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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re **CFB LIQUIDATING CORPORATION, f/k/a CHICAGO FIRE BRICK CO., an Illinois Corporation, *et al.*,** **Debtors.**	Case No. 01-45483 RLE Chapter 11 Jointly Administered Honorable Roger L. Efremsky **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CONFIRMATION OF THE JOINT CHAPTER 11 PLAN OF CFB LIQUIDATING CORPORATION, F/K/A CHICAGO FIRE BRICK COMPANY, AND WFB LIQUIDATING CORPORATION, F/K/A WELLSVILLE FIRE BRICK COMPANY, AS MODIFIED**

CFB Liquidating Corporation f/k/a Chicago Fire Brick Company ("CFB") and WFB Liquidating Corporation f/k/a Wellsville Fire Brick Company ("WFB" and, together with CFB, the "Debtors") submit this memorandum in support of confirmation of the Joint Chapter 11 Plan of Liquidation of CFB Liquidating Corporation f/k/a Chicago Fire Brick Company and WFB Liquidating Corporation, f/k/a Wellsville Fire Brick Company as Modified (as it may be further modified or amended, the "Plan") and approval of the transactions set forth therein, pursuant to sections 363 and 1129 of the Bankruptcy Code[1], 11 U.S.C. §§ 101 *et seq.*, (the "Bankruptcy Code"), and Rule 9019 of the Federal Rules of Bankruptcy Procedure.[2]

In support of confirmation of the Plan, the Debtors submit the Certification of Joseph Frank with Respect to the Tabulation of Votes on the Debtors' Joint Plan (the "Voting Certification") and the Declaration of Bradley Sharp (the "Sharp Declaration") and respectfully state as follows:

PRELIMINARY STATEMENT

The Plan is the result of years of active, arms'-length negotiations between the Debtors, their insurance carriers, and other constituent parties. The Plan provides for the funding and implementation of a liquidating trust mechanism (the "Liquidating Trust") that will permit the Debtors to resolve the asbestos liabilities they face in a fair, efficient, and centralized manner. The Liquidating Trust will be funded by the Debtors' settlements with four insurers that will yield in excess of $16 million. Sharp Declaration, ¶ 16. In addition, the Debtors have negotiated a settlement option with a fifth insurer that, if exercised by that insurer, will provide an additional recovery in excess of $2.5 million. Sharp Declaration, ¶ 17. The Debtors have exercised their business judgment in deciding to enter into these settlements and believe that these settlements are consistent with the best interests of the Debtors' creditors.

As described below, the Plan satisfies each of the requirements for confirmation set forth in the Bankruptcy Code. Creditors in Class 3 (Bar Date Asbestos Personal Injury Claims) and Class 4 (Supplemental Bar Date Asbestos Personal Injury Claims) (collectively, "Trust Claims"), the two voting classes, have unanimously accepted the Plan. See Voting Certification, Ex. A. The Debtors

[1] All section references herein, if not otherwise designated, refer to the Bankruptcy Code.

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

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received no objections to the Plan. Accordingly, the Plan should be confirmed.

STATEMENT OF FACTS

The Debtors entered bankruptcy in October, 2001, with few liquid assets and facing thousands of claims arising from exposure to asbestos and/or asbestos-containing products for which the Debtors have liability. In late 2002 and early 2003, the Debtors' operating assets were sold along with those of their parent and affiliates. Sharp Declaration, ¶ 4. Following that sale, the Debtors engaged in lengthy negotiations with their insurers. Sharp Declaration, ¶¶ 11, 16. Ultimately, these negotiations resulted in settlements with three primary insurers, Hartford Accident and Indemnity Company ("Hartford"), Bituminous Casualty Corporation ("Bituminous") and ACE Insurance Company ("Ace"), agreement on a claims submission process with Continental Casualty Company ("Continental") that includes a cash settlement option, and a settlement with the Debtors' excess insurer, Safety National Casualty Company ("Safety National"). Sharp Declaration, ¶¶ 16, 17, 20. These settlements have been incorporated into the Plan and, if approved, will yield over $16 million, from which the Debtors will be able to make substantial distributions on account of allowed Trust Claims. Sharp Declaration, ¶¶ 16, 17, 20. Finally, the Plan contemplates the adoption by the Liquidating Trust of certain claims liquidation procedures by which the Liquidating Trust will value and pay Trust Claims in an efficient, uniform manner. The facts relevant to Confirmation of the Plan, including the Debtors' historical business operations, the Trust Claims asserted against the Debtors and the Debtors' settlements with certain of their insurers, are set forth at length in the Debtors' Disclosure Statement with Respect to the Joint Chapter 11 Liquidating Plan of CFB Liquidating Corp., f/k/a Chicago Fire Brick Company and WFB Liquidating Corp. f/k/a Wellsville Fire Brick Company, as Modified (the "Disclosure Statement"), the Plan, the Voting Certification, the Sharp Declaration and any evidence presented or testimony that may be adduced at the Confirmation Hearing, all of which are incorporated herein by reference. Additional facts relating to the Debtors' exercise of their business judgment with respect to the settlements incorporated into the Plan are discussed in Section III below.

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ARGUMENT

I. THE PLAN MEETS EACH OF THE REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129(a)(1)-(7).

To obtain confirmation of a chapter 11 plan, a plan proponent must demonstrate that the plan satisfies each of the requirements set forth in section 1129. *See Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899, 905 (9th Cir. 1993). Except with respect to the requirement of section 1129(a)(8) of the Bankruptcy Code (addressed in Section II below), as demonstrated in the Voting Certification, the Sharp Declaration and through evidence to be presented at the Confirmation Hearing, the Plan satisfies the requirements of section 1129 and should therefore be confirmed.

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

Section 1129(a)(1) provides that a plan may be confirmed only if the plan "complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) indicates that the primary focus of this requirement is to ensure that the form of the plan complies with the provisions of sections 1122 (classification of claims and interests) and 1123 (contents of a plan). *See* S. Rep. No. 95-989, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5913; H.R. Rep. No. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6368; *see also In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986) (stating that "[o]bjections to confirmation raised under § 1129(a)(1) generally involve the failure of a plan to conform to the requirements of § 1122(a) or § 1123*"), aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom., Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2nd Cir. 1988). As demonstrated below, the Plan fully complies with all of the applicable provisions of the Bankruptcy Code, including, without limitation, sections 1122 and 1123.

1. Classification of Claims and Interests.

Section 1122 sets forth the basic rule governing the classification of claims and interests: the claims or interests within a given class must be "substantially similar" to the other claims or interests in that class. *See* 11 U.S.C. § 1122(a). The Bankruptcy Code does not, however, require the converse

— that all similar claims must be placed in one class. If the claims are substantially similar, the plan may place such claims in different classes if the debtor can show a business or economic justification for doing so. *Barakat v. Life Ins. Co. of Va. (In re Barakat)*, 99 F.3d 1520, 1526 (9th Cir.1996); *see also* 7 COLLIER ON BANKRUPTCY, ¶ 1122.03[4][a] (Henry J. Sommer & Alan N. Resnick eds., 15th ed. 2007) (stating that unsecured claims "may be divided into separate classes if separate classification is reasonable.").

Article 4 of the Plan reasonably provides for the separate classification of Claims and Equity Interests into the following six distinct Classes based upon (a) their security position, if any, (b) their legal priority against the Debtors' assets, and (c) other relevant criteria:[3]

Class Number	**Class Description**
Class 1	**Other Priority Claims**
Class 2	**Secured Claims**
Class 3	**Bar Date Asbestos Personal Injury Claims**
Class 4	**Supplemental Bar Date Asbestos Personal Injury Claims**
Class 5	**General Unsecured Claims**
Class 6	**Equity Interests**

The legal rights under the Bankruptcy Code of each of the holders of Claims or Equity Interests within a particular Class are substantially similar to other holders of Claims or Equity Interests within that Class. Valid business, factual and legal reasons exist for the separate classification of Claims and Equity Interests. Notably, holders of Class 3 Bar Date Asbestos Personal Injury Claims have been separately classified from holders of Class 4 Supplemental Bar Date Asbestos Personal Injury Claims because Class 3 Claimants timely filed their claims prior to the February 19, 2002, bar date established by the Court, while Class 4 Claimants did not. In order to avoid dilution of the recoveries of claimants who did timely file their claims, the Debtors have

[3] In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims and Priority Tax Claims have not been classified.

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separately classified Supplemental Bar Date Asbestos Personal Injury Claims and have segregated a separate pool of funds from which those creditors may recover. Similarly, holders of Trust Claims have been classified separately from holders of general unsecured claims, because Holders of Trust Claims may assert a beneficial interest in the proceeds of the Debtors' insurance policies. Unsecured trade or other non-tort creditors cannot assert such an interest. *See In re Allied Products Corporation*, 288 B.R. 533, 537-38 (Bankr. N.D. Ill. 2003) (injured parties have an interest in insurance policies subject to adequate protection in connection with a sale under section 363). Accordingly, the Debtors' classification of Claims and Equity Interests under the Plan: (i) is not an attempt to manufacture an impaired class that will vote in favor of the Plan; and (ii) does not discriminate unfairly between or among holders of Claims or Equity Interests.

2. Mandatory Contents of a Plan

Section 1123(a) requires a chapter 11 plan of a corporate debtor to:

- designate classes of claims and interests;
- specify unimpaired classes of claims and interests;
- specify treatment of impaired classes of claims and interests;
- provide for equality of treatment within each class of claims or interests;
- provide adequate means for implementation of a plan;
- prohibit the issuance of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and
- contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of a reorganized debtor's officers and directors.

See 11 U.S.C. §§ 1123(a)(1)-(7).[4] As provided below, the Plan fully complies with each of these requirements.

a. *11 U.S.C. § 1123(a)(1)-(4): Designation, Status, Treatment, and Equality of Treatment of Claims.*

In accordance with section 1123(a)(1), Article 4 of the Plan designates Classes of Claims and Equity Interests (other than Administrative Claims, Fee Claims and Priority Tax Claims) and specifies for each Class of Claims or Equity Interests whether such Class is impaired or unimpaired under the Plan. In addition, Article 5 of the Plan both (i) specifies the treatment of Claims or Equity Interests in each Class under the Plan, and (ii) provides equal treatment for all Claims or Equity

[4] Section 1123(a)(8) of the Bankruptcy Code applies only in cases "in which the debtor is an individual" and is thus inapplicable to the Chapter 11 Cases. 11 U.S.C. § 1123(a)(8).

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Interests within each such Class, unless the holder of a Claim or Interest agrees to less favorable treatment on account of its Claim or Equity Interest. In fact, the Debtors expect that the proposed Trust Distribution Procedures will yield greater equality of treatment among holders of Class 3 Claims and among holders of Class 4 Claims than the tort system, in which a claimant's jurisdiction may have a substantial impact on the amount and timing of payment. Sharp Declaration, ¶¶ 26-28.

b. 11 U.S.C. § 1123(a)(5): Adequate Means of Implementation.

In accordance with the requirements of section 1123(a)(5), Article 8 of the Plan ("Means for Execution of the Plan") provides adequate means for the Plan's implementation. Article 8 provides for, among other things: (i) the creation of the Liquidating Trust; (ii) the Debtors' transfer of assets to the Liquidating Trust, including the proceeds from the Debtors' insurance settlements and the right to pursue additional insurance-related assets of the Debtors' estates; (iii) the channeling of Trust Claims to the Liquidating Trust for processing and payment; and (iv) the implementation of certain procedures to ensure that Trust Claims are liquidated and paid in an efficient and consistent manner. *See* Plan, § 8.1 and Disclosure Statement, Ex. G. Each of the insurance carriers with whom the Debtors have reached a settlement remains solvent, and the Plan provides for *pro rata* distributions to holders of allowed claims in Classes 3 and 4. Accordingly, the Debtors expect to be able to implement their plan in full. Sharp Declaration, ¶ 29.

c. 11 U.S.C. § 1123(a)(6): Prohibition on Issuance of Nonvoting Equity Securities.

Section 1123(a)(6) requires a debtor's corporate documents to prohibit the issuance of nonvoting equity securities and requires that voting power be appropriately distributed among the classes of such securities. The Plan does not contemplate the issuance of equity securities. Furthermore, upon confirmation, the Liquidating Trust will be settled pursuant to the Trust Agreement attached to the Disclosure Statement as Exhibit A, and will not have the right, power or authority to conduct a trade or business or to operate as a business entity within the meaning of Treasury Regulations § 301.7701-2. *See* Plan, § 8.1.; Disclosure Statement, Ex A.

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d. 11 U.S.C. § 1123(a)(7): Selection of Trustees.

Section 1123(a)(7) requires that a chapter 11 plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director or trustee." 11 U.S.C. § 1123(a)(7). The Plan does not contemplate the continued service or appointment of any officer or director. Instead, the Plan and Trust Agreement provide for the selection of Barry A. Chatz, a partner in the Chicago, Illinois office of the law firm of Arnstein & Lehr LLP to serve as the initial trustee of the Liquidating Trust. Mr. Chatz was selected by Mr. Sharp, based on his experience and expertise. Sharp Declaration, ¶ 25. Mr. Chatz has practiced bankruptcy law for over twenty years, currently serves as a panel chapter 7 trustee for Cook County in the Northern District of Illinois, and has experience addressing asbestos-related liabilities in the bankruptcy context. Declaration of Barry A. Chatz (the "Chatz Declaration"), a copy of which is being filed contemporaneously herewith. The Trust Agreement also sets forth procedures for the selection of a successor trustee, to the extent necessary and/or the removal of a trustee, for cause. Disclosure Statement, Exhibit A, Article 5.5. On this basis, the Debtors believe that the manner of selection of the trustee of the Liquidating Trust is consistent with the interests of creditors, interest holders and public policy in accordance with section 1123(a)(7). Sharp Declaration, ¶ 25.

3. Permitted Contents of a Plan.

Section 1123(b) identifies various discretionary provisions that may be included in a chapter 11 plan, including the impairment or unimpairment of claims or interests, the rejection or assumption of executory contracts and unexpired leases, the retention of claims by the debtor, and other provisions that are "not inconsistent with" applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1123(b).

As permitted under section 1123(b), the Plan provides for: (i) the impairment or unimpairment of Classes of Claims and Equity Interests (Plan, Arts. 4 and 5); (ii) the rejection of certain Executory Contracts or Unexpired Leases not previously rejected under section 365 (Plan,

[5] The Trust Agreement also contemplates the retention of Wilmington Trust Company as Delaware Trustee to perform the limited functions set forth in section 5.10 therein.

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§ 6.1); (iii) the retention and enforcement and assignment to the Liquidating Trust of all Causes of Action (unless otherwise released under the Plan) (Plan, §12.1); (iv) distributions under the Plan on account of Allowed Claims (Plan, Art. 10); (v) the, release, and injunction against the pursuit of Claims and the channeling of Trust Claims to the Liquidating Trust (Plan, Art. 7); and (vi) the retention of jurisdiction by the Court over certain matters after the Effective Date (Plan, Art. 15).

B. Section 1129(a)(2) — The Debtors Have Complied with Applicable Provisions of Title 11.

Section 1129(a)(2) focuses on whether the plan proponent has complied with the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(2). The legislative history of this provision indicates that its principal purpose is to ensure that the proponent complies with the disclosure and solicitation requirements set forth in sections 1125 and 1126. *See* S. Rep. No. 95-989, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5912 ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); H.R. Rep. No. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6368; see also *In re Lighthouse Lodge, LLC*, 2010 WL 5156263, *7 (Bankr. N.D. Cal. December 14, 2010) (finding that because the proponents relied on the court-approved disclosure statement to solicit votes on their plan, they have satisfied requirements of section 1129(a)(2).) Here, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of sections 1125 and 1126 regarding disclosure and plan solicitation.

1. Compliance with Section 1125.

Section 1125 prohibits the solicitation of acceptances or rejections of a chapter 11 plan from holders of claims or interests "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved . . . by the court as containing adequate information." 11 U.S.C. § 1125(b). In these cases, after a hearing held on May 31, 2012, the Court approved the Debtors' Disclosure Statement by an order entered on June 4, 2012, [Docket No. 424] (the "Disclosure Statement Approval Order"). The Disclosure Statement Approval Order specifically found, among other things, that the Disclosure Statement contained "adequate information" within the meaning of section 1125. In addition, the Court considered and,

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by separate order approved, among other things: (a) the materials to be transmitted to creditors entitled to vote on the Plan (collectively, the "Solicitation Materials"), including the Plan and the Disclosure Statement; (b) notice of the Confirmation Hearing (the "Confirmation Hearing Notice") and related matters; (c) forms of Ballots and Master Ballots; and (d) the procedures for the solicitation and tabulation of votes to accept or reject the Plan, including approval of (i) the deadline for creditors' submission of Ballots, (ii) the rules for tabulating votes to accept or reject the Plan, and (iii) the proposed record date for Plan voting. The Debtors transmitted the Solicitation Materials and Confirmation Hearing Notice in accordance with the instructions of the Court in the Disclosure Statement Approval Order, and notice was given by publication to unknown creditors. *See* Certificate of Service, dated June 21, 2012 [Docket No. 431]; Affidavit and Verification of Publication dated June 22, 2012 (verifying publication in USA Today on June 12, 2012 and June 15, 2012) [Docket No. 432] (collectively, the "Solicitation Affidavits").

2. Compliance with Section 1126.

Pursuant to section 1126, only holders of allowed claims and allowed equity interests in impaired classes of claims or equity interests that will receive or retain property under a plan on account of their claims or equity interests may vote to accept or reject such plan. 11 U.S.C. § 1126.

As set forth in the Disclosure Statement and the Voting Certification, in accordance with section 1126, the Debtors solicited acceptances from Claimants in Classes 3 and 4, the only impaired classes of Claims expected to receive distributions under the Plan. Claims in Classes 1 and 2 are designated as unimpaired and are conclusively presumed to have accepted the Plan pursuant to section 1126(f). Holders of Class 5 Claims and Class 6 Interests are not expected to receive distributions under the Plan and are therefore deemed to reject it. 11 U.S.C. § 1126(g). Accordingly, pursuant to section 1126(a), only holders of Claims in Classes 3 and 4 were entitled to vote to accept or reject the Plan.

Based upon the foregoing, the Debtors' solicitation of votes with respect to the Plan was undertaken in conformity with sections 1125 and 1126 and the Disclosure Statement Approval Order, and the Debtors acted in good faith at all times with respect to the solicitation of votes on the Plan.

The Debtors, therefore, have complied with applicable provisions of the Bankruptcy Code and have satisfied the requirements of section 1129(a)(2). *See* Sharp Declaration, ¶ 35.

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

Section 1129(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). In the Ninth Circuit, courts determine whether a chapter 11 plan is proposed in good faith under the following principles: (a) "[a] plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the [Bankruptcy] Code." *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002); (b) the court is not to apply any ***per se*** rule, but is to consider the totality of the circumstances on a case-by-case basis. *Id.* at 1074–75; and (c) a plan is not proposed in bad faith merely because it is structured in a way designed to invoke the benefits of some provision of the Bankruptcy Code. "'[T]he fact that a debtor proposes a plan in which it avails itself of an applicable Code provision does not constitute evidence of bad faith.'" *Sylmar Plaza*, 314 F.3d at 1075, *quoting In re PPI Enters., Inc.*, 228 B.R. 339, 347 (Bankr. D. Del.1998).

Furthermore, the fact that the Debtors are not reorganizing does not prevent a finding of good faith. Proper use of Chapter 11 is not limited to cases in which the debtor preserves going-concern value. The Bankruptcy Code expressly authorizes the confirmation of a liquidating plan in a chapter 11 case. *See* 11 U.S.C. §§ 1123(a)(5)(D), 1141(d)(3)(A). A liquidating plan furthers other policies embodied in the Bankruptcy Code: the orderly disposition of assets to maximize value, and the equal treatment of claims of similar priority. The decisions upholding liquidating plans indicate that a plan need not satisfy all of the goals of chapter 11 to be in good faith. *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 120 n. 4 (3rd Cir. 2004).

The Debtors' Plan accomplishes the goals promoted by section 1129(a)(3) and other sections of the Bankruptcy Code by creating the Liquidating Trust to efficiently liquidate and pay claims in Classes 3 and 4, in a manner consistent with the objectives and purposes of the Bankruptcy Code. *See* Sharp Declaration, ¶¶ 26-29. Through the Plan, the Debtors have maximized recoveries for the benefit of their creditors, recovering significant sums from the Debtors' primary and excess insurers despite uncertainties such as coverage defenses. *See* Sharp Declaration ¶¶ 11-23.

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Hand in hand with those efforts and in consultation with several parties in interest, the Debtors will establish a Liquidating Trust that will minimize and/or eliminate the significant delays, substantial litigation costs and inconsistent results that might otherwise impact individual claimants if they were forced to liquidate their claims in the tort system. The Trust Distribution Procedures, attached as Exhibit G to the Disclosure Statement, require submission of various documents and information to establish illness and the requisite exposure to products for which the Debtors have legal responsibility, providing that only meritorious claims will be allowed and paid, and assigns specific dollar amounts to various disease levels, ensuring that similarly-situated claimants will receive equivalent treatment. *See* Disclosure Statement, Ex G, §§ 5.1-5.3. Accordingly, for the foregoing reasons, the Debtors have satisfied the requirements of section 1129(a)(3).

D. Section 1129(a)(4) — All Payments to Be Made by the Debtors in Connection with these Cases are Subject to the Approval of the Court.

Section 1129(a)(4) requires that all payments made by the debtor, the plan proponent or by a person issuing securities or acquiring property under a plan for services or for costs and expenses incurred in connection with the case or the plan, be approved by the Court as reasonable. 11 U.S.C. § 1129(a)(4). This section subjects the reasonableness of the Debtors' administrative expenses to the scrutiny and approval of the court. *In re Beyond.com Corp.*, 289 B.R. 138, 144 (Bankr. N.D. Cal. 2003).

Section 3.4 of the Plan provides for the payment only of Allowed Administrative Claims, and section 3.2 of the Plan requires all professionals seeking payment for services rendered prior to the Effective Date of the Plan to file a fee application within thirty (30) days of the Effective Date, and provides 45 days thereafter for parties to file any objections. Plan §§ 3.2, 3.4. Accordingly, all such fees and expenses remain subject to Court approval under the standards established by the Bankruptcy Code, including the requirements of sections 327, 328, 330, 331, 503(b) and 1103, as applicable. Furthermore, Article 15 of the Plan preserves the Court's continuing jurisdiction over these matters. Plan, Art. 15. These procedures for the Court's review and ultimate determination of the fees and expenses to be paid by the Debtors satisfy the objectives of section 1129(a)(4).

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

Section 1129(a)(5)(A)(i) provides that a chapter 11 plan may be confirmed only if the proponent of such a plan discloses the identity and affiliations of the proposed officers and directors of the reorganized debtor, the identity of any insider to be employed or retained by the reorganized debtor, and the nature of any compensation proposed to be paid to such insider. In addition, under section 1129(a)(5)(A)(ii), the appointment or continuation in office of such officers and directors must be consistent with the interests of creditors, equity security holders and public policy. 11 U.S.C.§ 1129(a)(5)(A)(i). *See, e.g., In re SM 104 Ltd.*, 160 B.R. 202 (Bankr. S.D. Fla. 1993) (manager who diverted rents, violated court orders, made misrepresentations to secured creditors, commingled funds and maintained a grossly inadequate accounting system, was prohibited by § 1129(a)(5) from continuing in that capacity). As set forth above, the Debtors will not have post-confirmation officers and directors and Barry Chatz shall serve as the initial trustee of the Liquidating Trust. Mr. Chatz is not an insider of the Debtors and has had no prior involvement in these cases. Chatz Declaration, ¶ 4. Based upon the foregoing, the Debtors have satisfied the requirements of section 1129(a)(5).

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

Section 1129(a)(6) requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). In these cases, section 1129(a)(6) is not applicable because the Liquidating Trust's activities do not involve the establishment of rates over which any regulatory commission has jurisdiction or will have jurisdiction after confirmation. Moreover, because the Debtors will not be operating after the Effective Date, even if there were such agencies, their rate approval would be irrelevant to confirmation of the Plan.

G. Section 1129(a)(7) — The Plan Is in the Best Interests of Creditors.

Section 1129(a)(7) requires that, with respect to each impaired class of claims or interests

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under a plan of reorganization, each holder of a claim or interest (i) has accepted the plan, or (ii) will receive or retain property of a value, as of the effective date of the plan, not less than what such holder would receive or retain if the debtor were liquidated under chapter 7 on that date. *See* 11 U.S.C. § 1129(a)(7). Referred to as the "best interests of creditors" test, section 1129(a)(7) focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 442 n.13 (1999) (stating that the "'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan"). Under the best interests test, the court "must find that each [nonaccepting] creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated." *203 N. LaSalle*, 526 U.S. at 440; *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228 (1996) (same). *In re LCGI Fairfield, LLC*, 424 B.R. 846, 853 (Bankr. N.D. Cal. 2010) (Plan must merely propose to pay creditor at least as much as it would receive in a chapter 7 case).

Attached as Exhibit F to the Debtors' Disclosure Statement is a Liquidation Analysis that compares a hypothetical liquidation under chapter 7 with the liquidation proposed under the Plan. Through the settlements incorporated in the Plan, the Debtors have sought to maximize recoveries for creditors, in effect monetizing the benefits and protections available in connection with a chapter 11 plan and section 363. Because Judge Tchaikovsky previously ruled that the protections contemplated in the Debtors' settlement agreements with their settling insurers are only available under a chapter 11 plan, the Debtors accordingly do not believe that these settlements would be available to the Debtors' creditors in a chapter 7 liquidation in these proceedings. Furthermore, without a plan transferring the claims to a Liquidating Trust, a chapter 7 trustee might not be able to employ the Trust Distribution Procedures proposed by the Debtors. Moreover, in a chapter 7 liquidation context, the Debtors anticipate that a chapter 7 trustee would incur substantial additional expenses in connection with the pursuit of these recoveries, including the fees payable to the chapter 7 trustee which, if a chapter 7 trustee were able to recover $16 million, would equal approximately $517,000, exclusive of the fees of his or her counsel. Finally, although general unsecured creditors are not expected to receive any distributions, the same would be true in a chapter 7 liquidation. Sharp

Declaration, ¶¶ 31-32. As a result, the Plan satisfies the requirements of section 1129(a)(7).

H. Section 1129(a)(8) — The Plan Has Been Accepted by the Requisite Classes 1 Through 4 and Classes 5 and 6 Are Subject to Cramdown.

Section 1129(a)(8) requires that each class of claims or interests under a plan has either accepted the plan or is not impaired under the plan. 11 U.S.C. § 1129(a)(8). Although Classes 1 through 4 either have voted to, or are presumed to, accept the plan, because Classes 5 and 6 (the "Rejecting Classes") are deemed to reject the Plan, the requirements of section 1129(a)(8) are not met. Nevertheless, even when the requirements of section 1129(a)(8) cannot be satisfied, the Plan nevertheless may be confirmed over such nonacceptance pursuant to the "cramdown" provisions of section 1129(b)(1). As a result, the condition precedent to confirmation contained in section 1129(a)(8) is the only condition of section 1129(a) that is not necessary for confirmation of a plan of reorganization. *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 653 (9th Cir. 1997) ("Because 11 U.S.C. § 1129(a)(8) is not met, the Plan must satisfy the cramdown provision, 11 U.S.C. § 1129(b), to be confirmed.")

As described in greater detail in section II below, the Debtors have met the "cramdown" requirements under section 1129(b) and can therefore obtain confirmation of the Plan notwithstanding the deemed rejection of the Rejecting Classes.

I. Section 1129(a)(9) — The Plan Provides for the Payment of Priority Claims.

Section 1129(a)(9) requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments, except to the extent that the holder of such a priority claim agrees to different treatment. 11 U.S.C. § 1129(a)(9). In particular:

- Section 1129(a)(9)(A) requires that holders of claims of a kind specified in section 507(a)(2) (i.e., administrative claims allowed under section 503(b)) must receive cash equal to the allowed amount of such claims on the effective date of a plan.
- Section 1129(a)(9)(B) requires that each holder of a claim of a kind specified in section 507(a)(1) and sections 507(a)(4) through (7) must receive (i) deferred cash payments of a value, as of the effective date of a plan, equal to the allowed amount of such claim if the class has accepted a plan; or (ii) cash equal to the allowed amount of such claim on the effective date of the plan if the class has not accepted a plan;

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- Section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) (*i.e.*, priority tax claims) must receive regular installment payments in cash of a total value, as of the effective date of a plan, equal to the allowed amount of the claim; over a period ending not later than 5 years after the date the order for relief was entered in the chapter 11 case; and in a manner not less favorable than the most favored non-priority unsecured claim provided for by a plan; and
- Section 1129(a)(9)(D) provides that, with respect to a secured claim that would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8) (but for the claim's secured status), the holder of such a claim will receive cash payments in the same manner and over the same period as prescribed in section 1129(a)(9)(C).

The Plan satisfies each of the requirements of section 1129(a)(9). With respect to Administrative Claims, Priority Tax Claims (including secured tax claims) and Other Priority Claims, the Plan provides for payment in full on the later of the date on which the claim at issue becomes Allowed, or the Effective Date, unless the holder of such Claim agrees to other treatment. *See* Plan, §§ 3.4, 3.5 and 5.1(b). As required by section 1129(a)(9)(C), such treatment of Priority Tax Claims is as favorable as the treatment accorded to the most favored non-priority unsecured Claim under the Plan. Accordingly, in light of the foregoing, the Plan satisfies the requirements set forth in section 1129(a)(9).

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

Section 1129(a)(10) requires that a chapter 11 plan be accepted by at least one class of claims that is impaired under such plan, determined without including the acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10). As set forth in the Voting Certification, the Debtors have satisfied this requirement because impaired Classes 3 and 4 have voted to accept the Plan. Voting Certification, Ex. A.

K. Section 1129(a)(11) — The Plan Is Feasible.

Under section 1129(a)(11), a chapter 11 plan may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). One commentator has stated that this section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." 7 COLLIER ON BANKRUPTCY ¶ 1129.03[11] (Henry J. Sommer &

Alan N. Resnick eds. 15th ed. rev. 2007).

Section 1129(a)(11), however, does not require a guarantee of the plan's success. Instead, section 1129(a)(11) has been interpreted in the Ninth Circuit to mean that the plan has a "reasonable probability of success." *In re Acequia, Inc.*, 787 F.2d 1352, 1364–65 (9th Cir.1986). The "feasibility" standard has been interpreted as excluding "visionary schemes." *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir.1985). But, *possibility* of failure is not fatal. *Hobson v. Travelstead (In re Travelstead)*, 227 B.R. 638, 651 (D.Md.1998). The issue is primarily one of fact, so long as the plan proponent presents evidence that it can reasonably accomplish what is promised in the plan. The Code does not require a proponent to prove that success is inevitable or assured, and a relatively low threshold of proof will satisfy Section 1129(a)(11) so long as adequate evidence supports a finding of feasibility. *Computer Task Group, Inc. v. Brotby* (*In re Brotby*), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003), *citing In re WCI Cable*, *Inc.*, 282 B.R. 457, 486 (Bankr.D.Or. 2002).

Here, the Debtors will not engage in postpetition business operations. Instead, the Plan contemplates liquidation of the Debtors and transfer of the Debtors' assets to the Liquidating Trust on the Effective Date. Plan, Art. 8. Although the Debtors' assets do include certain unliquidated claims and rights against certain non-settling insurers, the Debtors' settlements with several of their insurance carriers, which have been incorporated into the Plan, are expected to provide the Liquidating Trust with over $16 million, shortly after the Effective Date. Sharp Declaration ¶¶ 16, 20. These funds will be sufficient to permit the Debtors and/or Liquidating Trustee to pay any and all Allowed Unclassified Claims and Allowed Claims in Classes 1 and 2, and to make a distribution to holders of Allowed Claims in Classes 3 and 4. Sharp Declaration ¶ 31.

Furthermore, as set forth in sections 5.3 and 5.4 of the Plan, holders of Allowed Claims in Classes 3 and 4 are entitled to a *pro rata* distribution from the funds available to pay those claims in satisfaction of those claims. Plan, §§ 5.3, 5.4. Thus, although at this time, the Debtors' claims against Continental and insolvent-insurer Home Insurance Company remain unliquidated, the Plan's feasibility is not tied to those recoveries,[6] and the Debtors and Liquidating Trust will have the ability

[6] The Debtors have given Continental the option of entering into a settlement prior to the Effective Date of the Plan that will resolve all of the Debtors' claims against Continental in exchange for Continental's payment of its remaining coverage limits (estimated to be in excess of $2.5 million).

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to implement all material provisions of the Plan. Sharp Declaration ¶¶ 23, 29.

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

Section 1129(a)(12) requires that, as a condition precedent to the confirmation of a plan of reorganization, "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). The Plan complies with section 1129(a)(12) by providing that all fees payable on or before the Effective Date pursuant to section 1930 of title 28 of the United States Code shall be paid in full on or as soon as practicable after the Effective Date. Plan, § 3.6. Section 3.6 further provides that, after the Effective Date, quarterly fees will be paid as they accrue until the case is closed.

M. Section 1129(a)(13) – (16) – Inapplicable Subsections of Section 1129.

The Debtors do not owe any domestic support obligations, are not individuals and are not nonprofit corporations. Therefore, sections 1129(a)(14), 1129(a)(15) and 1129(a)(16) do not apply to the Debtors' chapter 11 cases. *See In re Hawaiian Telcom Communications, Inc.*, 430 B.R. 564, 598-99 (Bankr. D. Haw. 2009)

II. SECTION 1129(B) — THE PLAN SATISFIES THE "CRAMDOWN" REQUIREMENTS FOR CONFIRMATION.

Because the Debtors cannot meet the requirements of section 1129(a)(8), the Debtors are required to satisfy the requirements of section 1129(b) with respect to the Rejecting Classes. Section 1129(b) provides a mechanism (known colloquially as "cram down") for confirmation of a plan of reorganization despite the rejection of the plan by a class or classes of impaired claims or equity interests. Specifically, section 1129(b) provides that, if all the requirements of section 1129(a) are satisfied, other than the requirement of acceptance by all impaired classes under section 1129(a)(8), a plan nevertheless may be confirmed so long as the plan "does not discriminate unfairly" and is "fair and equitable" with respect to impaired, non-consenting classes. 11 U.S.C. § 1129(b)(1). The Plan satisfies these requirements.

A. The Plan Does Not Discriminate Unfairly.

Section 1129(b)(1) does not prohibit discrimination between classes under a chapter 11 plan;

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it prohibits only discrimination that is "unfair." 11 U.S. C. § 1129(b)(1). Generally speaking, section 1129(b)(1) is intended to ensure that a dissenting class will receive relative value equal to the value given to all other similarly situated classes. *See In re Tucson Self-Storage, Inc.*, 166 B.R. 892, 898 (B.A.P. 9th Cir. 1994) ("A plan discriminates unfairly if it singles out the holder of some claim or interest for particular treatment."); *see also In re Johns–Manville Corp.*, 68 B.R. 618, 636 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987), *aff'd*, 843 F.2d 636 (2d Cir.1988) ("[A] plan proponent may not segregate two similar claims or groups of claims into separate classes and provide disparate treatment for those classes."); *In re Armstrong World Indus., Inc*., 348 B.R. 111, 121 (D. Del. 2006) ("hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination.").

Under the foregoing standards, the Plan does not "discriminate unfairly" against the Rejecting Classes. As set forth above, the Debtors' recoveries for creditors arise exclusively from insurance policies in which Holders of Claims in Classes 3 and 4 may assert a beneficial interest. Thus, separate classification and treatment of these claims from the Class 5 General Unsecured Claims is warranted by virtue of the differing nature of their legal rights with respect to the Debtors' assets. Sharp Declaration, ¶ 31. Furthermore, Equity Interests in Class 6 are legally distinct from all Claims in Classes 1 through 5 and would not be entitled to any recovery unless all other creditors are paid in full. *See* 11 U.S.C. § 1129(b)(2)(B). Accordingly, the Plan does not "discriminate unfairly" against the Rejecting Classes.

B. The Plan is Fair and Equitable.

Section 1129(b)(2)(B) states that a plan is "fair and equitable" with respect to a class of unsecured claims if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). Section 1129(b)(2)(C) further provides that a plan is fair and equitable with respect to a class of interests if the plan provides that "the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property." 11 U.S.C. § 1129(b)(2)(C)(ii). This latter standard necessarily is satisfied with

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respect to any impaired dissenting class to the extent that there is no class of claims junior to such dissenting class. *See Westpointe, L.P. v. Franke* (*In re Westpointe, L.P.*), 241 F.3d 1005, 1007 (8th Cir. 2001) ("[A] plan is fair and equitable as long as the holder of any interest junior to the dissenting impaired class does not receive any property under the reorganization plan, and because there are no interests junior to the [impaired class], the confirmed plan satisfies this requirement").

The Plan meets the standards of section 1129(b)(2) with respect to the Rejecting Classes. *First*, the Plan satisfies the "fair and equitable" requirements of section 1129(b)(2)(B) of the Bankruptcy Code with respect to the General Unsecured Claims in Class 5 since there are no Classes of Claims or Equity Interests junior to Class 5 that are retaining any property under the Plan on account of their Claims or Equity Interests. Plan, § 5.6 (providing for no recovery to Class 6 Equity Interests). *Second*, the Plan satisfies the requirements of sections 1129(b)(2)(B) and 1129(b)(2)(C) with respect to the Equity Interests in Class 6, because no Claim or Equity Interest that is junior to Class 6 Equity Interests will receive or retain any property under the Plan on account of such junior Claim or Equity Interest; indeed, no such junior Claims or Equity Interests exist under the Plan. Accordingly, the requirements of section 1129(b) are satisfied with respect to the Rejecting Classes and the Plan may be confirmed notwithstanding the fact that the requirements of section 1129(a)(8) have not been satisfied.

III. THE INSURANCE SETTLEMENTS AND THE RELEASES CONTEMPLATED THEREUNDER SHOULD BE APPROVED.

A. The Insurance Settlements Meet the Requirements of Bankruptcy Rule 9019.

As set forth in Article 9 of the Plan, the Debtors have reached settlement agreements with three of their primary insurance carriers, Hartford, Bituminous and ACE, and the Debtors' excess insurance carrier, Safety National (collectively, the "Insurance Settlements"). *See* Plan, Art. 9. The Insurance Settlements have been incorporated into the Plan and, if approved, will provide the Debtors' estates with recoveries in excess of $16 million. Sharp Declaration ¶¶ 16, 20. In addition, the Debtors have given Continental Casualty Company, another of the Debtors' primary insurance carriers, the option to enter into a settlement similar in form to the Insurance Settlements prior to the

Effective Date of the Plan, in exchange for paying the full remaining limits under its policies, which are acknowledged to be in excess of $2.5 million. Sharp Declaration, ¶ 17.

Bankruptcy Rule 9019 authorizes this Court to approve settlements of a debtor's claims against third parties. The law encourages settlements in bankruptcy cases. *In re Sassalos*, 160 B.R. 646 (D. Or. 1993); *In re Dow Corning Corp.*, 198 B.R. 214, 221 (Bankr. E.D. Mich. 1996); *In re Edwards*, 228 B.R. 552, 568-69 (Bankr. E.D. Pa. 1998). ("It is well accepted that compromises are favored in bankruptcy in order to minimize the cost of litigation to the estate and expedite its administration.").

The bankruptcy court must consider all "factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). To approve these settlements, the Court must find the settlements to be fair and equitable, based upon four necessary findings:

(a) The probability of success in the litigation;

(b) the difficulties, if any, to be encountered in the matter of collection;

(c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and,

(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *In re ISE Corp.*, 2012 WL 1377085 (Bankr. S.D. Cal. April 13, 2012), *citing Martin v. Kane (In re A & C Properties)*, 784 F.2d 1377, 1381 (9th Cir.1986).

To be approved, the proposed settlements need only fall within the range of reasonably possible outcomes were the matters tried on their merits. *See In re Plant Insulation Co.*, 469 B.R. 843, 885 (Bankr. N.D. Cal. 2012), *quoting In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir.2007) (citations omitted) ("This reasonable equivalence standard is met if the settlement falls within the reasonable range of possible litigation outcomes. Because litigation outcomes cannot be predicted with mathematical precision, only if a settlement falls below the low end of possible litigation outcomes will it fail the reasonable equivalence standard."); *see also In re Penn Central Transp. Co.*, 596 F.2d 1102, 1114 (3rd Cir. 1979); *In re Indian Motorcycle, Inc.*, 289 B.R. 269, 283 (1st Cir. B.A.P. 2003) ("Compromises are generally approved if they meet the business judgment of the trustee [or debtor in possession].”); *see also In re Dalen*, 259 B.R. 586, 609-15 (W.D. Mich. 2001) (applying business judgment rule to process of approving settlement proposed by bankruptcy trustee [or debtor in possession]). In making its determination, a court should not substitute its own judgment for that of the Debtors. *In re Neshaminy Office Bldg. Assoc.*, 62 B.R. 798, 803 (E.D. Pa. 1986). Ultimately, this Court should approve the Insurance Settlements and the Continental Settlement Option if it finds that the Debtors exercised appropriate business judgment.

The Debtors believe that the Insurance Settlements and the Continental Settlement Option are in the best interests of the bankruptcy estates and their creditors.

1. Probability of Success in the Litigation.

In assessing a compromise, courts need not rule on disputed matters of fact or law; they need only “canvass the issues.” *Burton v. Ulrich (In re Schmitt)*, 215 B.R. 417, 423 (B.A.P. 9th Cir.1997), *citing In re Blair*, 538 F.2d 849, 851–852 (9th Cir.1976). The Debtors believe that the probability of success in any litigation to determine the obligations of the Settling Insurers has been duly accounted for in the Insurance Settlements. While the Debtors’ investigation of the potential claims against the Settling Insurers leads them to believe that each of these claims is meritorious, the Debtors’ insurance carriers have asserted various defenses to coverage (the “Coverage Disputes”) that will prove costly and time consuming to litigate to a conclusion and will further delay payment to the holders of Trust Claims. Sharp Declaration, ¶¶ 19, 21, and 23. The determination of the probability of success of litigation also entails consideration of the risk of uncertainty and the desire for expediency. The Debtors’ main duty here as debtors in possession is to expeditiously close the estate. *See In re Riverside–Linden Inv. Co.*, 925 F.2d 320, 322 (9th Cir.1991). Furthermore, although the Debtors disagree with the Settling Insurers’ contentions relating to the Coverage Disputes, if the Settling Insurers were to prevail upon any of their arguments, the Debtors’ potential recovery would be substantially reduced, including a risk that they might recover nothing. Sharp Declaration, ¶¶ 19, 21, and 23. In assessing the probability of the Debtors’ success in litigation with the Settling Insurers, the Debtors cannot be expected, through litigation, to exceed the recoveries proposed from their Insurance Settlements with Hartford, ACE or Bituminous or Continental (if exercised), each of which yields recoveries at, or in excess of, available limits. Sharp Declaration,

¶¶ 16, 17, 23. Furthermore, as discussed at length in section VI.D. of the Disclosure Statement, Safety National, as an excess insurance carrier, asserts certain unique coverage defenses that might delay or prevent any recovery from Safety National until all of the underlying policies are officially exhausted. The Debtors believe that the proposed settlement with Safety National, albeit below the limits of Safety National's excess Policies, appropriately accounts for the probability of success in litigation. Sharp Declaration, ¶ 21.

2. Likely Difficulties in Collection.

Because none of the Settling Insurers are insolvent, this factor did not influence the Debtors' decision making with respect to the Insurance Settlements.

3. Complexity of Litigation Involved, and the Expense, Inconvenience and Delay Necessarily Attending it.

Without question, the Coverage Disputes involve complex legal issues and would involve substantial litigation expense, particularly relating to discovery, disputes with respect to particular claims and trial. The Debtors' estates currently lack the funds from which to engage in these litigation efforts, and would have little choice but to enter into a contingent fee arrangement for the litigation of the Coverage Disputes. Under such circumstances, even if the Debtors were to prevail in their Coverage Disputes with each Settling Insurer, the recoveries for the benefit of holders of Trust Claims would be substantially diminished by the contingent fees charged by counsel.

Furthermore, the Debtors believe that, in the absence of settlement, if they were to obtain a favorable coverage determination in coverage actions against Hartford, Bituminous and/or ACE, that one or more of the settling insurers would likely appeal, further prolonging a final decision and increasing the litigation expense to the Debtors' bankruptcy estates. Sharp Declaration, ¶ 23.

Finally, so long as Coverage Disputes persist, Safety National would likely assert that the Debtors have not exhausted their primary insurance coverage, which could substantially delay the Debtors' efforts to obtain indemnity from Safety National on the excess policies it issued to the Debtors. Sharp Declaration, ¶¶ 21, 23.

4. The Interests of Creditors.

In approving a compromise, the bankruptcy court determines whether it is in the best interests

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of the estate and its creditors. *In re Schmitt*, 215 B.R. at 424. The creditors' interests are "paramount" and must be given "proper deference." *In re A & C Properties*, 784 F.2d at 1381. *See also In re Blair*, 538 F.2d 849, 851 (9th Cir.1976) (if properly investigated, the court should "give weight to the opinions of the trustee, the parties, and their attorneys"). A "court generally gives deference to a trustee's business judgment in deciding whether to settle a matter." *Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.)*, 292 B.R. 415, 420 (B.A.P. 9th Cir.2003). The interests of creditors strongly support approval of the Insurance Settlements. The proposed settlements are well within the range of likely outcomes of the litigants' disputes and the Debtors have concluded that each of the proposed settlements and Settlement Buy-Back Payments reflects an appropriate balance of costs, risks and potential rewards of litigation. Indeed, with respect to each of the three Settling Insurers that issued primary insurance policies to the Debtors, the contemplated buy-back repurchase price for the Policies is greater than the full amount of the acknowledged remaining applicable limits of liability that each Settling Insurer owes to the Debtors under the Policies, which makes it unlikely that litigation could lead to a better outcome than the settlements will provide, given contingent fees and the risks of litigation.

In addition, as discussed in section VI.D. of the Disclosure Statement, Safety National, the Settling Insurer that issued excess policies to the Debtors, has raised various Coverage Disputes relating to the issue of whether their policies have been, or could be, triggered by the Claims against the Debtors. In the absence of the proposed settlement, the Debtors would be forced to engage in lengthy litigation with Safety National before any coverage is obtained and might be forced to wait several years before the Debtors could demonstrate exhaustion of all underlying policies and obtain coverage, assuming it would prevail on other coverage issues. Sharp Declaration, ¶ 23. Thus, achieving the outcomes for which the Plan provides in the absence of these settlements (if it could be done at all) would involve extended litigation in which expenses likely could amount to hundreds of thousands of dollars, and even more in contingent fees – money that the Debtors lack. Sharp Declaration, ¶ In the absence of such settlements, individual creditors would face added litigation expense, a risk of disparate results and potential delays. *See* Sharp Declaration ¶¶ 23, 33. The proposed payments under the Insurance Settlements, if approved, will yield in excess of $16 million.

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Sharp Declaration, ¶¶ 16, 20. These funds would permit the Debtors to pay all allowed professional fees and administrative expenses and to provide a meaningful recovery for holders of Trust Claims. Thus, the Insurance Settlements are consistent with the best interests of both the Debtors and their creditors, and permit the Debtors and Trust Claimants to avoid the delays which would otherwise force the Trust Claimants to continue to wait for their recoveries pending resolution of the Coverage Disputes and face additional risk from litigation. Accordingly, the interest of creditors also favors approval of the Settlement Agreement.

B. The Sale of the Policies to the Settling Insurers Free and Clear of Interests Should Be Authorized under Section 363.

Section 363 provides that a debtor, "after notice and a hearing, may . . . sell . . . other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). To approve such sales, this Court must determine that the Debtors' decision to enter into each of the respective Settlement and Purchase Agreements is supported by an articulated business justification. *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 514 (Bankr. N.D. Ala. 2002) ("Under [the Lionel] standard, the Trustee [or debtor in possession] has the burden to establish sound business reasons for the terms of the proposed sale. Factors for the Court to consider in whether to approve the sale include: (1) any improper or bad faith motive, (2) price is fair and the negotiations or bidding occurred at arm's length, (3) adequate procedure, including proper exposure to the market and accurate and reasonable notice to all parties in interest."); *see also In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) (to approve a sale under section 363(b), "the court must not only articulate a sufficient business reason for the sale, it must further find it is in the best interest of the estate, i.e. it is fair and reasonable, that it has been given adequate marketing, that it has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith, and that it is an "arms-length" transaction). A debtor's application of its sound business judgment in the use, sale, or lease of property is subject to great judicial deference. *In re Moore*, 110 B.R. 924 (Bankr. C.D. Cal. 1990). If the Debtors articulate a sound business reason for the sale, provide adequate notice as required by section 363(b), and proceed in good faith to sell

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the property at a fair and reasonable price, then the Court should approve the sale.[7]

Because the Debtors can articulate a valid business reason for a sale, the business judgment rule acts as a presumption that the Debtors have acted on an informed basis, in good faith and in the honest belief that the sale is in the best interests of the Debtors and their creditors.

The Debtors' decision to sell the Policies as part of the Insurance Settlements is based upon sound business judgment and comes after years of arms' length negotiations. *See* Sharp Declaration, ¶¶ 16-20, 23, and 24. The Debtors ceased ordinary course operations several years ago and are liquidating their few remaining assets. Sharp Declaration, ¶¶ 4-10, 16-20. The Policies constitute the primary remaining assets of the bankruptcy estates, and their sale will help to provide recoveries for holders of Trust Claims that they might not otherwise receive. Sharp Declaration, ¶¶23, 32, 33.

As discussed above, the proposed purchase price set forth in each of the Insurance Settlements constitutes fair and reasonable consideration for the sale of the Policies at issue. Absent the settlement, the Debtors' ability to obtain any payment under the Policies remains speculative, as it is uncertain that the Debtors would ultimately prevail in their claims against the Settling Insurers. Moreover, with the exception of Safety National, an excess carrier with unique coverage defenses, the purchase price to be paid by each of the Settling Insurers under their respective Insurance Settlements represents more than payment in full of the remaining applicable aggregate limits of liability under the Policies. Sharp Declaration, ¶16. Furthermore, the Continental Settlement Option, if exercised, will yield 100% of the coverage limits remaining available from Continental. Sharp Declaration, ¶ 17. Although the settlement with Safety National does not meet or exceed the limits of the policies issued by Safety National, for the reasons discussed above, the Debtors' believe that each of their Insurance Settlements provide fair and reasonable consideration for the sale of each of the Policies at issue. Sharp Declaration, at ¶¶ 21, 23.

The Agreements are the product of extensive good faith, arm's-length negotiations between

[7] At least one court has concluded that the standards for approving a debtor's settlement of claims arising under insurance policies and a debtor's sale of those insurance policies are substantially the same. *In re Dow Corning Corp.,* 198 B.R. 214, 222 n.7 (Bankr. E.D. Mich. 1996) (concluding that the various phrasings of the test for approving a sale "are really just applications of the same business judgment test, and each test will render the same result. And since approval of a settlement also seems founded upon the business judgment test, it appears that the test for approving a settlement is not appreciably different from the test for approving a sale.").

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the Debtors and the Settling Insurers. Sharp Declaration, at ¶ 24. None of the Settling Insurers is an "insider" of the Debtors within the meaning of section 101(31), or is controlled by, or acting on the behalf of, any insider of the Debtors. Sharp Declaration, ¶ 23; *see, e.g., In re After Six, Inc.*, 154 B.R. 876, 883 (Bankr. E.D. Pa. 1993) (good faith found where officers, directors and employees of debtor had no apparent connection to purchasers). Therefore, the Court should find that each of the Settling Insurers is a "good faith purchaser" under section 363(m).

Finally, as set forth below, proper notice has been given to the interested creditors whose rights are or may be impacted by the proposed Insurance Settlements. Accordingly, the Debtors' proposed sale of the Policies as part of the Insurance Settlements is amply justified under section 363, and this Court should approve the sale of the Policies.

To further the sale of the Policies, the Debtors seek authorization to sell the Policies free and clear of any Interests that may be asserted against the Policies, with any and all such Interests attaching to the sale proceeds.[3] In accordance with section 363(f), a debtor in possession may sell property under section 363(b) "free and clear of any interest in such property of an entity other than the estate" so long as at least one of the several conditions enumerated in section 363(f) is satisfied. *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581 (4th Cir. 1996). Section 363(f) authorizes a trustee (or debtor in possession) to sell property under subsection (b) or (c) of section 363, free and clear of any interest in such property of an entity other than the estate only if:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

Pursuant to section 363(f)(2), a debtor may sell its property free and clear of an interest of an

[3] This will satisfy the requirement under section 363(e) of the Bankruptcy Code that a sale free and clear of interests under section 363(f) of the Bankruptcy Code provide adequate protection for those interests. *See In re Allied Products Corp.*, 288 B.R. at 536; *see also MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2nd Cir. 1988) ("It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition.").

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entity if that entity "consents." 11 U.S.C. § 363(f)(2). The Ninth Circuit Court of Appeals has not ruled on the issue of what constitutes consent for purposes of section 363(f)(2) of the Bankruptcy Code. However, courts in other circuits have found the failure to object to the proposed sale free and clear to constitute consent. *See, e.g., In re Borders Group, Inc.*, 453 B.R. 477, 484 (Bankr. S.D.N.Y. 2011) ("Under section 363(f)(2), a lien holder who receives notice of a sale but does not object within the prescribed time period is deemed to consent to the proposed sale, and assets thereafter may be sold free and clear of liens."); *see also In re Gabel*, 61 B.R. 661, 667 (Bankr.W.D.La.1985) (holding that implied consent is sufficient under § 363(f)(2) to sell property free and clear of liens); *In re Colarusso*, 295 B.R. 166, 175 (B.A.P. 1st Cir. 2003) *aff'd*, 382 F.3d 51 (1st Cir. 2004) (failure to object to sale or to seek adequate protection constitutes consent for purposes of §¶ 363(f)(2)); *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (7th Cir.2002); *In re Blixseth*, 2011 WL 1519914, at *14 (Bankr. D. Mont. April 20, 2011); *Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J.1994). Here, no parties in interest have objected to the Plan or the settlement buyback transactions included therein.

Section 363(f)(5) of the Bankruptcy Code provides that property may be sold free and clear of interests of an entity if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5).[8] To the extent that holders of Trust Claims have an interest in individual Policies, they hold such interests as tort claimants, and, therefore, each of them can "be compelled, in a legal or equitable proceeding, to accept money satisfaction of such interest." *See* 11 U.S.C. § 363(f)(5). Accordingly, the sale of the Policies free and clear of Interests satisfies the statutory prerequisites of section 363(f).

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[8] It is possible that not all of the Tort Claimants will receive payments equal to the full amount of their claims. However, full money satisfaction of a claimant's claim is not required. *See In re Grand Slam U.S.A., Inc.*, 178 B.R. 460, 461 (Bankr. E.D. Mich. 1995). Nor does section 363(f)(5) require that the purchase price for an asset exceed the interests of creditors in that asset. *In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) ("Section 363(f)(5) does not require that the sale price for the Property must exceed the value of the interests, but rather, only that the mechanism exists to address extinguishing the lien or interest without paying such interest in full."). To the extent that holders of Trust Claims have interests in the individual Policies being sold, those interests are adequately protected by their attachment to the sale proceeds and the use of those sale proceeds for the purpose of paying their Trust Claims as set forth in the Plan.

CONCLUSION

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

Dated: August 30, 2012

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