No. 24-

IN THE

Supreme Court of the United States

SC SJ HOLDINGS LLC AND FMT SJ LLC,

Petitioners,

v.

PILLSBURY WINTHROP SHAW PITTMAN LLP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Chapter 11 reorganization plans often contain binding consensual releases. *See, e.g., In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993). Non-consensual releases of non-debtor third parties are invalid. *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024). Attorneys generally may not contract with their clients to prospectively release claims for the attorneys' malpractice. *See, e.g.,* Model Rules of Prof'l Conduct R. 1.8(h) (2018).

Following Third Circuit precedent, the lower courts concluded that a non-consensual release immunizing Petitioners' bankruptcy attorneys from malpractice claims is enforceable once a bankruptcy plan is confirmed and substantially consummated, even if Petitioners' attorneys did not obtain their clients' informed consent to the release and Petitioners could not know of the malpractice or harm until *after* the plan was confirmed and substantially consummated. The lower courts found that 11 U.S.C. §§ 1127 and 1144 provide the exclusive means to modify or revoke a Chapter 11 plan and rejected Petitioners' request to review the validity of the release pursuant to Fed. R. Civ. P. 60 and Fed. R. Bankr. P. 9024. The circuits are split on this issue, a split this Court specifically identified, but did not settle, in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 n.9 (2010). The questions presented are:

1. Whether a non-consensual third-party release of debtors' attorneys for malpractice claims is enforceable when included in a confirmed Chapter 11 plan even though debtors' attorneys did not advise or inform debtors of the scope of the release or obtain the debtors' informed consent?

2. Whether a bankruptcy plan may include a release of and exculpate debtors' attorneys from existing or prospective malpractice claims without the debtors' informed consent?

3. Whether Fed. R. Civ. P. 60 and Fed. R. Bankr. P. 9024 permit a court to grant debtors relief from a non-consensual third-party release of malpractice claims against debtors' attorneys contained in a confirmed and substantially consummated Chapter 11 plan?

PARTIES TO THE PROCEEDING

Petitioners are SC SJ Holdings LLC and FMT SJ LLC, the reorganized Chapter 11 debtors in the bankruptcy proceedings below, and they were the appellants in the court of appeals.

Respondent is Pillsbury Winthrop Shaw Pittman LLP, the appellee below in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners SC SJ Holdings LLC and FMT SJ LLC ("Petitioners") make the following disclosure:

1) For non-governmental corporations, identification of parent corporations:

a) FMT SJ Holdings LLC; b) ST SJ LLC; c) Eagle Canyon Capital LLC; d) Eagle Canyon Partners LLC; e) Eagle Canyon Holdings LLC; and f) Sotech LLC.

2) For non-governmental corporations, a listing of all publicly held companies that hold 10% or more of the party's stock:

None.

RELATED PROCEEDINGS

In re: SC SJ Holdings LLC, et al., No. 21-10549-JTD, U.S. Bankruptcy Court for the District of Delaware. Judgment entered May 12, 2022.

In re: FMT SJ LLC, No. 21-10521-JTD, U.S. Bankruptcy Court for the District of Delaware. Order Directing Joint Administration entered March 12, 2021.

SC SJ Holdings LLC, et al. v. Accor Management US Inc., No. 21-50992-JTD, U.S. Bankruptcy Court for the District of Delaware. Closed February 9, 2022.

In re: SC SJ Holdings LLC, et al., No. 1-22-cv-00689-MN, U.S. District Court for the District of Delaware. Judgment entered March 22, 2023.

SC SJ Holdings LLC, et al. v. Pillsbury Winthrop Shaw Pittman LLP, No. 1:23-cv-00808-MN, U.S. District Court for the District of Delaware. Closed September 29, 2023.

SC SJ Holdings LLC, et al. v. Pillsbury Winthrop Shaw Pittman LLP, No. 1:23-cv-00957-MN, U.S. District Court for the District of Delaware. Closed May 6, 2024.

In re: SC SJ Holdings LLC, et al., No. 23-1731, U.S. Court of Appeals for the Third Circuit. Judgment entered March 28, 2024.

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SC SJ Holdings LLC and FMT SJ LLC respectfully petition for a writ of certiorari to review the judgment of the Third Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is unreported. App. A, p.1a. The district court's order affirming the bankruptcy court's orders is unpublished. App. B, p.8a. The bankruptcy court's order denying Petitioners' request for relief is unpublished. App. C, p.39a. The bankruptcy court's order confirming the bankruptcy plan at issue is unpublished. App. D, p.48a.

STATEMENT OF JURISDICTION

The court of appeals issued its original opinion on March 28, 2024. App. A, p.1a. On June 10, 2024, Justice Alito extended the time to file a petition for writ of certiorari to and including July 26, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Titles 11 and 28 of the U.S. Code, Fed. R. Civ. P. 60, Fed. R. Bankr. P. 9024, and Model Rules of Prof'l Conduct R. 1.8 (as adopted by Del. Bankr. L.R. 9010-1(f)) are set forth in the appendix. App. E, pp.116a – 139a.

STATEMENT

Non-consensual third-party releases in Chapter 11 plans are invalid. *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024). Lurking in countless Chapter 11 plans – including the plan in this case – are provisions that contain non-consensual third-party releases that release debtors' attorneys from any existing or prospective malpractice claims, exculpate debtors' attorneys, and enjoin debtors from bringing malpractice claims against debtors' attorneys. Debtors often do not know about such releases because the releases benefit debtors' attorneys, and debtors' attorneys do not advise debtors that the scope of such releases includes the attorneys. Debtors often do not discover bankruptcy attorneys' malpractice until after plan confirmation and substantial consummation. Outside the context of bankruptcy law, such prospective or non-consensual releases between clients and their attorneys are usually unenforceable. *See* App. E p.139a (Model Rule 1.8(h)).

Petitioners' confirmed Chapter 11 plan contains a release and exculpation provisions immunizing their bankruptcy lawyers, Respondent Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury"), from malpractice claims. Petitioners did not consent to releasing Pillsbury from malpractice claims, and Pillsbury did not advise them they were doing so via the Chapter 11 plan. Pillsbury's malpractice did not manifest itself until after the plan was confirmed and substantially consummated. Petitioners sought relief in the bankruptcy court from the invalid release pursuant to Fed. R. Civ. P. 60(b). Following circuit precedent, the lower courts, including the Third Circuit, rejected Petitioners' efforts to

obtain relief under Rule 60(b) from the non-consensual, prospective, third-party release based upon an erroneous application of 11 U.S.C. §§ 1127 and 1144, which preclude plan modification or revocation after confirmation and substantial consummation.

But other circuits permit review of confirmed and substantially consummated Chapter 11 plans under Rule 60(b). This Court has recognized this split of authority, noting that some courts permit relief from confirmed Chapter 11 plans under Rule 60(b) while others do not. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 n.9, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) ("*Espinosa*"). The Third Circuit, for example, holds that Rule 60(b), as a procedural rule, cannot modify or expand the Bankruptcy Code, including 11 U.S.C. §§ 1127 and 1144, which narrowly define the circumstances and timing of any efforts to modify or revoke a Chapter 11 plan. In contrast, the Second Circuit, for example, recognizes that orders confirming Chapter 11 plans are final judgments that are subject to the narrow avenues of relief defined by Fed. R. Civ. P. 60(b)(1)-(6).

The Second Circuit's view is correct because all final judgments are subject to the narrow exceptions to judgment finality set forth in Rule 60(b), and permitting such relief does not modify or otherwise revoke Chapter 11 plans in contravention of 11 U.S.C. §§ 1127 or 1144. Further, nothing in the Bankruptcy Code states that confirmed Chapter 11 plans are exempt from relief under Rule 60(b) or that a court can never examine otherwise invalid and unenforceable portions of a judgment post-confirmation simply because the judgment was issued by a bankruptcy court. If such were the case, a confirmation

order could turn an illegal and unenforceable provision into a legal and enforceable one through the alchemy of bankruptcy procedure.

This is an important and recurring issue in bankruptcy law because, as recognized by the lower courts and Pillsbury, the types of releases at issue are common, if not ubiquitous, in Chapter 11 plans. While legal malpractice claims by debtors against their bankruptcy attorneys seem rare, that is perhaps because of the very issue presented here: debtors are often enjoined from pursuing such malpractice claims because their attorneys have inserted self-serving boilerplate language into the Chapter 11 plan but never explained the language to the debtors or obtained the debtors' informed consent. Courts help promote the integrity of the legal profession by limiting, rather than expanding, the circumstances in which attorneys immunize themselves from malpractice claims and by helping ensure that attorneys inform and advise their clients of potential conflicts of interest and the risks of releasing claims or limiting clients' rights.

This case presents an ideal vehicle for the Court to resolve a well-known and unresolved circuit split; review the validity of non-consensual, third-party releases of debtors' attorneys in Chapter 11 plans under *Harrington*; and determine whether courts can review such releases after confirmation and substantial consummation.

A. Legal Background

1. The Bankruptcy Code Governs Chapter 11 Plan Creation, Modification, and Revocation.

The Bankruptcy Code gives the "honest but unfortunate debtor" a fresh start. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367, 125 S. Ct. 1105, 166 L. Ed. 2d 956 (2007). Once the bankruptcy court confirms a Chapter 11 plan, it "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). That discharge "voids any judgment" against the debtor for a discharged debt. 11 U.S.C. § 524(a)(1). It also "operates as an injunction against the commencement or continuation of an action" to recover a discharged debt from the debtor. *Id.* § 524(a)(2). The "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Id.* § 524(e).

After a debtor files a Chapter 11 bankruptcy petition, the debtor operates its business under the bankruptcy court's supervision as a "debtor-in-possession." *See* 11 U.S.C. §§ 1107(a), 1108, 1121. In the meantime, debtors' attorneys, and stakeholders (such as creditors) devise a plan of reorganization. *See* 5 William L. Norton, Norton Bankruptcy Law and Practice § 91:4 (3d ed. rev. 2022). Debtors' bankruptcy attorneys are intimately involved in crafting the Chapter 11 reorganization plan. *See* 11 U.S.C. § 1121(a)-(c).

A Chapter 11 plan takes effect and becomes binding upon confirmation. *See* 11 U.S.C. § 1141(a). Such plans are implemented when funds are distributed and claims

discharged – this is called substantial consummation. *See* 11 U.S.C. § 1101(2).

A debtor can modify a plan before or after confirmation so long as it is before substantial consummation. *See* 11 U.S.C. § 1127(a), (b). Within 180 days after confirmation, debtors can revoke plans only if fraud exists. *See* 11 U.S.C. § 1144. Revocation is a drastic, all-or-nothing remedy that "put[s] the parties back to their pre-confirmation positions, effectively attempting to 'unscramble the egg'" of Chapter 11 reorganization. *Tenn-Fla Partners v. First Union Nat'l Bank of Fla.*, 229 B.R. 720, 737 (W.D. Tenn. 1999), *aff'd sub nom. In re Tenn-Fla Partners*, 226 F.3d 746 (6th Cir. 2000); *In re Winom Tool & Die, Inc.*, 173 B.R. 613, 616 (Bankr. E.D. Mich. 1994).

2. Circuits Are Split on Whether Fed. R. Civ. P. 60(b) Enables Courts to Adjust Confirmed and Substantially Consummated Plans.

A confirmed Chapter 11 plan is a final judgment. *See, e.g.*, *Kelley v. South Bay Bank (In re Kelley)*, 199 B.R. 698, 703 (B.A.P. 9th Cir. 1996). Litigants can typically obtain relief from final judgments if they establish one or more of the grounds set forth in Rule 60(b) and file a motion for relief within a reasonable time. *See* Fed. R. Civ. P. 60(b), (c).[1] In bankruptcy practice, however, whether a debtor can obtain post-judgment relief depends on in which circuit it filed its bankruptcy petition.

Some circuits apply Rule 60(b) to allow relief from

1. Fed. R. Bankr. P. 9024 makes Fed. R. Civ. P. 60(b) part of bankruptcy procedure.

bankruptcy plans after confirmation and substantial consummation. *See, e.g., Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005), *abrogated on other grounds by Espinosa*, 559 U.S. 260; *Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 307 B.R. 28, 32 (B.A.P. 6th Cir. 2004), *aff'd*, 412 F.3d 679 (6th Cir. 2005); *Bowen v. United States (In re Bowen)*, 174 B.R. 840, 848 (Bankr. S.D. Ga. 1994); *Carter v. Peoples Bank and Trust Co. (In re BNW, Inc.)*, 201 B.R. 838, 846–47 (Bankr. S.D. Ala. 1996); *In re 401 East 89th Street Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998). Other circuits hold that fraud under section 1144 is the exclusive means by which a plan can be revoked (and only if within 180 days of confirmation), and section 1127 is the exclusive means by which a plan can be modified; thus Rules 60(b) and 9024 do not authorize a court to alter a confirmed and substantially consummated plan. *See, e.g., Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq),* 153 F.3d 113, 119 n.8 (3d Cir. 1998); *Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.)*, 961 F.2d 1445, 1447 (9th Cir. 1992); *In re Newport Harbor Assocs.*, 589 F.2d 20, 22 (1st Cir. 1978). This Court explicitly recognized this circuit split in *Espinosa*, 559 U.S. at 270 n.9.

Since this case arose in the Third Circuit, the lower courts adopted the latter view and rejected Petitioners' request for relief under Rules 60(b) and 9024 from an otherwise invalid and unenforceable release because Petitioners initiated their efforts to invalidate the release more than 180 days after confirmation and substantial consummation. *See* App. A, p.3a-4a.

B. Factual and Procedural Background

1. Pillsbury Advises Petitioners that Chapter 11 Bankruptcy Will Solve the Hotel's Financial Struggles Arising from the COVID-19 Pandemic.

Petitioners owned the largest convention hotel in San Jose, California. Bankr. D.I. 89, p.16. The hotel was burdened with a hotel management agreement ("HMA") that required it to be branded as a Fairmont hotel and managed by Fairmont Hotels & Resorts (U.S.), Inc., now known as Accor Management US Inc. ("Accor"). *Id.* p.17. Petitioners wished to change the "flag" from Fairmont to another brand, *e.g.*, Hilton Hotels. Bankr. D.I. 904, ¶3. If the brand changed, Petitioners would owe Accor liquidated damages under the HMA, which also contained an arbitration provision. Bankr. D.I. 89, pp.23, 27.

The COVID-19 pandemic devastated Petitioners' hotel business, so Petitioners hired Pillsbury to advise them about how best to address their financial difficulties and how best to terminate the HMA with Accor and bring in another hotel brand. Bankr. D.I. 11, p.3; Bankr. D.I. 904, ¶¶3-4. Pillsbury advised Petitioners that Chapter 11 bankruptcy was the best solution, and that Delaware bankruptcy court would provide a favorable forum even though the hotel was in California. Bankr. D.I. 904, ¶¶3-4; *id.* at Ex. A ¶28(f). Pillsbury advised Petitioners that bankruptcy would: a) allow them to terminate the HMA; b) limit Accor's damages to only about $2 million for such termination; c) allow Petitioners to "avoid arbitration;" d) "cost [only] approximately $3.5 million in legal fees and damages;" and e) "take just one hundred days to complete."

App. A p.3a; Bankr. D.I. 904 ¶¶3-4. To ensure the court approved the Chapter 11 plan, Pillsbury advised Petitioners to close the hotel and to have Petitioners' principal promise under oath to pay in full any damages owed to Accor. Bankr. D.I. 904, ¶¶3-4; *id.* at Ex. A, ¶¶28(g), (h).

2. Pillsbury's Advice Is Mostly Wrong and Makes a Bad Situation Much Worse.

Pillsbury's advice was bad. Chapter 11 bankruptcy did not permit Petitioners to avoid arbitration, and Petitioners consequently became ensnared in expensive parallel bankruptcy and arbitration proceedings that lasted more than six months. Bankr. D.I. 904, ¶4. As it turns out, bankruptcy was not necessary to terminate the HMA because California law permitted "breach termination." *See Woolley v. Embassy Suites, Inc.,* 227 Cal. App. 3d 1520 (1991). The costs of bankruptcy ballooned to more than $12 million ($6 million of which were Pillsbury's fees). Bankr. D.I. 904 at Ex. A, ¶28(j). Compounding the disastrous results, the arbitration panel (post-confirmation) awarded damages of $13 million, not $2 million. D.Ct. D.I. 21, p.16. Before the arbitration damages were known, Petitioners – relying on Pillsbury's assurance that liquidated damages would be around $2 million – promised to pay all damages in full, which created significant problems with Petitioners' exit mezzanine financing. Bankr. D.I. 904 at Ex. A, ¶29. In other words, while Pillsbury advised Petitioners that bankruptcy would be quick and cost about $5.5 million, the bankruptcy dragged on for months and cost Petitioners more than $25 million while crippling Petitioners' ability to re-open the hotel once the pandemic eased, thus causing tens of millions more in damages.

The court confirmed the Chapter 11 plan on August 18, 2021. App. A, p.3a. Petitioners, on Pillsbury's advice, selected an Effective Date of November 8, 2021, which meant the plan became effective and substantially consummated on that date. App. A., p.3a; App. C, p.41a; Bankr. D.I. 684. But the arbitration panel did not issue its award finding Petitioners liable for $13 million until November 9, 2021 – after confirmation and substantial consummation. App. B, p.13a; Bankr. D.I. 904 at 7. Pillsbury's malpractice therefore began to manifest itself to Petitioners only after the plan was confirmed and substantially consummated.

Petitioners' ability to modify the plan under 11 U.S.C. § 1127 was foreclosed because it was not until after substantially consummating the plan (and learning of the $13 million arbitration award) that Petitioners recognized that they might have a malpractice claim. Moreover, revocation under 11 U.S.C § 1144 was not an option because Petitioners did not want to revoke their plan; they merely wanted to bring a malpractice claim against the law firm that unnecessarily ensnared them in a financial mess. No bankruptcy statute addressed Petitioners' situation – post-confirmation relief from a non-consensual, third-party release only as to a specific releasee – so Petitioners' only recourse was to seek relief from a final judgment under Fed. R. Civ. P. 60(b).

3. The Chapter 11 Plan Pillsbury Crafts Includes Prospective Releases that Preclude Petitioners from Bringing Malpractice Claims, But Pillsbury Fails to Inform or Advise Petitioners that the Releases Will Apply to Pillsbury.

As is common in complex Chapter 11 plans, Pillsbury included myriad third-party releases that protected various people and entities, including Petitioners, creditors, and various professionals. App. B, p.11a. As far as Petitioners knew, based on Pillsbury's advice, the releases were necessary to plan confirmation. *Id.* at pp.11a-12a. But Pillsbury never informed Petitioners that the Chapter 11 plan as drafted also included a release that protected Pillsbury from malpractice claims, and it never advised Petitioners to consult with independent counsel about the release. Bankr. D.I. 904, ¶27; *id.* at Ex. A, ¶¶40-43. The release provisions themselves are a series of complex, inter-connected labyrinths of defined terms that reference each other but are in all capital letters, making it difficult to identify and trace the defined terms. *See* Bankr. D.I. 904, ¶7 (and accompanying diagram); App. B, p.12a. Tracing through the maze, however, lawyers (not laypeople) can conclude Pillsbury wrote itself into the release. *See* Bankr. D.I. 904, ¶7 (and accompanying diagram); App. B, p.11a.

Pillsbury still represented Petitioners when Petitioners discovered that the release applied to Pillsbury. Petitioners scrambled to find independent counsel to evaluate the release and the malpractice while also working to implement the Chapter 11 plan, which required debt restructuring and massive payments along with rebranding and renovating the hotel. Bankr. D.I. 904

at Ex. A, ¶¶34-39, 43. Petitioners soon realized, however, that the release barred claims against Pillsbury. Once represented by different counsel, Petitioners requested that the bankruptcy court invalidate the release as to Pillsbury only, pursuant to Fed. R. Civ. P. 60(b) and Fed. R. Bank. P. 9024. App. B, p.14a.

4. The Lower Courts Reject Petitioners' Request for Relief from the Release, Relying on Third Circuit Case Law, Which, Unlike the Law in Other Circuits, Forecloses Relief Under Fed. R. Civ. P. 60(b).

Petitioners filed their motion for relief under Fed. R. Civ. P. 60(b) in the bankruptcy court on February 28, 2022. *Id.* Although the bankruptcy court recognized that the issue presented was one of first impression, *see* App. C, p.42a, the court rejected Petitioners' efforts to invalidate the release as to Pillsbury. *Id.* The court held that Petitioners' efforts to invalidate the release as to Pillsbury were an attempt to modify the plan under 11 U.S.C. § 1127 after confirmation and substantial consummation and were a time-barred effort to revoke the plan under 11 U.S.C. § 1144. The bankruptcy court also held that Rule 60(b) was inapplicable. *Id.* pp.41a-45a.

The District Court for the District of Delaware affirmed on the same grounds. App. B, pp.17a-33a. The District Court noted that the release in the plan included Petitioners' attorneys and the plan unconditionally released and exculpated Petitioners' attorneys from malpractice claims. App. B, pp.20a-21a. The court adopted the bankruptcy court's view that the release of Pillsbury was integral to the plan, necessary, and negotiated. *Id.*

p.11a. The court found that Petitioners' requested relief was, in fact, a modification of the plan prohibited by 11 U.S.C. § 1127 because it sought changes "contrary" to the plan. *Id.* pp.21a-24a. The court, relying on *In re Fesq.*, 153 F.3d 113 (3d Cir. 1998), concluded that Rule 60(b) is not a basis to invalidate the release. *Id.* pp.22a-23a. The court noted the circuit split that exists about whether courts can apply Rule 60(b) to grant relief from provisions of a confirmed and substantially consummated bankruptcy plan. *Id.* p.25a. The court also found that 11 U.S.C. § 1144 barred relief and was inconsistent with relief under Rule 60(b). *Id.* pp.27a-33a. The court again noted the circuit split, but held it was bound by *In re Fesq. Id.* pp.29a-31a.

As the Third Circuit aptly summarized, Pillsbury's orchestrated Chapter 11 reorganization "compounded, rather than resolved, [Petitioners'] financial difficulties." App. A, pp.1a-2a. Nonetheless, the Third Circuit affirmed on the same grounds as the District Court. *Id.* pp.2a, 4a-7a. The court rejected Petitioners' efforts to obtain relief pursuant to Rules 60(b) and 9024 from what otherwise would be an unquestionably invalid release, finding Petitioners' request was an untimely and improper attempt to modify or revoke, which is only possible under the strict rubric of sections 1127 and 1144. *Id.* pp.4a-7a. All the lower courts denied Petitioners relief despite the facts that: a) Pillsbury drafted the Chapter 11 plan provisions releasing itself from both existing and prospective malpractice liability; b) Pillsbury never advised Petitioners that the plan contained a third-party release that released malpractice claims against Pillsbury; c) Pillsbury never advised Petitioners to seek independent counsel to advise Petitioners about the release; d) Petitioners did not realize they had a basis for a malpractice claim against Pillsbury

until after the plan was confirmed and substantially consummated; and e) Petitioners did not learn that the release immunized Pillsbury from malpractice claims until after the plan was confirmed and substantially consummated.

This Court should grant certiorari to apply *Harrington* and determine whether non-consensual, third-party releases of existing or prospective malpractice claims against debtors' attorneys in bankruptcy plans are unenforceable and whether Fed. R. Civ. P. 60(b) permits relief from judgments granting such releases after confirmation and substantial consummation.

REASONS FOR GRANTING THE PETITION

Section 524 of the Bankruptcy Code discharges Chapter 11 debtors from claims. Nothing in the Bankruptcy Code suggests that debtors' attorneys are entitled to release from existing or prospective malpractice claims – particularly when the attorneys do not inform debtors that the release includes those same attorneys, obtain informed consent from the debtors, or advise debtors to seek independent counsel. Confirmation and substantial consummation of a bankruptcy plan should not, by a form of legal alchemy, turn an otherwise invalid release into a valid get-out-of-malpractice-free card.

Bankruptcy discharge does not extend to third parties who have not entered bankruptcy themselves. Debtors' bankruptcy attorneys do not enter bankruptcy and do not put their assets on the line in bankruptcy. Nonetheless, Chapter 11 plans routinely immunize debtors' bankruptcy attorneys from malpractice claims – all claims against

the debtors' attorneys are released and discharged upon confirmation.

Chapter 11 should not shield debtors' attorneys from malpractice claims simply because otherwise unenforceable releases of malpractice claims are surreptitiously part of a confirmed and substantially consummated Chapter 11 plan. *Educ. Credit Mgmt. Corp. v. Whelton (In re Whelton)*, 299 B.R. 306, 318 (Bankr. D. Vt. 2003), *aff'd*, 312 B.R. 508 (D. Vt. 2004), *aff'd sub nom. Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150 (2d Cir. 2005) ("Sneaking a provision in a plan, hoping no one will notice it, and then reaping the benefits of its inclusion violates the fundamental principles of due process and of fair play, and threatens the heart of our legal, adversarial system. Enforcement of the discharge here would be tantamount to condoning a surreptitious strategy that should, in fact, be discouraged with vigor."). There is a clear path in some circuits for courts to grant relief from such objectively improper releases: Fed. R. Civ. P. 60(b). In other circuits, that path is foreclosed. This Court should grant this Petition to confirm the path is clear.

I. Non-Consensual Third-Party Releases Between Debtors and Debtors' Attorneys are Common in Chapter 11 Plans.

Under *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024), most, if not all, non-consensual, third-party releases in a Chapter 11 plan are invalid. Model Rule of Professional Conduct 1.8(h) generally prohibits a client's prospective releases of malpractice claims against the client's attorneys absent informed consent. *See* App.

E, p.139a.[2] If attorneys do not obtain informed consent, prospective releases between clients and their attorneys are unenforceable. *See e.g., Swift v. Choe*, 647 N.Y.S.2d 17, 20 (N.Y. App. Div. 1998); *Messerli & Kramer, P.A. v. Levandoski*, No. C2-96-628, 1996 WL 453605, at *3 (Minn. Ct. App. Aug. 13, 1996); Model Rule 1.4 (attorneys are required to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent … is required by these Rules …. [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); Model Rule 1.7 ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: … (2) there is a significant risk that the representation of one or more clients will be materially limited … by a personal interest of the lawyer.").[3] Such releases may be enforceable if the client receives not just *notice* of the release, but also *specific advice* from the attorney who is the subject of the release regarding the impact of the release

2. Delaware Bankruptcy Court's local rules require that all attorneys appearing in that court "shall be governed by" the American Bar Association's Model Rules of Professional Conduct. Del. Bankr. L.R. 9010-1(f).

3. There has been considerable debate about the enforceability of arbitration clauses contained in attorney-client engagement letters with courts and disciplinary panels coming to varying conclusions. What is clear, however, is that such arbitration provisions are only enforceable when there is informed consent. *See Castillo v. Arrieta*, 368 P.3d 1249, 1257 (N.M. App. 2016) (providing examination of varying approaches and concluding, that, "[a]t a minimum, the attorney should inform his client that arbitration will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits.").

and opportunity to consult independent counsel regarding the release. Model Rule 1.8(h) (found at App. E, p.139a).

As Pillsbury argued, "release provisions that bar [d]ebtors from bringing claims against their affiliates and advisors, including [their own counsel]," are "standard in Delaware and across the country." 3d Cir. D.I. 36, p.12 (emphasis added). *See also id.* at p.17. The lower courts agreed: "[b]ankruptcy courts routinely approve chapter 11 plans with release provisions substantively identical to the ones here." App. B, pp.32a-33a.[4] Thus, lurking in most Chapter 11 plans are non-consensual, third-party releases that release debtors' attorneys from both existing and prospective malpractice claims.

The circumstances in *Harrington* and in another case for which certiorari petitions are pending[5] were such that the non-consensual third-party releases were apparent, and objections could be lodged before the Chapter 11 plans were confirmed. But what if the existence of malpractice and/or reach of non-consensual third-party releases are known only after confirmation and substantial consummation because the very fiduciaries responsible for drafting, disclosing, and making known the releases say nothing? This case allows the Court to address that very issue.

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4. The District Court's assertion that because such releases are "routinely approve[d]" in Chapter 11 proceedings, the release provisions are enforceable in this case is unpersuasive. App. B, pp.33a-34a. "[A]n observation that something is done frequently does not explain why it may be done properly." *In re Terrell*, 39 F.4th 888, 891 (7th Cir. 2022).

5. *See NexPoint Advisors, L.P., et al. v. Highland Capital Management, L.P., et al.*, Nos. 22-631 and 22-669.

II. Invalid Releases Between Debtors and Their Attorneys Cannot Be Challenged Unless This Court Resolves a Circuit Split.

The releases at issue here, common in Chapter 11 plans, are invalid under *Harrington*. A debtor's release of existing or prospective malpractice claims against its attorneys is clearly a third-party release since the debtor's attorneys are not parties to the bankruptcy. Under Model Rule 1.8, a valid release can only exist if the debtor's attorneys inform the debtor of the release and obtain proper informed consent from the debtor. App. E., p.139a. Without informed consent, the release is non-consensual. Without such informed consent, under *Harrington,* such non-consensual releases may be invalidated if objections are made before confirmation. *Harrington*, 144 S. Ct. at 2088. Indeed, if such pre-confirmation objections were made, this Court could "GVR" (Grant, Vacate, and Remand) such a case.

In the present case, however, Petitioners – like most debtors – could not know about the scope or import of the release before confirmation or substantial consummation unless their attorneys advised them and obtained informed consent. Thus, this case gives the Court the opportunity to examine whether non-consensual third-party releases that are not objected to and become part of a confirmed and substantially consummated plan are nevertheless invalid and unenforceable. Put another way, this Court can determine if *Harrington* has any effect after plan confirmation.

While some courts permit review of a confirmed plan under Fed. R. Civ. P. 60(b), others do not. *See infra* § III.

Granting the Petition allows this Court to affirm that confirmed Chapter 11 plans, like all "final judgments," are subject to relief under Rule 60(b). Further, granting the Petition enables the Court to set parameters for what is required of debtors' attorneys when such releases affect the attorney-client relationship so that debtors can ensure they are receiving sound legal advice before unwittingly agreeing to immunize their own attorneys from legal malpractice claims. *See* Restatement (Third) of the Law Governing Lawyers § 54, cmt. b (2000) ("Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement.").

III. The Court Can Resolve a Well-Recognized Circuit Split About Whether Courts Can Use Fed. R. Civ. P. 60(b) to Grant Relief from Confirmed and Substantially Consummated Chapter 11 Plans.

"There are four possible avenues for setting aside a final confirmation order that parties have attempted to use in other reported cases: (1) revocation of the order under 11 U.S.C. § 1144; (2) modification of the plan under 11 U.S.C. § 1127(b); (3) relief from the order under Fed. R. Bankr. P. 9024; or (4) relief under § 105 of the Bankruptcy Code." *Carter v. Peoples Bank and Trust Co. (In re BNW, Inc.)*, 201 B.R. 838, 844 (Bankr. S.D. Ala. 1996). *See also In re F.A. Potts & Co., Inc.*, 86 B.R. 853, 857 (Bankr. E.D. Pa. 1988) ("The many subsections of" Fed. R. Civ. P. 60(b) "provide a broad spectrum in which bankruptcy judges can vacate prior orders," or aspects of prior orders.). But not all those options are available in every circuit.

In *Espinosa*, 559 U.S. at 269-270, this Court recognized the split in the circuits regarding the availability of relief under Rule 60(b). This Court first recognized that a bankruptcy court's order confirming a Chapter 11 plan is a final judgment. *Id.* at 269. This Court, however, also recognized that Rule 60(b) provided "an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Id.* (internal citations and quotations omitted). This Court was careful to point out that the "Courts of Appeals disagree as to whether" Rule 60(b) provides for an avenue of relief from a confirmed Chapter 11 plan in lieu of Bankruptcy Code provisions, including 11 U.S.C. §§ 1144 and 1330, which set forth limited circumstances and timelines for motions that seek to revoke a plan. *Id.* at 270 n.9.

This Court cited two competing cases on this issue: the Second Circuit's opinion in *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005), which permits relief from a confirmed plan under Rule 60(b), and the Third Circuit's opinion in *Fesq*, 153 F.3d at 119 n. 8, which does not. *Id.* This Court went on to state that "[w]e need not settle that question, however, because the parties did not raise it in the courts below." *Id.* Finally, this Court noted that even if a motion under Rule 60(b) were an effort to revoke a confirmed plan subject to a 180-day deadline (pursuant to 11 U.S.C. § 1330), that deadline did "not deprive [this Court]—of authority to consider the motion on the merits because those limitations are not jurisdictional." *Id.*

The present case provides this Court an opportunity to address and resolve this circuit split. *See* Sup. Ct. R.

10(a). The issue of whether a Rule 60(b) motion constitutes a motion to revoke or modify a plan under sections 1127 or 1144 is squarely presented and was preserved below. *See* App. A, p.6a; App. B, pp.17a-18a; App. C, pp.39a-41a. Addressing this issue will help the Court to reduce forum shopping based on the circuit split. Further, the specific release at issue – a non-consensual third-party release between clients and their attorneys – is one that will usually evade court review *before* confirmation or substantial consummation. Resolving Rule 60(b)'s applicability to confirmed and substantially consummated Chapter 11 plans and addressing the interplay between the Rule and relevant provisions of the Bankruptcy Code will bring much needed certainty to all Chapter 11 proceedings. Indeed, some bankruptcy courts have determined that attorney misconduct is a basis on which to grant relief pursuant to Bankruptcy Rule 9024 and Rule 60. *See, e.g.*, *In re Lewis Road, LLC*, No. 09-37672, 2011 WL 6140747, at *14 (Bankr. E.D. Va. Dec. 9, 2011) (failure to disclose a conflict of interest); *In re Benjamin's-Arnolds, Inc.*, No. 4-90-6127, 1997 WL 86463, at *10 (Bankr. D. Minn. Feb. 28, 1997) (estate attorney's failure to disclose a disqualifying conflict of interest, whether intentional or not, justifies relief under Rule 60(b)(6); holding otherwise would penalize trustee and reward conflicted attorneys for failing to disclose). But debtors whose attorneys advise them to file in venues like the Third Circuit are now precluded from obtaining relief under Rule 60(b).

Debtors have the right to know in advance whether they are waiving malpractice claims against their own attorneys. If debtors' attorneys do not provide their clients with sufficient information about the risks and

consequences of such waivers so that debtors can make informed decisions, this Court should determine whether debtors can seek relief under Rule 60(b). Also, bankruptcy attorneys are entitled to know whether and to what extent Chapter 11 plans they craft can release malpractice claims so they do not find themselves in a dilemma when advising clients to file bankruptcy in forums such as the Third Circuit; such advice could later be seen as motivated by self-interest when, in fact, such advice may be in the client's best interest.

Denying this Petition for Certiorari will allow this unresolved problem to linger and create confusion in Chapter 11 cases, particularly considering the Court's recent *Harrington* decision. While that decision seems to hold that releases like the one at issue here are invalid, courts and bankruptcy attorneys will be left to wonder whether such releases nonetheless preclude malpractice claims by debtors against their bankruptcy attorneys since the releases usually are not challenged prior to confirmation or substantial consummation. Indeed, allowing such releases to remain enforceable will allow Chapter 11 plans to magically validate otherwise invalid agreements through the unique procedures of Chapter 11 bankruptcy.

CONCLUSION

In any other context, a court may review a final judgment under Fed. R. Civ. P. 60(b) so long as the movant timely files a motion. In Chapter 11 bankruptcy, however, in some but not all circuits final judgments known as confirmed Chapter 11 plans cannot be reviewed under Fed. R. Civ. P. 60(b).

Here, Petitioners could not modify the plan because it was substantially consummated the day before the unfortunate arbitration ruling and before Petitioners became aware that their attorneys were within the ambit of the release. Petitioners did not want to revoke the plan because they had spent millions of dollars and many months working with creditors to put the plan in place and did not want to start over; Petitioners merely want to pursue their malpractice claims against Pillsbury. The lower courts were wrong when they found 11 U.S.C. §§ 1127 and 1144 were the only avenues for invalidating the release as to Pillsbury.

Rule 60(b) must present a third option, particularly considering *Harrington*'s clear holding that non-consensual third-party releases are invalid. Allowing such releases to become valid and enforceable incentivizes debtors' attorneys to avoid obtaining informed consent from their clients and to file cases in favorable venues where courts will not review such releases post-confirmation. Even if the debtor eventually discovers its bankruptcy attorneys' malpractice after confirmation and substantial consummation of the Chapter 11 plan, there is no available remedy if debtors cannot seek relief pursuant to Fed. R. Civ. P. 60(b), thus making ineffectual this Court's opinion

in *Harrington*. As this Court recognizes, a well-known circuit split exists such that in some circuits Rule 60(b) relief is available while in others it is not.

The Court should grant the Petition to: a) ensure courts are following *Harrington,* particularly as it relates to releases such as the one at issue here between debtors and their bankruptcy attorneys; and b) resolve the split in authority as to whether relief from confirmed and substantially consummated Chapter 11 is available under Rule 60(b). *See* Sup. Ct. R. 10(a).

Respectfully Submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MARCH 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1731

In re: SC SJ HOLDINGS, LLC; FMT SJ, LLC,

Appellants.

On Appeal from the United States District Court for the District of Delaware (D.C. Civ. No. 1-22-cv-00689)
District Judge: Maryellen Noreika

March 4, 2024, Submitted under Third Circuit L.A.R. 34.1(a)
March 28, 2024, Filed

Before: SHWARTZ, RENDELL, and AMBRO, *Circuit Judges.*

OPINION*

RENDELL, *Circuit Judge.*

Appellants are debtors whose Chapter 11 reorganization compounded, rather than resolved, their financial difficulties. They came to believe that

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

this was due to erroneous legal advice given to them by their former bankruptcy attorneys from the law firm of Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury"). Belatedly discovering this after their reorganization plan was confirmed and consummated, Appellants wished to sue Pillsbury for purported malpractice, but realized that such a suit would be barred by release provisions that they agreed to as part of their Chapter 11 plan. Faced with this legal hurdle, they requested that the Bankruptcy Court relieve them from these provisions. It rejected their request as an untimely attempt to modify or revoke the plan. The District Court affirmed. Perceiving no error in its well-reasoned opinion, we will affirm.

I.

In 2018, Appellants obtained a loan of more than $150 million to purchase the Fairmont Hotel in San Jose, CA. Under a Hotel Management Agreement ("HMA"), the hotel would be operated by Accor Management US Inc. as a Fairmont-branded property. During the COVID-19 pandemic, however, Appellants struggled to service the loan and investigated options for securing new capital and a possible restructuring of the debt. Accor refused to provide financing to Appellants and further would not permit them to obtain financing from others if such financing would depend on rebranding the hotel in violation of the HMA. Hampered by the HMA, and unable to obtain financing, Appellants retained Pillsbury for advice.

According to Appellants, Pillsbury advised them that, to unburden themselves from the HMA, they should file

voluntary Chapter 11 petitions. Appellants allege that Pillsbury lawyers explained that the bankruptcy process would permit termination of the HMA, avoid arbitration, cost approximately $3.5 million in legal fees and damages, and take just one hundred days to complete. Acting on this advice, Appellants filed Chapter 11 petitions. Contrary to Pillsbury's purported assurances, however, the proceedings lasted more than eight months, during which time Appellants were forced to arbitrate with Accor and were ultimately required to pay more than $20 million in damages, fees, and interest to Accor for breaching the HMA.

On August 18, 2021, the Bankruptcy Court confirmed Appellants' Chapter 11 bankruptcy plan. It contained provisions "for mutual releases among numerous parties as to any claims arising out of or related to the bankruptcy proceedings or to Debtors. Those release provisions cover Debtors' 'Related Persons,' defined to include their 'attorneys . . . and other professionals.'" *In re: SC SJ Holdings, LLC*, 2023 U.S. Dist. LEXIS 48320, 2023 WL 2598842, at *2 (D. Del Mar. 22, 2023) (citation omitted). The provisions "also expressly exculpate Debtors and their 'Professionals' from claims and causes of action arising out of post-petition conduct, with the exception of claims of intentional fraud and willful misconduct." *Id.* (citation omitted). On November 8, 2021, the plan became effective and was substantially consummated.

On February 28, 2022, more than six months after the Bankruptcy Court confirmed the plan and more than three months after the plan had been substantially

consummated, Appellants filed a motion in the Bankruptcy Court seeking an order to "reliev[e] [them] from certain aspects of the . . . Plan of Reorganization[.]" JA526. Appellants requested that the Court "modify[]" the release provisions of the plan to permit them to sue Pillsbury for malpractice. JA537. After reviewing the parties' briefing and hearing oral argument, the Bankruptcy Court denied the motion. The District Court later affirmed.

II.[1]

Appellants urge this Court to reverse the District Court and permit the modification or revocation of the plan despite their admittedly untimely motion for such relief. Alternatively, they assert that the District Court erred by not holding an evidentiary hearing before ruling on their motion. We disagree.

As the District Court correctly concluded, Appellants' failure to comply with the strictures of 11 U.S.C. §§ 1127 and 1144 is fatal to their case. Section 1127 provides that "the reorganized debtor may modify [a] plan at any time after confirmation of such plan and before substantial consummation of such plan[.]" 11 U.S.C. § 1127(b). As both

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1. The Bankruptcy Court had jurisdiction under 11 U.S.C. § 101. *et seq.* The District Court had jurisdiction under 28 U.S.C. § 158(a). This Court has jurisdiction under 28 U.S.C. § 1291.

We review a district court's legal conclusions de novo. *In re Trans World Airlines*, 145 F.3d 124, 131 (3d Cir. 1998). We review a district court's decision on whether to hold an evidentiary hearing for abuse of discretion. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 320 (3d Cir. 2001).

the District Court and "Bankruptcy Court recognized . . . [,] § 1127(b) is 'the exclusive means by which to modify a [Chapter 11] plan.'" *In re: SC SJ Holdings*, 2023 U.S. Dist. LEXIS 48320, 2023 WL 2598842, at *7 (citations omitted). Indeed, "[t]he parties do not dispute that Debtors' motion for relief was filed after the Plan had been substantially consummated." *Id.* Thus, Appellants' motion was untimely. While Appellants attempt to circumvent the requirement of § 1127 by disclaiming any intent to "modify" the plan, the District Court rightly focused on the "substance rather than the form of the requested relief" in deciding that § 1127 controlled. 2023 U.S. Dist. LEXIS 48320, [WL] at *5 (citation omitted). As Appellants sought permission to sue Pillsbury for malpractice in connection with the Chapter 11 proceedings—a claim that was specifically released under the plain terms of the plan, the District Court rightly concluded that Appellants sought a "modification." *Id.*

Section 1144 is also controlling, as it limits the time in which a debtor may seek revocation of a confirmed plan. Under § 1144, "[o]n request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud." 11 U.S.C. § 1144. The District Court recognized that even if Appellants' request for relief from the release provisions did not entail "modification" of the plan, it could be considered a partial or wholesale "revocation." *In re: SC SJ Holdings*, 2023 U.S. Dist. LEXIS 48320, 2023 WL 2598842, at *7. Thus, the Court rightly concluded that "[t]o the extent Debtors' motion

for relief can be read as a motion for revocation of the Confirmation Order, Debtors have not complied with the strict requirements of § 1144." *Id.* Appellants failed to file their request within 180 days of confirmation.[2] **JA22**.

On appeal, Appellants rehash an argument that was rejected by the District Court, namely, that §§ 1127 and 1144 do not "provide the exclusive procedural means of relief" in this case. Appellants' Br. 25. Instead, they contend that Bankruptcy Rule of Civil Procedure 9024 and Federal Rule of Civil Procedure 60 permit modification or revocation of the plan independent of these two statutory provisions.[3] We disagree.

As the District Court succinctly explained, it is well established that "a rule of procedure cannot 'negate the substantive impact of [a] restriction contained' in a provision of the Bankruptcy Code or 'validly provide' a movant 'with a substantive remedy that would be foreclosed by' such a statutory provision." *In re: SC SJ Holdings*, 2023 U.S. Dist. LEXIS 48320, 2023 WL 2598842, at *6 (quoting *In re Fesq*, 153 F.3d 113, 116-17 (3d Cir. 1998)). Here, to permit Appellants to modify or revoke their plan under Rule 9024 or Rule 60 would simply

2. Section 1144 would allow revocation of the plan if it was procured by fraud, but Appellants did not make that allegation.

3. These rules relate to procedures for seeking relief from a final judgment. They do not supersede the Code's provisions, and Rule 9024 specifically refers to § 1144 in any event. For the same reason, Appellants also cannot use the Rules of Professional Conduct to undermine the statute's requirements.

"produce a result at odds with the specific provisions of" the Bankruptcy Code. *Id.* (quoting *In re Rickel & Assocs. Inc.*, 260 B.R. 673, 676 (Bankr. S.D.N.Y. 2001)) (internal quotation marks omitted).

As we agree with the District Court's legal conclusion that Appellants' request was untimely, we see no error in the District Court's decision not to grant Appellants a full evidentiary hearing. Because they could not establish entitlement to relief as a matter of law, there was no need for an evidentiary hearing, and the District Court did not abuse its discretion in denying Appellants' request for one.

III.

For these reasons, we will affirm the District Court's order.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED MARCH 22, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 21-10549 (JTD)
(Jointly Administered)

C.A. No. 22-689 (MN)

IN RE: SC SJ HOLDINGS, LLC, et al.,

Reorganized Debtors.

SC SJ HOLDINGS, LLC, *et al.*,

Appellants,

v.

PILLSBURY WINTHROP SHAW PITTMAN LLP,

Appellee.

MEMORANDUM OPINION

March 22, 2023
Wilmington, Delaware

Appendix B

/s/ Maryellen Noreika
NOREIKA, U.S. DISTRICT JUDGE:

Pending before the Court is an appeal by reorganized debtors SC SJ Holdings, *et al.* ("Debtors") from the Bankruptcy Court's May 12, 2022 *Order Denying Motion to Relieve Reorganized Debtors from Certain Aspects of the Confirmed Third Amended Joint Chapter 11 Plan as to Pillsbury Only* (D.I. 1-1) ("Order"), 2022 Bankr. LEXIS 3716. The Order denied Debtors' motion pursuant to Rule 60 of the Federal Rules of Civil Procedure ("FRCP 60"), made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure ("FRBP 9024"), for relief from certain releases contained in their confirmed plan, solely as those releases pertain to their bankruptcy counsel, Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury"), under theory that the plan contains prospective malpractice releases obtained without Debtors' informed consent in violation of Pillsbury's ethical obligations under Rule of Professional Conduct 1.8(h).[1] For reasons set forth on the record at the May 4, 2022 hearing (A1357-1365) ("5/4/2022 Tr."),[2] including that sections 1127 and 1144

1. *See, e.g.*, ABA Model Rule of Professional Conduct 1.8(h), which provides, in relevant part, that "A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/.

2. The docket of the chapter 11 cases, captioned *In SC SJ Holdings, LLC, et al.*, Case No. 21-10549 (JTD) (Bankr. D. Del.) is cited herein as "Bankr. D.I. ." The appendix (D.I. 23) filed in support

of the Bankruptcy Code state the only means by which a plan confirmation order may be modified or revoked, the Bankruptcy Court denied Debtors' motion for relief. For the reasons set forth herein, the Court will affirm the Order.

I. BACKGROUND

A. The Chapter 11 Cases

Debtors operated an 805-room luxury convention hotel in San Jose, California ("Hotel"), which experienced financial difficulties due to the COVID-19 pandemic. (A29-31 ¶¶ 4, 10). Beginning in the fall and winter of 2020, the Hotel's operator, Fairmont, refused requests for financing and would not agree to a consensual termination of the Hotel Management Agreement ("HMA") so that Debtors could pursue financing from other hotel operators. (A33 ¶ 17). Debtors retained Pillsbury in July 2020 to provide advice on "considering and developing chapter 11 options." (A911-13). In March 2021, with economic conditions having only worsened, Debtors filed voluntary chapter 11 petitions. Debtors identified three core objectives for the bankruptcy: (1) engage with their pre-petition secured lender to restructure and extend the maturity date of their secured mortgage loan; (2) terminate the relationship with Fairmont; and (3) find a new brand for the Hotel that would be willing to provide additional financing. (A8 ¶ 28).

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of Pillsbury's answering brief (D.I. 22) is cited herein as "A_;" and the appendix (D.I. 26) filed in support of Debtors' reply brief (D.I. 25) is cited herein as "B_."

B. The Plan's Release Provisions

As part of the negotiations among Debtors and various constituents, the Plan went through a number of revisions between March and August 2021. (*See, e.g.*, A37, A96, A155, A460, A523, A587). Each version of the Plan contained substantively identical release, exculpatory, and injunctive provisions. The release provisions provide for mutual releases among numerous parties as to any claims arising out of or related to the bankruptcy proceedings or to Debtors. Those release provisions cover Debtors' "Related Persons," defined to include their "attorneys . . . and other professionals." (A790, A792, A829-830). The release provisions also expressly exculpate Debtors and their "Professionals" from claims and causes of action arising out of post-petition conduct, with the exception of claims of intentional fraud and willful misconduct. (A783, A832-833).[3] The release provisions were highlighted in various disclosure statements as well as in the Plan solicitation materials approved by the Bankruptcy Court and noticed to all creditors, parties in interest, and stakeholders. (*See* A217; A301; A401-459). Debtors' sole principal, Sam Hirbod, submitted sworn testimony to the Bankruptcy Court in support of the Plan specifically addressing its release provisions. (A710-716). Mr. Hirbod affirmed that the releases were in Debtors' best interest

3. The release provision and the exculpation provision are enforced by an injunction provision, which specifies that "the releasing parties shall be permanently enjoined from commencing or continuing in any manner against the debtor released parties . . . and the exculpated parties." (A833-834). This Memorandum Opinion refers to all three provisions together as the "release provisions."

and integral to their successful reorganization. (A713-714 ¶¶ 10-14).

The Bankruptcy Court approved the plan of reorganization ("the Plan") that achieved Debtors' objectives (A717-770) ("the Confirmation Order"). The Bankruptcy Court found that the release provisions in the Plan were set forth in bold type, contained "specific and conspicuous language," had been "negotiated in good faith and at arm's length," and were "each integral to the Plan, supported by valuable consideration, and necessary for the Debtors' successful reorganization." (A721, A727). The Bankruptcy Court also found that Debtors' releases were "given and made after due notice and opportunity for hearing" and that the exculpations were "reasonable in scope." (A738, A740).

Debtors later asserted, and continue to assert on appeal, that "[t]he Plan contains five-and-one-half pages of release, exculpatory, and injunctive legal jargon in bold, all-caps lettering that makes it impossible to identify defined terms without cross-referencing each word in those provisions against the Plan's 179 defined terms, many of which cross reference one another. (*See* A931-932; D.I. 21 at 8).

C. The Fairmont Arbitration

Fairmont filed proofs of claim against the Debtors in the amount of approximately $36 million for claims under the HMA. Fairmont also commenced an arbitration action asserting breach of the covenant of good faith and fair dealing. The Bankruptcy Court ordered the

Debtors to arbitration and estimated Fairmont's claim for plan feasibility purposes at $22.24 million. (A930 ¶ 4). On August 18, 2021, the Bankruptcy Court entered the Confirmation Order. The sixday arbitration between Debtors and Fairmont began on September 22 and concluded on October 16, 2021. The Plan went effective on November 8, 2021. (A844). The parties agree that the Plan was substantially consummated the same day. On November 9, 2021, the arbitration panel issued a Final Arbitration Award ("the Final Award"), setting Fairmont's damages for Debtors' breach of the covenant of good faith and fair dealing at approximately $13 million. (A933 ¶ 8). The arbitrators found such a breach based on Debtors' "shopping [of] the brand." (*Id.*).

Not surprisingly, the parties disagree as to the events that led to the Fairmont dispute. Those facts have no bearing on this appeal, and the parties' arguments are briefly summarized here only to provide context for Debtors' subsequent motion for relief. In general, Debtors wish to assert malpractice claims on the grounds that (i) Pillsbury failed to inform Debtors that "having discussions with other [hotel brands] violated the HMA's implied covenant of good faith and fair dealing" and advised the Debtors that Fairmont's sole remedy at law for terminating the HMA was its liquidated damages provision, which would amount to approximately $2 million; and (ii) "Pillsbury's advice essentially and unnecessarily created two paths of expensive litigation, the bankruptcy and the arbitration." (D.I. 21 at 7-8). Pillsbury disputes these contentions, asserting that it "was not made aware of the details of Mr. Hirbod's brand-changing efforts or provided with a copy of the HMA until after November

2, 2020, and Pillsbury was not asked for any advice with respect to brand-changing efforts until after November 2, 2020 — that is, until after Mr. Hirbod undertook the secretive rebranding efforts that led to the damage award." (D.I. 22 at 9 n.3).

D. Debtors' Motion for Relief

On February 28, 2022 — more than 180 days after the entry of the Bankruptcy Court's August 18, 2021 Confirmation Order and long after the November 8, 2021 substantial consummation of the Plan — Debtors filed a motion, pursuant to FRCP 60 and FRBP 9024,[4] asking the Bankruptcy Court for an order "relieving [them] from certain aspects of the confirmed Third Amended Joint Chapter 11 Plan of Reorganization." (A928). Debtors asked the Bankruptcy Court to "modify" the Plan's release provisions, which Debtors admitted barred them from bringing their desired legal malpractice claims against Pillsbury. (A934, A940, A943-44, A946). Debtors asserted, among other things, that (i) prior to the Plan's effective date, Debtors were unaware of Pillsbury's alleged malpractice, and (ii) Pillsbury failed to advise Debtors of the import of the Plan's release provisions. Debtors argued that the Bankruptcy Court had the authority to grant such relief under FRBP 9024 on several bases

4. FRCP 60 permits the Court to relieve a party from a final judgment, order, or proceeding for reasons including, but not limited to, mistake, inadvertence, surprise, excusable neglect; newly discovered evidence; or fraud, misrepresentation, or other misconduct of an adverse party. *See* Fed. R. Civ. P. 60(b)(1)-(6). Pursuant to Bankruptcy Rule 9024, Rule 60 applies to contested matters such as this matter. *See* Fed. R. Bankr. P. 9024.

including changed circumstances and excusable neglect. (*See* A928, A944). Pillsbury objected to Debtors' motion, explaining that it was improper and untimely under the Bankruptcy Code and FRBP 9024, contained a revisionist account of the "facts," and was otherwise entirely without merit. (A965-85). Debtors then filed a reply in which they asserted, for the first time, that the Due Process Clause of the Constitution provided a basis for the Bankruptcy Court to grant Debtors' requested relief. (A1196-98).

On May 4, 2022, the Bankruptcy Court held a hearing and based on the undisputed facts denied Debtors' motion for relief as a matter of law. (5/4/2022 Tr. at 76-84). The Bankruptcy Court determined that Debtors' request for "relief" from the Plan really sought modification of the Plan or revocation of the Confirmation Order, which could be accomplished only under Bankruptcy Code §§ 1127 or 1144. (5/4/2022 Tr. at 77-78; *see id.* at 84 (explaining that Debtors were effectively seeking to "writ[e] the releases and exculpation provisions out of the order" with respect to Pillsbury); 11 U.S.C. §§ 1127, 1144). The Bankruptcy Court concluded that Debtors did not satisfy the requirements for relief under either of those provisions.

The Bankruptcy Court further explained that, under § 1127(b), a movant may seek plan modification only before a plan's substantial consummation — and Debtors did not seek relief here until well after the Plan was confirmed and substantially consummated. (5/4/2022 Tr. at 78-79). Debtors also could not seek revocation of the Confirmation Order under § 1144, the Bankruptcy Court found, because they undisputedly filed their motion outside of § 1144's 180-day post-confirmation deadline — a deadline that "is

strictly enforced and may not be extended" for any reason. (*Id.* at 79). The Bankruptcy Court rejected Debtors' argument that a purported breach of ethical obligations by Pillsbury allowed for an exception to § 1144's plain-text requirements. (*Id.* at 80-81). In addition, the Bankruptcy Court ruled that the limitations on relief set forth in §§ 1127 and 1144 cannot be circumvented by means of a motion for relief under FRBP 9024. (*Id.* at 78-80). Having disposed of the entire motion as a matter of law, the Bankruptcy Court declined Debtors' request to hold an evidentiary hearing for purposes of an appeal.

E. Appeal

On May 26, 2022, Debtors filed a timely notice of appeal of the Order. (D.I. 1). The appeal is fully briefed. (D.I. 21, 22, 25). The Court did not hear oral argument because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

II. JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction to hear an appeal from a final judgment of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). The Confirmation Order is a final order. The Order denying Debtors' request for relief from the Confirmation Order is also a final order.

Whether the Bankruptcy Court erred in ruling, as a matter of law, that the plain text of §§ 1127 and 1144 bars Debtors' request for relief from the release provisions of the substantially consummated plan of reorganization

— including whether FRBP 9024, which makes FRCP 60 applicable to bankruptcy proceedings under certain circumstances, overrides those statutes — is a purely legal issue reviewed *de novo. See Interface Group-Nevada v. TWA (In re TWA)*, 145 F.3d 124, 131 (3d Cir. 1998). Whether Pillsbury's actions violated the Due Process Clause is a purely legal issue that is also reviewed *de novo. See id.* Finally, Debtors argue that the Bankruptcy Court erroneously declined to hold an evidentiary hearing. The Court reviews that decision for abuse of discretion. *See id.*

III. ANALYSIS

Debtors sought relief from the Plan's release provisions pursuant to FRCP 60(b)(5), which authorizes relief where "it is no longer equitable that a judgment should have prospective application." (A935-36 (*quoting In re Lebanon Steel Foundry*, 48 B.R. 520, 523 (Bankr. M.D. Pa. 1985))). Debtors argued that modification of the terms of an injunctive decree was within the Bankruptcy Court's discretion "if the circumstances, whether of law or fact, obtaining at the time of the issuance have changed, or new ones have since arisen." (*Id.* (quoting *In re Lebanon*, 48 B.R. at 523)). Debtors contended that they only learned of Pillsbury's incorrect advice regarding Fairmont after the Plan was confirmed, and that this change in "factual circumstances" warranted relief from the Plan's release provisions. (A936). Debtors further argued that FRCP 60(b)(1)'s excusable neglect provision permitted relief. (A944). Thus, Debtors' main argument on appeal is that relief they sought was available under FRCP 60(b), and that the Bankruptcy Court erred in determining that §§ 1127 and 1144 of the Bankruptcy Code — requirements

of which they failed to meet — provided the exclusive means of relief. (*See* D.I. 21 at 14-26).

A. Plan Modification Is Barred By § 1127 of the Bankruptcy Code

1. Section 1127 Bars Plan Modification

Section 1127(b) states, in relevant part, that "[t]he proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and ***before substantial consummation of such plan***." 11 U.S.C. § 1127(b) (emphasis added). Accordingly, by its plain terms "section 1127(b) is an absolute bar to modification after substantial consummation." *In re NorthEast Gas Generation, LLC*, 639 B.R. 914, 922 (Bankr. D. Del. 2022).

The Bankruptcy Court recognized that § 1127(b) is "the exclusive means by which to modify a [Chapter 11] plan." (*See* 5/4/2022 Tr. at 77-78 (citing *In re Logan Place Properties, Ltd.*, 327 B.R. 811, 812 (Bankr. S.D. Tex. 2005) and *In re Vencor, Inc.*, 284 B.R. 79, 87 (Bankr. D. Del. 2002)). *See also, In re Rickel & Assocs., Inc.*, 260 B.R. 673, 677 (Bankr. S.D.N.Y. 2001) ("Section 1127(b) provides the sole means for modifying a confirmed plan."); *In re Daewoo Motor Am., Inc.*, 488 B.R. 418, 426-27 (C.D. Cal. 2011); *In re WBY, Inc.*, 2019 Bankr. LEXIS 2437, 2019 WL 3713686, at *10-11 (Bankr. N.D. Ga. Aug. 5, 2019); 7 Richard Levin & Henry J. Sommer, eds., COLLIER ON BANKRUPTCY ¶ 1127.03[2][a] (16th ed. 2022).

The parties do not dispute that Debtors' motion for relief was filed after the Plan had been substantially consummated. The Plan was substantially consummated, and became effective, on November 8, 2021. (*See* A844; *see also* A770). Debtors did not file their motion in the Bankruptcy Court until February 28, 2022 — nearly four months after substantial consummation. (*See* A949). Rather, Debtors argue that the Bankruptcy Court erred in determining that § 1127(b) applies at all to their motion and that it bars relief from the Plan's release provisions.

2. Debtors' Motion for Relief Sought Plan Modification

Debtors' primary argument, repeated throughout their briefs, is that § 1127(b) did not apply to their request for relief because they are not seeking any "modification" of the Plan. (*See, e.g.*, D.I. 21 at 2, 13-14, 16-17, 19-22, 25). Rather, Debtors contend, they merely seek "limited relief" from the Plan — specifically, "to have the Bankruptcy Court determine that those portions of the Release Provisions applicable to Pillsbury were improperly obtained and, ineffective, and thus unenforceable, thereby granting limited relief from the provisions to allow Debtors to pursue malpractice claims against Pillsbury" — and "[s]uch relief is appropriate under Rule 9024 and Rule 60." (*Id.* at 13). According to Pillsbury, Debtors want a change to the Plan that is directly contrary to the Plan's express provisions, so there is no question that what they seek constitutes a "modif[ication]" within the meaning of § 1127(b) — regardless of the magnitude of that change. (D.I. 22 at 20-21).

The Court agrees that Debtors' motion for relief really sought a modification of the Plan within the meaning of § 1127(b). As an initial matter, the motion candidly and repeatedly urges the Bankruptcy Court to "modify the Plan so as to permit Debtors to pursue malpractice claims against Pillsbury." (A940; *see, e.g.*, A943 ("this Court should ***modify*** the provisions that stand to prevent Debtors from fully and fairly presenting their malpractice case against Pillsbury") (emphasis added; quotations, alterations, and citations omitted); A944 ("***modification*** of the Plan is appropriate") (emphasis added); A946 ("this Court should ***modify*** the Plan") (emphasis added)).

Nevertheless, "the Court will consider the substance rather than the form of the requested relief." *In re Logan*, 327 B.R. at 813. As many courts have held, a "requested change" that "is directly contrary to the express provisions of the [p]lan" constitutes a modification within the meaning of § 1127(b). *In re Daewoo Motor*, 488 B.R. at 425-26 (collecting cases); *see, e.g., NorthEast Gas Generation*, 639 B.R. at 924 (party is not asking merely "to interpret, clarify, or fill a gap in the Plan" where "[t]he proposed modification is contrary to the express terms of the Plan"); *In re Planet Hollywood Int'l*, 274 B.R. 391, 399-400 (Bankr. D. Del. 2001) (party seeking "relief inconsistent with the Plan" is seeking a modification of that Plan); *In re Vencor*, 284 B.R. at 82-85. A change contrary to the express provisions of the Plan is precisely what Debtors' motion for relief sought. The Plan provides that Debtors release from any liability their "attorneys . . . and other professionals," a category that includes Pillsbury. (A829-30 (stating that "Debtor Released Parties" are

"conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged" by Debtors "from any and all claims, interests, obligations, suits, judgments, damages, demands, debts, rights, and causes of action, losses, remedies, or liabilities whatsoever" relating (*inter alia*) to Debtors or the chapter 11 proceedings); *see* A781, A793 (defining "Debtor Released Parties" to include Debtors' "Related Persons," which includes attorneys)). Debtors' motion seeks to change the release provisions of the Plan so that they no longer cover Pillsbury. (*See* 5/4/2022 Tr. at 76-77). Without that modification, as Debtors have acknowledged, the release provisions bar the malpractice claims against Pillsbury that Debtors wish to assert. (D.I. 21 at 1 ("The Release Provisions preclude malpractice claims against Pillsbury"); 5/4/2022 Tr. at 83-84) ("In order to bring a lawsuit against Pillsbury for malpractice, debtors need to modify the confirmation order effectively writing the releases and exculpation provisions out of the order.")).

Contrary to Debtors' argument, the fact that they wish to modify the release provisions to carve out only one particular group of attorneys, while leaving those provisions in place as to all other attorneys, other professionals, and principals, does not take Debtors' requested relief outside of the scope of § 1127(b). That provision limits all plan modifications, regardless of the magnitude of the requested change. *See, e.g., NorthEast Gas Generation*, 639 B.R. at 922-24 (ruling that changing a single definition in a plan constituted a modification for purposes of § 1127); *In re WBY*, 2019 Bankr. LEXIS 2437, 2019 WL 3713686, at *11. Indeed, in a decision on which

the Bankruptcy Court here relied (5/4/2022 Tr. at 77-78), a bankruptcy court in this District characterized a change in a plan's releases to exclude one previously covered party — relief almost identical to that sought here — as a modification within the meaning of § 1127(b). *See In re Vencor*, 284 B.R. at 85 (concluding that "striking the releases granted to Ventas in the Plan . . . is a modification of the Plan").

3. FRCP 60/FRBP 9024 Cannot Be Used to Circumvent § 1127

The Bankruptcy Court further concluded that FRBP 9024 is "inapplicable" as a means of circumventing § 1127(b)'s prohibition on modification of a plan after substantial consummation. (5/4/2022 Tr. at 78-80 (citing *In re Logan*, 327 B.R. at 812-14)). Debtors argue on appeal that the Bankruptcy Court erred in determining that FRCP 60, made applicable by FRBP 9024, was inapplicable to Debtors' request for relief. (D.I. 21 at 1). The Court disagrees.

As the Third Circuit has explained, a rule of procedure cannot "negate the substantive impact of [a] restriction contained" in a provision of the Bankruptcy Code or "validly provide" a movant "with a substantive remedy that would be foreclosed by" such a statutory provision. *In re Fesq*, 153 F.3d 113, 116-17 (3d Cir. 1998) (discussing 11 U.S.C. § 1330); *see* 28 U.S.C. § 2075 (federal bankruptcy rules cannot "abridge, enlarge, or modify any substantive right"); 28 U.S.C. § 2072 (same as to federal rules of civil procedure). A rule can do no more than "define the process" by which the substantive rights set forth in the

Code can be effected. *In re Fesq*, 153 F.3d at 116; *see, e.g., Midstate Mortg. Invs., Inc.*, 105 F. App'x 420, 423 n.4 (3d Cir. 2004); *In re Rodriguez*, 521 F. App'x 87, 92 (3d Cir. 2013); *see also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

Applying that well-established principle, courts have held that "[FRCP] 60(b) cannot be invoked to bypass § 1127(b)." *In re Rickel*, 260 B.R. at 678. If a debtor could modify a plan after substantial consummation under FRCP 60/FRBP 9024, even though § 1127(b) provides that such modification can occur only before substantial consummation, then the rules of procedure would "produce a result at odds with the specific provisions of § 1127(b)." *Id.*; *see Fesq*, 153 F.3d at 116; *see also, e.g., NorthEast Gas Generation*, 639 B.R. at 924-25 (neither FRCP 60 nor bankruptcy court's equitable powers under § 105 permit plan modification after substantial consummation to circumvent the requirements of § 1127(b)); *In re Vencor*, 284 B.R. at 85; *In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 816-17 (S.D.N.Y. 1997); *In re Indu Craft Inc.*, 2011 Bankr. LEXIS 2545, 2011 WL 2619501, at *3 (Bankr. S.D.N.Y. July 1, 2011), *aff'd*, 580 F. App'x 33 (2d Cir. 2014); *In re Logan*, 327 B.R. at 814-15; *In re Planet Hollywood*, 274 B.R. at 399; *In re Daewoo Motors*, 488 B.R. at 426-27; *In re Xpedior Inc.*, 354 B.R. 210, 232 (Bankr. N.D. Ill. 2006). And as Pillsbury correctly points out, the refusal to permit an end run around § 1127(b) serves important interests. Allowing a debtor to change the terms of a plan that has already been substantially consummated would "upset[]

the legitimate expectations" of the entities and individuals affected by the plan and would ultimately "undermine the integrity" of the bankruptcy process, as necessary players would not be willing to "participate in reorganization if they could not feel that the plan was final." *In re Fesq*, 153 F.3d at 119-20; *see id.* at 119 (explaining that "Congress established finality as an important goal of bankruptcy law").

4. Authorities Cited By Debtors Require No Different Ruling

The cases cited by Debtors do not support their position that plan modification can be accomplished under FRCP 60(b) even where § 1127(b) would not permit that modification. As Pillsbury points out, several of those cases apply FRCP 60(b) outside of the context of plan modification, such that § 1127(b) plays no role in the analysis.[5] While a few of the other cases cited by Debtors discuss FRCP 60(b) with respect to confirmation orders or plans, they do not discuss § 1127(b) at all, and therefore do not constitute persuasive precedent regarding whether a FRCP 60(b) motion is barred where § 1127(b)'s limitations on plan modification are exceeded. *See In re Benjamin's-*

5. *See In re Johnson & Morgan Contractors*, 29 B.R. 372 (Bankr. M.D. Pa. 1983) (stipulated order related to lift stay); *In re Lebanon Steel Foundry*, 48 B.R. 520 (Bankr. M.D. Pa. 1985) (same); *In re F.A. Potts & Co., Inc.*, 86 B.R. 853, 854 (Bankr. E.D. Pa. 1988) (order authorizing an asset sale); *In re Durkalec*, 21 B.R. 618, 619 (Bankr. E.D. Pa. 1982) (lift stay order); and *In re Lewis Rd., LLC*, 2011 Bankr. LEXIS 4827, 2011 WL 6140747, at *1 (Bankr. E.D. Va. Dec. 9, 2011) (settlement agreement under Bankruptcy Rule 9019).

Arnolds, Inc., 1997 Bankr. LEXIS 192, 1997 WL 86463, at *2 (Bankr. D. Minn. Feb. 28, 1997) (plan modification); *In re Griffin Oil Co.*, 149 B.R. 419, 421 (Bankr. E.D. Tex. 1992) (effectiveness of confirmation order); *In re 401 E. 89th St. Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998) (same). Debtors also cite the *Whelton* case, as the court distinguished the relief sought in that case in the following way: "This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void." (*See* D.I. 21 at 16-17) (quoting *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005) *abrogated on other grounds by United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)). But as the Supreme Court noted, that case is contradicted by binding Third Circuit precedent ruling that FRCP 60(b) cannot be used to circumvent a provision of the Bankruptcy Code. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 n.9, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (contrasting *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 (2d Cir. 2005) with *In re Fesq*, 153 F.3d at 119 n.8). Finally, Debtors cite *In re BNW, Inc.*, 201 B.R. 838 (Bankr. S.D. Ala. 1996), but as Pillsbury correctly argues, that case concluded that FRCP 60(b)'s requirements were not satisfied and therefore never reached or analyzed the interaction between FRCP 60(b) and § 1127(b). *See id.* at 846-47. And to the extent that BNW could be read to suggest that FRCP 60(b) might apply even where § 1127(b) bars relief, that suggestion is inconsistent with the Third Circuit's ruling that a bankruptcy rule cannot overcome a limitation in the Bankruptcy Code. *See In re Fesq*, 153 F.3d at 116-17. Finally, Debtors contend that *In re Vencor* and

In re Logan, on which the Bankruptcy Court relied in its ruling, are distinguishable. Even assuming that is correct, the discussion above illustrates that those decisions are hardly the only ones supporting the Bankruptcy Court's § 1127(b) analysis.

5. Debtors' Remaining Arguments Are Unavailing

Debtors assert that application of § 1127(b) in this case does not serve the finality interests underlying that provision, asserting that a change in the release provisions would not "impact the finality of the [confirmation] order as to Debtors or its creditors." (D.I. 21 at 19). This Court does not assess the applicability of a statutory provision by asking whether its overarching purposes are directly served in any particular case; rather, it looks to the provision's plain language, and then applies that language by its terms. *See, e.g., Lawrence v. City of Phila.*, 527 F.3d 299, 316-17 (3d Cir. 2008) ("except in the rare instance when the court determines that the plain meaning is ambiguous," the "plain meaning of the [statutory] text should be conclusive"); *see also Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1905, 213 L. Ed. 2d 251 (2022) (court cannot adopt "an interpretation that would eviscerate . . . significant aspects of the statutory text"). The plain language of § 1127(b) admits of no exceptions. Debtors further contend that they should not be held to the requirements of § 1127(b) because they could not have requested relief prior to substantial consummation. (D.I. 21 at 19; D.I. 25 at 7-8). The plain text of § 1127(b) does not provide any exception to the requirement that modification

must be requested before substantial confirmation. Congress decided that the timing requirement applies regardless of the circumstances. Finally, Debtors contend that the relief they ask for would not violate § 1127(b) because the Plan provides that it "may be amended, modified, or supplemented by the Debtors in accordance with section 1127 of the Bankruptcy Code or as otherwise permitted by law." (D.I. 21 at 22 (citing Plan § 11.1)). The Plan provision does not advance Debtors' cause. The Plan states that it may be modified under § 1127 or "as otherwise permitted by law." (*Id.*) Contrary to Debtors' apparent argument, the phrase "as otherwise permitted by law" does not indicate that modification under some other authority is permitted by law — let alone under the circumstances presented here, where § 1127(b) affirmatively bars modification after substantial consummation. Debtors point to no lawful means by which the Plan could be modified in light of § 1127(b)'s express language.

B. Revocation of Confirmation Order Is Barred Under § 1144

1. Section 1144 Bars Revocation of Confirmation Order

Debtors further insist that they do not seek revocation here, so the Bankruptcy Court's application of § 1144 to their motion for relief was erroneous. (D.I. 21 at 20). Conversely, Pillsbury argues that, to the extent that Debtors are not seeking to modify the Plan's release provisions, they are necessarily seeking to revoke the

Confirmation Order so as to render those provisions of no force and effect as to Pillsbury. (D.I. 22 at 33). "Because as a matter of law there is no such thing as partial revocation of a Confirmation Order's terms, Debtors must necessarily be seeking to revoke that order in its entirety." (*Id.* (citing *Rodriguez*, 521 F. App'x at 91-92 (a confirmed plan is "the plan in all respects, and one cannot take a piece of it, and say that the rest of it remains intact, therefore, the order of confirmation is not disturbed."))). Pillsbury is correct. If the release provisions are not modified and they are not revoked, then they continue to bind Debtors and bar Debtors' proposed malpractice action.

As the Bankruptcy Court explained, "the debtors seek to either modify the provisions of the plan to avoid the release provisions or [to] revoke the plan" so as to render the release provisions of no force and effect. (5/4/2022 Tr. at 77). The Bankruptcy Court correctly ruled that revocation is barred by the plain terms of § 1144, which provides that "[o]n request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud." (*Id.* at 79-81 (citing 11 U.S.C. § 1144)). Just as § 1127(b) is the sole means of modifying a plan, § 1144 is the "only means by which a confirmation order may be . . . revoked." (*Id.* at 77-78) (quoting *In re Vencor*, 284 B.R. at 87); *see also In re Logan*, 327 B.R. at 812-14 (§ 1144 provides the exclusive means by which to vacate a plan"); *In re Longardner & Assocs.*, 855 F.2d 455, 460 (7th Cir. 1988) ("section 1144 is the only avenue for revoking confirmation of a plan of reorganization").

To the extent Debtors' motion for relief can be read as a motion for revocation of the Confirmation Order, Debtors have not complied with the strict requirements of § 1144. Debtors did not file their motion within 180 days of confirmation. (5/4/2022 Tr. at 81). Debtors also have not sought to revoke the confirmation order on the grounds of fraud. (*See* A927-49; A958-59). Section 1144 is clear that a court "may revoke such order if and only if such order was procured by fraud." 11 U.S.C. § 1144. Both of those flaws are independently fatal to Debtors' motion for relief. (*See* 5/4/2022 Tr. at 79 (explaining that "Section 1144's 180-day limitation is strictly enforced and may not be extended even if the fraud" on which a revocation request is based "is not discovered until the period has passed") (citing *Midstate Mortg.*, 105 F. App'x at 423)).

2. FRCP 60/FRBP 9024 Cannot Be Used to Circumvent § 1144

Debtors appear to contend that the Bankruptcy Court erred in ruling that FRCP 60(b) and FRBP 9024 cannot be used to make an end run around the strictures of § 1144. But like § 1127(b), § 1144 cannot be circumvented by means of a motion under FRCP 60 and FRBP 9024. FRBP 9024 expressly states that FRCP 60 applies "in cases under the Code ***except that . . . a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144*** [governing revocation in Chapter 11 cases], § 1230 [governing revocation in Chapter 12 cases], or § 1330 [governing revocation in Chapter 13 cases]." Fed. R. Bankr. P. 9024 (emphasis added). To the extent Debtors seek revocation of the Confirmation Order, and

they did not file their motion within the 180-day period allowed by § 1144. By its own terms, then, FRBP 9024 cannot aid them.

In *In re Fesq*, the Third Circuit directly addresses § 1144's analog under Chapter 13 — § 1330, which is worded almost identically to § 1144 an§ 1230 [governing revocation in Chapter 12 cases], or § 1330 [governing revocation in Chapter 13 cases]." Fed. R. Bankr. P. 9024 (emphasis added). To the extent Debtors seek revocation of the Confirmation Order, and they did not file their motion within thed provides that "[o]n request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation . . ., the court may revoke such order if such order was procured by fraud." 11 U.S.C. § 1330(a). In *In re Fesq*, a creditor of a Chapter 13 debtor sought to vacate a confirmation order under FRCP 60(b) on the basis of "excusable neglect," claiming that a computer error caused the creditor's counsel to miss the deadline for filing an objection. 153 F.3d at 114-15. The court of appeals concluded that, because the motion was filed more than 180 days after confirmation, it was barred by § 1330, the Chapter 13 analog to § 1144. *Id.* at 115. The court rejected an argument that FRCP 60 allowed revocation notwithstanding § 1330, reasoning that a procedural rule could not provide a remedy foreclosed by statute. *Id.* at 116-17. In other words, the terms of § 1330, and § 1144, mean precisely what they say: the only ground for revoking a confirmation order is an allegation of fraud made within 180 days. The Third Circuit has subsequently followed that holding in a series of unpublished decisions. *See, e.g., In re Rodriguez*, 521 F.

App'x at 92; *In re Midstate Mortg.*, 105 F. App'x at 423 & n.4. The Court agrees that the Third Circuit's ruling as to the interaction between § 1330, FRCP 60, and FRBP 9024 is directly applicable to § 1144 as well.

Debtors argue that some courts "disagree" with the Third Circuit "as to whether a Rule 60(b)(4) motion, which seeks relief from a judgment on the basis that the judgment is void, should be treated as a 'complaint to revoke' a plan subject to § 1330's time limit and substantive limitation to motions based on fraud." (D.I. 21 at 25). This Court is, of course, bound by the Third Circuit's precedential decision in *In re Fesq*, whatever other courts may have ruled.

3. Debtors' Malpractice Claims Are Not "Independent" of the Plan

Debtors argue that § 1144 does not apply here to bar relief because proceeding with a malpractice action would not "redivide the pie" of assets that the Plan divided but rather would give Debtors a claim for some additional recovery. (D.I. 21 at 23-25). Debtors rely on two decisions: *In re Genesis Health Ventures, Inc.*, 355 B.R. 438 (Bankr. D. Del. 2006), and *In re Coffee Cupboard, Inc.*, 119 B.R. 14 (E.D.N.Y. 1990). In those decisions, courts considered whether post-confirmation damages claims, which were not expressly addressed or blocked by any provision in the confirmed plan, were nevertheless so intertwined with the confirmed plan that allowing the claims to proceed would be "tantamount to revoking the plan." *In re Genesis*, 355 B.R. at 445; *see In re Coffee Cupboard*, 119 B.R. at 18-20. To make that assessment, both courts analyzed whether

the relief sought would be tantamount to revocation because it would "upset [the] confirmed plan" in some way — for example, by changing the way that money would be distributed under the plan (*i.e.*, "redivid[ing] the pie") — or whether the relief sought was instead "independent" of the plan. *In re Genesis*, 355 B.R. at 444-48; *see In re Coffee Cupboard*, 119 B.R. at 18-20. That analysis has no bearing where, as here, the confirmed Plan contains an express provision foreclosing the claims Debtors wish to pursue. The Bankruptcy Court correctly rejected this argument.

4. Section 1144 Contains No Exception for Purported Ethical Violations

Debtors argue that § 1144 "is not applicable to" requests for relief where purported ethical violations give rise to late discovery of the basis for a request. (D.I. 21 at 26-29). This Court need not reach any factual issues in order to affirm the Bankruptcy Court's decision. The statute contains no exception for purported ethical violations, and the Bankruptcy Court did not err in declining to create one out of whole cloth. (*See* 5/4/2022 Tr. at 80-81). Debtors insist this is a "matter of first impression." (D.I. 21 at 26). More accurately stated, there no authority for Debtors' argument that this Court should create an exception in derogation of the statute's plain text.

Finally, the Court must rejects Debtors' suggestion that the Plan's release provisions as they relate to Pillsbury are unusually broad or ethically improper. (D.I. 25 at 4). Bankruptcy courts routinely approve chapter

11 plans with release provisions substantively identical to the ones here. Debtors reference the "special rule" governing bilateral agreements between a lawyer and a client, which, among other things, requires that such agreements be made with the client's "full knowledge of all material circumstances." (D.I. 21 at 30 (quoting *Swift v. Choe*, 674 N.Y.S. 2d 17, 20, 242 A.D.2d 188 (N.Y. App. Div. 1998))). A chapter 11 plan of reorganization is not a bilateral agreement between lawyer and client. It is negotiated among a number of parties, subject to a court-approved disclosure statement that is noticed for creditor vote and stakeholder objection, and it is reviewed and approved by a bankruptcy court. Courts have rejected attempts to invalidate exculpatory provisions in chapter 11 plans on grounds that they violate ethical rules. *See, e.g., In re Stearns Holdings, LLC*, 607 B.R. 781, 791 (Bankr. S.D.N.Y. 2019) (holding that New York's rule of professional conduct restricting attorney release of malpractice liability "has no bearing on the standard of care established in an exculpation provision contained in a plan"). The Bankruptcy Court correctly did the same.

C. Due Process

Debtors argue that the Bankruptcy Court erred by not addressing their due process challenge. (*See* D.I. 21 at 29). Debtors did not present a due process argument in their opening brief below, instead raising it only in reply. (*See* A1196-98). Debtors argue that Pillsbury had a full opportunity to address, and did in fact address, Debtors' due process argument during the May 4, 2022 hearing, and never objected to such due process argument as

untimely or prejudicial. *See* 5/4/22 Tr. at 27-28. The law is clear, however, that "[i]ssues raised for the first time in a reply brief should not be heard." *Teleconference Sys. v. Proctor & Gamble Pharmaceuticals, Inc.*, 676 F. Supp. 2d at 331 n.13; *see also In re Insys Therapeutics*, 2021 Bankr. LEXIS 1923, 2021 WL 3083325, at *2 n.7 (noting that because an argument "was not raised in the opening brief" the court "need not consider it"). Because the issue was not properly raised in Debtors' opening brief below, the Bankruptcy Court committed no error in failing to address it. *See Jaludi v. CitiGroup*, 933 F.3d 246, 256 n.11 (3d Cir. 2019) (an argument raised for the first time in a reply brief in the district court is forfeited).

In any event, Debtors' argument that Pillsbury's actions somehow deprived Debtors of Constitutional due process is unavailing. (D.I. 21 at 29-37). The due process guarantee — whether derived from the Fifth Amendment or the Fourteenth Amendment — applies only to wrongful acts by government actors and has no application to "private conduct," even if that conduct is "discriminatory or wrongful." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)) (internal quotation marks omitted); *see Warren v. Government Nat'l Mortg. Asso.*, 611 F.2d 1229, 1232 (8th Cir. 1980) ("The standard for finding federal government action under the fifth amendment is the same as that for finding state action under the fourteenth amendment").

Pillsbury asserts that it is a private law firm whose actions cannot give rise to a due process claim. According to Debtors, Pillsbury's "private conduct" argument is a

red herring. (D.I. 25 at 13). Because the Plan containing the release provisions was confirmed by an order of the Bankruptcy Court, Debtors argue, "it is the government, *i.e.*, the Bankruptcy Court, depriving Debtors of due process." *Id.* "The Bankruptcy Court's decision to deny Debtors even the opportunity to present evidence — including an offer of proof — demonstrates the extent of the due process denial in this case." *Id.*

Procedural due process requires only that a person affected receive "notice and opportunity to be heard" before a deprivation of liberty or property. *Jeannot v. Philadelphia Hous. Auth.*, 356 F. Supp. 3d 440, 452-53 (E.D. Pa. 2018); *see LaChance v. Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."). Debtors had notice of their own plan of reorganization. Debtors' principal reviewed the plan and submitted a declaration discussing and endorsing the Plan's release provisions. (*See* A713-14 ¶¶ 10-14). Debtors had many opportunities to raise any issues they may have had with the release provisions or any other aspect of the Plan, including before the confirmation hearing, at the confirmation hearing, and at any time within the statutory time limit to modify the Plan. Finally, Debtors had counsel other than Pillsbury with whom to discuss the release provisions.[6] That Debtors may now

6. The record reflects that, in addition to in-house attorneys Hamed Adib and Linda Tran (A995-96, A999, A1010-97), Debtors were represented by separate bankruptcy counsel at Cole Schotz. (A1245). In addition, by no later than September 2021 (nearly two months before the Plan's effective date), Debtors had consulted

wish to have better focused on the release provisions appliable to Pillsbury — or that they had more time to seek to modify the plan — does not create a due process deprivation.

The Court finds no support for Debtors' additional argument that the Bankruptcy Court erred by ruling as a matter of law without an evidentiary hearing. (*See* D.I. 1 at 38-39). The ability of a court to rule as a matter of law, without trial or a hearing, is beyond dispute. It is something courts do every day, in granting motions for judgment on the pleadings or for summary judgment. Here, the Bankruptcy Court correctly determined that Debtors' factual arguments were immaterial because their claims were untimely. The Bankruptcy Court therefore had no need to waste time taking testimony that could not change the outcome of the matter. Debtors' argument that the Bankruptcy Court was required to hold an evidentiary hearing (and to do so after it had already conclusively ruled on the merits of the motion based on undisputed facts) rests on an incorrect reading of Bankruptcy Rule 9014(d), which provides that "[t]estimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding." Fed. R. Bankr. P. 9014(d). The language of that rule makes clear that live testimony is needed only if the factual dispute is "material." A fact is "material" only if it "might affect the outcome" of the dispute "under the governing law." *Anderson v. Liberty Lobby,*

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with separate counsel (LimNexus LPP) to advise them on potential objections to Pillsbury's fee applications. (A1181-86).

Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (discussing materiality in the context of summary judgment). As Debtors' motion was untimely, there was no need for an evidentiary hearing, and the Bankruptcy Court was well within its discretion in declining to hold one.

IV. CONCLUSION

The Court finds no error in the Bankruptcy Court's holdings, including that Debtors' motion for relief sought a modification of the Plan within the meaning of § 1127 of the Bankruptcy Code, that any such modification is barred after substantial consummation, that Debtors cannot circumvent the time limits imposed by §§ 1127 and 1144 by relying on FRCP 60/FRBP 9024, and that those statutes contain no exceptions for purported ethical violations. For the reasons set forth herein, the Order is affirmed. An appropriate order will be entered.

APPENDIX C — EXCERPT OF TRANSCRIPT OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, FILED JUNE 9, 2022

[1]IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 21-10549 (JTD)
(Jointly Administered

In re:

SC SJ HOLDINGS LLC, et al.

Wednesday, May 4, 2022

TRANSCRIPT OF ZOOM HEARING

BEFORE THE HONORABLE JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

***

[76]back, I'll give you my ruling on both of these issues.

So let's recess until 12 o'clock.

MS. KRISTOVICH: Thank you, Your Honor.

(RECESS TAKEN 11:28 a.m.)

(RECESS ENDED AT 12:04 p.m.)

THE COURT: All right. We are back on the record.

Do we have everyone back?

MS. KRISTOVICH: Yes.

THE COURT: All right. Well, first, I'll address the motion for relief seeing the plan.

The reorganized debtors, which I'll refer to as "debtors," have moved for an order pursuant to Federal Rule of Civil Procedure 60 as made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9024, quote, "Relieving the debtors from certain aspects of the third amended joint Chapter 11 plan," end quote, as to its former counsel Pillsbury Winthrop Shaw Pittman LLP, or Pillsbury.

Specifically the debtors seek to [77]avoid the plan's release, exculpation, and injunctive provisions granted to Pillsbury in order to pursue alleged malpractice claims against the firm.

I'm hearing some -- I'm going to mute folks. I'm getting some feedback.

In effect, the debtors seek to either modify the provisions of the plan to avoid the release provisions or revoke the plan under a theory that the plan releases were obtained by fraud or as a result of a breach of Pillsbury's ethical obligations under the rules of professional conduct.

Not surprisingly, Pillsbury has objected to the motion.

For the reasons I will discuss, the motion is denied.

As previously recognized by this Court, quote, "Revocation and modification of a Chapter 11 plan are specifically circumscribed by the Bankruptcy Code," closed quote. That's In Re Northfield Laboratories, 467 BR 582 at 588, Bankruptcy District of Delaware, 2010.

See also In Re Vencor, Inc., 284 BR 79 at 87, Bankruptcy District of Delaware, [78]2002, in which Judge Walrath stated, quote, "Sections 1127 and 1144 state the only means by which a confirmed confirmation order may be modified or revoked," closed quote.

Debtors' reliance on Rule 9024 is therefore misplaced.

As the Bankruptcy Court for the Southern District of Texas recognizes, Section 1127 provides the exclusive means by which a plan can be modified in Section 1144, the exclusive means to revoke a plan.

Rule 9024 is simply inapplicable. That's In Re Logan Place Properties Limited, 327 BR 811 at 812 through 814, Bankruptcy Southern District of Texas, 2005.

The question, then, is, do the debtors meet the statutory requirements for a modification or revocation of the plan pursuant to 1127 or 1144?

The answer is no.

Appendix C

Section 1127(b) allows for modification of a plan by a plan proponent or reorganized debtor, quote, "At any time after confirmation of such plan and before substantial consummation of the plan," closed quote.

[79]The plan here was approved, and the confirmation order was entered on August 18th, 2021. The parties agree that the plan became effective on November 8th, 2021, and pursuant to the confirmation order, the plan became substantially consummated on that date under Sections 1101 and 1127.

Since we are now post-confirmation and the plan by its own terms is substantially consummated, the debtors cannot now seek to modify the plan.

The debtors also cannot comply with the strict statutory requirements of Section 1144. Section 1144 provides that an order of confirmation that was procured by fraud can be revoked within 180 days of the entry of the confirmation order.

Section 1144's 180-day limitation is strictly enforced and may not be extended even if the fraud is not discovered until the period has passed.

In Re Mid-State Mortgage Investments, Inc., 105 Federal Appendix 420 at 423, Third Circuit, 2004.

Nor can a party seek to rely on [80]Rule 9024 to extend the time period because by its own terms, Section 1144 limits actions to revoke a confirmation order to the time limits contained in Section 1144. Any motion seeking relief

under Rule 9024 must be treated as a Complaint seeking to revoke the confirmation order. In Re Tesque, 1153 F.3rd 1113 at – or excuse me -- 113 at 116, Third Circuit, 1998; and In Re Rodriguez, 521 Federal Appendix 87 at 92, Third Circuit, 2013.

Debtors argue that the situation here is different because the releases and exculpation granted to Pillsbury in these cases are the result of an alleged breach of Pillsbury's ethical obligations.

Debtors' counsel correctly pointed out -- excuse me. Yes.

Debtors' counsel correctly pointed out during argument that there is no case precedent addressing the application of Section 1144 in that type of situation.

In light of the Third Circuit's view that even outright fraud that was not discovered until after the applicable 180-day period has run can form the basis for a [81] revocation of a confirmation order.

I am not prepared to say that the alleged ethical violations would allow for an exception to the Code's mandate.

Even assuming there were ethical violations -- and to be clear, I am not making any finding that there were -- there are other avenues to deal with those allegations.

As I previously noted, the confirmation order here was entered on August 18, 2021. Section 1144's 180-day

period, therefore, ran on February 14th, 2022. Debtors did not file their Rule 9024 motion, which I must consider a Complaint to revoke under 1144, until February 28th, 2022, two weeks after the deadline.

Since the Third Circuit has made clear that the deadline cannot be extended, the debtors' motion must be denied.

Debtors' attempt to avoid the strict requirements of Sections 1127 and 1144 by arguing that their motion does not attempt to, quote, "redivide the pie," close quote, and, therefore, is, quote, "an independent action," close quote, that does not affect the [82]confirmation order.

Debtors rely primarily on Judge Walrath's decision and Genesis Health Ventures Inc., 355 BR 438, Bankruptcy District of Delaware, 2006, and the case is cited by Judge Walsh in his ruling.

In Genesis, a creditor filed suit in state court more than 180 days after confirmation of the plan against the debtor: three senior creditors and the debtor's CFO.

The Bankruptcy Court dismissed the claims against the debtor as time barred by Section 1144 and against the remaining defendants as barred by the doctrines of claim issue preclusion.

The District Court upheld dismissal of the debtor under Section 1144 and remanded for determination of whether Section 1144 also barred claims against the

remaining defendants along with certain issues related to claim and issue preclusion.

Judge Walsh concluded that the claims against the nondebtor defendants were not barred by 1144 because pursuit of those claims would not require revisiting the confirmation [83]order and would not otherwise be a collateral attack on that order.

As Judge Walsh recognized, quote, "An independent money judgment against the creditor guilty of fraud would only affect that particular creditor," UDAAP 446.

He went on to conclude that, quote, "No one other than the plaintiff would benefit from the money judgment against the defendants," UDAAP 447.

While on its face this analysis might seem to be equally applicable here because pursuing Pillsbury for alleged malpractice will not require a redividing of the pie and only Pillsbury would potentially be affected by any money judgment, there is one overriding distinction between Genesis as well as the other cases referred to in that opinion and this case.

That is releases and exculpations granted under the plan.

The debtors' granted releases and exculpation to Pillsbury without reservation as the debtors clearly recognize by the fact that they brought this motion. In order to bring a lawsuit against Pillsbury for malpractice,

[84]debtors need to modify the confirmation order effectively writing the releases and exculpation provisions out of the order.

That constitutes a collateral attack on the confirmation order and can only be accomplished through Sections 1127 or 1144. See again In Re Verestar, Inc., 284 BR 79 at 85 finding that striking release is granted and a plan as a modification of the plan. Also Gulf States Long-Term Acute Care of Covington, LLC, 487 BR 713 at 719 through 20, Eastern District of Louisiana 2013, finding that withdrawal of release of claims granted under our plan required compliance with Section 1144.

It says the plan was confirmed as substantially consummated, debtors cannot seek to modify the confirmation order pursuant to 1127, and because the debtors did not seek to revoke -- excuse me -- revoke the confirmation order within the 180 days required by Section 1144, the relief they seek is unavailable. The objection is sustained and the motion is denied.

Turning to the motion for leave to file an objection to Pillsbury's final fee application. As the Pillsbury's counsel pointed [85]out, the Court must consider the Pioneer factors, and those factors are a danger of prejudice to the debtors or in this case to Pillsbury, the length of delay, the reason for the delay, and whether it was in the control of the movant, and whether the movant acted in good faith.

As to danger of prejudice to Pillsbury, the only danger is that there might be a delay in their receiving their final fees. That is not the type of prejudice that I think the

Supreme Court had in mind when it decided the Pioneer case.

So I find that there's no actual -- there's no significant prejudice to Pillsbury in having to wait for their fees.

The length of the delay. Here, it was less than 30 days from the time of the deadline for filing an objection to the final fee application and the time when the objection was actually filed. That is not a significant delay.

Reasons for the delay, and whether it was in control of the movement -- movant, I don't have any actual evidentiary, but [86]based on the representations of counsel, the reasons for the delay seemed to be legitimate. There were a lot of things happening at that period of time. Mr. Hirbod and the debtors were busy with other matters and trying to turn to that and caused them to miss the deadline, and, therefore, I find there's no -- that factor does not weigh in favor of granting -- or of denying the relief.

Four, whether the movant acted in good faith, I have no -- Pillsbury has made allegations that there was bad faith on the part of the debtors in seeking to object to the fees, but when you're looking at good faith, the question is are they trying to gain some advantage, and there certainly was no advantage to the debtors' 30-day -- less than 30-day delay in filing the objection to the fee application.

So, therefore, I will grant that motion and allow the debtors to file an objection.

I'm going to limit -- I'm going to give you a timeline, because we need to move this along. So I will give the debtors 30 days from today to file their objections. So that [87]will be -- that will give you, what, four weeks. So June 1st, we'll say, is the deadline to file objections to the fee application.

I'll let the parties meet and confer and discuss what the remaining briefing schedule will be on that. And then once you've determined what the briefing schedule will be, contact chambers and we'll get a date for a hearing.

All right. That's all I had on the fee application.

The other thing on the agenda for today was the sealed motions. Is that something we still need to address at this time or -- given that we're not going to have any testimony today.

Whose motion was it? Mr. Wesoky.

MR. WESOKY: Yes, Your Honor, it was our motion. Effectively a motion to seal the various filings and exhibits in the -- obviously that are before this Court on the two issues that we've addressed today. We do believe that those records should be sealed.

They are privileged, although there is a limited waiver as to the privilege.

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APPENDIX D — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, DATED AUGUST 18, 2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 21-10549 (JTD)
(Jointly Administered)
Related to Docket No. 660

In re:

SC SJ HOLDINGS LLC, *et al.*

Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (I) CONFIRMING THIRD AMENDED JOINT CHAPTER 11 PLAN AND (II) GRANTING RELATED RELIEF

Upon the filing by the above-captioned debtors and debtors in possession (collectively, the "Debtors") of the *Third Amended Joint Chapter 11 Plan of Reorganization* [Docket No. 660] on August 13, 2021 (the "Plan"),[1] which is attached hereto as **Exhibit A**; and the Bankruptcy Court previously having approved (i) the *Amended Disclosure Statement With Respect to Amended Joint Chapter 11 Plan of Reorganization* [Docket No. 391] (the

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

"Disclosure Statement") and the solicitation procedures related to the Disclosure Statement pursuant to the Order entered on June 3, 2021 [Docket No. 396] (the "Disclosure Statement Order") and (ii) a supplement to the Disclosure Statement (the "Disclosure Statement Supplement") and the solicitation of acceptances and rejections of the Plan from Class 4C pursuant to the *Order Conditionally Approving the Solicitation of the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization for Class 4C and the Adequacy of the Supplemental Disclosure Therewith* [Docket No. 623] (the "Disclosure Statement Supplement Order"); and the Debtors having served on the Holders of Claims and Interests the Disclosure Statement and Disclosure Statement Supplement, as applicable, pursuant to the Disclosure Statement Order and Disclosure Statement Supplement Order, [*see* Docket No. 423, 526, 540, 603]; and the Debtors having filed the documents comprising the Plan Supplement on June 25, 2021, July 28, 2021, August 13, 2021, August 16, 2021, and August 17, 2021 [Docket Nos. 489, 600, 662, 664, 671, 674]; and the Debtors having voluntarily extended and continued certain dates and deadlines in the Disclosure Statement Order pursuant to that *Notice of Rescheduled Confirmation Hearing and Extensions of Related Deadlines* [Docket No. 516] (the "Confirmation Deadline Notice"), which was served on the Holders of Claims and Interests; and the Bankruptcy Court having considered the record in these Chapter 11 Cases, the creditor support for the Plan evidenced in the *Declaration of Aileen Daversa on Behalf of Stretto Regarding the Solicitation of Votes and Tabulation of Ballots Accepting and Rejecting Proposed Third Amended*

Chapter 11 Plan of Reorganization [Docket No. 666] (the "Voting Certification"), the compromises and settlements embodied in and contemplated by the Plan, the briefs and arguments regarding confirmation of the Plan, and the evidence regarding confirmation of the Plan; and the Bankruptcy Court having held a hearing on confirmation of the Plan on [August 18, 2021] (the "Confirmation Hearing"); and after due deliberation, this Bankruptcy Court hereby FINDS, DETERMINES, and CONCLUDES as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Conclusions of Law. The findings and conclusions set forth herein and orally on the record of the Confirmation Hearing constitute this Bankruptcy Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable herein by Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. Jurisdiction, Venue, Core Proceeding. This Bankruptcy Court has jurisdiction over these Chapter 11 Cases and this matter pursuant to 28 U.S.C. § 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b) and this Bankruptcy Court has jurisdiction to enter a final order with respect thereto. The Debtors consent to the entry of a final order by the Bankruptcy Court in accordance with the terms set forth

herein to the extent that it is later determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution. Venue is proper before this Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Chapter 11 Petitions. On March 5, 2021, Debtor FMT SJ LLC commenced with this Bankruptcy Court a voluntary case under chapter 11 of the Bankruptcy Code. On March 10, 2021, Debtor SC SJ Holdings LLC commenced with this Bankruptcy Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Debtors' Chapter 11 Cases pursuant to section 1104 of the Bankruptcy Code. The Debtors' Chapter 11 Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1.

D. Judicial Notice. This Bankruptcy Court takes judicial notice of the docket of the Debtors' Chapter 11 Cases maintained by the Clerk of the Bankruptcy Court, including all pleadings and other documents filed, all orders entered, all hearing transcripts, and all evidence and arguments made, proffered, or adduced at the hearings held before this Bankruptcy Court during the pendency of the Debtors' Chapter 11 Cases. Any resolution of objections to the confirmation of the Plan explained on the record at the Confirmation Hearing is hereby

incorporated by reference. All unresolved objections, statements, informal objections, and reservations of rights, if any, related to the Plan, or confirmation of the Plan are overruled in their entirety on the merits and denied.

E. Burden of Proof. Based on the record of the Debtors' Chapter 11 Cases, each of the Debtors has met the burden of proving each element of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence.

F. Adequacy of Disclosure Statement Supplement. The Disclosure Statement Supplement contains "adequate information" as to Class 4(C) as such term is defined in section 1125(a)(1) of the Bankruptcy Code, with respect to the treatment of Class 4(C) under the Plan.

G. Solicitation. The Debtors, through their solicitation and balloting agent, Stretto, duly caused the transmittal of the Disclosure Statement, the Plan, and the Disclosure Statement Supplement, as applicable, and related solicitation materials, including forms of ballots (the "Ballots"), notices of non-voting status, and notice of the Confirmation Hearing (collectively, the "Solicitation Materials"), to holders of Claims and Interests in accordance with the Disclosure Statement Order and the Disclosure Statement Supplement Order, as applicable, as described in the *Affidavit of Service* [Docket No. 423] (collectively, the "Solicitation Affidavit"), as well as the Voting Certification. Transmittal and service of the Solicitation Materials (the "Solicitation") was timely, adequate, appropriate, and sufficient under the

circumstances. The Solicitation (i) was conducted in good faith and (ii) complied with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Disclosure Statement Order, the Disclosure Statement Supplement Order, and all other applicable non-bankruptcy rules, laws, and regulations applicable to the Solicitation.

H. Notice. As evidenced by the Solicitation Affidavit and the Voting Certification, all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to confirmation of the Plan) have been given due, proper, adequate, timely, and sufficient notice of the Confirmation Hearing in accordance with the Disclosure Statement Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and all other applicable non-bankruptcy rules, laws, and regulations, and such parties have had an opportunity to appear and be heard with respect thereto and the Plan.

I. Tabulation Results. As described in the Voting Certification, holders of Claims in Classes 3A, 3B, 4B, 4C, 5, 6B, and 7A are Impaired under the Plan and Classes 1, 2, 4A, 6A, and 7A are Unimpaired.

J. Bankruptcy Rule 3016. In accordance with Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtors as proponents of the Plan. The Debtors appropriately filed the Disclosure Statement and the Plan with this Bankruptcy Court, thereby satisfying Bankruptcy Rule 3016(b). The discharge, release, injunction, and exculpation provisions of the Plan are set

forth in bold and with specific and conspicuous language, thereby complying with Bankruptcy Rule 3016(c).

K. Plan Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1)). The Plan complies with the applicable provisions of the Bankruptcy Code and thereby satisfies section 1129(a)(1) of the Bankruptcy Code. More particularly:

(i) Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)). In addition to Administrative Expense Claims (Section 2.1 of the Plan), Professional Fee Claims (Section 2.2 of the Plan), Priority Tax Claims (Section 2.3 of the Plan), and DIP Claims (Section 2.4 of the Plan), which need not be classified, Sections 3 and 4 of the Plan classify and describe the treatment of twelve (12) Classes of Claims and Interests of the Debtors. The Claims and Interests placed in each Class are substantially similar to the other Claims and Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, the classifications were not implemented for improper purposes, and such Classes do not unfairly discriminate between holders of Claims and Interests. The Plan therefore satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

(ii) Specified Unimpaired Classes (11 U.S.C. § 1123(a)(2)). Sections 3 and 4 of the Plan specify that Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4A (SC SJ General Unsecured Claims), Class 6A (SC SJ Subordinated Claims), and Class 7A (SC SJ Equity

Interest) are Unimpaired under the Plan within the meaning of section 1124 of the Bankruptcy Code, thereby satisfying section 1123(a)(2) of the Bankruptcy Code.

(iii) Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)). Articles III and IV of the Plan designate Class 3A (SC SJ Prepetition Secured Loan Claims), Class 3B (FMT Prepetition Secured Loan Claims), Class 4B (FMT General Unsecured Claims), Class 4C (Fairmont General Unsecured Claim), Class 5 (Inter-Debtor Claims), Class 6B (FMT Subordinated Claims), and Class 7B (FMT Equity Interest) as Impaired within the meaning of section 1124 of the Bankruptcy Code and specify the treatment of the Claims and Interests in those Classes, thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

(iv) No Discrimination (11 U.S.C. § 1123(a)(4)). The Plan provides for the same treatment for each Claim or Interest in each respective Class unless the Holder of a particular Claim or Interest has agreed to a less favorable treatment of such Claim or Interest, thereby satisfying section 1123(a)(4) of the Bankruptcy Code.

(v) Implementation of Plan (11 U.S.C. § 1123(a)(5)). The Plan, including the documents and agreements included in the Plan Supplement, provides adequate and proper means for implementing the Plan by, among other things, specifying (a) all corporate actions, (b) the funding of the Plan, (c) the compromise and settlement of Claims, Interests, and controversies, (d) the cancellation of certain existing securities and agreements, (e) the cancellation

of certain existing security interests, (f) the Committee Settlement, (g) the granting of valid and enforceable first priority Liens, pledges, mortgages, and security interests in connection with the Post-Effective Date Secured Loan Documents, (h) the Real Property Sales, and (i) the Qualified Manager and Qualified Mezzanine Lender, selected pursuant to that *Order on Debtors' Motion for an Order Authorizing Marketing Process to Solicit Hotel Brands* [Docket No. 159] (the "Marketing Process Order"). The Plan therefore satisfies section 1123(a)(5) of the Bankruptcy Code.

(vi) Non-Voting Equity Securities/Allocation of Voting Power (11 U.S.C. § 1123(a)(6)). The applicable governance documents for Reorganized SC SJ and New Lessee have been or will be amended on or prior to the Effective Date to prohibit the issuance of non-voting equity securities, thereby satisfying section 1123(a)(6) of the Bankruptcy Code.

(vii) Designation of Independent Managers (11 U.S.C. § 1123(a)(7)). The Plan Supplement identifies the independent managers of Reorganized SC SJ and New Lessee. Neither the Plan nor the Plan Supplement contain provisions that are inconsistent 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 officers, director, or trustee.

(viii) Impairment/Unimpairment of Classes of Claims or Interests (11 U.S.C. § 1123(b)(1)). As

contemplated by section 1123(b)(1) of the Bankruptcy Code, and pursuant to section 1124 of the Bankruptcy Code, Sections 3 and 4 of the Plan classify and describe the treatment of the Unimpaired Classes and Impaired Classes as follows: Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4A (SC SJ General Unsecured Claims), Class 6A (SC SJ Subordinated Claims), and Class 7A (SC SJ Equity Interest) are Unimpaired. Class 3A (SC SJ Prepetition Secured Loan Claims), Class 3B (FMT Prepetition Secured Loan Claims), Class 4B (FMT General Unsecured Claims), Class 4C (Fairmont General Unsecured Claim), Class 5 (Inter-Debtor Claims), Class 6B (FMT Subordinated Claims, and Class 7B (FMT Equity Interest) are Impaired.

(ix) Assumption and Rejection (11 U.S.C. § 1123(b)(2)). Section 8 of the Plan addresses the assumption and rejection of Executory Contracts and Unexpired Leases and satisfies the requirements of section 365(b) of the Bankruptcy Code. In accordance with Section 8 of the Plan, as set forth in the Schedule of Assumed Contracts, the Debtors served a notice on parties to Executory Contracts and Unexpired Leases to be assumed or assumed and assigned reflecting (a) the Debtors' intention to assume or assume and assign such Executory Contracts or Unexpired Leases in connection with the Plan and (b) the Cure Amounts. By paying the Cure Amounts, if any, in Cash upon the Effective Date (or as otherwise agreed to by the Debtors and the applicable counterparty) pursuant to Section 8.4 of the Plan, any monetary amounts by which any Executory Contract or Unexpired Lease to be assumed under the Plan is in default shall be deemed satisfied, under section 365(b)(1) of the Bankruptcy Code.

(x) Compromise and Settlement (11 U.S.C. § 1123(b)(3)). In accordance with section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019, the compromises and settlements set forth in the Plan, including the Fairmont Release Consent Agreement and the Fairmont Mutual Release Agreement, are approved and will be effective immediately and binding on all parties in interest on the Effective Date. For the avoidance of doubt and notwithstanding any provision in the Plan to the contrary, the settlements set forth in the Plan are approved as settlements between the parties that have agreed to them.

(xi) Retention of Causes of Action and Reservation of Rights (11 U.S.C. § 1123(b)(3)). On June 25, 2021, the Debtors filed with the Bankruptcy Court a schedule of retained Causes of Action as an exhibit to the Plan Supplement. In accordance with section 1123(b)(3) of the Bankruptcy Code and Section 10.11 of the Plan, except as otherwise released under the Plan or Confirmation Order, the Reorganized Debtors shall have retained, reserved, and be entitled to assert all such claims, Causes of Action, rights of setoff or recoupment, and other legal or equitable defenses as fully as if these Chapter 11 Cases had not been commenced, and all of the Debtors' legal and equitable rights in respect of any Unimpaired Claim may be asserted after the Effective Date to the same extent as if these Chapter 11 Cases had not been commenced.

(xii) Modification of Rights and Unaffected Rights of Holders of Claims (11 U.S.C. § 1123(b)(5)). Except to the extent that Holders of such Claims and

Interests agree to a less favorable treatment, the Plan leaves unaffected the rights of holders of Claims and Interests in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4A (SC SJ General Unsecured Claims), Class 6A (SC SJ Subordinated Claims), and Class 7A (SC SJ Equity Interest). The Plan thus complies with section 1123(b)(5) of the Bankruptcy Code. The Plan modifies the rights of Holders of Claims or Interests, as applicable, in Class 3A (SC SJ Prepetition Secured Loan Claims), Class 3B (FMT Prepetition Secured Loan Claims), Class 4B (FMT General Unsecured Claims), Class 4C (Fairmont General Unsecured Claim), Class 5 (Inter-Debtor Claims), Class 6B (FMT Subordinated Claims), and Class 7B (FMT Equity Interest).

(xiii) Additional Plan Provisions (11 U.S.C. § 1123(b)(6)). The provisions of the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1123(a)(6) of the Bankruptcy Code.

(xiv) Cure of Defaults (11 U.S.C. § 1123(d)). Section 8 of the Plan provides for the payment of Cure Amounts for each Executory Contract and Unexpired Lease to be assumed pursuant to the Plan. The Debtors, the Post-Effective Date Debtors, or New Lessee, as applicable, have paid or will pay valid Cure Amounts in the ordinary course. Thus, the Plan complies with section 1123(d) of the Bankruptcy Code.

L. Debtors' Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)). The Debtors have complied with the applicable provisions of the Bankruptcy Code. Specifically:

(i) each of the Debtors is an eligible debtor under section 109 of the Bankruptcy Code;

(ii) the Debtors are proper plan proponents under section 1121(a) of the Bankruptcy Code;

(iii) the Debtors have complied with all other applicable provisions of the Bankruptcy Code, except as otherwise provided or permitted by orders of the Bankruptcy Court; and

(iv) the Debtors have complied with the applicable provisions of the Bankruptcy Code, including sections 1125 and 1126(b), the Bankruptcy Rules, the Local Rules, and all other applicable laws, rules, and regulations in transmitting the Plan, the Plan Supplement, the Disclosure Statement, the Ballots, and related documents and notices and in soliciting and tabulating the votes on the Plan.

M. Plan Proposed in Good Faith (11 U.S.C. § 1129(a)(3)). The Debtors have proposed the Plan (and all documents necessary to effectuate the Plan), the Plan Supplement, and all other restructuring documents in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. The Debtors' good faith is evident from the facts and record of the Debtors' Chapter 11 Cases, the Disclosure Statement, the record of the Confirmation Hearing, and other proceedings held in the Debtors' Chapter 11 Cases. The Plan and the documents contained in or contemplated by the Plan, including but not limited to the Plan Supplement, the Post-Effective Date

Secured Loan Agreement, the New Lease, the Qualified Manager Documents (defined below), and the Qualified Mezzanine Documents (defined below) (collectively, the "Plan Documents"), were proposed with the legitimate and honest purpose of maximizing the value of the Debtors' Estates and to effectuate a successful reorganization of the Debtors. The Plan and the Plan Documents were negotiated in good faith and at arm's length among the Debtors, the Prepetition Secured Lender, the Committee, the Qualified Manager, the Qualified Mezzanine Lender, and various other parties in interest. Further, the Plan's classification, indemnification, exculpation, release, and injunction provisions have been negotiated in good faith and at arm's length, are consistent with sections 105, 1122, 1123(b)(3)(A), 1123(b)(6), 1129, and 1142 of the Bankruptcy Code, and are each integral to the Plan, supported by valuable consideration, and necessary for the Debtors' successful reorganization. The Exculpated Parties have participated in good faith and in compliance with the provisions of the applicable laws with regard to the solicitation of, and the distribution of consideration pursuant to, the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

N. Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)). Any payment made or to be made by the Debtors for services or for costs and expenses of the Debtors' professionals in connection with the Debtors' Chapter 11 Cases, or in connection with the

Plan and incident to the Debtors' Chapter 11 Cases, has been approved by, or is subject to the approval of, the Bankruptcy Court as reasonable, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

O. Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)). The Debtors have complied with section 1129(a)(5) of the Bankruptcy Code. The Debtors do not have directors or officers. However, the identities and affiliations of the independent managers of Reorganized SC SJ and New Lessee are disclosed in the Plan Supplement. The Plan Supplement also discloses the identities and affiliations of the Post-Effective Date FMT Manager. The appointment to, or continuance in, such offices of such persons is consistent with the interests of holders of Claims against and Interests in the Debtors and with public policy.

P. No Rate Changes (11 U.S.C. § 1129(a)(6)). The Plan does not provide for rate changes by any of the Post-Effective Date Debtors. Thus, section 1129(a)(6) of the Bankruptcy Code is not applicable in the Debtors' Chapter 11 Cases.

Q. Best Interest of Creditors (11 U.S.C. § 1129(a)(7)). The Plan satisfies section 1129(a)(7) of the Bankruptcy Code. The liquidation analysis provided in the Disclosure Statement, the Demchick Declaration, and the other evidence presented, proffered, or adduced at the Confirmation Hearing (i) are persuasive and credible, (ii) have not been controverted by other evidence, and (iii) establish that each holder of an Impaired Claim or

Interest either has accepted the Plan or will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

R. Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)). Class 5 (Inter-Debtor Claims), Class 6B (FMT Subordinated Claims), and Class 7B (FMT Equity Interest) are Classes of Impaired Claims or Interests that are conclusively deemed to have rejected the Plan in accordance with section 1126(g) of the Bankruptcy Code. Class 3A (SC SJ Prepetition Secured Loan Claims), Class 3B (FMT Prepetition Secured Loan Claims), Class 4B (FMT General Unsecured Claims, and Class 4C (Fairmont General Unsecured Claim) are Classes of Impaired Claims or Interests that have voted to accept the Plan in accordance with sections 1126(b) and (c) of the Bankruptcy Code. Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 4A (SC SJ General Unsecured Claims), Class 6A (SC SJ Subordinated Claims), and Class 7A (SC SJ Equity Interest) are Unimpaired under the Plan pursuant to section 1124 of the Bankruptcy Code and, accordingly, Holders of Claims or Interests in such classes are conclusively deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code.

S. Treatment of Administrative Expense Claims, Fee Claims, Priority Tax Claims, and Other Priority Claims (11 U.S.C. § 1129(a)(9)). The treatment of Allowed Administrative Expense Claims and Professional Fee

Claims pursuant to Sections 2.1 and 2.2, respectively, of the Plan satisfies the requirements of section 1129(a)(9)(A) of the Bankruptcy Code. The treatment of Priority Tax Claims pursuant to Section 2.3 of the Plan satisfies the requirements of section 1129(a)(9)(C) of the Bankruptcy Code. The treatment of Other Priority Claims pursuant to Section 4.1 of the Plan satisfies the requirements of section 1129(a)(9)(B) of the Bankruptcy Code.

T. Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10)). Class 3A (SC SJ Prepetition Secured Loan Claims), Class 3B (FMT Prepetition Secured Loan Claims), Class 4B (FMT General Unsecured Claims, and Class 4C (Fairmont General Unsecured Claim) are Classes of Impaired Claims or Interests that have voted to accept the Plan by the requisite majorities in accordance with section 1126 of the Bankruptcy Code, determined without including any acceptance of the Plan by any insider, thereby satisfying the requirements of section 1129(a)(10) of the Bankruptcy Code.

U. Feasibility (11 U.S.C. § 1129(a)(11)). The information in the Disclosure Statement, the Disclosure Statement Supplement, [the Declarations], and the evidence proffered or adduced at the Confirmation Hearing (i) are persuasive and credible, (ii) have not been controverted by other evidence, and (iii) together with the record of the Debtors' Chapter 11 Cases and the evidence presented at the Confirmation Hearing, establish that the Plan is feasible, that there is a reasonable prospect of the Post-Effective Date Debtors being able to meet their financial obligations under the Plan as well as their business obligations in the

ordinary course, that the incurrence of the obligations contemplated by the Plan will not result in the Debtors' insolvency, and that confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of Reorganized SC SJ or New Lessee, thereby satisfying the requirements of section 1129(a)(11) of the Bankruptcy Code.

V. Payment of Statutory Fees (11 U.S.C. § 1129(a)(11)). All fees currently payable under section 1930 of title 28 of the United States Code, as determined by the Bankruptcy Code, have been or will be paid on or before the Effective Date, thereby satisfying the requirements of section 1129(a)(12) of the Bankruptcy Code.

W. Continuation of Retiree Benefits (11 U.S.C. § 1129(a)(13)). The Plan Supplement provides for the assumption and continuance by New Lessee of Debtor FMT's obligations with respect to the Stationary Engineers Trust Funds, the Unite Here Pension Fund, the Painters Pension Fund, and the Teamsters Pension Fund (each, as defined below) in accordance with applicable non-bankruptcy law. The Plan therefore satisfies section 1129(a)(13) of the Bankruptcy Code.

X. No Domestic Support Obligations (11 U.S.C. § 1129(a)(14)). The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in the Debtors' Chapter 11 Cases.

Y. Debtors Are Not Individuals (11 U.S.C. § 1129(a)(15)). The Debtors are not individuals and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in the Debtors' Chapter 11 Cases.

Z. No Applicable Non-Bankruptcy Law Regarding Transfers (11 U.S.C. §1129(a)(16)). The Debtors are each a moneyed, business, or commercial corporation, and section 1129(a)(16) of the Bankruptcy Code is thus inapplicable.

AA. No Unfair Discrimination; Fair and Equitable (11 U.S.C. § 1129(b)). The Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code. Notwithstanding the fact that Classes 5 (Inter-Debtor Claims), 6B (FMT Subordinated Claims) and 7B (FMT Equity Interest) are deemed to have rejected the Plan, the Plan may be confirmed pursuant to section 1129(b)(1) and (b)(2) of the Bankruptcy Code. Based upon the evidence proffered, adduced, and presented by the Debtors at the Confirmation Hearing, the Plan does not discriminate unfairly between holders of Claims and Interests and is fair and equitable with respect to the aforementioned Classes, as required by sections 1129(b)(1) and (b)(2) of the Bankruptcy Code. No holder of any Claim or Interest that is junior to Class 6B or Class 7B will receive or retain any property under the Plan on account of such junior Claim or Interest and no holder of a Claim or Interest in a Class senior to such Classes is receiving more than 100% recovery. Class 5 consists of Claims of Debtor SC SJ Holdings LLC against Debtor FMT SJ LLC and Claims of Debtor FMT SJ LLC against Debtor SC SJ Holdings LLC, and both Debtors are proponents of the Plan. Section 1129(b) is thus satisfied.

BB. Only One Plan (11 U.S.C. § 1129(c)). The Plan is the only plan filed in each of the Debtors' Chapter 11 Cases. Section 1129(c) of the Bankruptcy Code is thus inapplicable.

CC. Principal Purpose of the Plan (11 U.S.C. § 1129(d)). The principal purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933, and no governmental entity has objected to the confirmation of the Plan on any such grounds. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

DD. Good Faith Solicitation (11 U.S.C. § 1125(e)). Based on the record before the Bankruptcy Court in the Debtors' Chapter 11 Cases, including evidence presented at the hearing on the Disclosure Statement and the Confirmation Hearing, the Debtors, the Released Parties, and the Exculpated Parties (i) have acted in "good faith" at all times within the meaning of section 1125(e) of the Bankruptcy Code in compliance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any applicable non-bankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with the development of the Plan, all their respective activities relating to the solicitation of acceptances to the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, including, without limitation, the negotiation, execution, delivery, entry into and performance of the Restructuring Support Agreement, DIP Facility Term Sheet, the New Hotel Management Agreement and all related agreements, including the Qualified Manager Guaranty,

the Qualified Mezzanine Loan Agreement and all related agreements, the Post-Effective Date Secured Loan Documents, the Eagle Canyon Commitment Letter and Parent Capital Contribution, and all other Plan Documents, consummation of the Restructuring Transactions, the New Lessee LLC Agreement and amended LLC agreement for Reorganized SC SJ, the appointment of the Post-Effective Date FMT Manager, and the appointment of the independent managers of Reorganized SC SJ and New Lessee, and (ii) shall be deemed to have participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code in the offer and issuance of any securities under the Plan, and therefore are not, and on account of such offer, issuance, and solicitation shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or the offer and issuance of the securities under the Plan, and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the exculpation provisions set forth in Section 10.9 of the Plan.

EE. Satisfaction of Confirmation Requirements. Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

FF. Likelihood of Satisfaction of Conditions Precedent to the Effective Date. Each of the conditions precedent to the Effective Date, as set forth in Section 9.1 of the Plan, has been or is reasonably likely to be satisfied or waived in accordance with the Plan.

GG. Implementation. The Plan Documents are essential elements of the Plan, and entry into each Plan Document is in the best interests of the Debtors, the Estates, and holders of Claims and Interests. The Plan Documents are incorporated by reference, are approved in all respects, and constitute an integral part of this Confirmation Order. The Debtors are hereby authorized to execute the Plan Documents and take all such further actions as are necessary to implement the Plan Documents, including the payment of all fees, expenses, and other payments in accordance with the terms thereof. The Debtors have exercised reasonable business judgment in determining to enter into each of the Plan Documents, and the terms and conditions of all such Plan Documents, including the fees, expenses, and other payments set forth therein, have been and continue to be negotiated in good faith and at arm's length, are fair and reasonable, are supported by reasonably equivalent value and fair consideration, and shall, upon completion of documentation and execution, be valid, binding, non-avoidable, and enforceable agreements and not be in conflict with any federal, state, or local law. The Debtors have provided sufficient and adequate notice of each of the Plan Documents to all parties in interest in the Debtors' Chapter 11 Cases.

HH. Executory Contracts and Unexpired Leases. The Debtors have exercised reasonable business judgment in determining whether to assume or reject Executory Contracts and Unexpired Leases pursuant to Section 8 of the Plan. Each assumption of an Executory Contract or Unexpired Lease pursuant to

Section 8 of the Plan shall be legal, valid, and binding upon the Debtors, the Post-Effective Date Debtors and their successors and assigns and all non-Debtor parties and their successors and assigns to such Executory Contract or Unexpired Lease, all to the same extent as if such assumption were effectuated pursuant to an order of this Bankruptcy Court under section 365 of the Bankruptcy Code entered before entry of this Confirmation Order. Moreover, the Debtors have cured, or provided adequate assurance that the Debtors, the Post- Effective Date Debtors or their successors and assigns, as applicable, will cure, defaults (if any) under or relating to each of the executory contracts and unexpired leases that are being assumed by the Debtors or assumed and assigned to New Lessee pursuant to the Plan.

II. Good Faith. The Debtors and the Released Parties have been and will be acting in good faith if they proceed to (i) consummate the Plan, the Plan Documents, and the agreements, settlements, transactions, and other transfers set forth or contemplated therein and (ii) take any actions authorized and directed by this Confirmation Order.

JJ. New Hotel Management Agreement. The Plan is premised in material part on entry into the New Hotel Management Agreement with the Qualified Manager. The New Hotel Management Agreement is the best branding and management agreement available for the Hotel, is necessary to the consummation of the Plan and the operation of the Hotel. Additionally, the terms of the New Hotel Management Agreement and all

related documents to be entered into by the Qualified Manager, including non-Debtor affiliate guaranties, as required by the Qualified Manager (the "Qualified Manager Documents"), are fair and reasonable, reflect the Debtors' exercise of prudent business judgment, do not conflict with any contracts or agreements of third parties, are supported by reasonably equivalent value and fair consideration, and are in the best interests of the Debtors, the Debtors' Estates, and their creditors. The Debtors, the Qualified Manager, the Prepetition Secured Lender, and their respective representatives and advisors, have acted at all times in good faith and in compliance with the Marketing Process Order in selecting the Qualified Manager and negotiating and implementing the Qualified Manager Documents. The Qualified Manager Documents and the selection of the Qualified Manager are the results of and in compliance with the Marketing Process Order. The financial accommodations to be extended pursuant to the Qualified Manager Documents are being extended in good faith and for legitimate business purposes, are reasonable, shall not be subject to recharacterization for any purposes whatsoever, and shall not constitute preferential transfers or fraudulent conveyances under the Bankruptcy Code or any other applicable non-bankruptcy law. Each party to the Qualified Manager Documents may rely upon the provisions of this Confirmation Order in closing the Qualified Manager Documents and the transactions contemplated therein.

KK. Qualified Mezzanine Loan. The Qualified Mezzanine Loan, and the terms thereof set forth in the term sheet for the Qualified Mezzanine Loan Agreement

[*see* Docket No. 664, Exh. A] (the "Qualified Mezzanine Loan Term Sheet"), is the best financing alternative available and is necessary to the consummation of the Plan and the operation of the Hotel after the Effective Date. Additionally, the terms of the Qualified Mezzanine Loan Agreement and all related documents to be entered into by the Qualified Mezzanine Lender, as set forth in the Qualified Mezzanine Loan Term Sheet (collectively, the "Qualified Mezzanine Documents"), are fair and reasonable, reflect the Debtors' exercise of prudent business judgment, do not conflict with any contracts or agreements of third parties, are supported by reasonably equivalent value and fair consideration, and are in the best interests of the Debtors and their Estates. The Debtors, the Qualified Mezzanine Lender, the Prepetition Secured Lender, the Qualified Manager, and their respective representatives and advisors, acted in good faith and in compliance with the Marketing Process Order in the selection of the Qualified Mezzanine Lender and in negotiating and implementing the Qualified Mezzanine Documents. The Qualified Mezzanine Documents and the selection of the Qualified Mezzanine Lender are the results of and in compliance with the Marketing Process Order. The financial accommodations to be extended pursuant to the Qualified Mezzanine Loan are being extended in good faith and for legitimate business purposes, are reasonable, shall not be subject to recharacterization for any purposes whatsoever, and shall not constitute preferential transfers or fraudulent conveyances under the Bankruptcy Code or any other applicable non-bankruptcy law. Each party to the Qualified Mezzanine Loan may rely on the provisions of this Confirmation Order in closing the Qualified

Mezzanine Loan and the transactions contemplated therein.

LL. Post-Effective Date Secured Loan Documents. The terms of the Post-Effective Date Secured Loan Documents (as defined below), as set forth in the term sheet for the Qualified Manager Amendment [Docket No. 664, Exh. O] are fair and reasonable, reflect the Debtors' exercise of prudent business judgment, do not conflict with any contracts or agreements of third parties, are supported by reasonably equivalent value and fair consideration, and are in the best interests of the Debtors' Estate and their creditors. The financial accommodations to be extended pursuant to the Post-Effective Date Secured Loan Documents are being extended in good faith and for legitimate business purposes, are reasonable, shall not be subject to recharacterization for any purposes whatsoever, and shall not constitute preferential transfers or fraudulent conveyances under the Bankruptcy Code or any other applicable non-bankruptcy law. Each party to the Post- Effective Date Secured Loan Documents may rely on the provisions of this Confirmation Order in closing the Post-Effective Date Secured Loan Documents and the transactions contemplated therein.

MM. Injunctions, Releases, and Exculpation. The Bankruptcy Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code and authority under section 105 of the Bankruptcy Code to approve (i) the injunctions or stays, injunction against interference with the Plan, releases, and exculpation set forth in the Plan, including, without limitation, Sections 10.4, 10.5, 10.6,

10.7, 10.8, 10.9, and 10.10 of the Plan, respectively, and (ii) the releases set forth in paragraph 26 of this Confirmation Order, the Fairmont Release Consent Agreement, and the Fairmont Mutual Release Agreement. As has been established based upon the record in these Chapter 11 Cases and the evidence presented at the Confirmation Hearing, such provisions (i) were given in exchange for good and valuable consideration, (ii) were integral to the agreements among the various parties in interest and are essential to the formulation and implementation of the Plan, as provided in section 1123 of the Bankruptcy Code, (iii) confer substantial benefits on the Debtors' Estates, (iv) are fair, equitable, and reasonable, (v) are in the best interests of the Debtors, their Estates, and parties in interest, and (vi) failure to implement the injunctions, exculpation, and releases would seriously jeopardize the Debtors' ability to confirm and implement the Plan. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a), the injunctions, releases, and exculpation set forth in the Plan and implemented by this Confirmation Order are fair, equitable, reasonable, and in the best interest of the Debtors, the Post-Effective Date Debtors, and their Estates, creditors, and equity holders and are supported by adequate consideration.

(i) The releases granted by the Debtors and their Estates under Section 10.6 of the Plan (the "Debtors' Release") represent a valid exercise of the Debtors' business judgment. For the reasons set forth on the record of these Chapter 11 Cases and the evidence proffered or adduced at the Confirmation Hearing, the Debtors' Release is an integral and necessary part of the Plan and

is fair, reasonable, and in the best interests of the Debtors, the Estates, and holders of Claims and Interests. Also, the Debtors' Release is: (a) in exchange for the good and valuable consideration provided by the Released Parties; (b) a good faith settlement and compromise of the released claims released by the Debtors, the Post-Effective Debtors, and the Estates; (c) given and made after due notice and opportunity for hearing; and (d) a bar to any of the Debtors, the Post- Effective Date Debtors, or the Estates asserting any Claim or Cause of Action released pursuant to the release described in Section 10.6 of the Plan, except as otherwise set forth in the Plan.

(ii) The releases contained in Section 10.7 of the Plan (the "Third-Party Releases") are appropriate. Holders of Claims and Interests were duly informed of the Third-Party Releases and given the opportunity to opt out. The Third-Party Releases in Section 10.7 of the Plan are consensual under applicable law because the releases are provided only by (a) the holders of all Claims and Interests who voted to accept the Plan; (b) the holders of all Claims and Interests whose vote to accept or reject the Plan was solicited but that did not vote either to accept or to reject the Plan; (c) the holders of all Claims and Interests that voted, or were deemed, to reject the Plan but did not opt out of granting the releases set forth therein; (d) the holders of all Claims and Interests that were given notice of the opportunity to opt out of granting the releases set forth in the Plan but did not opt out; and (e) the Released Parties; and notwithstanding anything to the contrary in the Plan or this Confirmation Order, Fairmont and its Related Persons are only Releasing Parties as

to the Released Parties that are also Fairmont Release Consent Parties as of the Effective Date. The Third-Party Releases are consensual and: (i) in exchange for good and valuable consideration provided by the Released Parties; (ii) a good faith settlement and compromise of the claims released by the Third-Party Releases; (iii) in the best interests of the Debtors and all holders of Claims and Interests; (iv) fair, equitable, and reasonable; (v) given and made after due notice and opportunity for hearing; and (vi) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Releases, except as otherwise set forth in the Plan. The Third-Party Releases are an integral part of the Plan and were critical in incentivizing the parties to negotiate or support the Plan. Like the Debtors' Release, the Third-Party Releases facilitated participation in both the Debtors' Plan and the chapter 11 process generally. The Third-Party Releases are appropriately tailored under the facts and circumstances of these Chapter 11 Cases. Parties-in-interest have had a full opportunity to object to and/or opt out of the Third-Party Releases. As such, the Third-Party Releases appropriately offer certain protections to parties that constructively participated in the Debtors' restructuring process by, among other things, supporting the Plan and the Restructuring Transactions. Each of (A) the Notice of Non-Voting Status and Notice of Right to Opt-Out of Certain Releases (the "Notice of Non-Voting Status"), which was sent to holders of Claims and Interests in Non-Voting Classes [*see* Docket No. 608], and (B) the Ballots, which were sent to holders of Claims in Voting Classes, expressly included in bold font the terms of the Third-Party Releases, as set forth

in Section 10.7 in the Plan [*see* Docket Nos. 608 and 627]. The Notice of Non-Voting Status and the Ballots advised careful review and consideration of the terms of the Third-Party Releases, along with the exculpation and injunction provisions of the Plan. The language of the Third-Party Releases was also emphasized using bold font in the Plan and the Disclosure Statement. The Debtors sufficiently put the Releasing Parties on notice of the claims being released.

(iii) The releases set forth in paragraph 26 of this Confirmation Order, the Fairmont Release Consent Agreement, and the Fairmont Mutual Release Agreement are appropriate and are consensual. The releases set forth in paragraph 26 of this Confirmation Order, the Fairmont Release Consent Agreement, and the Fairmont Mutual Release Agreement are (a) in exchange for good and valuable consideration provided by the Fairmont Release Consent Parties and Fairmont Mutual Release Parties, as applicable; (b) a good faith settlement and compromise of the claims thereunder; (c) in the best interests of the Debtors, the Fairmont Release Consent Parties, and the Fairmont Mutual Release Parties; (d) fair, equitable, and reasonable; and (e) a bar to any of the Fairmont Release Consent Parties or Fairmont Mutual Release Parties asserting any claim or cause of action released pursuant thereto.

(iv) The exculpations granted under the Plan are reasonable in scope and do not relieve any party of liability for an act or omission to the extent such act or omission is a criminal act or constitutes intentional fraud, gross negligence, or willful misconduct.

(v) The record of the Confirmation Hearing and these Chapter 11 Cases is sufficient to support the injunctions, releases, and exculpation provided for in the Plan, including in Sections 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, and 10.10 of the Plan, in this Confirmation Order, in the Fairmont Release Consent Agreement, and in the Fairmont Mutual Release Agreement. Accordingly, based upon the record of these Chapter 11 Cases, the representations of the parties, and/or the evidence proffered, adduced, and/or presented at the Confirmation Hearing, the injunctions, exculpation, and releases set forth in Section 10 of the Plan, in this Confirmation Order, in the Fairmont Release Consent Agreement, and in the Fairmont Mutual Release Agreement are consistent with the Bankruptcy Code and applicable law and are approved.

NN. Real Property Commitments. By signing an acknowledgment to the Plan and endorsing this Confirmation Order, the Real Estate Affiliates and the Additional Real Estate Affiliates agreed to (i) be bound by the Real Property Commitments and the other obligations imposed on the Real Estate Affiliates or the Additional Real Estate Affiliates, as applicable, by this Confirmation Order and under Section 4.7 and Section 5.9 of the Plan, and (ii) be subject to the jurisdiction of the Bankruptcy Court to enforce such obligations.

OO. Authorized Modifications. All modifications to the Plan filed prior to the date of this Confirmation Order (the "Modifications") comply with all applicable provisions of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules. The filing and service of the

Modifications constitutes due and sufficient notice thereof under the circumstances of the Chapter 11 Cases. The Modifications do not adversely change the treatment of any Holder of a Claim or Interest under the Plan that has not consented to the Modifications, do not require the re-solicitation of any Voting Class, and are hereby approved pursuant to section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims or Interests who voted to accept the Plan or who are conclusively presumed to have accepted the Plan are deemed to have accepted the Plan as modified by the Modifications. No Holder of a Claim or Interest that has voted to accept the Plan shall be permitted to change its acceptance to a rejection as a consequence of the Modifications.

PP. Retention of Jurisdiction. The Bankruptcy Court may properly, and upon the Effective Date shall, retain exclusive jurisdiction over all matters arising in or related to, the Chapter 11 Cases, including the matters set forth in Section 12 of the Plan and section 1142 of the Bankruptcy Code.

ORDER

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, DECREED, AND DETERMINED THAT:

1. Findings of Fact and Conclusions of Law. The above-referenced findings of fact and conclusions of law are

hereby incorporated by reference as though fully set forth herein and shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable herein by Bankruptcy Rule 9014. All findings of fact and conclusions of law announced by this Bankruptcy Court at the Confirmation Hearing in relation to confirmation of the Plan are hereby incorporated into this Confirmation Order. To the extent that any finding of fact shall be determined to be a conclusion of law, it shall be deemed so, and vice versa.

2. Notice of the Confirmation Hearing and Solicitation. The Solicitation and notice of the Confirmation Hearing complied with the Disclosure Statement Order, were appropriate and satisfactory based upon the circumstances of the Debtors' Chapter 11 Cases, and were in compliance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

3. Confirmation of Plan. The Plan and each of its provisions are confirmed pursuant to section 1129 of the Bankruptcy Code. The Plan Documents are hereby authorized and approved. The terms of the Plan and the Plan Supplement are incorporated herein by reference and are an integral part of this Confirmation Order. The terms of the Plan (including all consent rights provided therein), the Plan Supplement, all exhibits thereto, and all other relevant and necessary documents shall be effective and binding as of the Effective Date. Subject to the terms of the Plan, (including all consent rights provided therein), the Debtors reserve the right to alter, amend, update, or modify the Plan Documents prior to the Effective Date

with the consent of the respective counterparties or other parties affected thereby. The failure to specifically include or refer to any particular article, section, or provision of the Plan or the Plan Documents in this Confirmation Order shall not diminish or impair the effectiveness or enforceability of such article, section, or provision, nor constitute a waiver thereof, it being the intent of this Bankruptcy Court that the Plan is confirmed in its entirety and is incorporated herein by reference in its entirety.

4. Objections. To the extent that any objections (including any reservations of rights contained therein) to confirmation of the Plan or other responses or reservations of rights with respect thereto have not been withdrawn, waived, settled, or otherwise resolved prior to entry of this Confirmation Order, such objections, responses, and reservations of rights shall be, and hereby are, overruled on the merits and denied.

5. No Action. Pursuant to the appropriate provisions of applicable non-bankruptcy law, and section 1142(b) of the Bankruptcy Code, no action of the respective directors, managers, or members of the Debtors or New Lessee shall be required to authorize them to enter into, execute, deliver, file, adopt, amend, restate, consummate, or effectuate, as the case may be, the Plan nor any contract, instrument, or other document to be executed, delivered, adopted, or amended in connection with the implementation of the Plan.

6. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and

consents required, if any, by the laws, rules, or regulations of any state or any other governmental authority with respect to the implementation of the Plan and the Plan Documents and any other acts that may be necessary or appropriate for the implementation or consummation of the Plan or the Plan Documents.

7. Implementation of the Plan. After the Confirmation Date, the Debtors and the Post-Effective Date Debtors, as applicable, and the appropriate managers, officers, representatives, and members thereof shall be authorized to, and may, issue, execute, deliver, file, or record such documents, contracts, instruments, releases, and other agreements, including those contained in the Plan Documents, and take such other actions as may be necessary or appropriate to effectuate, implement, and further evidence the terms and conditions of the Plan, including the Restructuring Transactions and all such other actions delineated in Section 5 of the Plan or otherwise contemplated by the Plan, including the conversion, merger, or dissolution of any Debtor, without the need for any further approvals, authorization, or consents, in each case, subject to the terms of the Plan and this Confirmation Order. The Debtors, the Post-Effective Date Debtors, and any non- Debtor parties to the Plan Documents are authorized to alter, amend, update, or modify the Plan Documents prior to the Effective Date subject to the terms of the Plan, this Confirmation Order, and the Restructuring Support Agreement.

8. Restructuring Transactions. On the Effective Date or as soon as reasonably practicable thereafter, the

Debtors or Post-Effective Date Debtors, as applicable, may take all actions consistent with this Confirmation Order and the Plan as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Restructuring Transactions under and in connection with the Plan Documents.

9. Approval of the New Corporate Governance Documents. The Reorganized SC SJ LLC Agreement, the New Lessee LLC Agreement, and the New Lease (the "New Corporate Governance Documents"), are hereby approved in all respects. The Debtors and the Post-Effective Date Debtors, as applicable, and New Lessee are authorized, without further approval of the Bankruptcy Court or any other party, to execute and deliver all agreements, documents, instruments, and certificates relating to the New Corporate Governance Documents, and take such other actions as reasonably deemed necessary to perform their obligations thereunder.

10. Approval of the Qualified Manager Documents. The Qualified Manager Documents are hereby approved and shall be enforced pursuant to their terms. The Debtors and the Post-Effective Date Debtors, as applicable, and New Lessee are authorized, without further approval of the Bankruptcy Court or any other party, to execute and deliver all agreements, documents, instruments, and certificates relating to the Qualified Manager Documents, and take such other actions as reasonably deemed necessary to perform their obligations thereunder. The Qualified Manager Documents shall constitute legal, valid, binding, and authorized obligations

of Reorganized SC SJ, New Lessee, and any other counterparty thereto, as applicable, enforceable in accordance with their terms and such obligations shall not be enjoined or subject to discharge, impairment, release, avoidance, recharacterization, or subordination under applicable law, the Plan, or this Confirmation Order.

11. Approval of the Qualified Mezzanine Loan. The Qualified Mezzanine Documents are hereby approved and shall be enforced pursuant to their terms. The Debtors and the Post- Effective Date Debtors, as applicable, and New Lessee are authorized, without further approval of the Bankruptcy Court or any other party, to execute and deliver all agreements, instruments, certificates, and any other documents relating to the Qualified Mezzanine Documents, and take such other actions as reasonably deemed necessary to perform their obligations thereunder. The Qualified Mezzanine Documents shall constitute legal, valid, binding, and authorized obligations of the counterparties thereto, as applicable, enforceable in accordance with their terms and such obligations shall not be enjoined or subject to discharge, impairment, release, avoidance, recharacterization, or subordination under applicable law, the Plan, or this Confirmation Order.

12. Approval of the Post-Effective Date Secured Loan Documents.

(i) On the Effective Date, Reorganized SC SJ and New Lessee shall enter into the Qualified Manager Loan Amendment and all other documents, notes, agreements, guaranties, and other collateral documents

contemplated thereby, including, but not limited to, the Guaranty Reaffirmation and the Guarantors' Additional Guarantees (collectively, the "Post-Effective Date Secured Loan Documents"). The Post-Effective Date Secured Loan Documents shall constitute legal, valid, binding, and authorized joint and several obligations of Reorganized SC SJ and New Lessee, as applicable, enforceable in accordance with their terms and such obligations shall not be enjoined or subject to discharge, impairment, release, avoidance, recharacterization, or subordination under applicable law, the Plan, or this Confirmation Order. On the Effective Date, all Liens and security interests granted pursuant to, or in connection with the Post-Effective Date Secured Loan Documents (x) shall be valid, binding, perfected, enforceable first priority Liens on and security interests in the property subject to a security interest granted by Reorganized SC SJ and New Lessee, as applicable, with the priorities established in respect thereof under applicable non-bankruptcy law and the Qualified Mezzanine Intercreditor Agreement and (y) shall not be enjoined or subject to discharge, impairment, release, avoidance, recharacterization or subordination under any applicable law, the Plan, or this Confirmation Order.

(ii) This Confirmation Order shall be deemed approval of the Post-Effective Date Secured Loan Documents (including the transactions contemplated thereby, and all actions to be taken, undertakings to be made, and obligations to be incurred and fees paid or to be paid by the Debtors, the Post-Effective Date Debtors, or New Lessee, as applicable, in connection therewith),

to the extent not approved by the Bankruptcy Court previously, and Reorganized SC SJ and New Lessee are authorized to execute and deliver those documents necessary, desirable, advisable or appropriate to obtain the Qualified Manager Loan Amendment, including the Post-Effective Date Secured Loan Documents, without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or vote, consent, authorization, or approval of any Person, subject to such modifications as Reorganized SC SJ, New Lessee, and the Prepetition Secured Lender may deem to be necessary, desirable, advisable or appropriate to consummate the Qualified Manager Loan Amendment.

(iii) On the Effective Date, the Prepetition Secured Lender shall be fully discharged of all of its duties and obligations associated with the Prepetition Secured Loan Agreement.

(iv) Notwithstanding anything herein to the contrary, the Liens and security interests granted under and pursuant to the Prepetition Secured Loan Documents shall be deemed to become Liens carried forward under the Post-Effective Date Secured Loan Documents, with the rights, priority, and protections as more fully set forth below and shall not be discharged hereby as to the Post-Effective Date Debtors, including but not limited to any Assets delivered in kind to Reorganized SC SJ pursuant to Section 4.4(a) of the Plan.

(v) On the Effective Date, all of the Liens and security interests to be granted in accordance with, or

carried forward pursuant to, the Post-Effective Date Secured Loan Documents, including (x) all mortgage liens encumbering the Hotel, (y) all Uniform Commercial Code financing statements perfecting liens in personal property, and (z) all control agreements perfecting liens in deposit accounts or security accounts, in each case, in favor of the Prepetition Secured Lender: (a) shall be deemed to be approved; (b) shall be legal, binding, and enforceable Liens on, and security interests in, the collateral granted thereunder in accordance with the terms of the Post-Effective Date Secured Loan Documents; (c) shall be deemed fully perfected on the earlier of the applicable recording or filing date of such security instrument, or the Effective Date, as applicable, subject only to such Liens and security interests as may be permitted under the Post- Effective Date Secured Loan Documents and applicable non-bankruptcy law; and (d) shall not be subject to avoidance, recharacterization, or subordination (including equitable subordination) for any purposes whatsoever and shall not constitute preferential transfers, fraudulent conveyances, or other voidable transfers under the Bankruptcy Code or any applicable non-bankruptcy law.

(vi) The Debtors, the Post-Effective Date Debtors, New Lessee, and the Prepetition Secured Lender are authorized to make all filings and recordings, including, without limitation, financing statements, amendments thereto, or assignments thereof and other documents, including mortgages or amendments or assignments thereof with the appropriate authorities in order to evidence the first priority Liens, pledges,

mortgages, and security interests granted in connection with the Post-Effective Date Secured Loan Documents under the provisions of the applicable state, federal, or other law that would be applicable in the absence of the Plan and the Confirmation Order, and will thereafter cooperate to make all other filings and recordings that otherwise would be necessary under applicable law to give notice of such Liens and security interests to third parties. To the extent that any holder of an Other Secured Claim that has been satisfied or discharged in full pursuant to the Plan, or any agent for such holder, has filed or recorded publicly any Liens and/or security interests to secure such holder's Other Secured Claim, then as soon as practicable on or after the Effective Date, such holder (or the agent for such holder) shall take any and all steps requested by the Debtors, the Post-Effective Date Debtors, New Lessee, or the Prepetition Secured Lender Facility Agent that are necessary to cancel and/or extinguish such publicly-filed Liens and/or security interests. The guaranties, mortgages, pledges, Liens, and other security interests granted in connection with the Post-Effective Date Secured Loan Documents are granted in good faith as an inducement to the Prepetition Secured Lender to extend credit thereunder, shall be deemed not to constitute a fraudulent conveyance or fraudulent transfer, shall not otherwise be subject to avoidance, and the priorities of such Liens, mortgages, pledges, and security interests shall be as set forth in the Post-Effective Date Secured Loan Documents, the Qualified Mezzanine Intercreditor Agreement and the collateral documents executed and delivered in connection therewith.

13. Plan Distributions. The Debtors are authorized to make all plan distributions pursuant to the terms of the Plan and to pay any other applicable fees and expenses approved by this Confirmation Order or any other order of this Bankruptcy Court.

14. Vesting of Assets. On the Effective Date, all property of the Estate of a Debtor, and any property acquired by a Debtor under the Plan, shall vest, subject to the Restructuring Transactions, in the recipient provided under the Plan, including but not limited to Section 4.4 of the Plan, in each case free and clear of all Claims, Liens, charges, other encumbrances, and interests other than those relating to the Post-Effective Date Secured Loan Documents.

15. Approval of the Fairmont Claim Guaranty. The Fairmont Claim Guaranty is hereby approved and shall be enforced pursuant to its terms. The Fairmont Limited Guarantor and Fairmont are authorized, without further approval of the Bankruptcy Court or any other party, to execute and deliver all agreements, documents, instruments, and certificates relating to the Fairmont Claim Guaranty, and take such other actions as reasonably deemed necessary to perform their obligations thereunder.

16. Cancellation of Existing Securities, Security Interests and Agreements. Except as provided under the Plan, the Confirmation Order (including Paragraph 12 hereof) or for the purpose of evidencing a right to and allowing holders of Claims to receive a distribution under the Plan, and except as otherwise set forth in the Plan, or

in the Plan Supplement or any agreement, instrument, or document related thereto, automatically on the Effective Date, all agreements, instruments, notes, certificates, indentures, mortgages, security documents, and other instruments or documents evidencing or creating any prepetition Claim or Interest and any rights of any holder in respect thereof shall be deemed cancelled and of no force or effect and the Debtors shall not have any continuing obligations thereunder. The releases and termination described herein have been effected, and are and shall be binding upon and govern the acts of all Persons, including all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, county and local officials and all other Persons who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments that reflect the release of security interests as set forth herein (collectively, "Recording Officers").

17. Approval of the Committee Settlement. This Confirmation Order constitutes the Bankruptcy Court's approval of the Committee Settlement as well as a finding by the Bankruptcy Court that (a) the Plan is dependent upon and incorporates the terms of the Committee Settlement, (b) the Committee Settlement was negotiated in good faith and at arm's length and is an essential element of the Plan, (c) the Committee Settlement is fair, equitable, and reasonable, and in the best interests of the Debtors, the Debtors' Estates, the Holders of

Claims and Interests, and all other parties in interest, (d) the Committee Settlement satisfies the standards for approval under Bankruptcy Rule 9019 and sections 363 and 1123(b)(3) of the Bankruptcy Code, and (e) the Debtors properly discharged their fiduciary duties in entering into and negotiating the terms of the Committee Settlement and the Plan.

18. Treatment of Claim of County of Santa Clara, Department of Tax & Collections. The County of Santa Clara, Department of Tax & Collections ("Santa Clara County") asserted an Other Secured Claim in the amount of $2,023,825.23 against Debtor SC SJ in proof of claim number 152 and proof of claim 162, which are duplicates and include $1,903,629.55 for real estate property taxes (the "Santa Clara Property Taxes"), and $120,195.68 of penalties and interest (the "Santa Clara Tax Penalties and Interest"). Notwithstanding anything in the Plan or this Confirmation Order to the contrary, Santa Clara County and the Debtors have agreed that, subject to, and upon the occurrence of the Effective Date, (a) Santa Clara County shall have an Allowed Other Secured Claim in the amount of $2,023,825.23, (b) Reorganized SC SJ shall pay, or cause to be paid consistent with the Plan and Post-Effective Date Secured Loan Documents, the full outstanding balance of Santa Clara Property Taxes by no later than December 31, 2024, and (c) if the full outstanding balance of Santa Clara Property Taxes is paid by December 31, 2024, Santa Clara County shall waive and release its Claim for Santa Clara Tax Penalties and Interest, and Reorganized SC SJ shall have no obligation to pay such Santa Clara Tax Penalties and Interest.

Appendix D

19. Executory Contracts and Unexpired Leases.

(i) Pursuant to section 8 of the Plan, as of and subject to the occurrence of the Effective Date, all Executory Contracts and Unexpired Leases to which any of the Debtors are parties shall be deemed rejected pursuant to sections 365 and 1123 of the Bankruptcy Code, unless such contract or lease (a) was previously assumed, assumed and assigned, or rejected by the Debtors pursuant to a Final Order of the Bankruptcy Court, (b) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto, (c) is the subject of a pending motion to assume filed by the Debtors before the Effective Date, or (d) was specifically designated as a contract or lease to be assumed or assumed and assigned on the Schedule of Assumed Contracts. As of and subject to the occurrence of the Effective Date and the payment of any applicable Cure Amount (as specified in the Schedule of Assumed Contracts or as otherwise agreed to between the Debtors and the applicable counterparty), all executory contracts and unexpired leases that were included in the Schedule of Assumed Contracts shall be deemed assumed or assumed and assigned to New Lessee, as applicable, and any consent required pursuant to section 365(c) of the Bankruptcy Code, applicable law, or otherwise shall be deemed to have been granted.

(ii) Subject to (a) satisfaction of the conditions set forth in section 8 of the Plan, and (b) the occurrence of the Effective Date, entry of this Confirmation Order shall constitute approval of the assumptions or rejections provided for in the Plan pursuant to sections 365(a) and

1123 of the Bankruptcy Code and a determination by the Bankruptcy Court that Reorganized SC SJ or New Lessee, as applicable, have provided adequate assurance of future performance under such assumed executory contracts and unexpired leases. Each executory contract and unexpired lease assumed pursuant to the Plan shall vest in and be fully enforceable by Reorganized SC SJ or New Lessee, as applicable, in accordance with its terms, except as modified by the provisions of the Plan, any Final Order of this Bankruptcy Court authorizing and providing for its assumption, or applicable law.

(iii) Unless otherwise provided by a Final Order of the Bankruptcy Court, any proofs of Claim based on the deemed rejection of an executory contract or unexpired lease pursuant to Section 8.1 of the Plan, must be filed with the Claims Agent and served on the Debtors or the Post-Effective Date Debtors and counsel, at the address listed in Section 13.18 of the Plan, as applicable, by no later than thirty (30) days after the entry of this Confirmation Order. Any objection to the deemed rejection of an executory contract or unexpired lease pursuant to Section 8.1 of the Plan must be filed with the Bankruptcy Court and served on the Debtors or Post-Effective Date Debtors and counsel, at the address listed in Section 13.18 of the Plan, as applicable, by no later than fourteen (14) days from entry of this Confirmation Order.

(iv) Notwithstanding anything to the contrary set forth in the Plan or this Confirmation Order, subject to, and upon the occurrence of, the Effective Date, Debtor FMT shall assume and assign to New Lessee that certain

Telecommunications Network Agreement, dated April 24, 2015, and the First Amendment thereto, dated September 27, 2018 (collectively, the "ExteNet Contract"), with ExteNet Systems (California) LLC ("ExteNet"). New Lessee and ExteNet agree that the Cure Amount for the ExteNet Contract, which is $106,000, shall be paid in monthly payments of $5,000. The first payment shall be due on the first business day of the first month following the Effective Date, and subsequent payments shall be made on the first business day of each successive month until the Cure Amount is fully paid. ExteNet reserves its right of set-off until the $106,000 is fully paid. In the event of a payment default (*i.e.*, when an installment payment is more than 5 days overdue), the entire unpaid balance of the Cure Amount will be immediately due and payable.

20. Collective Bargaining Agreements and Certain Pension Obligations.

(i) The Plan Supplement provides that as of and subject to the occurrence of the Effective Date, Debtor FMT shall assume and assign to New Lessee that certain collective bargaining agreement, dated as of November 1, 2019, by and between the Fairmont Hotel, San Jose and the International Union of Operating Engineers, Stationary Engineers, Local 39 and all side letters and memoranda of understanding related thereto (collectively, the "Stationary Engineers CBA"). As of and subject to the occurrence of the Effective Date, New Lessee shall continue and assume Debtor FMT's obligations under the Stationary Engineers CBA related to the Stationary Engineers Local 39 Pension Trust Fund, Stationary

Engineers Local 39 Annuity Trust Fund, and Stationary Engineers Local 39 Health and Welfare Trust Fund (collectively, the "Stationary Engineers Trust Funds") in accordance with applicable non-bankruptcy law (and the Post-Effective Date Debtors and New Lessee reserve all rights thereunder). The Debtors and the Stationary Engineers Trust Funds agree that, upon the Effective Date, no withdrawal from the Stationary Engineers Trust Funds will have occurred because, under ERISA, no material change will occur in the identity of the employer with the obligation to contribute to it. The Debtors' view and the Stationary Engineers Trust Funds' view of the controlling authority for that proposition differs in certain respects, but no need exists to determine at the present time which authority controls because, in either case, upon the Effective Date, no withdrawal from the Stationary Engineers Trust Funds will have occurred, and the parties are reserving their respective rights. Accordingly, as of and subject to the occurrence of the Effective Date, any Claim asserted by the Stationary Engineers Trust Funds for withdrawal liability under 29 U.S.C. §§ 1383 and/or 1385 (including, without limitation, the withdrawal liability claim set forth in proof of claim 139) shall be deemed to be withdrawn.

(ii) The Plan Supplement provides that as of and subject to the occurrence of the Effective Date, Debtor FMT shall assume and assign to New Lessee that certain collective bargaining agreement, dated as of July 1, 2017, by and between District Council 16 and Northern California Painting and Finishing Contractors Association and the Fairmont Hotel, San Jose and all side

letters and memoranda of understanding related thereto (collectively, the "Painters CBA"). As of and subject to the occurrence of the Effective Date, New Lessee shall continue and assume Debtor FMT's obligations under the Painters CBA related to the Bay Area Painters and Tapers Pension Trust Fund (the "Painters Pension Fund") in accordance with applicable non-bankruptcy law (and the Post-Effective Date Debtors and New Lessee reserve all rights thereunder). Upon the Effective Date, no withdrawal from the Painters Pension will have occurred.

(iii) The Plan Supplement provides that as of and subject to the occurrence of the Effective Date, Debtor FMT shall assume and assign to New Lessee that certain collective bargaining agreement, dated as of July 1, 2018, by and between UNITE H.E.R.E.! Local 19 International Union and Debtor FMT and all side letters and memoranda of understanding related thereto, including that certain memorandum of understanding dated as of May 19, 2021 (collectively, the "Unite Here CBA"). As of and subject to the occurrence of the Effective Date, New Lessee shall continue and assume Debtor FMT's obligations under the Unite Here CBA related to the UNITE HERE Retirement Fund (the "Unite Here Pension Fund") in accordance with applicable non-bankruptcy law (and the Post-Effective Date Debtors and New Lessee reserve all rights thereunder). The Debtors and the Unite Here Pension Fund agree that, upon the Effective Date, no withdrawal from the Unite Here Pension Fund will have occurred because, under ERISA, no material change will occur in the identity of the employer with the obligation to contribute to it. The Debtors' view and the Unite

Here Pension Fund's view of the controlling authority for that proposition differs in certain respects, but no need exists to determine at the present time which authority controls because, in either case, upon the Effective Date, no withdrawal from the Unite Here Pension Fund will have occurred, and the parties are reserving their respective rights. Accordingly, as of and subject to the occurrence of the Effective Date, proof of claim 70 submitted by the Unite Here Pension Fund shall be deemed to be withdrawn.

(iv) The Plan Supplement provides that, as of and subject to the occurrence of the Effective Date, Debtor FMT shall assume and assign to New Lessee that certain collective bargaining agreement, dated as of May 1, 2016, by and between the Fairmont Hotel, San Jose and the Freight Checkers, Clerical Employees & Helpers Union Local No. 856 and all side letters and memoranda of understanding related thereto, including that certain memorandum of understanding dated as of August 9, 2021 (collectively, the "Teamsters CBA"). As of and subject to the occurrence of the Effective Date, New Lessee shall continue and assume Debtor FMT's obligations under the Teamsters CBA, including certain enumerated obligations to the Western Conference of Teamsters Pension Trust Fund (the "Teamsters Pension Fund") in accordance with applicable non-bankruptcy law (and the Post-Effective Date Debtors and New Lessee reserve all rights thereunder). As a result of the foregoing and upon the Effective Date, no withdrawal from the Teamsters Pension will be considered to have occurred.

Appendix D

21. Treatment of Fairmont and Real Property Sales.

(i) On the date that the Fairmont General Unsecured Claim becomes an Allowed Fairmont General Unsecured Claim (the "Real Property Sale Trigger Date"), the Real Estate Affiliates shall either (x) pay such Allowed Fairmont General Unsecured Claim in the amount required under Section 4.7(a) of the Plan, or (y) (i) list all of the Real Properties for sale with a licensed broker within ninety (90) days of the Real Property Sale Trigger Date, (ii) enter into an Approved Purchase Agreement with respect to at least one (1) Real Property within ninety (90) days of the Real Property Sale Trigger Date, enter into an Approved Purchase Agreement with respect to at least two (2) Real Properties within one hundred eighty (180) days of the Real Property Sale Trigger Date, and enter into an Approved Purchase Agreement with respect to all five (5) Real Properties within two hundred seventy (270) days of the Real Property Sale Trigger Date, and (iii) consummate each sale provided for under an Approved Purchase Agreement in an amount that would result in aggregate Real Property Sale Proceeds sufficient to make payment on account of such Allowed Fairmont General Unsecured Claim in the amount required under Section 4.7(a) of the Plan ("Real Property Sales"), within sixty (60) days after the execution date of each Approved Purchase Agreement and in no event later than the Fairmont Outside Payment Date. Without limiting the foregoing, in all events, the Allowed Fairmont General Unsecured Claim shall be paid in the amount required under Section 4.7(a) of the Plan by no later than the Fairmont Outside Payment Date. The Real Estate Affiliates must accept any bona fide

offer for any of the Real Properties for a purchase price at or above the applicable Real Property Release Price and cannot accept any offer for any of the Real Properties for a purchase price below the applicable Real Property Release Price, absent the consent of Fairmont (provided, that Fairmont shall not withhold its consent to any Real Property Sale that would generate Real Property Sale Proceeds sufficient to pay the outstanding amount of the Allowed Fairmont General Unsecured Claim in full pursuant to Section 4.7(a) of the Plan). Following consummation of each Real Property Sale or upon any condemnation or casualty of a Real Property, the applicable Real Estate Affiliate shall pay the Real Property Sale Proceeds to Fairmont pursuant to Section 4.7(a) of the Plan in satisfaction of any remaining unpaid amount of the Allowed Fairmont General Unsecured Claim directly from the escrow for the closing of the Real Property Sale and in all events, within one (1) Business Day after receiving such Real Property Sale Proceeds. The Real Property Sale Proceeds shall not be used for any other purpose until the Allowed Fairmont General Unsecured Claim is indefeasibly paid in full in Cash as provided under Section 4.7 of the Plan. Subject to the terms and conditions of the Plan, the Real Estate Affiliates shall not be relieved of any of the Real Property Commitments absent either (a) the full, indefeasible payment of the Allowed Fairmont General Unsecured Claim, if any, in Cash, or (b) Fairmont's consent; *provided* that, notwithstanding anything potentially or actually to the contrary in the Plan, (i) the Real Property Sale Proceeds (and/or, if Section 5.9(e) of the Plan applies, the Additional Real Property Sale Proceeds) and the Fairmont Claim Guaranty (if and

to the extent any payment obligations thereunder arise) shall be the sole sources of payment of and remedies for the Allowed Fairmont General Unsecured Claim, and (ii) the Real Estate Affiliates may, in their sole discretion, pay or arrange for one or more designees (other than designees that are obligors on the Post-Effective Date Secured Loan Documents) to pay the Allowed Fairmont General Unsecured Claim from alternate funding sources at any time. For the avoidance of doubt, nothing herein shall be deemed to modify or extend the Fairmont Outside Payment Date. In the event that the Allowed Fairmont General Unsecured Claim is indefeasibly paid in full in Cash as provided under Section 4.7(a) of the Plan from such alternate funding sources, the Real Estate Affiliates shall have no further obligation to consummate Real Property Sales.

(ii) The below-listed commitments (collectively, the "Real Property Commitments") are hereby approved:

(A) Until the Allowed Fairmont General Unsecured Claim, if any, is indefeasibly paid in full pursuant to Section 4.7 of the Plan, the Real Estate Affiliates and the Additional Real Estate Affiliates:

(1) shall not cause or permit (a) the Real Properties or Additional Real Properties to be subject to any Liens that do not exist as of the Confirmation Hearing, (b) the incurrence of indebtedness by the Real Estate Affiliates or the Additional Real Estate Affiliates or otherwise with respect to the Real Properties and the Additional Real Properties other than the mortgage

financings existing as of the Confirmation Hearing and any trade payables, taxes, or other amounts incurred in the ordinary course of business relating to the ownership and operation of the Real Properties and the Additional Real Properties and paid within sixty (60) days of the date incurred, (c) the transfer, assignment, mortgage, pledge, or other conveyance of the Real Properties or the Additional Real Properties or any part thereof (except for tenant leases per clause (2) below) or any direct or indirect interest in any Real Estate Affiliate or any Additional Real Estate Affiliate, except as expressly provided in the Plan or Confirmation Order, (d) any modifications to the loan agreement or other documents related to the mortgage financings existing as of the Confirmation Hearing that would cause economic harm to Fairmont (including, without limitation, any change to any of the conditions for release of any of the Real Properties or the Additional Real Properties), (e) the Real Property Loan Balance to exceed the Real Property Loan Balance Amount, and (f) any material alterations to the Real Properties or the Additional Real Properties that would materially devalue such properties, and;

(2) shall operate and maintain the Real Properties and the Additional Real Properties in the ordinary course of business, including paying taxes and other charges prior to delinquency, maintaining insurance and using commercially reasonable efforts to have Fairmont included as an additional insured thereunder, performing landlord's duties under any leases and entering into new leases with rental rates and terms comparable or greater than existing local market rates

with bona fide third party tenants, and maintaining the Real Properties and the Additional Real Properties in good and safe condition and repair.

(iii) The Real Estate Affiliates and the Additional Real Estate Affiliates shall not be relieved of any of the Real Property Commitments absent either (a) the full, indefeasible payment of the Allowed Fairmont General Unsecured Claim, if any, in Cash, or (b) Fairmont's consent.

(iv) The endorsement of this Confirmation Order by the Real Estate Affiliates and the Additional Real Estate Affiliates constitutes their (a) agreement to comply with the obligations set forth in this Paragraph of this Confirmation Order and Sections 4.7 and 5.9 of the Plan, and (b) consent to the jurisdiction of this Bankruptcy Court to enforce such obligations.

(v) For the avoidance of doubt, nothing in this Confirmation Order or the Plan constitutes a finding of fact or conclusion of law with respect to any claims or defenses now pending in the Arbitration, any Transferred Disputes (including any Rejected Disputes), or any related matter, including, but not limited to, any Claim objection or Claim allowance process in these Chapter 11 Cases concerning any Claim of Fairmont, nor shall the Confirmation Order or Plan, or any contents therein, be used as a finding of fact or conclusion of law in the Arbitration or any related matter by the Debtors, Fairmont, or any third-party, such that it would have a precedential or conclusive effect in any such matter; *provided* that nothing in this sentence authorizes

the arbitrators in the Arbitration to (i) recommend or grant any relief that would change, modify, or alter the Restructuring Transactions or Plan Documents, as implemented under the Plan and this Confirmation Order, or (ii) change, modify, or alter the discharge set forth in Section 10.3 of the Plan. Notwithstanding anything in the Plan or this Confirmation Order to the contrary, nothing in the Arbitration shall have any impact on Section 10.2 of the Plan and, on and after the Effective Date, pursuant to sections 1141(b) and (c) of the Bankruptcy Code, all Assets of the Estates, including the Hotel, shall vest in each respective Post-Effective Date Debtor or in the recipient provided for under the Plan, free and clear of all Claims, Liens, charges, other encumbrances, and interests, other than the rights of the Prepetition Secured Lender under the Post-Effective Date Secured Loan Documents.

22. Conditions Precedent to Effective Date. The Plan shall not become effective unless and until all conditions set forth in Section 9.1 of the Plan have been satisfied or waived pursuant to Section 9.2 of the Plan.

23. Injunctions, Releases and Exculpation. As of the Effective Date, except for the rights that remain in effect from and after the Effective Date to enforce the Plan, all injunctions, releases, and exculpation provisions embodied in the Plan, including those contained in Sections 10.6 (Releases by the Debtors), 10.7 (Releases by Holders of Claims), 10.8 (Release of Liens), 10.9 (Exculpation), and 10.10 (Injunction), are hereby approved and shall be effective and binding on all Persons, to the extent provided in the Plan, without further order or action by this Bankruptcy Court.

24. Preference Causes of Action. Pursuant to Section 10.11 of the Plan, on the Effective Date the Debtors shall forever waive, relinquish, and release any and all Causes of Action the Debtors and their Estates had, have, or may have had that arise under section 547 of the Bankruptcy Code against any Person with whom the Debtors conducted business prior to the Effective Date; *provided, however*, that the foregoing waiver, relinquishment and release shall not apply to any claims and Causes of Action that the Debtors and their Estates had, have or may have against Fairmont.

25. Statutory Fees. All statutory fees due and payable pursuant to section 1930(a) of Title 28 of the United States Code and prior to the Effective Date shall be paid by the Debtors or the Post-Effective Date Debtors. On and after the Effective Date, the Post-Effective Date Debtors shall pay any and all Statutory Fees when due and payable and shall file with this Bankruptcy Court quarterly reports. Each Debtor or Post-Effective Date Debtor, as applicable, shall remain obligated to pay quarterly fees to the U.S. Trustee until the earliest of that particular Debtor's, or Post-Effective Date Debtor's, as applicable, case being closed, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code.

26. Fairmont Mutual Release.

(i) As of the Effective Date, except for the rights and remedies that remain in effect from and after the Effective Date to enforce the Plan and the obligations contemplated by the Plan, on and after the Effective

Date, Fairmont and its Related Persons will be deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Fairmont Release Consent Parties, from any and all claims and causes of action whatsoever (including any derivative claims, asserted or assertable on behalf of the Debtors, the Post-Effective Date Debtors, or their Estates), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, contract, tort, or otherwise by statute, violations of federal or state securities laws or otherwise, that such holders or their estates, affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other persons claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any claim or interest or other person, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Post-Effective Date Debtors, or their Estates or Assets, the Chapter 11 Cases, the Restructuring, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Post- Effective Date Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements or interactions between any Debtor and any Fairmont Release Consent Party, the Restructuring, the restructuring of any Claims or Interests before or during the Chapter 11 Cases, the negotiation, formulation, preparation, or consummation of the Plan, the documents in the Plan Supplement, or

related agreements, instruments, or other documents, relating thereto, or the solicitation of votes with respect to the Plan, in all cases based upon any act or omission, transaction, agreement, event, or other occurrences taking place on or before the Effective Date

(ii) As of the Effective Date, except for the rights and remedies that remain in effect from and after the Effective Date to enforce the Plan and the obligations contemplated by the Plan, on and after the Effective Date, Fairmont and its Related Persons will be deemed conclusively, absolutely, unconditionally, irrevocably, and forever to have provided the releases set forth in Section 10.7 of the Plan solely to the Released Parties that are Fairmont Release Consent Parties as of the Effective Date. Notwithstanding anything to the contrary in this Confirmation Order or the Plan, to the extent any of the Released Parties, including any of the Fairmont Release Consent Parties, is not releasing or deemed to release Fairmont and its Related Persons as of the Effective Date, then Fairmont and its Related Persons shall not release or be deemed to release any such Released Parties under any provision of the Plan or Confirmation Order. For the avoidance of doubt, nothing contained in the Plan or in this Confirmation Order shall affect, nor be construed to release, any of (a) the claims and causes of action between Fairmont and the Debtors pending in the Arbitration or (b) the Transferred Disputes, including any Rejected Disputes.

(iii) Notwithstanding anything to the contrary in the Plan or the Confirmation Order, the Debtors are

not releasing any claims or causes of action against any individuals that were formerly employed by Debtor FMT based upon acts, omissions or other matters arising while such individuals were employees of Debtor FMT.

27. Fairmont Mutual Release Agreement. The Fairmont Mutual Release Agreement is hereby approved and shall be enforced pursuant to its terms. The Fairmont Mutual Release Parties shall be bound by the terms of the Fairmont Mutual Release Agreement; *provided* that, to the extent any Fairmont Mutual Release Parties are deemed not to be bound by the terms of the Fairmont Mutual Release Agreement (a "Non-Mutual Release Party"), then the other Fairmont Mutual Release Parties also shall not be bound by the terms of the Fairmont Mutual Release Agreement solely with respect to such Non-Mutual Release Party.

28. Fairmont Release Consent Agreement. The Fairmont Release Consent Agreement is hereby approved and shall be enforced pursuant to its terms. The Fairmont Release Consent Parties shall be bound by the terms of the Fairmont Release Consent Agreement; *provided* that, to the extent any Fairmont Release Consent Parties are deemed not to be bound by the terms of the Fairmont Release Consent Agreement as of the Effective Date, then Fairmont and its Related Persons also shall not be bound by the terms of the Fairmont Release Consent Agreement solely with respect to such Fairmont Release Consent Parties.

29. Documents, Mortgages, and Instruments. Each federal, state, commonwealth, local, foreign, or other governmental agency is hereby authorized to accept any and all documents, mortgages, and instruments necessary or appropriate to effectuate, implement, or consummate the transactions, including the Restructuring Transactions, contemplated by the Plan and this Confirmation Order.

30. Treatment of Other Secured Claims. Section 4.2 of the Plan provides that the legal, equitable, and contractual rights of the Holders of Allowed Other Secured Claims are unaltered by the Plan. Except to the extent that a Holder of an Allowed Other Secured Claim agrees to a less favorable treatment, Holders of Allowed Other Secured Claims that do not receive payment in full of such Allowed Other Secured Claim as of the later of the Effective Date and the date that is ten (10) Business Days after the date on which such Other Secured Claim becomes an Allowed Other Secured Claim shall retain the Lien securing such Allowed Other Secured Claim until payment in full of such Allowed Other Secured Claim or as otherwise agreed to by the Holder of such Allowed Other Secured Claim.

31. Exemption from Certain Transfer Taxes. Pursuant to section 1146 of the Bankruptcy Code, (i) the issuance, transfer or exchange of any securities, instruments or documents, (ii) the creation of any lien, mortgage, deed of trust or other security interest, (iii) any sale transactions consummated by the Debtors and approved by the Bankruptcy Court on and after the Confirmation Date through and including the Effective

Date of the Plan, including any transfers effectuated pursuant to the Plan, (iv) any assumption, assignment, or sale by the Debtors of their interests in unexpired leases of nonresidential real property or executory contracts pursuant to section 365(a) of the Bankruptcy Code, (v) the grant of collateral under the Post-Effective Date Secured Loan Documents, and (vi) the issuance, renewal, modification, or securing of indebtedness by such means, and the making, delivery or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan, including this Confirmation Order, shall not be subject to any document recording tax, stamp tax, conveyance fee or other similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, sales tax, use tax or other similar tax or governmental assessment. Consistent with the foregoing, each Recording Officer for any county, city, or Governmental Unit in which any instrument hereunder is to be recorded shall, pursuant to this Confirmation Order, be ordered and directed to accept such instrument without requiring the payment of any filing fees, documentary stamp tax, deed stamps, stamp tax, transfer tax, intangible tax, or similar tax.

32. Certain Provisions Related to the United States. Notwithstanding any provision to the contrary in the Plan, the Plan Supplement, this Confirmation Order, or any implementing Plan documents (collectively, "Documents"):

i. As to the United States, nothing in the Documents shall: (1) discharge, release, enjoin, impair or otherwise preclude (a) any liability to the United States that is not a "claim" within the meaning of section 101(5) of the Bankruptcy Code, (b) any claim of the United States arising after the Confirmation Date, or (c) any liability of any entity or person under police or regulatory statutes or regulations to any Governmental Unit as the owner, lessor, lessee or operator of property or rights to property that such entity owns, operates or leases after the Confirmation Date; (2) release, nullify, preclude or enjoin the enforcement of any police or regulatory power; (3) confer exclusive jurisdiction to the Bankruptcy Court with respect to any federal interests, suits, rights, claims, liabilities and Causes of Action, except to the extent set forth in 28 U.S.C. § 1334 (as limited by any other provisions of the United States Code); (4) release, exculpate, enjoin, impair or discharge any non-Debtor from any claim, liability, suit, interest, right or Cause of Action of the United States; (5) affect any setoff or recoupment rights of the United States and such rights are preserved; (6) require the United States to file an administrative claim in order to receive payment for any liability described in Section 503(b)(1)(B) and (C) pursuant to section 503(b)(1)(D) of the Bankruptcy Code; (7) constitute an approval or consent by the United States without compliance with all applicable legal requirements and approvals under non- bankruptcy law; (8) be construed as a compromise or settlement of any liability, suit, claim, Cause of Action or interest of the United States; (9) modify the scope of section 502 of the Bankruptcy Code with respect to the claims of the United States; or (10) cause the filing of any

claim, including but not limited to amended claims, by the United States to be automatically disallowed and expunged on or after the Effective Date pursuant to Section 7.10 of the Plan.

ii. Administrative expense claims of the United States allowed pursuant to the Plan or the Bankruptcy Code shall accrue interest and penalties as provided by non-bankruptcy law until paid in full. Priority Tax Claims of the United States allowed pursuant to the Plan or the Bankruptcy Code will be paid in accordance with section 1129(a)(9)(C) of the Bankruptcy Code. To the extent allowed Priority Tax Claims (including any penalties, interest or additions to tax entitled to priority under the Bankruptcy Code) are not paid in full in cash on the Effective Date, then such Priority Tax Claims shall accrue interest commencing on the Effective Date at the rate set forth in section 511 of the Bankruptcy Code. Moreover, nothing shall effect a release, injunction or otherwise preclude any claim whatsoever against the Debtors or the Debtors' Estates by or on behalf of the United States for any liability arising a) out of pre-petition or post-petition tax periods for which a return has not been filed or b) as a result of a pending audit or audit that may be performed with respect to any pre-petition or post-petition tax period. Further, nothing shall enjoin the United States from amending any claim against the Debtors or the Debtors' Estates with respect to any tax liability a) arising out of pre-petition or post-petition tax periods for which a tax return has not been filed or b) from a pending audit or audit that may be performed with respect to any pre-petition or post-petition tax period.

Any liability arising a) out of pre-petition or post-petition tax periods for which a return has not been filed or b) as a result of a pending audit or audit which may be performed with respect to any pre-petition or post-petition tax period shall be paid in accordance with sections 1129(a)(9)(A) and (C) of the Bankruptcy Code. Without limiting the foregoing but for the avoidance of doubt, nothing contained in the Documents shall be deemed to bind the United States to any characterization of any transaction for tax purposes or to determine the tax liability of any person or entity, including, but not limited to, the Debtors and the Debtors' Estates, nor shall the Documents be deemed to have determined the federal tax treatment of any item, distribution, or entity, including the federal tax consequences of this Plan, nor shall anything in the Documents be deemed to have conferred jurisdiction upon the Bankruptcy Court to make determinations as to federal tax liability and federal tax treatment except as provided under section 505 of the Bankruptcy Code.

33. Final Approval of Disclosure Statement Supplement. The Disclosure Statement Supplement is approved on a final basis as having adequate information with respect to Class 4(C) as contemplated by section 1125(a)(1) of the Bankruptcy Code.

34. Approval of the Stipulation with the City of San Jose. The *Stipulation Concerning Certain Rights and Claims of the City of San Jose*, dated as of August 16, 2021, between the Debtors and the City of San Jose [Docket No. 673] (the "San Jose Stipulation") is approved and its terms and hereby incorporated. In the event of

any inconsistencies between the terms of the San Jose Stipulation and the terms of the Plan or this Confirmation Order, the San Jose Stipulation shall control.

35. Reversal/Stay/Modification/Reconsideration/Vacatur of Order. Except as otherwise provided in this Confirmation Order, if any or all of the provisions of this Confirmation Order are hereafter reversed, modified, vacated, reconsidered, or stayed by subsequent order of this Bankruptcy Court or any other court, such reversal, stay, modification, reconsideration, or vacatur shall not affect the validity or enforceability of any act, obligation, indebtedness, liability, priority, or Lien incurred or undertaken by the Debtors, the Post-Effective Date Debtors, or any other party authorized or required to take action to implement the Plan, as applicable, prior to the effective date of such reversal, stay, modification, reconsideration, or vacatur. Notwithstanding any such reversal, stay, modification, reconsideration, or vacatur of this Confirmation Order, any act or obligation incurred or undertaken pursuant to, or in reliance on, this Confirmation Order prior to the effective date of such reversal, stay, modification, reconsideration, or vacatur shall be governed in all respects by the provisions of this Confirmation Order, the Plan, the Plan Documents, or any amendments or modifications to the foregoing.

36. Provisions of Plan and Order Nonseverable and Mutually Dependent. The provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are nonseverable and mutually dependent.

37. Headings. Headings used in this Confirmation Order are for convenience and reference only, and do not constitute a part of the Plan or this Confirmation Order for any other purpose.

38. Governing Law. Except to the extent that the Bankruptcy Code or other federal law is applicable or to the extent that a Plan Document provides otherwise, the rights, duties, and obligations arising under the Plan and the Plan Documents shall be governed by, and construed and enforced in accordance with, the internal laws of the State of New York, without giving effect to the principles of conflicts of laws thereof (other than section 5-1401 and section 5-1402 of the New York General Obligations Law).

39. Applicable Non-Bankruptcy Law. Pursuant to sections 1123(a) and 1142(a) of the Bankruptcy Code, the provisions of this Confirmation Order, the Plan, the Plan Documents, and any other related documents or any amendments or modifications thereto, shall apply and be enforceable notwithstanding any otherwise applicable non-bankruptcy law.

40. Notice of Entry of Order and Effective Date. In accordance with Bankruptcy Rules 2002 and 3020(c), as soon as reasonably practicable after the Effective Date, the Debtors shall serve notice of the entry of this Confirmation Order and occurrence of the Effective Date, substantially in the form annexed hereto as **Exhibit B**, on all parties who hold a Claim or Interest in these cases, the U.S. Trustee, and any other parties in interest. Such notice is hereby approved in all respects and shall

be deemed good and sufficient notice of entry of this Confirmation Order and the occurrence of the Effective Date.

41. Final Order. This Confirmation Order is a final order and the period in which an appeal must be filed shall commence upon the entry hereof.

42. Substantial Consummation. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

43. Waiver of Stay. The requirements under Bankruptcy Rule 3020(e) that an order confirming a plan is stayed until the expiration of 14 days after entry of the order are hereby waived. This Confirmation Order shall take effect immediately and shall not be stayed pursuant to Bankruptcy Rules 3020(e), 6004(h), 6006(d), 7062, Federal Rule of Civil Procedure 62 or otherwise.

44. Inconsistency. To the extent of any inconsistency between this Confirmation Order and the Plan, this Confirmation Order shall govern.

Dated: August 18th, 2021 Wilmington, Delaware

/s/_____
JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E — RELEVANT STATUTORY PROVISIONS

11 U.S.C.A. § 524

§ 524. Effect of discharge

(a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of

the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * *

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1192, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

* * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

* * *

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court

shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of--

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that--

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan--

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by

at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan--

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to--

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction

(by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of--

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to--

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means--

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in--

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if--

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph

is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that--

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

* * * *

Appendix E

11 U.S.C.A. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as--

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the

several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) 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; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may--

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for--

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is

proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

Appendix E

11 U.S.C.A. § 1127

§ 1127. Modification of plan

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

* * * *

Appendix E

11 U.S.C.A. § 1141

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a

kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if--

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

* * * *

Appendix E

11 U.S.C.A. § 1144

§ 1144. Revocation of an order of confirmation

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall--

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

Appendix E

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order [Rule Text & Notes of Decisions subdivisions I to III]

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

* * * *

Appendix E

Federal Rules of Bankruptcy Procedure, Rule 9024

Rule 9024. Relief From Judgment or Order

(a) In General. Fed. R. Civ. P. 60 applies in a bankruptcy case--except that:

(1) the one-year limitation in Fed. R. Civ. P. 60(c) does not apply to a motion to reopen a case or to reconsider an uncontested order allowing or disallowing a claim against the estate;

(2) a complaint to revoke a discharge in a Chapter 7 case must be filed within the time allowed by § 727(e); and

(3) a complaint to revoke an order confirming a plan must be filed within the time allowed by § 1144, 1230, or 1330.

* * * *

Appendix E

Ann. Mod. Rules Prof. Cond. § 1.8

1.8 Conflict of Interest: Current Clients: Specific Rules

* * *

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

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