart detailing the projected creditor recoveries following the auction (to the extent applicable, based on the tentative successful bid); and (c) any additional information the Debtors deem material to the creditors' decision to vote to accept or reject the Plan (including financial projections if the Equitization Restructuring is pursued). The Debtors anticipate that those bids and projections will demonstrate these chapter 11 cases will not be followed by a liquidation or additional restructuring. Any questions regarding the projections or the ability of the Reorganized Debtors to service their funded debt obligations can be raised at the Confirmation Hearing, which is the appropriate time to raise such concerns. *See Cardinal Congregate I*, 121 B.R. at 763–64 (overruling objections to feasibility); *see also Armstrong Energy, Inc.*, No. 17-47541 (KASS) (Bankr. E.D. Mo. Dec. 18, 2017) (approving a disclosure statement that provided a summary overview of the proposed sale transaction not yet consummated that would affect the debtors' ability to service funded debt obligations).

**E. The Amended Disclosure Statement Addresses the Discharge-Related Objection Raised by the U.S. Trustee**.

36. The U.S. Trustee also raises concerns about the Debtors' entitlement to a discharge "if the means for the Plan's performance is an Asset Sale resulting in a sale of all or substantially all of the Debtors' assets." (*See* UST Obj. ¶ 42) The Debtors have amended the Disclosure Statement to address the U.S. Trustee's concerns as follows:

> M. Will the Debtors be entitled to a discharge?
>
> Section 1141(d)(3) of the Bankruptcy Code provides that a non-individual debtor is not entitled to a discharge if (i) the plan provides for the liquidation of all or substantially all of the property of the estate; (ii) the debtor does not engage in business after consummation of the plan; and (iii) the debtor would be denied a discharge under section 727(a) of the Bankruptcy Code if the case is a case under chapter 7. If an Equitization Restructuring occurs, the Debtors will be entitled to a discharge. If an Asset Restructuring occurs, the U.S. Trustee asserts that the Debtors may not become entitled to a discharge.

The Debtors believe that the above language adequately addresses the related Objection from the U.S. Trustee.

**F. The EPA's Objection Is a Confirmation Issue To Be Addressed at the Confirmation Hearing and Should Be Overruled**.

37. The EPA objects to the approval of the Disclosure Statement on the basis that the Disclosure Statement fails to describe any mechanism by which the Debtors intend to comply with their RIN retirement obligations if the Court so requires, thereby failing to disclose how the EPA's interests will be protected. *See* EPA Obj. ¶ 8.

38. As a preliminary matter, the Debtors do not intend, as is implied by the EPA, to use bankruptcy as a "safe haven" for any of their obligations under environmental law or the Consent Decree. The Debtors have been engaging in good faith discussions with the EPA to address the EPA's concerns and have agreed to add a significant amount of language requested by the EPA to

the Disclosure Statement and Plan which, among other disclosures, includes a toggle mechanism to ensure proper treatment of, and compliance with, such obligations. The only remaining issue, which forms the basis for the EPA Objection, is the EPA's request for the establishment of a reserve to safeguard the EPA's recovery for any potential RIN-related obligations. Such concern is not a Disclosure Statement issue but one that will be adequately addressed in the context of confirmation of the Plan, and all rights of the parties are reserved with respect thereto. The Debtors will continue to seek a consensual resolution with the EPA in advance of the Disclosure Statement Hearing. To the extent the parties do not come to resolution before then, the Debtors respectfully request that the EPA Objection be overruled.

**Conclusion**

39. For the foregoing reasons, the Debtors respectfully submit that the Disclosure Statement should be approved because it clearly satisfies the requirements of section 1125 of the Bankruptcy Code and because the relief provided in the Disclosure Statement Order is fair, appropriate, and in the best interests of their chapter 11 estates. The Debtors respectfully request that the Court overrule the Objections and enter the Disclosure Statement Order.

[*Remainder of page intentionally left blank.*]

Dated: December 8, 2019
Wilmington, Delaware

*/s/ Laura Davis Jones*

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# EXHIBIT A

## Objection Chart

**PES Holdings, LLC, *et al.* - Disclosure Statement Objections[1]**

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| **Nooter Objection[2]** | | |
| *Disclosures Regarding Other Secured Claims* | • The Disclosure Statement does not disclose that, as a matter of applicable non-bankruptcy law, Holders of Other Secured Claims and construction lienholders may be entitled to legal fees, expenses and interest. *See* Nooter Obj. ¶¶ 13, 16. | • In response to this objection, the Plan and Disclosure Statement has been revised to provide that certain Holders of Other Secured Claims may be entitled to legal fees, expenses, and interest on account of their Claims, as applicable. *See* Plan Art. III.B.1; Disclosure Statement Art. IV.D.<br>• This disclosure has resolved all objections set forth in the Nooter Objection. |
| | • The Disclosure Statement does not provide the amount of Other Secured Claims and Other Secured Claims Reserve Amount, thereby preventing Holders to determine whether they are impaired under the Plan. *See* Nooter Obj. ¶¶ 13, 16. | • The Nooter Objection is resolved, such that this objection is no longer asserted.<br>• Nevertheless, the Plan and Disclosure Statement provide that Holders of Other Secured Claims remain unimpaired, such that additional disclosure on the amount of Other Secured Claims and Other Secured Claims Reserve Amount at this stage is not warranted. |
| | • The Disclosure Statement's lack of information with respect to Class 1 Claims denies the Holders of General Unsecured Claims the ability to make an informed decision as to whether to vote to accept or reject the Plan. *See* Nooter Obj. ¶ 14. | • The Nooter Objection is resolved, such that this objection is no longer asserted.<br>• Nevertheless, disclosures as to Other Secured Claims are adequate and Holders of General Unsecured Claims are able to make an informed decision as to whether to vote to accept or reject the Plan. The Plan |

[1] Capitalized terms used but not otherwise defined in this Exhibit shall have the meaning ascribed to them in the applicable objection.

[2] *Objection of Nooter Construction Company's to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 506] (the "Nooter Objection").

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| | | and Disclosure Statement provide that Other Secured Claims are paid in full, and the Disclosure Statement discloses that certain Holders of Other Secured Claims may be entitled to legal fees, expenses, and interest on account of their Claims, as applicable. *See* Plan Art. III.B.1; Disclosure Statement Art. IV.D |
| *Impairment of Other Secured Claims* | • The Plan is unconfirmable because it appears that the Other Secured Creditors are impaired because they will not receive interest, legal fees, and expenses on account of their Claims as allowed by Pennsylvania law. *See* Nooter Obj. ¶ 21. | • The Nooter Objection is resolved, such that this objection is no longer asserted.<br><br>• Nevertheless, Holders of Other Secured Claims are unimpaired, and the Disclosure Statement discloses that certain Holders of Other Secured Claims may be entitled to legal fees, expenses, and interest on account of their Claims, as applicable. *See* Plan Art. III.B.1; Disclosure Statement Art. IV.D. |
| **Belcher Joinder[3]** | | |
| *N/A* | • Belcher joins in the Nooter Objection. | • In response to the Nooter Objection, the Disclosure Statement has been revised to provide that certain Holders of Other Secured Claims may be entitled to legal fees, expenses, and interest on account of their Claims, as applicable. *See* Plan Art. III.B.1; Disclosure Statement Art. IV.D.<br><br>• The Nooter Objection is resolved, such that the Belcher Joinder is similarly resolved. |

[3] *Belcher Roofing Corporation's Joinder to Objection of Nooter Construction Company to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 556] (the "Belcher Joinder").

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| **L-M Joinder[4]** | | |
| *N/A* | • L-M Service joins in the Nooter Objection. | • In response to the Nooter Objection, the Disclosure Statement has been revised to provide that certain Holders of Other Secured Claims may be entitled to legal fees, expenses, and interest on account of their Claims, as applicable. *See* Plan Art. III.B.1; Disclosure Statement Art. IV.D.<br><br>• The Nooter Objection is resolved, such that the L-M Joinder is similarly resolved. |
| **Chubb Objection[5]** | | |
| *Insurance Program* | • To the extent that the Reorganized Debtors seek to retain the benefits of any portion of the Insurance Program, the Reorganized Debtors must remain liable in full for all of the Obligations arising under the Insurance Program, regardless of when they arise. *See* Chubb Obj. ¶¶ 18–23. | • In response to this objection, the Disclosure Statement has been revised to provide the following:<br><br>"The Chubb Companies ("Chubb") have objections to the Disclosure Statement and Plan, which the Debtors believe are confirmation rather than disclosure statement objections. Chubb has provided the Debtors with suggested changes to the Plan to address its objection. The Debtors are considering the changes. If no agreement is reached, Chubb reserves the right to object to confirmation of the Plan." *See* Disclosure Statement Art. VIII.I.2. |

[4] *Joinder of L-M Service Co., Inc. to Objection of Nooter Construction Company to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 506] (the "L-M Joinder").

[5] *The Chubb Companies' (I) Limited Objection to the Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates; and (II) Reservation of Rights with Respect to the Debtors' Motion for Entry of an Order (A) Establishing Bidding Procedures, (B) Approving Bid Protections, and (C) Granting Related Relief* [Docket No. 615] (the "Chubb Objection").

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| | • The Disclosure Statement and Plan must clarify that nothing in the Disclosure Statement, the Plan, Plan Supplement, the Confirmation Order shall modify, alter or impair the Collateral or the Insurance Program, including the rights and obligations of the Chubb Companies and the Debtor or Reorganized Debtor thereunder, and the coverage provided thereunder. *See* Chubb Obj. ¶¶ 24–26. | • In response to this objection, the Disclosure Statement has been revised to provide the following:<br><br>"The Chubb Companies ("Chubb") have objections to the Disclosure Statement and Plan, which the Debtors believe are confirmation rather than disclosure statement objections. Chubb has provided the Debtors with suggested changes to the Plan to address its objection. The Debtors are considering the changes. If no agreement is reached, Chubb reserves the right to object to confirmation of the Plan." *See* Disclosure Statement Art. VIII.I.2. |
| | • The Disclosure Statement and Plan must clarify that workers' compensation and direct action claims may continue to be administered, handled, defended, settled, and/or paid in the ordinary course. *See* Chubb Obj. ¶¶ 27–30. | • In response to this objection, the Disclosure Statement has been revised to provide the following:<br><br>"The Chubb Companies ("Chubb") have objections to the Disclosure Statement and Plan, which the Debtors believe are confirmation rather than disclosure statement objections. Chubb has provided the Debtors with suggested changes to the Plan to address its objection. The Debtors are considering the changes. If no agreement is reached, Chubb reserves the right to object to confirmation of the Plan." *See* Disclosure Statement Art. VIII.I.2. |
| **U.S. Trustee Objection[6]** | | |
| *Creditor Recoveries* | • The Disclosure Statement does not disclose the estimated amount of claims, estimated percentage recoveries for any class of claims identified in the Disclosure Statement, whether classified or | • In response to this objection, the Plan and Disclosure Statement have been revised to provide that the Plan Supplement, filed ahead of the Objection Deadline and Voting Deadline, shall include: (a) a description of the bids received and/or the tentative successful |

[6] *United States Trustee's Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, and (V) Granting Related Relief* [Docket No. 621].

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| | unclassified, nor the amount necessary to fund the various reserve funds defined in the Plan. *See* UST Obj. ¶ 25. | bid or stalking horse, as applicable; (b) a chart detailing the projected creditor recoveries following the auction (to the extent applicable, based on the tentative successful bid); and (c) any additional information the Debtors deem material to the creditors' decision to vote to accept or reject the Plan (including financial projections if the Equitization Restructuring is pursued). *See* Plan. Art. I.A.120. |
| *Best Interests of Creditors* | • The Disclosure Statement does not contain a liquidation analysis. The purported liquidation analysis filed on November 26 contains no financial information. *See* UST Obj. ¶ 24. | • As an initial matter, any objections relating to the best interest test are plan confirmation issues and will be addressed at the time of plan confirmation. *See* Reply ¶ 20.<br><br>• Nevertheless, the liquidation analysis filed as Exhibit C to the Disclosure Statement satisfied the best interests of creditors test. *See* Docket No. 613.<br><br>• The Liquidation Analysis sets forth the reasons why the Debtors expect that the recoveries available to Holders of Allowed Claims under the Plan will be greater than the recoveries available in a chapter 7 liquidation. Despite the U.S. Trustee's assertion to the contrary, it is immaterial that the Liquidation Analysis does not contain financial information where, as here, proceeds to be distributed under the Plan cannot be quantified yet. *See* Reply ¶ 20–21.<br><br>• Courts in this district and others have approved disclosure statements as adequate where the liquidation analysis, as here, set forth the reasons why recoveries in a chapter 7 would be lower than through a chapter 11 plan. *See* Reply ¶ 21. |
| *Financial Projections* | • The Disclosure Statement does not disclose future projections necessary for parties in interest to assess the prospects for future recoveries if the Plan results in an Equitization Restructuring as opposed to an Asset Sale. *See* UST Obj. ¶¶ 24–26. | • In response to this objection, the Plan and Disclosure Statement have been revised to provide that the Plan Supplement, filed ahead of the Objection Deadline and Voting Deadline, shall include: (a) a description of the bids received and/or the tentative successful bid or stalking horse, as applicable; (b) a chart detailing the projected |

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| | | creditor recoveries following the auction (to the extent applicable, based on the tentative successful bid); and (c) any additional information the Debtors deem material to the creditors' decision to vote to accept or reject the Plan (including financial projections if the Equitization Restructuring is pursued). *See* Plan. Art. I.A.120. |
| *Discharge* | • The Disclosure Statement does not disclose that the Debtors may not be entitled to a discharge if the Plan's performance is an Asset Sale resulting in a sale of all or substantially all of the Debtors' assets. *See* UST Obj. ¶¶ 28, 40–43 | • In response to this objection, the Disclosure Statement has been revised to provide the following:<br><br>"X. Will the Debtors be entitled to a discharge? Section 1141(d)(3) of the Bankruptcy Code provides that a non-individual debtor is not entitled to a discharge if the plan provides for the liquidation of all or substantially all of the property of the estate; the debtor does not engage in business after consummation of the Plan; and the debtor would be denied a discharge under Section 727(a) of the Bankruptcy Code if the case is a case under chapter 7. If an Equitization Restructuring takes place the Debtors will be entitled to a discharge. The United States Trustee asserts that, if an Asset Restructuring takes place, the Debtors may not become entitled to a discharge." |
| *Third Party Releases* | • The third-party release is non-consensual and does not conform to applicable law. *See* UST Obj. ¶¶ 30–33. | • As an initial matter, any objections relating to the appropriateness of third party releases are confirmation issues and will be addressed at the time of plan confirmation.<br><br>• Nevertheless, the third party release is consensual because the Plan expressly provides that any Holder of Claim or Interest may opt out of the releases. All parties in interest will have ample opportunity to evaluate and opt out of the third party release by filing an objection with the Court. *See* Reply ¶ 27. |

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| | | • Courts in this district and others routinely approve consensual third-party releases where, as here, they are consensual, and with similar opt out mechanisms. *See* Reply ¶ 27. |
| *Debtor Release and Third Party Release* | • The Debtor release and third-party release are overly broad and contrary to applicable law. *See* UST Obj. ¶¶ 30–35. | • As an initial matter, any objections relating to the appropriateness of Debtor release and third party release are confirmation issues and will be addressed at the time of plan confirmation. Reply ¶ 29<br><br>• Nevertheless, the Debtor release and third party release easily meet the applicable standard because the releases are fair, reasonable, and in the best interests of the Debtors' estates. The breadth of the Debtor release and third-party release is consistent with those regularly approved in this jurisdiction and others, and is limited by the subject-matter limitation clearly contained in the releases. *See* Reply ¶ 28.<br><br>• Additionally, the third-party releases form an integral part of the Plan. Each of the released parties, as stakeholders and critical participants in the Debtors' reorganization process, share a common goal with the Debtors in seeing the Plan succeed, and have afforded value to the Debtors and aided in the reorganization process. *See* Reply ¶ 29. |
| *Exculpation* | • The Exculpated Party definition includes direct and indirect equity security holders, who are not estate fiduciaries. As such, the exculpation provision is overbroad as to parties covered. *See* UST Obj. ¶ 36. | • As an initial matter, any objections relating to the appropriateness of exculpation provisions are confirmation issues and will be addressed at the time of plan confirmation. *See* Reply ¶ 30.<br><br>• Nevertheless, in response to this objection, the Disclosure Statement has been revised to exclude direct and indirect equity security holders from exculpated parties. *See* Reply ¶ 30; Plan Art. I.A. 55. |

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| *Exculpation* | • The provision regarding the Exculpated Parties' entitlement to reasonably rely upon the advice of counsel is inappropriate. *See* UST Obj. ¶ 37. | • As an initial matter, any objections relating to the appropriateness of exculpation provisions are confirmation issues and will be addressed at the time of plan confirmation.<br><br>• Nevertheless, the scope of the provision regarding Exculpated Parties' entitlement to reasonably rely upon the advice of counsel is consistent with those regularly approved in this jurisdiction. *See* Reply ¶ 32. |
| *Feasibility* | • The Plan does not satisfy the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code because there is no present bidder for an Asset Sale and no Plan Sponsor for an Equitization Restructuring. *See* UST Obj. ¶¶ 38–39. | • As an initial matter, any objections relating to the feasibility of the Plan are confirmation issues and will be addressed at the time of plan confirmation.<br><br>• Nevertheless, in response to this objection, the Plan and Disclosure Statement have been revised to provide that the Plan Supplement, filed ahead of the Objection Deadline and Voting Deadline, shall include: (a) a description of the bids received and/or the tentative successful bid or stalking horse, as applicable; (b) a chart detailing the projected creditor recoveries following the auction (to the extent applicable, based on the tentative successful bid); and (c) any additional information the Debtors deem material to the creditors' decision to vote to accept or reject the Plan (including financial projections if the Equitization Restructuring is pursued). *See* Plan. Art. I.A.120. |
| *Bankruptcy Rule 9019 Standard* | • The Plan is not confirmable because it purports to impose the settlement standards of Bankruptcy Rule 9019 upon all claims and interests, not on those parties who have expressly entered into a settlement agreement. *See* UST Obj. ¶¶ 44–50. | • Any objections relating to the standard for settling claims are confirmation issues and will be addressed at the time of plan confirmation. The Court should defer consideration of this issue until then. *See, e.g.*, *In re Am. Capital Equip., LLC*, 688 F.3d 145, 155 n.6 (3d Cir. 2012) (citations omitted) ("[B]ankruptcy courts must . . . tak[e] care to not prematurely convert a disclosure statement hearing into a confirmation hearing.").<br><br>• Nonetheless, even if this issue were to be considered at the Disclosure Statement Hearing, the U.S. Trustee Objection should be overruled. |

| Topic | Bases of Objection | Proposed Response |
|---|---|---|
| | | A plan is not patently unconfirmable where the debtor can show that "the plan is confirmable or that defects might be cured or involve material facts in dispute." *Am. Capital Equip., LLC*, 688 F.3d at 155. Even if the Court were to agree with the U.S. Trustee's position regarding settlements, the Debtors do not believe the Plan is patently unconfirmable as appropriate modifications could be made at confirmation without the need for resolution at the Disclosure Statement Hearing. |
| **EPA Objection**[7] | | |
| *Environmental Liabilities* | • The Disclosure Statement on the basis that it fails to provide for any mechanism by which the Debtors intend to comply with their RIN retirement obligations if the Court so requires, thereby failing to disclose how the EPA's interests will be protected. *See* EPA Obj. ¶ 8. | • The EPA's basis for its objection, that the Debtors have not agreed to establish a reserve for certain asserted obligations, is not a Disclosure Statement issue but one that will be adequately addressed in the context of confirmation of the Plan, and all rights of the parties are reserved with respect thereto. *See* Reply ¶ 38. |

[7] *United States' Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 646] (the "EPA Objection").