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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
SUNGARD AVAILABILITY SERVICES CAPITAL, INC. *et al.*,[1]	)	Case No. 19-22915 (RDD)
Debtors.	)	(Joint Administration Requested)

DEBTORS' SUPPLEMENTAL BRIEF IN SUPPORT OF CONFIRMATION OF THE JOINT PREPACKAGED PLAN OF REORGANIZATION OF SUNGARD AVAILABILITY SERVICES CAPITAL, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors") file this memorandum (this "Supplemental Brief")[2] in further support of confirmation of the *Joint Prepackaged Plan of Reorganization of Sungard Availability Services Capital, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (As Modified)* (as may be modified,

[1] The last four digits of the Debtors' tax identification number are Sungard Availability Services Capital, Inc. (7677); Sungard Availability Services Holdings, LLC (6403); Sungard Availability Services Technology, LLC (9118); Inflow LLC (9489); Sungard Availability Services, LP (6195); Sungard Availability Services Vericenter Inc. (4039); Sungard Availability Network Solutions, Inc. (1034). The location of the Debtors' service address for purposes of these chapter 11 cases is: 50 Main Street, Suite 1014, White Plains, NY 10606, USA.

[2] *Debtors' Memorandum of Law in Support of an Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' First Amended Joint Prepackaged Chapter 11 Plan* (the "Confirmation Brief"), filed contemporaneously herewith, is incorporated herein by reference.

supplemented, restated, and further amended from time to time, the "Plan"),[3] filed contemporaneously herewith, pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code") and in response to the forthcoming objection as communicated to the Debtors by the Office of the United States Trustee (the "U.S. Trustee").

Preliminary Statement

1. The U.S. Trustee has indicated to the Debtors that he will object to confirmation of the Plan on the basis of prepetition notice, assumption of employment obligations, application of third party releases to abstaining creditors that do not opt out, and application of exculpation beyond estate fiduciaries. The Debtors submit that each of the U.S. Trustee's forthcoming objections has been routinely rejected by this Court and others, and should be overruled.

2. Importantly, the Debtors' robust notice process has included frequent contact and communication with the U.S. Trustee. Counsel for the Debtors reached out to the U.S. Trustee on April 1, 2019 to notify him about the bankruptcy process and describe the Plan and notice thereof. On April 2, 2019, the Debtors served a Combined Hearing Notice (as defined below) on, among others, the U.S. Trustee.[4] The U.S. Trustee informed the Debtors that it would file an objection to the Plan and the plan process, but not until the Debtors officially commenced their chapter 11 cases.[5] On April 3, 2019, counsel for the Debtors hand-delivered (and delivered by email) the

[3] All capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Plan or the Confirmation Brief, as applicable.

[4] The *Amended Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York, as amended, effective June 27, 2013 (as adopted by General Order M 387)* (the "Guidelines") provide that, at least three (3) days prior to the anticipated filing date of the prepackaged case, the debtor should "(i) notify the United States Trustee of the Debtor's intention to file a prepackaged Chapter 11 case and (ii) supply the United States Trustee with two (2) copies of the Debtor's plan and disclosure statement (or other solicitation document)." The Debtors far exceeded the Guidelines' requirements.

[5] While this Supplemental Brief, which acts as a reply to the U.S. Trustee's informal objections and questions, is unorthodox as there is no filed objection yet, the Debtors believed it was important to officially respond to ensure there would be no delay to the confirmation of these prepackaged chapter 11 cases.

Plan, Disclosure Statement, and Combined Hearing Notice to the U.S. Trustee and convened a call with the U.S. Trustee on April 5, 2019 to discuss the manner by which the Debtors proposed to effectuate the Plan. On April 17, 2019, counsel for the Debtors hand-delivered a binder to the U.S. Trustee containing the Plan Supplement. On April 26, 2019, counsel for the Debtors sent the U.S. Trustee via email, and hand-delivered, first day pleadings that were posted on the Prime Clerk website that day. On April 30, 2019, counsel for the Debtors convened calls with U.S. Trustee to discuss the Plan and provide further information in response to the U.S. Trustee's questions.

3. On May 1, 2019, the Debtors' counsel and the U.S. Trustee spoke telephonically to better understand and attempt to address the nature and scope of the objections. During the solicitation period, the Debtors also made certain revisions to the Plan on account of the U.S. Trustee's comments. Ultimately, the Debtors were not able to resolve all outstanding issues with the U.S. Trustee, and the Debtors understand that the U.S. Trustee will file an objection to confirmation of the Plan prior to the first day hearing. The potential objections posed by the U.S. Trustee relate to:

(a) the payments to non-Debtor professionals;

(b) allowing creditors to enforce their rights in a non-bankruptcy forum;

(c) the nature of the opt-out mechanism for Holders entitled to vote that abstain from voting on the Plan;

(d) the procedures for prepetition noticing and soliciting;

(e) the employee compensation and benefits programs; and

(f) the exculpation for non-fiduciaries.

4. The Debtors believe that (a)-(b) have been resolved. With respect to the payment of non-Debtor professionals, the U.S. Trustee was concerned with the authority for such payments. Debtors' counsel explained to the U.S. Trustee that the non-Debtor professionals would be paid

under the terms of the debtor-in-possession financing order. Moreover, the Debtors believe that (b) is resolved pursuant to revisions made to the Plan.[6] The Debtors were not able to resolve items (c)-(f), however, because, as a matter of policy, the U.S. Trustee objects to these issues in most chapter 11 cases.

5. As the Court is aware, the Plan has overwhelming support from the Debtors' stakeholders—***100 percent of voting creditors voted in favor of the Plan***. In addition, all general unsecured creditors are unimpaired by these chapter 11 cases. And, not only did the Debtors effectuate proper service, the Debtors' management and advisors went above and beyond statutory notice and personally contacted the Debtors' major vendors and suppliers, landlords, banking providers, employees, and more to inform them about the prepackaged plan process and specified where pleadings could be obtained. As provided for in more detail in the Mansfield Declaration,[7] no parties have filed formal objections and, indeed, have frequently stated their support as the Debtors will emerge from chapter 11 stronger and more financially sound. Thus, the U.S. Trustee will be the only objecting party, and is raising issues that this Court has previously overruled in other chapter 11 cases—most recently in February of this year in *In re FULLBEAUTY Brands Holdings Corp*. The Debtors respectfully request that the U.S. Trustee's objections be overruled and the Court confirm the Plan.

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[6] In Section 7.1, the Debtors have revised the Plan to clarify that "a creditor that files a Proof of Claim with the Court retains any right it may have to pursue remedies in a forum other than the Court in accordance with applicable law."

[7] *Declaration of Michael L. Mansfield in Support of the Joint Prepackaged Plan of Reorganization of Sungard Availability Services Capital, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code,* (the "Mansfield Declaration") [Docket No. 21].

Argument

A. The Debtors Have Complied with All Notice Provisions Under the Bankruptcy Code, the Bankruptcy Rules, and the Guidelines.

6. Echoing the same arguments that the U.S. Trustee made in *In re Roust*, *In re Global A&T Electronics* and *In re FULLBEAUTY Brands Holdings Corp.*, the U.S. Trustee intends to argue that confirmation of the Plan violates rules 2002 and 3017 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). This Court overruled this exact objection in both of those, and other, chapter 11 cases.[8] Bankruptcy Rule 3017 provides that after a disclosure statement is filed, the Court must hold a hearing on at least 28 days' notice, as provided in Bankruptcy Rule 2002.[9] Bankruptcy Rule 3018(b) explicitly states that a debtor may obtain acceptances or rejections to a chapter 11 plan prior to the petition date.[10] Moreover, section 1126(b) of the Bankruptcy Code explicitly allows for solicitation of a chapter 11 plan prior to the petition date if either the solicitation was in compliance with any applicable non-bankruptcy law, rule, regulation governing the adequacy of disclosure in connection with such solicitation or, if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information as defined in section 1125(a) of the Bankruptcy Code.[11]

7. In these Chapter 11 Cases, creditors impaired under the Plan obtained more than 28 days' notice of the Plan, *i.e.* April 2, 2019 through May 2, 2019. The Debtors also provided actual

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[8] *In re Global A&T Electronics Ltd.,* Case No. 17-23931 (RDD) (Bankr. S.D.N.Y. Dec. 21, 2017) [Docket No. 66] Confirmation Hr'g Tr. 34:6-40:15; *In re Roust Corp.,* Case No. 16-23786 (RDD) (Bankr. S.D.N.Y. Jan. 6, 2017) [Docket No. 60] Confirmation Hr'g Tr. 46:22-47:1.

[9] *See* Fed. R. Bank. P. 2002, 3017.

[10] *See* Fed. R. Bank. P. 3018(b).

[11] *See* 11 U.S.C. § 1126(b).

notice to the Debtors' top thirty (30) largest general unsecured creditors, all equity holders, governmental parties (including the U.S. Trustee), and directors and officers. The Debtors also published notice of their intent to file prepackaged chapter 11 cases and seek approval of the Disclosure Statement and confirmation of the Plan at a combined hearing on April 4, 2019 in *The Wall Street Journal* and on April 5, 2019 in the *Financial Times International Edition.* The notice contained information as to how parties in interest may obtain copies of the Plan and Disclosure Statement. Thus, just as this Court ruled in *In re FULLBEAUTY Brands Holdings Corp.*, *In re Global A&T Electronics,* and *In re Roust*, the Debtors have complied with Bankruptcy Rules 2002, 3017, and 6003.[12]

B. The Assumption of the Employee Compensation and Benefits Programs Does Not Violate the Bankruptcy Code and Should be Approved.

8. The U.S. Trustee intends to object to the Debtors' assumption of the Compensation and Benefits Programs (as defined in the Plan) on the grounds that the Debtors should be required to satisfy section 503(c) of the Bankruptcy Code when assuming the prepetition Compensation and Benefits Programs pursuant to section 365 of the Bankruptcy Code under the Plan. This objection is premised on the alleged applicability of section 503(c) of the Bankruptcy Code.

9. To assume a prepetition contract, a debtor need only satisfy section 365(c) of the Bankruptcy Code.[13] The payments arising under the Compensation and Benefits Programs are no

[12] *See* Fed. R. Bankr. P. 2002, 3017, and 6003; *In re Global A&T Electronics Ltd.,* Case No. 17-23931 (RDD) (Bankr. S.D.N.Y. Dec. 21, 2017) Confirmation Hr'g Tr. 38:11-39:25 (". . . the notice periods have actually been complied with, 21 days and 28 days . . . [s]o, I conclude that the plan, in fact, complies with the Bankruptcy Rules, the Bankruptcy Code itself, and the SDNY Guidelines as far as the process by which the disclosure statement and plan have been proposed . . . given the fact that all creditors except for the classes that have overwhelmingly accepted the plan are under the plan unimpaired and therefore ride through the plan, I believe that that concern is really limited to issues that would be truly unforeseeable even if I were to delay confirmation . . .").

[13] *See In re Genco Shipping & Trading Limited*, 509 B.R. 455 (2014) (holding that the business judgment standard of section 365 of the Bankruptcy Code governs the assumption of a contract, including where insider compensation is included in such contract); *see also In re Global Crossing Ltd.,* 295 B.R. 726, 743 (Bankr.

different than any other claim arising under a prepetition contract assumed by a debtor. As such, section 503(c) does not apply to assumption of the Compensation and Benefits Programs.

10. Moreover, the U.S. Trustee cannot deny that section 503(c) only applies to payments made in chapter 11. The Debtors entered into the Compensation and Benefits Programs prepetition.[14] The Debtors do not seek to make payments to insiders during these chapter 11 cases, rendering section 503(c) inapplicable and mooting the U.S. Trustee's objection. Rather, the Debtors seek to assume the Compensation and Benefits Programs under the Plan, consistent with the assumed, unimpaired treatment of all other contracts, and continue to operate such programs in the ordinary course after the Effective Date. As explained by this Court in *In re Cenveo,* "the key point is that they [employee incentive plans] become effective only upon the effective date of the plan and not before."[15] To the extent the Debtors were to make payments under these programs before the Effective Date, the Debtors would seek appropriate court authority to do so at that time. It is axiomatic that debtors are not required to comply with the Bankruptcy Code *prior* to filing for bankruptcy or after the Debtors have reorganized. Such obligations are solely those of the Reorganized Debtors. The Debtors believe the current structure of the Compensation and Benefits

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S.D.N.Y. 2003) (business judgment standard governs); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.),* 722 F.2d 1063, 1071 (2d Cir. 1983).

[14] Importantly, the Management Incentive Plan and Management Cash Plan (as defined in the Plan) are not assumed Employee Benefits and Compensations Programs nor do they provide for any transfer to insiders during the pendency of the Chapter 11 Cases. The grant and distribution of any awards pursuant to the Management Incentive Plan and the Management Cash Plan, as applicable, are entirely within the discretion of the New Board. Accordingly, section 503(c) of the Bankruptcy Code is inapplicable to the Management Incentive Plan and the Management Cash Plan. *See In re Cenveo, Inc.,* Case No. 18-22178 (RDD) (Bankr. S.D.N.Y. Aug. 16, 2018) [Docket No. 687] Confirmation Hr'g Tr. 99:11-23, 111:19-21 (confirming the management incentive plan that distributed equity upon emergence); *see also In re Roust Corp.,* Case No. 16-23786 (RDD) (Bankr. S.D.N.Y. Jan. 6, 2017) [Docket No. 39] Combined Disclosure Statement and Confirmation Hr'g Tr. 72:8-13, 72:15-19, 72:10-22, 73:1-7 ("I don't believe this objection [by the U.S. Trustee to the management incentive plan] should be granted.").

[15] *In re Cenveo, Inc.,* Case No. 18-22178 (RDD) (Bankr. S.D.N.Y. Aug. 16, 2018) [Docket No. 687] Confirmation Hr'g Tr. 111:19-21.

Programs, with their focus on driving value after emergence from these Chapter 11 Cases, is a reasonable exercise of the Debtors' business judgment, that section 503(c) of the Bankruptcy Code is inapplicable, and the U.S. Trustee's objection should be overruled.

C. The Third Party Release and Opt-Out is Appropriate.

11. The U.S. Trustee will object to the inclusion in the Third-Party Release of parties that abstain from voting but fail to opt-out of the Third-Party Release.[16] Contrary to the U.S. Trustee's position, the Debtors respectfully submit that there is ample support and evidence in the Bankruptcy Code and Second Circuit case law for binding non-voting creditors to the Third-Party Release when such parties fail to properly opt out.

12. Specifically, in its prior objections to similar release provisions, the U.S. Trustee has relied on the *Chassix* decision and its progeny,[17] which this Court has already found to be unpersuasive. This Court has recognized that the court in *Chassix* was deprived of the benefit of an analysis by the parties in that case regarding the applicability and scope of section 1141(a) to plan release provisions and was instead focused on the due process failings of the confusing release provisions in that case.[18] However, no party, including the U.S. Trustee, has asserted that the release provisions in these cases are in any way unclear, and accordingly, such reliance on *Chassix*

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[16] As set forth in the Voting Declaration, no voting creditor has voted to reject the Plan. Accordingly, to the extent the U.S. Trustee also objects to the Third-Party Release binding rejecting voting creditors, such objection is moot.

[17] [The U.S. Trustee also cites to *SunEdison* and *Aegean* for the same proposition, which for the reasons set forth herein with regard to *Chassix*, are similarly unpersuasive. *See, e.g., In re Tops Holding II Corp.* No. 11-22279 (RDD) (S.D.N.Y. Feb. 21, 2018) Nov. 8, 2018 Hr'g Tr. at 36:10-17 (And I don't fault [the SunEdison Judge] for not recognizing the source because no one raised it to him. But why isn't [section 1141(a)] the source for a duty to speak, and therefore, distinguish these facts from SunEdison").]

[18] *See Tops Holding II Corp.* No. 11-22279, Nov. 8, 2018 Hr'g Tr. at 36:18-37:16.

and its progeny ignores this Court's affirmation of releases similar or nearly identical to the Third-Party Release in these cases pursuant to section 1141(a).[19]

13. Section 1141(a) of the Bankruptcy Code provides that "[e]xcept as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor... and any creditor…whether or not the claim or interest of such creditor…is impaired under the plan and **whether or not such creditor**…**has accepted the plan**."[20] This Court has expounded upon section 1141 of the Bankruptcy Code, finding that it binds creditors to a plan's provisions—including third-party releases—if creditors receive adequate notice of a plan and terms provided therein but fail to properly object to it:

> But I firmly believe that Congress intended Chapter 11 plans to be broader than [a contract] and the effect of a Chapter 11 plan to be broader than that one-on-one agreement. And that's clearly laid out in [section] 1141 of the Bankruptcy Code. It gives people a last chance to object to a plan. And if they don't object and the plan is confirmed, it's binding on them, its terms are. And that's in one section of [section] 1141, and that's separate and [a]part from dealing with their claims. The whole plan is binding on them. ***In my view if someone doesn't object to that…and it's clearly described to them and its effect is clearly described to them, it's binding.***[21]

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[19] *In re MPM Silicones*, LLC, 2014 WL 4436335, at *32 ("While it is true that third-party releases and related injunctions in Chapter 11 plans and confirmation orders are, under the law of the Second Circuit, proper only in rare cases, see [*Metromedia*], if they are consensual or are not objected to after proper notice, courts generally approve them unless they are truly overreaching on their face. I do not find anything truly offensive in these releases and, thus, to the extent that…a party…***did not opt out notwithstanding the clear notice in the ballot that stated, in upper-case letters, 'If you voted to reject the plan and you did not opt out of the release provisions by checking the box below, or if you voted to accept the plan regardless of whether you checked the box below,*** you will be deemed to have conclusively, absolutely, unconditionally, irr*evocably and forever released* and discharged the Released Parties from any and all claims and causes of action") (emphasis added).

[20] 11 U.S.C. §1141(a) (emphasis added).

[21] *See In re Tops Holding II Corp*. No. 11-22279 (RDD) (S.D.N.Y. Feb. 21, 2018) Sept. 27, 2018 Hr'g Tr. at 33:25-34:8 (emphasis added). *See also In re MPM Silicones*, LLC, 2014 WL 4436335, at *32 ("While it is true that third-party releases and related injunctions in Chapter 11 plans and confirmation orders are, under the law of the Second Circuit, proper only in rare cases, see [*Metromedia*], if they are consensual or are not objected to after proper notice, courts generally approve them unless they are truly overreaching on their face. I do not find anything truly offensive in these releases and, thus, to the extent that they have not been objected to or a party… ***did not opt out notwithstanding the clear notice in the ballot that stated, in upper-case letters, 'If you voted to reject the plan and you did not opt out of the release provisions by checking the box below, or if you voted to accept the plan regardless of whether you checked the box below, you will be deemed to have conclusively,***

14. Accordingly, the key issue regarding compliance with section 1141 is proper notice of a plan's release provisions and satisfaction of due process. Despite the expedited timeline contemplated by the Debtors and the RSA Parties in these Chapter 11 Cases, the Debtors' management team and advisors have worked diligently to communicate with creditors regarding the provisions of the Plan, including the Third-Party Release. As detailed above, the Debtors' provided broad notice of these chapter 11 cases, including the Third-Party Release, to voting creditors and the general public, complying with or otherwise exceeding the notice guidelines for prepackaged chapter 11 cases in this district and the applicable Bankruptcy Rules.[22] Additionally, the Combined Hearing Notice, Disclosure Statement, and Ballots provided specific notice of the Third-Party Release in bold, conspicuous font, including a full reproduction of the text of the Third-Party Release and the definitions of "Released Party" and "Releasing Parties" contained in the Plan. These materials also included several warnings that Releasing Parties could have their rights affected by the Debtor Release and Third-Party Release. All voting creditors were given comprehensive and detailed notice of the Third-Party Releases, their impact on them and their rights, the opportunity and need to opt out, their right to object to confirmation of the Plan, and

absolutely, unconditionally, irrevocably and forever released and discharged the Released Parties from any and all claims and causes of action to the extent provided in Section 12.5 of the plan,' the plan may be confirmed consistent with both Metromedia and the case law interpreting it") (emphasis added); *Lawski v. Frontier Ins. Grp., LLC* (*In re Frontier Ins. Grp., Inc.*), 585 B.R. 685, 693 (Bankr. S.D.N.Y. 2018) ("References to chapter 11 plans as contracts or agreements -- while useful for purposes of interpreting plans . . . -- are only by analogy, however. The binding effect of a chapter 11 plan is in fact premised on statutory and common law claim preclusion. . . . First, in addition to providing for the discharge of a reorganizing debtor under a chapter 11 plan, section 1141 of the Bankruptcy Code prescribes the binding nature of a confirmed plan.") (internal citations omitted).

[22] Guidelines, Art. X ("Notice of the filing of the Plan and Disclosure Statement (or other solicitation document) and of the hearing to consider compliance with disclosure requirements and confirmation of the Plan must be given to all parties-in-interest. Paper copy of a notice must be mailed; service of a notice of electronic filing will not suffice. No further distribution of the Plan and Disclosure Statement (or other solicitation document) beyond that which occurred pre-petition is required unless requested by a party-in-interest."). *See also* Fed. R. Bank. P. 2002, 3017.

still no creditors entitled to vote on the Plan filed objections to the Third-Party Release or opted out. Accordingly, the Debtors submit that the Third-Party Release satisfies the standards of section 1141 of the Bankruptcy Code.

15. Additionally, courts in this district, have regularly found that parties that have been provided adequate disclosure and notice regarding release provisions consent to such releases when they vote in favor of a plan ***or*** abstain from voting and do not opt out of releases.[23] Significantly, this Court has approved plans that bind funded-debt creditors to releases that abstain from voting and fail to opt out in cases with ***higher abstention percentages*** than these Chapter 11 Cases.[24] As long as the proper procedural steps are taken, consent via an opt-out mechanism (including for stakeholders that abstain from voting) is proper and binding. This Court made its position on the issue clear in *In re 21st Century Oncology*:

> [T]hey will at least get the [opt-out] form, so they have the right to opt-out. That just raises the issue as to whether it's improper consent to have opt-out as opposed to opt-in. And frankly . . . if it's clear enough, I think opt-out is fine to me. If you care enough, you will opt out. . . . [T]hat's sufficient, giving people the right to opt-out is sufficient.[25]

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[23] *E.g.*, *In re FULLBEAUTY Brands Holdings Corp.*, No. 19-22185 (RDD) (approving third-party releases which were solicited via an opt-out mechanism for creditors that abstain from voting); *In re Cenveo, Inc.*, No. 18-22178 (RDD) Jun. 7, 2018 Hr'g Tr. 41:19-42:15 ("There is extensive case law, and I just wrote a lengthy opinion on this issue, that under Section 1141 of the code which is a statutory preclusion principle or provision as well as common law, res judicata and collateral estoppel provisions that a plan has the ability, if properly disclosed, to bind parties who do not speak up. There's extensive Circuit Court authority on that issue as to interests, property interests, let alone litigation claims."); *In re 21st Century Oncology*, Adv. No. 17-08280 (RDD) Oct. 16, 2017 Hr'g Tr. 26:3-4 ("[G]iving people the right to opt-out is enough."); *In re Calpine Corp.*, No. 05-60200 BRL, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) ("Such releases by Holders of Claims and Interests provide for the release by Holders of Claims and Interests that vote in favor of the Plan, who abstain from voting and choose not to opt out of the releases, or who have otherwise consented to give a release, and are consensual."); *In re DBSD N. Am., Inc.*, 419 B.R. at 218–19 ("Except for those who voted against the Plan, or who abstained and then opted out, I find the Third Party Release provision consensual and within the scope of releases permitted in the Second Circuit.").

[24] *See e.g.*, *In re Cenveo, Inc.*, in which 6.7%, 33.6%, and 14.7% respectively of creditors in voting classes abstained from voting.

[25] *In re 21st Century Oncology*, Adv. No. 17-08280 (RDD) (Oct. 16, 2017) Hr'g Tr. 25:15-26:4.

16. Further, the Third-Party Release is an important component of the Restructuring Support Agreement and Plan. As with the Debtor Release, each Released Party has made a substantial contribution to the Debtors restructuring justifying their release. Evidently, the value provided by such Released Parties was not lost on the Debtors' creditors, who overwhelmingly voted in favor of the Plan. Many of these valuable contributions are outlined in the Confirmation Brief. Accordingly the U.S. Trustee's objection to the Third Party Release should be overruled.

D. The Exculpation Provision Is Appropriate.

17. The U.S. Trustee will also object to the Debtors' exculpation for non-estate fiduciaries. However, exculpation provisions that extend to prepetition conduct and cover non-estate fiduciaries are regularly approved.[26] This is because courts evaluate exculpation provisions based upon a number of factors, including whether the beneficiaries of the exculpation have participated in good faith in negotiating the plan and bringing it to fruition, and whether the

[26] *See, e.g., In re Cenveo, Inc.,* Case No. 18-22178 (RDD) (Bankr. S.D.N.Y. Aug. 21, 2018) [Docket No. 685] (confirming a plan containing an exculpation extending to prepetition conduct and covering non-estate fiduciaries); *In re Oneida Ltd.,* 351 B.R. 79, 94, n.22 (Bankr. S.D.N.Y. 2006) (considering an exculpation provision covering a number of prepetition actors with respect to certain prepetition actions, as well as postpetition activity); *In re Granite Broad. Corp.,* 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (providing exculpation of controlling shareholder as well as estate fiduciaries); *see also In re Eastman Kodak Co.,* Case No. 12-10202 (Bankr. S.D.N.Y. Aug. 23, 2013) (overruling U.S. Trustee objection to exculpation of both estate fiduciaries and non-fiduciaries from liability for "any prepetition or postpetition act taken or omitted to be taken in connection with, or arising from or relating in any way to, the chapter 11 cases"); *In re Neff Corp.,* Case No. 10-12610 (Bankr. S.D.N.Y. Sept. 20, 2010) (estate and non-estate fiduciaries "shall neither have, nor incur any liability to any Entity for any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating . . . the Plan"); *In re Charter Commc'ns, Inc.,* Case No. 09-11435 (Bankr. S.D.N.Y. Nov. 17, 2009) (approving exculpation of estate fiduciaries and non-fiduciaries for "any prepetition or postpetition act taken or omitted to be taken in connection with, or related to . . . the restructuring of the Company"); *In re Cengage Learning, Inc.,* Case No. 13-44106 (ESS) (Bankr. E.D.N.Y. Mar. 14, 2014) (approving exculpation provision for estate fiduciaries and non-fiduciaries for "any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating, soliciting, preparing, disseminating, confirming, implementing, or consummating the Plan"); *In re Global A&T Electronics Ltd.*, Case No. 17-23931 (RDD) Confirmation Hr'g Tr. 115:15-116:23, Dec. 21, 2017 (explaining that "this was a very heavily negotiated process with, you know, three different ad hoc committees raising their hands at various times. So, I will overrule that objection. except as, of course, the Debtors have already met it, which was important and which I'm grateful for").

provision is integral to the plan.[27] Additionally, courts have specified certain parties that generally are appropriate candidates for exculpation, including where the exculpation is consensual and properly noticed or parties to "unique transactions" who "contribute substantial consideration to the reorganization."[28]

18. Here, the Debtors propose to exculpate the Exculpated Parties whose contributions and concessions have made the Plan possible.[29] The exculpation provision was a critical component of forming the Restructuring Support Agreement and Plan, as the protection it affords was essential to the promotion of good-faith plan negotiations that resulted in the global settlement embodied in the Plan, which might not otherwise have occurred had the negotiating parties faced the risk of future collateral attacks from other parties.[30] Ultimately, the exculpation provides protection to those parties that worked hand-in-hand with the Debtors and were instrumental in assuring the success of the Debtors' restructuring.

19. Significantly, the exculpation does not protect Exculpated Parties from liability that is determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence. Exculpation provisions with such exclusions are routinely approved in plans of

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[27] *See In re Bally Total Fitness of Greater N.Y., Inc.,* 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *In re WorldCom, Inc.,* 2003 WL 23861928, at *27 (approving an exculpation provision where it "was an essential element of the Plan formulation process and negotiations"); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.),* 326 B.R. at 501 (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

[28] *See In re Adelphia Commc 'ns Corp.*, 368 B.R. at 268.

[29] *See* Koza Decl., ¶¶ 17-18.

[30] *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d at 293 (protection against legal exposure may be key to settlement negotiations involving complex issues and multiple parties); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.),* 326 B.R. at 503 (exculpation necessary to encourage parties to participate in plan negotiation process; lack of exculpation would chill parties' willingness to participate).

reorganization in cases similar to these chapter 11 cases.[31] Without the significant contributions of the Exculpated Parties, these chapter 11 cases would have suffered from severe delay and expense. Instead, the concerted efforts of the Exculpated Parties were instrumental to the formation of the Plan and achievement of the unanimous support for the Plan by the vast majority of key stakeholders.[32] Further, exculpation provisions serve an important purpose—they extend to deserving parties and protect them from parties who failed to timely assert their rights and who, instead, could attempt to reopen settled litigation through back door methods.[33] In light of the foregoing, the protections afforded by the Exculpation are reasonable and appropriate. Accordingly, the U.S. Trustee objections thereto should be overruled.

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[31] *In re Adelphia Commc 'ns Corp.*, Case No. 02-41729 (REG) (Bankr. S.D.N.Y. Jan. 5, 2007) [Docket No. 12952] (approving exculpation for, *inter alia,* "all prepetition activities leading to the promulgation and confirmation of this Plan," as well as for "any act or omission in connection with, or arising out of the Debtors' restructuring, including, without limitation the negotiation and execution of this Plan, the Reorganization Cases . . . and . . . all documents ancillary thereto"); *In re Ampex Corp.,* Case No. 08-11094 (AJG) (Bankr. S.D.N.Y. July 31, 2008) [Docket No. 386] (same); *In re Oneida Ltd.,* Case No. 06-10489 (ALG) (Bankr. S.D.N.Y. Aug. 30, 2006) [Docket No. 387] (approving exculpation provision precluding liability for "any pre -petition or post-petition act or omission in connection with, or arising out of, the Disclosure Statement, the Plan or any Plan Document, including any Bankruptcy Court orders related thereto, the solicitation of votes for and the pursuit of Confirmation of this Plan, the Effective Date of this Plan, or the administration of this Plan or the property to be distributed under this Plan"); *In re Wellman, Inc.,* Case No. 08-10595 (SMB) (Bankr. S.D.N.Y. Jan. 14, 2009) [Docket No. 774] (approving exculpation provision precluding liability arising from "any Claim related to any act or omission in connection with, relating to, or arising out of the Debtors' in or out of court restructuring efforts . . . or any contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases . . ., including . . . the Plan Sponsorship Agreement . . . or any other agreement").

[32] *See* Koza Decl., ¶¶ 17-18.

[33] *See In re Global A&T Electronics Ltd.,* Case No. 17-23931 (RDD) Confirmation Hr'g Tr. 116:8-117:8, Dec. 21, 2017 ("So, I actually think 1125(e) can well apply to third parties who aren't necessarily fiduciaries as long as they're participating in the exchange. Now here, the people who really participated all sort of are releasing each other, but I guess I appreciate your point that this probably doesn't add anything but I don't think it adds anything in a bad way, either. I think it's consistent with the statute and the case law and, again, it's to prevent strike suits. It's to not give anyone a back door and particularly given the fact that the releases themselves say, "to the extent permitted by applicable law", you know, that's a potential loophole that the exculpation closes. . . It's basically to protect that finding that this was good faith so you can't go back and sue some third party who said, you know, you didn't act in good faith, because it's already been found.")

Conclusion

20. For all of the reasons set forth herein and in the Confirmation Brief, the Debtors submit that the Plan satisfies all of the applicable requirements of the Bankruptcy Code. Accordingly, the Debtors respectfully request that the Court overrule the U.S. Trustee's objection and confirm the Plan.

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New York, New York

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