Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
March 14, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 19-13366-MKN
	)	Chapter 11
ISLET SCIENCES, INC., a Nevada corporation, fdba ONE E-COMMERCE CORPORATION, fdba ARIANNE CO.,	)	Date: October 19, 2021
	)	Time: 9:30 a.m.
Debtor.	)	

MEMORANDUM DECISION AFTER TRIAL[1]

On October 19, 2021, a trial was completed in the above-captioned Chapter 11 bankruptcy proceeding. The trial addressed the requests of the above-captioned Debtor to approve the following matters: (1) Debtor's Fourth Amended Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code Dated May 7, 2021; (2) the Motion Pursuant to Bankruptcy Rule 9019 to Approve Settlement With: (I) the Official Committee of Unsecured Creditors; and (II) Western States Funding, LLC; and (3) the Motion to Modify Debtor's Chapter 11 Plan of Reorganization Pursuant to 11 U.S.C. § 1127.[2] The appearances of

[1] In this Memorandum Decision, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. Unless otherwise indicated, all references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. §§101, et seq. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "Debtor Ex." are to the numbered trial exhibits offered by the Debtor while all references to "Creditor Ex." are to the lettered trial exhibits offered by the objecting creditors.

[2] As necessary, the court takes judicial notice under FRE 201 of the other documents filed by the parties in this bankruptcy proceeding. See Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The

counsel were noted on the record. After conclusion of the trial, the matters were taken under submission. This Memorandum Decision constitutes the court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Civil Rule 52.[3] This Memorandum Decision discusses matters for which evidence and written testimony were admitted under seal and such evidence and written testimony shall remain under seal.[4]

BACKGROUND

On May 29, 2019, an involuntary Chapter 7 petition ("Involuntary Petition") was filed against Islet Sciences, Inc., a Nevada corporation ("Debtor"). (ECF No. 1). The Involuntary Petition was filed by seven separate creditors: James Green, Kevin M. Long, VACO Raleigh, LLC, William Wilkison, Brighthaven Ventures LLC, Steve Delmar, and Apex Biostatistics, Inc. (collectively, "Petitioning Creditors"). All of the Petitioning Creditors hold unsecured claims against the Debtor which allegedly are not contingent as to liability nor subject to bona fide dispute as to liability or amount. See Exhibit "2" to Involuntary Petition at ¶¶ 11 and 12.

On July 19, 2019, Debtor filed a motion to convert the proceeding to one under Chapter 11 ("Conversion Motion"), along with a declaration of John F. Steel, IV ("Steel Declaration").[5] (ECF Nos. 9 and 10).

Court may consider the records in this case, the underlying bankruptcy case and public records.").

[3] Separate orders incorporating this Memorandum Decision will be entered on each of the matters.

[4] In the event counsel seek to redact any portion of this Memorandum Decision, such requests will be considered on an expedited basis.

[5] According to the Steel Declaration, the declarant ("Steel") is the Debtor's chief executive officer. He attested that the Debtor was incorporated in Nevada in 1994 and changed its name to Islet Sciences, Inc. on February 23, 2012. See Steel Declaration at ¶ 6. Steel also attested that the Debtor "is a clinical stage biotechnology company focused on research, development, and commercialization of new medicines and technologies for the treatment and diagnosis of metabolic disease and related indications." Id. at ¶ 7. He also attested that the Debtor

> "focuses its efforts on the development of a robust intellectual property portfolio to facilitate fundamental advances in diabetes therapies. To that end, [Debtor] routinely develops new, novel, and innovative solutions to

On July 19, 2019, Debtor filed a motion, as prospective Chapter 11 debtor in possession ("DIP") for authority to borrow operating funds ("DIP Financing") from Western States Funding, LLC ("WSF"). (ECF No. 11).[6]

On July 28, 2019, Petitioning Creditors filed a motion for an order directing expedited discovery. (ECF No. 45).

On July 30, 2019, Debtor filed a motion for a protective order. (ECF No. 50).

On August 7, 2019, an expedited hearing was held on various motions.

On August 15, 2019, an order was entered with respect to the requested protective order. (ECF No. 78).

On September 10, 2019, Debtor filed a motion seeking to file under seal a copy of an agreement with Curiam Investments 2 LLC ("Curiam") to provide post-petition financing of certain litigation ("Litigation Funding").[7] (ECF No. 94). The motion was supported by the

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> treat both Type 1 and Type 2 diabetes, which solutions are enabled by [Debtor's] proprietary diagnostic test for: (1) very early onset detection of Type 1 diabetes; and (2) beta-cell death in Type 2 diabetes. The company addresses a critical scientific and economic need. In fact, the Harvard School of Public Health estimates that the worldwide economic burden of diabetes is approximately $1.3 trillion. [Debtor's] products, which are devoted to early detection, immunotherapy, and islet encapsulation and transplantation, seek to ameliorate the broad-ranging effects of the disease."

Id. at ¶ 8 (footnote omitted).

[6] A copy of a Revolving Line of Credit Promissory Note in the amount of $1 million was filed thereafter on July 25, 2019. See Exhibit "A" to Supplement to Debtor's Motion for the Entry of Interim and Final Orders (A) Authorizing the Debtor to Obtain Financing Pursuant to 11 U.S.C. §§ 105, 363 and 364 and (B) Approval of the Debtor's Budget Associated Thereto. (ECF No. 40). Paragraph 5 of the note provides for the conversion of debt to equity through issuance of securities under a confirmed Chapter 11 plan of reorganization.

[7] Prior to the filing of the Involuntary Petition, some or all of the parties were involved in certain civil litigation commenced in North Carolina state court ("NC State Litigation") and civil litigation pending in North Carolina federal court ("NC Federal Litigation"). On October 25, 2019, a stipulation was filed between the Debtor and certain of the Petitioning Creditors (ECF No. 175) describing the NC Federal Litigation as having been commenced in January 2019 by the Debtor in the Southern District of New York against James Green, William Wilkison, Brighthaven Ventures, LLC, and Avolynt, Inc. ("Litigation Creditors"), which was subsequently

Declaration of Francisco A. Villegas, Esq. ("Villegas Declaration"). (ECF No. 95). At the same time, Debtor filed a motion for authorization to approve the post-petition Litigation Funding through Curiam. (ECF No. 96). Attached as Exhibit "A" to the motion was a copy of a Security Agreement between the Debtor and Curiam dated November 2, 2018. Under the Security Agreement, Curiam had provided pre-petition Litigation Funding to the Debtor secured by the gross proceeds of any recovery from the NC Federal Litigation. (Debtor Ex. 11).

On September 18, 2019, an order was entered granting the Conversion Motion. (ECF No. 116).

On September 18, 2019, an order was entered authorizing Debtor to employ and retain the law firm of Brownstein Hyatt Farber Schreck, LLP, as counsel for the Debtor. (ECF No. 119).

On September 18, 2019, a notice of Chapter 11 bankruptcy case ("Bankruptcy Notice") was served on the creditor matrix[8] previously filed in the case. (ECF No. 127). The Bankruptcy Notice established a deadline of January 22, 2020, for non-governmental creditors to file proofs of claim and a deadline of March 16, 2020, for governmental creditors to file proofs of claim ("POC Deadline").

On September 23, 2019, an order was entered approving a stipulation between the Debtor and the Petitioning Creditors regarding certain confidential information ("Protective Order"). (ECF No. 134). The order provides for certain documents to be exchanged confidentially,

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being transferred to the Eastern District of North Carolina ("NC Federal Court"). The NC Federal Litigation is ongoing and includes various counterclaims alleged by the Litigation Creditors. The purpose of the Litigation Funding is to permit the Debtor to continue pursuit of its claims in the NC Federal Litigation. Although the Petitioning Creditors in this bankruptcy case are represented by the same law firm, the group of Litigation Creditors include only three out of the seven Petitioning Creditors. Kevin M. Long, VACO Raleigh, LLC, Steve Delmar, and Apex Biostatistics, Inc., joined in the Involuntary Petition, but are not named as defendants in the NC Federal Litigation. Steve Delmar is, however, the chief financial officer of Brighthaven Ventures, LLC and Avolynt, Inc.

[8] On September 16, 2019, Debtor filed a verification of creditor matrix that lists the names and addresses of the creditors in the case. (ECF No. 113).

disclosed under restrictive terms if necessary, and to be filed with the court under seal upon proper request.

On September 24, 2019, an order was entered granting the Debtor's request to file the Litigation Funding document under seal. (ECF No. 136; Debtor Ex. 10).

On October 1, 2019, an order was entered granting Debtor's request to approve DIP Financing. (ECF No. 148). That order approved a $1 million credit facility from WSF, with the repayment obligation accorded superpriority administrative expense status pursuant to Sections 364(c)(1), 503(b) and 507(b). A "Revolving Line of Credit Promissory Note" approved by the order also permitted WSF to elect to convert any outstanding debt to equity through confirmation of a Chapter 11 plan of reorganization.

On October 8, 2019, an order was entered granting in part Debtor's motion to quash Petitioning Creditors' access to copies of the post-petition Litigation Funding agreement. (ECF No. 153).

On October 14, 2019, Debtor filed an amended voluntary Chapter 11 petition setting forth its existing name, and adding "FDBA One E-Commerce Corporation" and "FDBA Arianne Co." (ECF No. 155).

On October 14, 2019, Debtor filed its initial schedules of assets and liabilities ("Schedules") along with its statement of financial affairs ("SOFA"). (ECF No. 156; Debtor Ex. 54). According to its initial property Schedule "A/B," Debtor has three separate assets described as "licenses, franchises, and royalties" having an unknown value. According to its initial Schedule "D," Debtor has one creditor, Curiam, holding a claim in the amount of $100,000, that is secured by property that is not identified in the schedule.[9] No other secured creditors are listed on Schedule "D." According to its initial Schedule "E/F," Debtor has no priority unsecured

[9] Debtor apparently had entered into a Litigation Funding agreement with Curiam in November 2018, i.e., prior to the commencement of the involuntary bankruptcy proceeding by the Litigation Creditors. See Villegas Declaration at ¶ 4. As mentioned, a copy of the agreement was submitted to the court under seal. The agreement appears to provide Curiam a security interest in the recovery from the NC Federal Litigation and the option to terminate funding if, *inter alia*, insolvency proceedings are commenced against or by the Debtor. Debtor has not scheduled Curiam's secured claim as disputed or contingent.

creditors and forty non-priority unsecured creditors, with claims totaling $8,882,869.00. Out of forty non-priority unsecured claims, six of them are the Petitioning Creditors with claims totaling $2,170,650.00 and all of those claims are designated as disputed. The remaining thirty-four non-priority unsecured creditors have claims totaling $5,892,611.00 that are not disputed, contingent, or unliquidated.[10] According to its initial Schedule "G," Debtor has four separate executory contracts and unexpired leases with Quest Advanced Diagnostics & IQVIA ("Quest"), UVA Licensing & Ventures Group ("UVA"), Xeris Pharmaceutical, Inc. ("Xeris"), and Yale University ("Yale"). Attached to the initial Schedules and SOFA is a thirty-page List of Equity Security Holders whose holdings range from a low of 4 shares to a high of 22,453,400 shares.

On October 17, 2019, an order was entered granting interim and final approval of the Litigation Funding and security agreements between the Debtor and Curiam. (ECF No. 160). The order approved a $3.5 million Litigation Funding credit facility to permit the Debtor to continue pursuing the NC Federal Litigation. Draws on the Litigation Funding are secured by a first priority security interest in the net proceeds of the NC Federal Litigation.

On October 17, 2019, an order was entered authorizing Debtor to employ and retain Armstrong Teasdale LLP, as special litigation counsel in the NC Federal Litigation. (ECF No. 162).

On October 22, 2019, separate orders were entered authorizing Debtor to employ special litigation counsel as well as two certified public accountants. (ECF Nos. 167, 168, and 169).

On November 13, 2019, an order was entered approving a stipulation terminating the automatic stay to permit the Litigation Creditors to file and prosecute certain counterclaims in the NC Federal Litigation. (ECF No. 182).

On November 20, 2019, Debtor filed its monthly operating report ("MOR") for the period ending October 31, 2019. (ECF No. 183; Creditor Ex. "G"). On its balance sheet, Debtor listed total assets of $227,783.00 consisting of loan funds that were in its prepetition bank accounts at the time the MOR was prepared.

[10] As a result, those thirty-four unsecured creditors are not required to file proofs of claim in this Chapter 11 proceeding. See FED.R.BANKR.P. 3003(b)(1).

On November 26, 2019, an official committee of unsecured creditors ("UCC") was appointed by the Office of the United States Trustee ("UST") pursuant to Section 1102(a)(1).[11] (ECF No. 184).[12] Members of the UCC consisted of Brighthaven Ventures LLC, Spring Point Project, and William Wilkison, i.e., two out of three of the UCC members were Petitioning Creditors.

On December 18, 2019, Debtor filed a motion seeking to disband the UCC. (ECF No. 205).

On January 7, 2020, Debtor filed a motion for authority to employ and retain Portage Point Partners, LLC ("Portage Point"), as its financial advisor for the purpose of performing a valuation analysis of the Debtor ("Portage Point Application").[13] (ECF No. 214).

On January 21, 2020, the UST filed an amended notice of appointment for the UCC. (ECF No. 228). Members of the UCC now consists of Brighthaven Ventures LLC, Spring Point Project, William Wilkison, PCG Advisory, Inc., and COVA Capital Partners, LLC. In other words, two out of five of the reconstituted UCC are Petitioning Creditors.

On January 21, 2020, James Green ("Green") filed a proof of claim ("Green POC") attesting that he is owed the general unsecured amount of $754,271.20, pursuant to a civil judgment. Attached to the Green POC is a copy of a Final Judgment that was entered in the NC State Litigation by the General Court of Justice Superior Court Division, County of Wake, State of North Carolina ("NC State Court"). That Final Judgment is captioned as Islet Sciences, Inc., plaintiff, v. Brighthaven Ventures, LLC, James Green, William Wilkison, defendants,

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[11] Section 1103 describes the powers and duties of a Chapter 11 committee. A committee may, *inter alia*, "participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan…" 11 U.S.C. §1103(c)(3).

[12] Although there appear to be more than 300 equity security holders of the Debtor, no committee of equity security holders has been formed in the case.

[13] Attached to the Portage Point Application is a Declaration of Thomas J. Allison ("Allison"), a senior advisor at Portage Point. The declaration outlines the qualifications of Allison to advise the Debtor in an organizational and financial restructuring.

denominated Case No. 15 CVS 16388 ("NC State Judgment").[14] The Green POC also refers to unliquidated counterclaims that apparently were asserted in the NC Federal Litigation, at least one of which alleges abuse of process against the Debtor and Steel ("Abuse of Process Counterclaim").

On January 21, 2020, William Wilkison ("Wilkison") filed a separate proof of claim ("Wilkison POC") attesting that he is owed $758,607.51 pursuant to a civil judgment. A copy of the same NC State Judgment is attached in support of the Wilkison POC. The Wilkison POC also refers to the same unliquidated amount sought from the Debtor and Steel in the Abuse of Process Counterclaim.

On January 21, 2020, Brighthaven Ventures LLC ("Brighthaven") filed a separate proof of claim ("Brighthaven POC") attesting that it is owed $442,342.63 based on certain unliquidated counterclaims it has filed in the NC Federal Litigation.[15] The Brighthaven POC also refers to the same unliquidated amount sought from the Debtor and Steel in the Abuse of Process Counterclaim.

On January 21, 2020, Avolynt Inc. ("Avolynt") filed a separate proof of claim "(Avolynt POC") attesting that it is owed an unknown amount based on certain unliquidated counterclaims it has filed in the NC Federal Litigation.[16] The Avolynt POC refers to the same unliquidated amount sought from the Debtor and Steel in the Abuse of Process Counterclaim.

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[14] The NC State Judgment recites that on April 2, 2019, Steel consented to entry of a judgment against him in the amount of $45,850,000.00, based on a claim for tortious interference with contract. The NC State Judgment also recites that the NC State Court previously had granted the defendants' motion for entry of judgment by default on their counterclaims. The NC State Judgment further orders that based on the order granting the default judgment motion, judgment is entered in favor of Brighthaven, Green, and Wilkison.

[15] For some reason, a copy of the NC State Judgment does not appear to be attached to the Brighthaven POC, but that judgment does indicate that Brighthaven was awarded $443,342.63, separate and apart from the amounts awarded to creditors Green and Wilkison.

[16] Like the Brighthaven POC, a copy of the NC State Judgment is not attached to the Avolynt POC.

On January 21, 2020, Steven R. Delmar ("Delmar") filed a proof of claim attesting that he is owed a general unsecured claim amount of $51,249.98 for unpaid wages.

On January 22, 2020, the POC Deadline elapsed.[17]

On January 24, 2020, an order was entered approving a stipulation by the Debtor, UCC, and UST to withdraw the motion to disband the UCC. (ECF No. 232).

On February 14, 2020, an order was entered extending the exclusive period under Section 1121(b) ("plan exclusivity period") for the Debtor to file a proposed Chapter 11 plan of reorganization. (ECF No. 242).

On February 19, 2020, an order was entered approving Debtor's employment and retention of Portage Point as its financial advisor. (ECF No. 244).

[17] As discussed at 5-6, supra, Debtor's Schedule "E/F" listed forty non-priority unsecured creditors with claims totaling $8,882,869.00. Six of those scheduled creditors were Petitioning Creditors, all of whose debt is disputed. As of the POC Deadline, fourteen proofs of claim had been filed and one non-governmental proof of claim after the deadline. All of the fifteen proofs of claim are for unsecured amounts and only one of them asserts priority unsecured status for a portion of the total claim. Out of the fifteen proofs of claim, four were filed by Delmar, Green, Wilkison, and Brighthaven, in the total amount of $1,955,221.34. All of their claims were scheduled as disputed. No proofs of claim were filed on behalf of Kevin M. Long, VACCO Raleigh LLC or Apex Biostatistics, Inc. Out of the remaining eleven proofs of claim, four were from persons or entities that were not listed and not designated as disputed in Debtor's Schedule "E/F" – Typenex Co-Investments, LLC ($251,373.32), Stephen H. Cohen ($25,000), Avolynt, Inc. (unknown); and Kolesar & Leatham, Chtd. ($11,910.50). (These four proofs of claim total $288,283.82.). Out of the remaining seven proofs of claim, one was filed on behalf of Islet Sciences in the amount of $188,000, but it appears to be a duplicate of the proof of claim of PCG Advisory Group. Out of the remaining six proofs of claim, another was filed in the amount of $500,000 on behalf of Christian Mende, MD, of which $13,650.00 allegedly is based on unpaid wages, salaries or commissions under Section 507(a)(4), i.e., leaving $486,350 as the amount of nonpriority unsecured debt. Based on the Schedules and the proofs of claim on file, it appears that the Debtor has approximately forty-two unsecured creditors whose claims would have to be addressed in any proposed Chapter 11 plan of reorganization. The total amount of the nonpriority unsecured claims scheduled as undisputed is $6,712,219. The total amount of additional nonpriority unsecured claims that are not scheduled but for which a POC was filed is $288,283.82. Adjusting for the amount asserted in the proof of claim filed by creditor Mende, the total amount of the nonpriority unsecured claims not currently in dispute appears to be approximately $6,986,852.80.

On April 16, 2020, an order was entered authorizing Debtor to employ and retain Schwartz Law, PLLC, as bankruptcy counsel for the Debtor instead of Brownstein Hyatt Farber & Schreck. (ECF No. 271).

On June 11, 2020, an order was entered further extending the plan exclusivity period. (ECF No. 284).

On September 2, 2020, Debtor filed a further motion seeking to extend the plan exclusivity period. (ECF No. 324).

On September 10, 2020, an amended order was entered to employ and retain Armstrong Teasdale LLP, as special litigation counsel in the NC Federal Litigation. (ECF No. 336).

On September 23, 2020, Delmar and Avolynt filed an opposition to a further extension of the plan exclusivity period. (ECF No. 342).[18]

On October 13, 2020, an order was entered further extending the plan exclusivity period. (ECF No. 354).

On November 25, 2020, Debtor filed a fourth motion seeking to extend the plan exclusivity period to December 30, 2020, and the exclusive solicitation period to March 8, 2021. (ECF No. 358).

On December 3, 2020, Debtor filed a motion to amend the DIP Financing to increase the credit facility with WSF from $1 million to $2 million, including the superpriority administrative expense status. It also included the provision allowing WSF to elect to convert the resulting debt to equity in a proposed Chapter 11 plan. (ECF Nos. 361 and 363).[19]

[18] In support of that opposition is a declaration from Delmar to which is attached a copy of the complaint that initiated the NC Federal Litigation. (ECF No. 343).

[19] Debtor's motion to amend the DIP Financing was supported by another declaration from Steel, to which is attached an Amended Revolving Line of Credit Promissory Note. Paragraph 5 of that amended promissory note provides for the conversion of debt to equity through issuance of securities under a confirmed Chapter 11 plan of reorganization.

On December 23, 2020, Debtor filed a Disclosure Statement for the Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code ("First Disclosure Statement").[20] (ECF No. 377).[21]

On December 23, 2020, Debtor filed the Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code ("First Plan").[22] (ECF No. 378).

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[20] In that initial disclosure statement, Debtor disclosed that Portage Point had performed a valuation analysis of the Debtor's two key assets as of August 30, 2020 ("Valuation Report"). Those key assets, described as a "Lisofylline combination therapy with GLP-1 ("Combo Treatment")" and a "Beta Cell Death Diagnostic Test ("Beta-Cell Test")" were valued at $61,772,000 and $380,626,000, respectively. See First Disclosure Statement at Art. II.B(3). Although the First Disclosure Statement referred to the Valuation Report as Exhibit "B," a redacted copy was not attached as it was subject to the prior Protective Order.

[21] A detailed and more thorough history of the Debtor was provided in the First Disclosure Statement. Debtor originally was incorporated in Nevada in September 1994 and changed to its current name on February 23, 2012. Debtor eventually became a publicly traded entity on the NASDAQ-OTC market under the symbol ISLT. See First Disclosure Statement at Section I.A and B. After the Debtor entered into a joint venture with Green, Wilkison and Brighthaven in August 2012, Green became the chief executive officer and Wilkison became the chief scientific officer of the Debtor in October 2013. Additionally, both Green and Wilkison were on the board of directors. Shortly thereafter, things fell apart, and the Debtor sued Green, Wilkison and Brighthaven in the NC State Court in December 2015, alleging breach of fiduciary duty and seeking imposition of a constructive trust. The NC State Judgment entered in 2019 was entered against the Debtor apparently based on a prior order granting default judgment in 2017 in favor of Brighthaven, Green and Wilkison on their counterclaims. See note 14, supra. (If the judgments entered in the NC State Litigation did not entail the actual litigation of factual issues, it is not clear whether under North Carolina law the judgment would be given issue preclusive effect in any subsequent litigation. See Sartin v. Macik, 535 F.3d 284, 289 (4th Cir. 2008). Thereafter, Debtor commenced the federal civil litigation against Green, Wilkison, Brighthaven, and Avolynt in the Southern District of New York in January 2019, that was transferred to the Eastern District of North Carolina, where it remains pending as the NC Federal Litigation. The pending federal litigation seeks damages and equitable relief against the Litigation Creditors under theories of breach of contract, breach of fiduciary duty, unjust enrichment, fraud and constructive trust. Id. at Section I.C. Copies of the complaints, answer, and counterclaims filed in the NC Federal Litigation were admitted into evidence as Debtor Exs. 47, 48, 49, 50, 51, and 52.

[22] From the outset, Debtor described its Chapter 11 strategy to reorganize as a going concern by issuing shares in the reorganized debtor to satisfy in full the amounts owing to WSF for its DIP Financing, to reserve sufficient shares for the Petitioning Creditors depending on the outcome of the NC Federal Litigation, to issue shares to the remaining general unsecured claims,

On December 23, 2020, Debtor filed a motion for approval of the First Disclosure Statement, for approval of form of ballots, noticing procedures, and related matters. (ECF No. 379). On December 28, 2020, an amended notice of hearing was filed scheduling the motion to be heard on February 17, 2021. (ECF No. 383). Attached to the amended notice of hearing is a certificate of service attesting that the motion and amended notice of hearing were served electronically on various counsel, as well as by regular mail on all parties in interest.

On December 30, 2020, an order was entered granting Debtor's fourth motion to further extend the plan exclusivity periods. (ECF No. 385).

On January 7, 2021, an order was entered approving the Debtor's amended DIP Financing from WSF. (ECF No. 387).[23]

On February 3, 2021, an objection to disclosure statement approval was filed by the UCC ("UCC Objection"). (ECF No. 399).

On February 3, 2021, an objection to disclosure statement approval, as well as plan confirmation procedures, was filed by the Litigation Creditors and Delmar, accompanied by the declarations of Mark M. Weisenmiller ("Weisenmiller Declaration") and Green. (ECF Nos. 401, 402, and 403). Additionally, the same five creditors filed a separate "Motion Pursuant to Fed. R. Bankr. P. 3013 Determining Classification and Impairment of Claims" ("3013 Motion"). (ECF No. 404).[24]

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and to issue the balance of the shares in the reorganized debtor to existing equity holders after satisfaction of the claims of creditors. See First Disclosure Statement at Section II.C.

[23] No objection to the amended DIP Financing request was filed or presented.

[24] FRBP 3013 provides, in pertinent part: "For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§1122…of the Code." The 3013 Motion sought a number of legal determinations in advance of confirmation of the proposed First Plan: (1) that Curiam is an administrative claimant improperly placed into separate Class 1; (2) that Curiam's claim in Class 1 is not an impaired class entitled to vote to accept or reject the proposed Plan; (3) that placing the Petitioning Creditors into unsecured Class 2 separate from other unsecured creditors in Class 3 constitutes improper "gerrymandering" of classes to achieve plan confirmation; and (4) that the proposed Plan is unconfirmable because the resulting misclassifications violated Sections 1122, 1123 and 1124, and therefore do not meet the plan confirmation requirement of Section 1129(a)(1).

On February 4, 2021, an order was entered shortening time so that the 3013 Motion could be heard contemporaneously with approval of the First Disclosure Statement. (ECF No. 409).

On February 5, 2021, an amended order was entered granting a prior request by the same five creditors to seal and redact certain portions of an exhibit attached to the Weisenmiller Declaration. (ECF No. 410).

On February 11, 2021, Debtor filed an opposition to the 3013 Motion, a reply to the UCC Objection, and a separate reply to the other objection ("Debtor 3013 Reply"). (ECF Nos. 411, 412, and 413).

On February 16, 2021, Debtor filed an "errata" that provides the final three pages that were missing from the Debtor 3013 Reply. (ECF No. 416).

On February 16, 2021, the Litigation Creditors filed a reply in support of their 3013 Motion. (ECF No. 419).

On March 17, 2021, an order was entered granting conditional approval of the First Disclosure Statement and directing the Debtor to file a second amended disclosure statement no later than March 31, 2021 ("First Disclosure Statement Order"). (ECF No. 424). That order required the Debtor to file an amended disclosure statement providing additional information, including the factual basis for any claims by the Debtor against Steel. On this same date, an order was entered denying the 3013 Motion.[25] (ECF No. 426).

On March 19, 2021, Debtor filed a fifth motion seeking to extend the exclusive solicitation period for an additional 48 days from March 31, 2021, through May 18, 2021. (ECF No. 431).

On March 31, 2021, Debtor filed its Second Amended Disclosure Statement for the Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code ("Second

[25] The order denied the relief requested under FRBP 3013 because the Debtor was required to otherwise amend its proposed plan of reorganization and accompanying disclosure statement. The order specifically authorized the same classification and other objections, see note 24, supra, to be raised in connection with plan confirmation.

Disclosure Statement") (ECF No. 439) along with the Second Amended Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code (ECF No. 440).

On April 6, 2021, a supplemental order was entered on Debtor's motion for approval of the First Disclosure Statement, directing the Debtor to submit a final order approving the Second Amended Disclosure Statement. (ECF No. 441).

On April 20, 2021, Debtor filed its Third Amended Disclosure Statement for the Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code Dated April 20, 2021 ("Third Amended Disclosure Statement") (ECF No. 456) along with its Third Amended Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code Dated April 20, 2021 ("Third Amended Plan") (ECF No. 457).[26] On this same date, Debtor filed its motion for leave to amend its Second Amended Disclosure Statement and Second Amended Plan. (ECF No. 458).

On April 20, 2021, Debtor also filed a further motion for entry of a final order authorizing additional DIP Financing not to exceed $3 million. (ECF Nos. 461, 462, and 473)[27]

On April 21, 2021, an order was entered granting Debtor's fifth motion to further extend the exclusive solicitation period. (ECF No. 468).

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[26] Both the amended disclosure statement and amended plan of reorganization described a "Renewed License" by which Yale has granted the Debtor an exclusive license to commercialize and market methods and products described as "Circulating Hypomethylated B cell derived DNA as a biomarker of B cell destruction" apparently encompassing the Beta-Cell Test. See Third Amended Disclosure Statement at Section III.E(2); Third Amended Plan at Art. V.B. The Renewed License apparently encompasses the prior licensing agreement between the parties entered on or about May 1, 2012. One of the executory contracts and unexpired leases appearing on Debtor's initial Schedule "G" was described as an exclusive license agreement and patent license agreement with Yale University Office of Cooperative Research.

[27] Under an Amended Revolving Line of Credit Promissory Note II, WSF is permitted to elect to receive equity in the Reorganized Debtor at a rate of six cents ($.06) per share for the principal balance of new advances, including accrued and unpaid interest, fees and costs. Moreover, the Debtor retains the right to distribute equity to WSF at the rate of four cents ($.04) per share for the principal balance of prior advances, including accrued and unpaid interest, fees and costs. Under this conversion option, the maximum number of shares in the Reorganized Debtor to be issued to WSF is 40 million.

On May 7, 2021, Debtor filed its "Fourth Amended Disclosure Statement for the Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code dated May 7, 2021" ("Fourth Amended Disclosure Statement")[28] (ECF No. 476; Debtor Ex. 1).[29] Exhibit B to the Fourth Amended Disclosure Statement also references a redacted copy of the Valuation Report that is available upon request to parties in interest that comply with the Protective Order.[30] Also attached as Exhibit "C" to the Fourth Amended Disclosure Statement is the Debtor's liquidation analysis setting forth the amount available for distribution to claims and interest holders in the event the case proceeded as a Chapter 7 liquidation rather than a Chapter 11 reorganization ("Liquidation Analysis"). On the same date, Debtor filed its "Fourth Amended Plan of Reorganization of Islet Sciences, Inc., Under Chapter 11 of the Bankruptcy Code dated May 7, 2021" ("Fourth Amended Plan").[31] (ECF No. 477; Debtor Ex. 2).

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[28] The amendment still includes the additional information describing the factual basis for any claims by the Debtor against Steel. See Fourth Amended Disclosure Statement at Section III.E(3). The amendment also discusses as a Key Employee Incentive Program ("KEIP") that the Debtor's board had approved on May 4, 2021, i.e., three days before the disclosure statement was filed. Id. at Section II.B(5). Participants in the KEIP are eligible to receive bonuses in the form of shares in the Reorganized Debtor, with the aggregate total of all bonuses not to exceed 15% of the equity interests in the Reorganized Debtor. Eligible participants in the KEIP include officers, directors, employees and professionals. Id. at Section X(71). The KEIP and KEIP bonuses are included as part of the "Restructuring Transactions" necessary to implement the proposed plan of reorganization. See Fourth Amended Plan at Art. V.B.

[29] As previously mentioned at note 7, supra, the Litigation Creditors do not include all of the Petitioning Creditors. In the initial Schedules and the Amended Schedules, however, all of the Petitioning Creditors' claims were identified as "disputed." Because their claims were scheduled as disputed, the Litigation Creditors have Disputed Claims under the proposed plan. See Fourth Amended Plan at Art. I(45). Payments and distributions on Disputed Claims, including partial payments and partial distributions, are not made until after a Disputed Claim becomes an allowed claim. Id. at Art. VI.B(1 and 2). The bar date for otherwise objecting to claims as defined under Section 101(5) may be set by the court. Id. at Art. I(22).

[30] Although the Valuation Report is not attached to the Fourth Amended Disclosure Statement, the combined value of the Debtor's two primary assets contained in the report is disclosed. See Fourth Amended Disclosure Statement at Section II.B(3).

[31] The Fourth Amended Plan designates four classes of claims and interests. Under Section 1123(a)(1), WSF is not classified because it holds a post-petition, priority unsecured

On May 13, 2021, a final order was entered approving the additional DIP Financing obtained from WSF. (ECF No. 479).[32]

On May 17, 2021, an order was entered: (i) approving the Fourth Amended Disclosure Statement, (ii) approving the form of ballots and related procedures, (iii) fixing the voting deadline,[33] (iv) prescribing the form and manner of notice, (v) fixing the plan confirmation objection deadline,[34] (vi) scheduling a plan confirmation evidentiary hearing for August 30 and 31, 2021,[35] and (vii) appointing Debtor's counsel as the ballot tabulation agent ("Disclosure Statement Approval Order"). (ECF No. 481).

On May 19, 2021, notice of entry of the Disclosure Statement Approval Order ("Disclosure Statement Approval Notice") was electronically served on various counsel, as well as by regular mail on all parties. (ECF No. 492).

On May 20, 2022, the Fourth Amended Disclosure Statement and Fourth Amended Plan attached thereto were sent to Class 4, as well as a Class 4 ballot, by regular mail. (ECF No. 498).

On May 24, 2021, a notice of (a) solicitation of votes to accept or reject the Fourth Amended Plan, (b) the evidentiary hearing on confirmation of the Fourth Amended Plan, and (c)

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administrative claim that must be satisfied as of the effective date of the proposed plan unless otherwise agreed by the claim holder.

[32] In addition to payment of administrative expenses during the Chapter 11 proceeding, the increase of DIP Financing to $3 million apparently is intended to provide adequate working capital for the Reorganized Debtor after plan confirmation. See Fourth Amended Disclosure Statement at Section II.A(4).

[33] A deadline of August 16, 2021, was set for impaired creditors to cast ballots accepting or rejecting the proposed Fourth Amended Plan ("Voting Deadline"). See Disclosure Statement Approval Order at 2:18-19.

[34] A deadline of July 26, 2021, was set for any party in interest to object to confirmation of the proposed Fourth Amended Plan ("Confirmation Objection Deadline"). See Disclosure Statement Approval Order at 3:1-7.

[35] A deadline of August 23, 2021, was set for pretrial statements, exhibit lists, witness lists, and alternate direct testimony ("ADT") declarations to be filed. See Disclosure Statement Approval Order at 2:27-28.

the deadline to file objections to plan confirmation, was filed ("Solicitation Notice"). (ECF No. 500).

On May 24, 2021, a notice of (a) the plan confirmation evidentiary hearing, and (b) the deadline to file confirmation objections, was filed ("Confirmation Objection Notice"). (ECF No. 501). On the same date, a certificate of service was filed attesting that the Confirmation Objection Notice was sent by regular mail to various parties in interest. (ECF No. 502).

On May 25, 2021, a certificate of service was filed attesting that the Solicitation Notice was electronically served on various counsel, as well as by regular mail on all parties. (ECF No. 503).

On June 8, 2021, a supplemental certificate of service was filed attesting that the Solicitation Notice, the Fourth Amended Disclosure Statement with attached Fourth Amended Plan, and a Class 4 ballot for equity security holders was sent by regular mail on June 7, 2021, to corrected addresses for the Debtor's equity holders. (ECF No. 504).

On June 21, 2021, a further supplemental certificate of service was filed attesting that: (1) the Solicitation Notice, and the Fourth Amended Disclosure Statement with attached Fourth Amended Plan was sent by regular mail on June 18, 2021, to certain corrected addresses for Debtor's equity holders; (2) that the Solicitation Notice, the Fourth Amended Disclosure Statement with attached Fourth Amended Plan, and Class 4 ballot for equity security holders was sent by regular mail to certain corrected addresses for Debtor's equity security holders; and (3) the same were sent electronically to certain equity security holders. (ECF No. 505).

On June 28, 2021, a Partial Objection to Allowance of Proofs of Claim of James Green, William Wilkison, Brighthaven Ventures, LLC, i.e., the Litigation Creditors, was filed by Debtor ("Claim Objection"). (ECF No. 507). Debtor objected to allowance of any amounts sought under the Abuse of Process Counterclaims included in the proofs of claim.

On July 9, 2021, notices of intent to serve subpoenas on Green, Wilkison, and Delmar, were filed. (ECF Nos. 510-512).

On July 14, 2021, the UCC filed separate notices, including subpoenas, to take depositions of Allison and Steel, respectively, on July 15, 2021, and July 19, 2021. (ECF Nos. 513 and 514).

On July 14, 2021, a joint response to the Claim Objection was filed by the Litigation Creditors, along with the declarations of Robert J. Novack, Esq. and Alan Parry, Esq. (ECF Nos. 516-518).

On July 16 and 19, 2021, amended notices of intent to serve subpoenas on Green, Wilkison, and Delmar, were filed by the Debtor. (ECF Nos. 519-522). On the same date, the Debtor, the UCC, and the Litigation Creditors, filed a stipulation to extend certain deadlines. (ECF No. 525).

On July 20, 2021, an order was entered granting the stipulation to extend certain deadlines, e.g., the last day to file objections to the Debtor's proposed Fourth Amended Plan was extended to July 28, 2021. (ECF No. 526).

On July 21, 2021, a reply was filed by Debtor to the Claim Objection joint response. (ECF No. 530).

On July 26, 2021, the Confirmation Objection Deadline elapsed for any party in interest to object to confirmation of the proposed Fourth Amended Plan.

On July 28, 2021, an order was entered approving another stipulation between the Debtor, the Litigation Creditors, and the UCC to extend certain deadlines, e.g., the last day to file objections to confirmation of the Fourth Amended Plan was extended to July 30, 2021. (ECF No. 533).

On July 28, 2021, the Claim Objection was heard. The court overruled the Claim Objection without prejudice to allowing the Litigation Creditors to file amended proofs of claim no later than August 6, 2021, stating the amount sought on the Abuse of Process Counterclaims. The court also ruled that the Debtor could file a motion to estimate the Abuse of Process Counterclaims under Section 502(c) no later than August 13, 2021.

On July 30, 2021, an order was entered approving a stipulation between the Debtor and the UCC to extend confirmation hearing briefing deadlines. (ECF No. 538). The deadline for

the UCC to object to plan confirmation also was extended to August 13, 2021. On the same date, a separate order was entered approving a stipulation between the Debtor and the Litigation Creditors to extend the deadline to object to plan confirmation to August 6, 2021. (ECF No. 541).

On August 5, 2021, an order was entered denying the Claim Objection on the terms specified at the July 28, 2021, hearing. (ECF No. 543).

On August 6, 2021, Debtor filed its motion in limine to preclude the Litigation Creditors from introducing evidence at the confirmation hearing relating to any documents and information that was neither produced nor timely supplemented in response to Debtor's written discovery ("First Limine Motion"). (ECF No. 545).[36] The First Limine Motion was noticed to be heard on August 30, 2021. (ECF No. 546).

On August 6, 2021, Debtor filed a second motion in limine to exclude, bar, or otherwise limit expert testimony by Green, Wilkison, and Delmar ("Second Limine Motion"). (ECF No. 547). The Second Limine Motion was noticed to be heard along with the First Limine Motion on August 30, 2021. (ECF No. 548).

On August 6, 2021, a joint objection to the Fourth Amended Plan was filed by the Litigation Creditors as well as Delmar ("Joint Creditor Objection"). (ECF No. 549).

On August 6, 2021, the Litigation Creditors and Delmar filed a motion in limine ("Creditors Limine Motion") to exclude the valuation report and testimony of Allison. (ECF No. 555). The Creditors Limine Motion was noticed to be heard on August 30, 2021, along with the First Limine Motion and the Second Limine Motion. (ECF No. 556).

On August 6, 2021, Brighthaven filed an amended proof of claim in the total non-priority, unsecured amount of $697,799.99, i.e., $255,457.36 more than its original POC.

On August 11, 2021, Debtor filed its Motion Pursuant to Bankruptcy Rule 9019 to Approve Settlement With : (I) the Official Committee of Unsecured Creditors; and (II) Western States Funding, LLC ("Settlement Motion"), supported by the Declaration of Mitchell May

[36] Copies of the Debtor's discovery requests and the Litigation Creditor's responses were admitted into evidence as Debtor Exs. 39, 40, 45, and 46.

("May Settlement Declaration") (ECF Nos. 564 and 565; Debtor Ex. 14).[37] On the same date, Debtor filed its Motion to Modify Debtor's Chapter 11 Plan of Reorganization Pursuant to 11 U.S.C. § 1127 ("Plan Modification Motion"), supported by a further declaration of Mitchell May (ECF Nos. 566 and 567; Debtor Ex. 16). The Settlement Motion seeks approval of a compromise reached with the UCC and WSF as to the latter's treatment under a Chapter 11 plan of reorganization for the Debtor. The Plan Modification Motion seeks to modify the proposed Chapter 11 plan in accordance with the compromise.

On August 12, 2021, separate orders were entered shortening time so that both the Settlement Motion and the Plan Modification Motion could be heard on August 30, 2021. (ECF Nos. 574 and 575).[38] On August 13, 2021, a separate notice of hearing ("NOH") was filed for each matter. (ECF Nos. 578 and 579). Certificates of service are attached to each NOH attesting that a copy of the subject motion and supporting declaration was served by ECF to certain counsel, and by email on all parties in interest.

On August 13, 2021, Debtor filed a Motion to Estimate Claims of James Green, William Wilkison, Brighthaven Ventures, LLC and Avolynt, Inc. Pursuant to 11 U.S.C. § 502(c)(2) ("Claims Estimation Motion"). (ECF No. 580). On the same date, an order shortening time was entered so that the Claims Estimation Motion could be heard on August 30, 2021. (ECF No. 583).

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[37] Attached to the Settlement Motion as Exhibit "1" is a proposed Plan Support Agreement ("PSA") memorializing the settlement reached by the Debtor, the UCC and WSF to support confirmation of the Fourth Amended Plan. (Debtor Ex. 12). Attached as Exhibit "2" is a proposed order approving the PSA ("Proposed Settlement Order").

[38] The orders shortening time were entered for cause based upon separate ex parte applications submitted by the Debtor. (ECF Nos. 570 and 572). Both applications were accompanied by attorney information sheets representing that counsel for the Litigation Creditors had consented to having both the Settlement Motion and the Plan Modification Motion heard on shortened notice. (ECF Nos. 571 and 573). After the separate orders shortening time were entered, however, Debtor filed amended attorney information sheets indicating that shortly before the orders shortening time were entered, counsel for the Litigation Creditors had reconsidered and no longer consented to the matters being heard on shortened notice. (ECF Nos. 576 and 577). No request was made by the Litigation Creditors to vacate the orders shortening time.

On August 16, 2021, the Voting Deadline elapsed for impaired creditors and interest holders to accept or reject the proposed Fourth Amended Plan.

On August 17, 2021, joint oppositions to the First Limine Motion, as well as the Second Limine Motion were filed by the Litigation Creditors. (ECF Nos. 586 and 588). On the same date, an opposition to the Creditors Limine Motion was filed by the Debtor. (ECF No. 587).

On August 19, 2021, joint oppositions to the Settlement Motion ("Settlement Opposition"), Plan Modification Motion, and Claims Estimation Motion were filed by the Litigation Creditors. (ECF Nos. 591-593). On the same date, the Litigation Creditors filed a Declaration of Steven R. Delmar in support of their joint opposition to the Claims Estimation Motion. (ECF No. 594).

On August 20, 2021, an order was entered granting the Litigation Creditors' motion to seal certain portions of the Creditors Limine Motion as well as certain exhibits to be submitted. (ECF. 595).

On August 20, 2021, Debtor filed a notice of its filing of a supplement to the Fourth Amended Plan ("Plan Supplement"). (ECF No. 596). Attached to the notice are two exhibits: (1) an Islet Sciences, Inc. Shareholders Agreement ("Islet Shareholders Agreement"), and (2) a Conversion Agreement between Islet Sciences, Inc. and Western States Funding, LLC ("WSF Conversion Agreement"). On the same date, Debtor filed a reply to the Joint Creditor Objection ("Confirmation Reply"). (ECF No. 597).

On August 23, 2021, Debtor filed an amended notice of its filing of a supplement to its Fourth Amended Plan. (ECF No. 598; Debtor Ex. 9). Attached to the notice is a third exhibit consisting of a List of Executory Contracts and Unexpired Leases to be Assumed or Rejected Pursuant to the Plan ("Assumption or Rejection List"). On the same date, Debtor filed a separate Notice Regarding (a) Executory Contracts and Unexpired Leases to be Assumed Pursuant to Section 365 of the Bankruptcy Code, (b) Amounts Required to Cure Defaults under Such Executory Contracts and Leases, and (c) Related Procedures ("Contract Assumption Notice").

(ECF No. 599; Debtor Ex. 17).[39] Attached as Exhibit "1" to that separate notice is a list including the executory contracts and unexpired leases previously appearing on Debtor's initial Schedule "G," i.e., Quest, UVA, Xeris, and Yale. The certificate of service attached to the Contract Assumption Notice attests that it was served by priority overnight mail addressed to all four of those parties.

On August 23, 2021, the Litigation Creditors filed separate alternate direct testimony declarations of Green ("Green ADT Declaration") (Creditor Ex. "A"), Wilkison ("Wilkison ADT Declaration") (Creditor Ex. "B") and Delmar ("Delmar ADT Declaration") (Creditor Ex. "C"), along with a separate notice specifying that those documents would serve as the direct testimony of the declarants in support of their objection to Plan Confirmation. (ECF Nos. 601, 602, 603, and 604). Litigation Creditors also filed the separate Declaration of Mark M. Weisenmiller in support of their Plan Objection as well as the Creditor Limine Motion. (ECF No. 605). Litigation Creditors also filed a witness and exhibit list as well as a trial statement. (ECF Nos. 614 and 615).

On August 23, 2021, Debtor filed its Memorandum of Law in Support of Confirmation of its Chapter 11 Plan of Reorganization ("Debtor Confirmation Brief") (Debtor Ex.7) along with its separate Trial Statement and witness list. (ECF Nos. 606, 607, and 616). On the same date, Debtor filed separate declarations of Mitchell May ("May ADT Declaration") (Debtor Ex. 3), Jonathan Lakey, Ph.D. ("Lakey ADT Declaration") (Debtor Ex. 5), Samuel A. Schwartz

[39] In addition to the treatment of creditors and interest holders, the proposed plan provides for the treatment of executory contracts and unexpired leases. See Fourth Amended Plan at Art. VI. Debtor previously scheduled four separate executory contracts and unexpired leases with Quest, UVA, Xeris, and Yale. See discussion at 6, supra. The plan provides for the identified contracts and leases to be assumed on the effective date and for any defaults on an assumed contract or lease to be cured on the effective date. See Fourth Amended Plan at Art. VI. A(1) and C. Opportunity to object to assumption of a contract or lease is provided in the proposed plan. Id. at Art. C. The treatment of executory contracts and unexpired leases is described in the disclosure statement accompanying the proposed plan. See Fourth Amended Disclosure Statement at Section III.F(1, 2, 3, and 4).

("Schwartz Declaration") (Debtor Ex. 8),[40] and Thomas J. Allison ("Allison ADT Declaration") (Debtor Ex. 4), along with a separate notice specifying that those documents would serve as the direct testimony of the declarants in support of Plan Confirmation. (ECF Nos. 608, 609, 610, 611, and 613).

On August 24, 2021, Debtor filed its MOR for the period ending July 31, 2021. (ECF No. 617). Among other things, Debtor reported that it was current on its quarterly UST fees. On its balance sheet, Debtor listed total assets of $8,892.00 consisting of the cash on hand at the time the MOR was prepared.

On August 24, 2021, Debtor filed its Motion Pursuant to 11 U.S.C. § 1126(e) to Designate the Votes of Class 2 Creditors for Bad Faith ("Designation Motion"). (ECF No. 619).

On August 24, 2021, Debtor filed amendments to certain Schedules ("Amended Schedules"). (ECF No. 622; Debtor Ex. 55). Its Amended Schedule "A/B" still listed three separate assets described as "licenses, franchises, and royalties," but provided current values of two of them: a "Yale University Exclusive Patent License Agreement with Quest Diagnostics for United States Patent No. US 10,125,394 B2 and European Patent No. 2723901 Compositions and Methods for Diagnosing Diseases and Disorders Associated with Beta-Cell Death" valued at $380,626,000.00,[41] and a "DiaKine Therapeutics, Inc./Xeris Pharmaceuticals, Inc. Developmental Agreement Collaborative patent agreement for United States Patent No. US 7,393,827 B2 assigned to DiaKine Therapeutics Inc./UVAPF Pharmaceutical Compositions and Methods for Restoring Beta-Cell Mass and Function" valued at $61,772,000.00. No amendments were made to Debtor's initial Schedule "G" that lists its executory contracts and unexpired leases with Quest, UVA, Xeris, and Yale.

[40] Under the Disclosure Statement Approval Order, Debtor's counsel is the ballot tabulation agent. All four classes under the proposed Fourth Amended Plan are identified as impaired and 66 ballots were cast reflecting acceptance of the proposed Chapter 11 plan by Classes 1, 3, and 4. See Schwartz Declaration at ¶ 7. Class 2, consisting only of the Litigation Creditors, does not accept.

[41] A copy of the U.S. patent, dated November 13, 2018, was admitted into evidence as Creditor Ex. "FF."

On August 24, 2021, Litigation Creditors filed their reply in support of the Creditor Limine Motion. (ECF No. 624).

On August 24, 2021, Debtor filed an Application to Employ Jonathan Lakey, Ph.D., MSM as Expert Witness for Debtors. (ECF No. 625). On the same date, Debtor filed separate replies in support of the First Limine Motion as well as the Second Limine Motion. (ECF Nos. 626 and 627).

On August 25, 2021, an order was entered denying without prejudice the Debtor's request to have its Designation Motion heard on an order shortening time. (ECF No. 628).

On August 26, 2021, separate orders were entered granting additional motions to file documents under seal: unredacted versions of the Allison ADT Declaration and the Valuation Report were provided to the court by the Debtor, and unredacted versions of the Wilkison and Green ADT Declarations were provided to the court by the Litigation Creditors. (ECF Nos. 630 and 631). Only redacted versions of those declarations were entered on the docket. The Delmar, May and Lakey, ADT Declarations were filed without redactions.

On August 26, 2021, separate replies were filed by the Debtor in support of the Settlement Motion ("Settlement Reply"),[42] Plan Modification Motion, and Claims Estimation Motion. (ECF Nos. 634, 635, and 636). On the same date, the UCC filed a joinder in the Debtor's replies ("UCC Reply") in connection with the Settlement Motion and Plan Modification Motion. (ECF No. 638).

On August 30, 2021, another order was entered granting a motion to seal certain documents. (ECF No. 642).

On August 30, 2021, trial commenced on Plan Confirmation, the Settlement Motion, and the Plan Modification Motion.[43] Examination commenced of witnesses designated by the parties

[42] Debtor also submitted another declaration of its counsel attaching a copy of certain pages from a deposition transcript referenced in its Settlement Reply. (ECF No. 637).

[43] On the first day of trial, the court orally ruled that the Claims Estimation Motion be granted in part and denied in part. For voting purposes only, the motion was granted to estimate at zero dollars the value of the Abuse of Process Counterclaims of Green, Wilkison and Avolynt. For voting purposes only, the motion was denied with respect to the Abuse of Process Counterclaim asserted by Brighthaven. For voting purposes, the value of the Abuse of Process

based on the ADT declarations previously submitted.[44] Additional testimony was presented on August 31, 2021, as well as on September 10, 2021. At the close of evidence, counsel were directed to submit simultaneous post-trial briefs.

On October 12, 2021, Litigation Creditors filed their supplemental brief on plan confirmation ("Creditor Closing Brief") and Debtor filed its closing brief on plan confirmation and settlement approval ("Debtor Closing Brief"). (ECF Nos. 684 and 685).

On October 19, 2021, closing arguments were presented by counsel and the matters were taken under submission.

THE EVIDENTIARY RECORD

During the course of the trial, live testimony was presented by seven witnesses, and fifty-eight exhibits were admitted into evidence.

A. The Witness Testimony

Through the admission of declarations, Debtor presented direct testimony from May, Lakey, and Allison. Through the admission of separate declarations, Litigation Creditors presented direct testimony from Green,[45] Wilkison,[46] and Delmar.[47] Through examination at

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Counterclaims of Brighthaven was estimated at $255,457.36. The final amount of the Abuse of Process Counterclaims are subject to liquidation in the NC Federal Litigation. No written order has been submitted by counsel.

[44] On the first day of trial, before any witnesses were called, the court orally ruled on the First Limine Motion, Second Limine Motion, and Creditors Limine Motion. The First Limine Motion was denied without prejudice to objections being raised to specific documents offered during the evidentiary hearing. Both the Second Limine Motion and the Creditor Limine Motion were denied without prejudice to allowing counsel to voir dire any proposed expert witness, to raise arguments going to impeachment of any witness testimony, and to raise arguments going to the weight to be given to the testimony of any proposed expert witness. No written orders memorializing these rulings have been submitted by counsel.

[45] The Green ADT Declaration does not contest nor address the Settlement Motion or Modification Motion.

[46] The Wilkison ADT Declaration does not contest nor address the Settlement Motion or Modification Motion.

[47] The Delmar ADT Declaration does not contest nor address the Settlement Motion or Modification Motion.

trial, Litigation Creditors presented testimony from Steel. Each witness was subject to live cross-examination.

B. The Exhibits[48]

Thirty-five exhibits were admitted on behalf of the Debtor. Twenty-three exhibits were admitted on behalf of the Litigation Creditors.[49] Certain of the exhibits were filed and admitted under seal.

APPLICABLE LEGAL STANDARDS

Debtor bears the burden of proof for all three submitted matters under a preponderance of the evidence standard. See Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986) (approval of a compromise applying four "A&C Factors"); In re Anderson, 2012 Bankr. LEXIS 3539, at *27-28 (Bankr.Mont. Aug. 1, 2012) (pre-confirmation Chapter 11 plan modification); Skyline Ridge, LLC v. Cinco Soldados, LLC (In re Skyline Ridge, LLC), 2021 WL 3829311, at *6 (B.A.P. 9th Cir. Aug. 25, 2021) (Chapter 11 plan confirmation).

Under Bankruptcy Rule 9019, a court may approve a compromise after notice and a hearing. The trustee or debtor in possession bears the burden of proving that the proposed compromise or settlement is in the best interests of the estate. Appropriate weight is given to a trustee or debtor in possession's business judgment, but the requirement of notice and a hearing assures that the decision of a trustee or debtor in possession is not simply rubber stamped. See In re Hyloft, Inc., 451 B.R. 104, 109 (Bankr. D. Nev. 2011). In approving a proposed compromise under the A&C Factors, the court should consider the probability of success on the merits, any collection difficulties, the expense, inconvenience a delay of further dispute, and the views of creditors. See In re A&C Properties, 784 F.2d at 1381, citing In re Flight Transportation Corporation Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984), cert. denied, 469 U.S. 1207 (1985). A Chapter 11 debtor in possession has a fiduciary obligation to all creditors of the

[48] Many of the exhibits are copies of documents filed and appearing on the docket in this Chapter 11 proceeding. No exhibits were offered by the UCC.

[49] One of those exhibits was a transcript of Litigation Creditors' deposition of Steel taken on July 15, 2021. (Creditor Ex. "JJ"). Only a specific portion of transcript page 55 was admitted into evidence.

bankruptcy estate, not to the individual principals of the pre-bankruptcy debtor. See Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 614 (9th Cir. 1988); In re Rosenblum, 2019 WL 5782589, at *5 n.17 (Bankr. D. Nev. Jul 15, 2019). Similarly, a creditors' committee formed in a Chapter 11 case has a fiduciary duty to all unsecured creditors rather than to individual members of the committee. See Shaw & Levine v. Gulf & W. Indus. Inc. (In re Bohack Corp.), 607 F.2d 258, 262 n.4 (2nd Cir. 1979); In re Continental Cast Stone, LLC, 625 B.R. 203, 208 (Bankr. D. Kan. 2020); In re Nat'l R.V. Holdings, Inc., 390 B.R. 690, 700 (Bankr. C.D. Cal. 2008).

Under Section 1127(a), a proposed plan may be modified prior to confirmation as long as it does not run afoul of the creditor classification requirements of Section 1122 or the plan content requirements of Section 1123. See 11 U.S.C. §1127(a) ("The proponent…may modify such plan any time before confirmation, but may not modify…so that such plan…fails to meet the requirements of sections 1122 and 1123…"). Permissible plan modifications prior to confirmation serve to facilitate consensual resolution of claims during the reorganization process. See In re Rhead, 179 B.R. 169, 176-77 (Bankr. D. Ariz. 1995). Section 1127(c) also provides that the proponent of a plan modification also must comply with the disclosure requirements of Section 1125. See generally 7 COLLIER ON BANKRUPTCY, ¶1127.03[1][a] (Richard Levin & Henry J. Sommer, eds. 16th ed. 2021).

Under Section 1129(a), sixteen requirements, if applicable, must be met for a proposed Chapter 11 plan to be confirmed. Under Section 1129(a)(1), a proposed plan must comply with the applicable provisions of the Bankruptcy Code. Under Section 1123(a)(1), every Chapter 11 plan must designate classes of claims. Under Section 1122(a), all claims and interests in a designated class must be substantially similar. Under Section 1129(a)(2), the proponent of a Chapter 11 plan must comply with the applicable provisions of the Bankruptcy Code. Under Section 1125(b), solicitation of a proposed plan must be accompanied by a disclosure statement containing adequate information. Under Section 1126(f), only parties whose claims or interests are impaired may vote to accept or reject a proposed Chapter 11 plan. Under Section 1129(a)(8), all classes of claims must not be impaired, or must vote to accept a proposed Chapter 11 plan.

Under Section 1129(a)(10), if a plan impairs any class of creditor claims, at least one class of impaired claims must vote to accept the proposed Chapter 11 plan. Under Section 1129(b), confirmation of a proposed plan that does not comply with Section 1129(a)(8) is permissible as long as all other applicable requirements of Section 1129(a) are met and the treatment of the non-accepting class is fair and equitable. See generally 7 COLLIER ON BANKRUPTCY ¶ 1100.09[e] (Richard Levin & Henry J. Sommer eds. 16th ed. 2021).

DISCUSSION

The evidence presented dictates the outcome of each of the matters before the court. The court will first address whether the compromise at issue in the Settlement Motion should be approved. If so, the court will second address whether modification of the proposed Chapter 11 plan as contemplated by the Settlement Motion is permissible before plan confirmation. If so, the court will consider whether the Debtor's proposed Fourth Amended Plan, as modified, meets the requirements for confirmation.

I. Settlement Approval.

Under the DIP Financing previously approved by the court, WSF has the option under any proposed plan to convert its outstanding superpriority administrative expense claim to equity in any reorganized debtor. Because WSF's claim has superpriority status, its treatment has a substantial impact on the treatment of non-priority general unsecured claims. Under Article II.B of the Fourth Amended Plan, WSF may receive up to 50% of the equity in the entity emerging from Chapter 11 proceeding ("Reorganized Debtor"). Under Article III.B(2 and 3) of the Fourth Amended Plan, creditors holding nonpriority unsecured claims in Class 2 receive .04% of the equity in the Reorganized Debtor and those holding nonpriority unsecured claims in Class 3 receive 1.5% of the equity in the Reorganized Debtor, i.e., an aggregate of 1.9%, in full satisfaction of the allowed amount of all nonpriority unsecured claims. Under Section II.B(5) of the Fourth Amended Disclosure Statement, the KEIP adopted by the Debtor's board includes the possibility of bonuses being distributed, not exceeding 15% of the equity interests in the Reorganized Debtor.

The PSA outlines several proposed modifications to the Fourth Amended Plan. Under the Termination provision of the PSA, however, none of the modifications are effective unless the Debtor's proposed plan, as modified, is confirmed. See PSA §7(a)-(d). Unfortunately, the wording of the Proposed Settlement Order suggests that approval of the Settlement Motion is not dependent on plan confirmation at all, including the effectiveness of releases of claims by the Debtor and the UCC against Steel. Alarmed by that language, the Petitioning Creditors have objected. See Settlement Opposition at 13:9-25. In response, Debtor's counsel disappointingly maintains that its chosen language is only "proposed," see Settlement Reply at 8:21-23, even though it is inconsistent with the terms of the PSA itself. While that response is far less than what is expected from officers of the court, the court has independently considered whether the PSA should be approved notwithstanding the deficiency in a proposed order that cannot be signed by the court.

Under the PSA, WSF will agree to limit its equity interest in the Reorganized Debtor to 42%[50] rather than a proposed distribution of 49.1% that apparently reflects the outstanding amount of the superpriority claim. See PSA §1(a).[51] WSF agrees[52] to contribute the other 7.1% to the general unsecured creditors. See PSA §1(b). Additionally, Debtor agrees to remove Steel from the KEIP and he will not be a participant if the KEIP is implemented and KEIP bonuses are paid by the Reorganized Debtor. See PSA §2(b). In exchange, claims by the Debtor and UCC against Steel will be released. See PSA §6. As a result, the aggregate shares in the Reorganized Debtor distributed to nonpriority unsecured creditors in both Classes 2 and 3 will increase from an aggregate of 1.9% to at least 9%. See PSA §2(a). In the event that equity interests are ever

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[50] The 42% figure appears in the Conversion Agreement attached as Exhibit 2 to the Plan Supplement.

[51] The equity interest necessary to satisfy WSF's superiority unsecured claim is based on the principal balance owed on the lines of credit approved by the DIP Financing. See discussion at note 27, supra.

[52] The proposed WSF Conversion Agreement expressly provides that the full amount of the superpriority administrative claim held by WSF under the approved DIP Financing will be converted to 42% of the common shares in the Reorganized Debtor.

distributed under the KEIP by the Reorganized Debtor, the PSA also provides that the equity interests distributed to unsecured creditors will not be diluted. See PSA §2(c). Moreover, the non-KEIP related shares distributed to unsecured creditors will be unrestricted and freely transferrable by the initial holders of those shares. See PSA §2(d).[53] Under the PSA, the UCC also agrees that holders of nonpriority unsecured claims who object to confirmation of the proposed Fourth Amended Plan will be treated in accordance with the proposed Fourth Amended Plan as it would exist prior to modification. See PSA §5.[54]

Under the PSA, both the UCC and WSF agree to support confirmation of the plan of reorganization as modified. See PSA §3(a). Additionally, members of the UCC and WSF agree not to transfer any of their claims unless the transferee agrees to be bound by the PSA. See PSA §3(b). Additionally, the Debtor agrees to promptly seek approval of the PSA and approval of its proposed plan as modified. See PSA §4. Because the Debtor's proposed Chapter 11 plan, including proposed modifications, still must meet all of the requirements for confirmation under Section 1129, approval of the PSA has only one effect: it settles the UCC's right to object to the plan.

Preliminarily, the Litigation Creditors argue that there is no identifiable dispute that is being settled under FRBP 9019. See Settlement Opposition at 6:11 to 7:3. They also maintain that the UCC has breached its fiduciary duty by discriminating against unsecured creditors who do not vote in favor of plan confirmation. Id. at 7:4-17. Moreover, they argue that the UCC lacks authority to bind unsecured creditors to the releases contained in the PSA or the proposed Chapter 11 plan as modified. Id. at 14:1-23. Litigation Creditors separately maintain that the

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[53] The proposed Islet Shareholders Agreement expressly provides that the shares in the Reorganized Debtor that are initially issued to any holder of a nonpriority unsecured claim are unrestricted and freely transferable. See Islet Shareholders Agreement at Art. III, 3.1(e). By eliminating any doubt that the initial shares in the Reorganized Debtor will be freely transferable, it appears that approval of such a provision enhances their value to nonpriority unsecured creditors.

[54] In other words, if any nonpriority unsecured creditor in Class 2 rejects the plan, only .04% of the equity in the Reorganized Debtor would be allocated to satisfy that creditor's claim. Likewise, if any nonpriority unsecured creditor in Class 3 rejects the Fourth Amended Plan, only 1.5% of the equity in the Reorganized Debtor would be allocated to satisfy that creditor's claim.

PSA does not otherwise satisfy the A&C Factors for approval of a compromise under FRBP 9019. Id. at 7:18 to 12:25. As previously mentioned, Litigation Creditors separately object that the Proposed Settlement Order is misleading because it includes provisions that bind parties to the proposed plan modifications before the proposed plan is even confirmed. See Settlement Opposition at 13:1-26.

The objections raised by the Litigation Creditors are overruled. It is clear that the PSA was reached prior to the deadline for the UCC to object to plan confirmation. Because a Chapter 11 plan of reorganization commonly is the result of negotiations between interested parties, it also is clear that the Debtor and the UCC reached a negotiated result that avoided any possible objections that could be raised by the UCC. The result is predicated on a proposed reduction in the distribution of equity in the Reorganized Debtor to WSF as well as potential equity to Steel under the KEIP, while avoiding the potential objections of WSF and Steel to such modifications of plan treatment. Nothing prevented the Litigation Creditors or any other party in interest from attempting to negotiate the terms of the proposed plan of reorganization in lieu of objecting to plan confirmation.[55] Thus, the PSA effectively settled disputes that could have been raised by the UCC, as well as by WSF and Steel. No more of a potential dispute must exist for approval to be sought under FRBP 9019.

There is no dispute that the UCC has a fiduciary duty to all unsecured creditors rather than to just its members. Litigation Creditors' suggestion is misguided that the UCC breached its fiduciary duty by including any particular provision in the PSA, i.e., a provision permitting a plan amendment specifically addressing treatment of dissenting unsecured creditors. That plan treatment provision still would be subject to acceptance or rejection by unsecured creditors, as well as review and approval by the court. Similarly, the effectiveness of any proposed release of Steel that is contemplated by the PSA is still dependent upon plan confirmation, which itself is

[55] Litigation Creditors seem to forget that they and their co-petitioners are responsible for commencing the bankruptcy case. Conversion from a Chapter 7 liquidation to a Chapter 11 reorganization altered the dynamics of their dispute with the Debtor, providing an opportunity for both sides to seek a resolution for the benefit of all creditors.

subject to objection by creditors and interest holders.[56] As a result, the PSA reached by the UCC is consistent with its obligation to represent the interests of all unsecured creditors while not interfering with the right of any of its constituency to disagree. [57]

The separate A&C Factors objections by the Litigation Creditors are similarly misguided because the plan modifications proposed in the PSA are effective only if the proposed Fourth Amended Plan is confirmed. The merits of any plan confirmation objection that could have been raised by the UCC will be addressed in connection with the confirmation objections raised by the Litigation Creditors. Moreover, because the court has an independent obligation to consider whether any proposed Chapter 11 plan meets the requirements for confirmation under Section 1129, see In re CWNevada, LLC, 602 B.R. 717, 729 n. 28 (Bankr. D. Nev. 2019), the only question is whether the UCC gives up its right to oppose plan confirmation in exchange for a greater equity interest in the Reorganized Debtor. Clearly it does. Given that limited inquiry, consideration of the remaining A&C Factors favor approval of the Settlement Motion.

The PSA does not jeopardize or implicate any collection rights that the estate may have against Steel, if any, as the release provisions are not being approved through the Settlement Motion. The PSA does not impact the complexity, convenience, expense or delay of pursuing any claims against any parties. The interest of all creditors in the case is being served by permitting consideration of a plan of reorganization negotiated by all parties, giving deference to any reasonable views expressed. In this instance, the UCC as a body tasked to represent the

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[56] The record indicates that the UCC scheduled the depositions of both Allison and Steel before entering into the PSA. The UCC represents that those depositions assisted in the evaluation of the merits of any claims against Steel. See UCC Reply at 1:28 to 2:2:5. Additionally, the collectability of any claims against Steel is diminished due to the multimillion dollar personal judgments that the Litigation Creditors already had obtained against Steel. Id. at 2:26 to 3:2. There is no dispute that such a judgment against Steel was entered by the NC State Court with the consent of Steel. See discussion at 8 & n.14, supra. The UCC's decision to recommend the proposed plan modification through the PSA is supported by the record.

[57] Notwithstanding the lack of merit of their preliminary arguments, the Litigation Creditors' position also is remarkable because two of the Petitioning Creditors (Brighthaven and Wilkison) currently are members of the UCC. There is no evidence provided that those creditors have resigned from the UCC. If the PSA reflects a breach of fiduciary duty by the UCC, then Brighthaven and Wilkison apparently are participants in the same breach.

interests of all unsecured creditors, has exchanged its ability to object to plan confirmation for plan modifications that result in additional equity interests being distributed to its constituency. Debtor and the UCC have agreed to plan modifications to release claims against Steel having little value in exchange for Steel's withdrawal from a KEIP that also might result in Steel receiving bonuses as part of proposed management of the Reorganized Debtor. No creditors have opposed the UCC's settlement of its right to object to plan confirmation other than the Litigation Creditors, two of whom are members of the UCC. On this record, the court concludes that the A&C Factors support approval of the PSA in this matter. The Settlement Motion therefore will be granted.

II. Plan Modification Prior to Confirmation.

As previously discussed, the PSA identifies various modifications to the Debtor's proposed Chapter 11 plan that become effective only if plan confirmation occurs.[58] In addition to the plan modifications discussed in the PSA, the Plan Modification Motion seeks to define the term "Released Parties" that was omitted inadvertently from the definitions in the Fourth Amended Plan. As previously discussed, the Fourth Amended Disclosure Statement was filed on May 7, 2021, and approved by the Disclosure Statement Approval Order entered on May 17, 2021. Notice of entry of that Order, which includes the confirmation objection deadline and the confirmation hearing date, was served on all parties in interest on May 19, 2021. The

[58] Moreover, the "Effective Date" of the Chapter 11 plan is defined as "the day that is the first Business Day occurring at least ten (10) days after the Confirmation Date on which: (a) no stay of the Confirmation Order is in effect; and (b) all conditions specified in Article IX.B have been: (i) satisfied; or (ii) waived pursuant to Article IX.C hereof." See Fourth Amended Plan at Art. I(48). There are three conditions specified in Article IX.B, but all appear to be waivable under Article IX.C at the discretion of the Debtor. The Confirmation Date is the date an order is entered by the court confirming the proposed plan. Id. at Art. I(29). Parties in interest have 14 days to appeal entry of an order. See FED.R.BANKR.P. 8002(a)(1). That time period may not be extended for an order confirming a Chapter 11 plan. Id. at 8002(d)(2)(F). A motion seeking to stay an order pending appeal may be filed in the bankruptcy court before or after a notice of appeal is filed. Id. at 8007(a)(2). As a result, it appears that the earliest possible Effective Date might be the 25th day after entry of an order confirming the Debtor's proposed Chapter 11 plan of reorganization.

Solicitation Notice, that also included the confirmation objection deadline, was served on all parties in interest on May 25, 2021.

On its face, Section 1127(a) does not alter the requirements that must be met under Section 1129 for a proposed Chapter 11 plan to be confirmed. It merely states the obvious that modifications to a proposed plan before confirmation must comply with classification requirements under Section 1122[59] as well as the plan content requirements under Section 1123.[60] In this instance, the proposed modifications described in the PSA do not alter any of the four classes designated under the Fourth Amended Plan, nor do the modifications preclude any interested party from asserting that the proposed classes are improper under Section 1122. The proposed modifications do not alter the ability of any interest party to raise an objection based on Section 1123. Thus, any objections to a proposed modification based on Section 1127(a) must be overruled.

On its face, Section 1127(c) does not alter the requirement that adequate information within the meaning of Section 1125(a) be provided in connection with a solicitation of plan acceptance. The court previously determined that the Fourth Amended Disclosure Statement contains information adequate to permit holders of claims in impaired classes to vote on whether to accept or reject the Fourth Amended Plan. See Disclosure Statement Approval Order at 2:12-14. The adequacy of disclosure, of course, may be revisited at plan confirmation. See First Disclosure Statement Order at 9:14-17, citing Official Comm. of Unsecured Creditors v. Michelson (In re Michelson), 141 B.R. 715 (Bankr. E.D. Cal. 1992).

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[59] Section 1122 has two subparagraphs. Subparagraph (a) requires that all claims or interests in a designated class must be substantially similar. Subparagraph (b) allows a separate class of claims consisting of only unsecured claims that are less than or reduced to an amount the court approves as reasonable and necessary.

[60] Section 1123 has four subparagraphs. Subparagraph (a) requires every proposed Chapter 11 plan to include certain provisions, including the designation of classes, the identification of impaired classes, the treatment of classes, and the means of implementing the plan. Subparagraph (b) permits every proposed Chapter 11 plan to include certain provisions, including the retention and transfer of property, and the issuance of securities. Subparagraph (c) applies only to Chapter 11 debtors who are individuals. Subparagraph (d) directs the manner in which monetary defaults may be cured under a proposed plan.

In this instance, both the Plan Modification Motion and the Settlement Motion were filed on August 11, 2021, and orders shortening time were entered on August 12, 2021, permitting both matters to be heard in conjunction with confirmation of the Fourth Amended Plan. A notice of hearing, along with both motions and supporting declarations, was served by electronic notice to counsel and by email to all counsel and parties in interest on August 13, 2021. Both the Plan Modification Motion and the Settlement Motion provide information adequate to enable a creditor to make an informed judgment about the proposed modifications, including the consideration exchanged among the settling parties and the inclusion of "Released Parties" as a defined term in the proposed Fourth Amended Plan. The evidentiary hearing on plan confirmation, as well as approval of the Settlement Motion and Plan Modification Motion, commenced on August 30, 2021. Further evidence was taken on August 31, 2021, and September 10, 2021. Post-hearing briefs were filed on October 12, 2021. Closing arguments were presented on October 19, 2021. No party in interest, including the Litigation Creditors, have sought relief from the orders shortening time. During the two month period from service of the Plan Modification Motion and Settlement Motion, to the presentation of closing arguments, no objections have been presented to the adequacy of disclosure. Under these circumstances, any objections to a proposed modification based on Section 1127(c) must be overruled.

Because the Debtor has met the requirements of Section 1127(a) and Section 1127(c), the Plan Modification Motion will be granted.

III. Plan Confirmation.

As previously mentioned, there are sixteen requirements for confirmation of a Chapter 11 plan, some of which are not applicable in this proceeding. See 11 U.S.C. § 1129(a)(1) to (a)(16). Of the four classes designated in the Fourth Amended Plan, only the Litigation Creditors in Class 2 have rejected the proposed plan. In addition to casting their ballots rejecting plan treatment, the Litigation Creditors also object to plan confirmation on a number of grounds. Those objections will be addressed in discussing each of the requirements for plan confirmation.

1. Section 1129(a)(1): Plan compliance with applicable provisions of the Code.

Under Section 1129(a)(1), the court may not confirm a plan unless "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Those applicable provisions generally concern whether the proposed plan contains the terms both required or permitted by Section 1123, and that the designation of classes included in the proposed plan complies with Section 1122. See 7 COLLIER ON BANKRUPTCY & 1129.02[1] (Richard Levin & Henry J. Sommer, eds. 16th ed. 2021).

In this case, the Fourth Amended Plan designates classes of claims and interests, specifies whether the classes are unimpaired, and specifies the treatment of any class that is impaired. It provides for equal treatment of claims within each designated class and sets forth a means to implement the plan, including the selection of postconfirmation management. It also provides for the impairment of classes of claims.[61] Thus, the court concludes that the proposed Fourth Amended Plan on its face complies with the applicable provisions of Section 1123 as well as Section 1122.[62]

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[61] Litigation Creditors object that the secured claim of Curiam in Class 1 is improperly identified as "impaired" even though its rights are unaltered within the meaning of Section 1124(1). See Joint Creditor Objection at 17:13 to 18:4. As previously discussed at note 9, supra, Curiam had a prepetition claim secured by the Debtor's recovery in the NC Federal Litigation. Under Class 1, it continues to provide Litigation Funding until completion of the NC Federal Litigation, even though it otherwise would have the right to terminate the agreement because of the very bankruptcy commenced by the Litigation Creditors. In essence, Curiam's claim is impaired because its rights are not "unaltered" within the meaning of Section 1124(1). Even if the objection is correct, its impact on plan confirmation is minimal inasmuch as impaired Class 3 has accepted the proposed Fourth Amended Plan thereby allowing the Debtor to seek cramdown treatment of dissenting Class 2. In any event, Curiam does not object to the inclusion in Class 1 of its postpetition funding of the NC Federal Litigation, rather than being treated as a priority administrative expense under Section 1129(a)(9). Compare Joint Creditor Objection at 16:26 to 17:12 (objecting to amount for postpetition Litigation Funding being included in Class 1). In other words, any alleged misclassification of Curiam's claim does not impact whether the Fourth Amended Plan may be confirmed over the Litigation Creditors' rejection of treatment in Class 2.

[62] The Litigation Creditors separately object that the placement of their nonpriority unsecured claims in Class 2, while the remaining nonpriority unsecured claims are placed in Class 3, is impermissible. Section 1122(a), however, only requires that all claims within a class be substantially similar. It does not require all substantially similar claims to be placed in the same class. The validity of the creation of two separate classes under the proposed Fourth Amended Plan will be discussed below in connection with the good faith requirement under Section 1129(a)(3).

Litigation Creditors also initially objected, apparently under Section 1129(a)(1), that the proposed Fourth Amended Plan does not comply with Section 524(e) because it contains release provisions that may impermissibly extend the equivalent of a bankruptcy discharge to non-bankruptcy parties. See Joint Creditor Objection at 15:17 to 16:12. They correctly observed that the plan provision entitled "Settlement, Release and Related Provisions" includes language imposing an "Injunction." See Fourth Amended Plan at Art. X.D.[63] More important, the Litigation Creditors correctly observed that the injunction language of the Fourth Amended Plan encompasses "Released Parties" but does not define the individuals or entities who are included in that term. See Joint Creditor Objection at 16:3-12. That omission, however, was corrected by the Plan Modification Motion that includes the following language:

> "Released Parties" mean, collectively, and in this case in its capacity as such: (a) the Debtor and the Reorganized Debtor; (b) any official committees appointed in the Chapter 11 Cases and each of their respective members; (c) WSF; (d) Curiam; and (e) with respect to each of the foregoing entities, each such Entity's current and former predecessors, successors, affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equity holders, funds, portfolio companies, management companies, consultants, financial advisors, and attorneys (each in their capacity as such).

See Plan Modification Motion at 6:19-24. That language apparently is to be included as revised Article I.A(99) of the proposed Fourth Amended Plan, as modified. The language is identical to the definition of "Exculpated Parties" already appearing in Article I.A(53) of the Fourth Amended Plan. The language applies only to claims against the Debtor, the Reorganized Debtor, the UCC (as the only official committee appointed in the case), WSF, and Curiam to the extent

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[63] That Injunction language in Article X.D provides, in pertinent part, that after the effective date of the plan, all entities with claims or interests released, discharged or exculpated under the plan, are permanently enjoined from taking certain actions against "the Debtor, the Reorganized Debtor, or the Released Parties…." The language does not enjoin any parties from pursuing claims that are not encompassed by the release and exculpation provisions approved by the court, nor from pursuing claims that are not encompassed by the Chapter 11 discharge. That language is consistent with Article X.A which provides, in pertinent part, that under Section 1141(d), "the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, discharge, and release…of Claims…, Interests, and Causes of Action of any nature whatsoever, including any interest accrued on Claims or Interests from and after the Petition Date…"

that such claims have been released or exculpated. Only the Debtor and Reorganized Debtor obtain a bankruptcy discharge of the estate's obligations, while the UCC, WSF and Curiam obtain any releases otherwise approved by the court. No other creditors or parties in interest are included in the release without their consent.[64] No other claims are encompassed by the Injunction imposed by the Fourth Amended Plan. Under these circumstances, the Fourth Amended Plan does not discharge or impermissibly release any nondebtors from claims that belong to nonconsenting parties. Compare Resorts Int'l v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394 (9th Cir. 1995); American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989); Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985). Thus, the Fourth Amended Plan does not violate Section 524(e) and complies with the applicable provisions of the Bankruptcy Code.

For these reasons, the court concludes that Section 1129(a)(1) has been met.

2. Section 1129(a)(2): Plan proponent's compliance with applicable provisions of the Code.

Pursuant to Section 1129(a)(2), the court may not confirm a plan unless "[t]he proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). "The legislative history of the section indicates that Congress was concerned 'that the proponent of the plan comply with the applicable provisions of title 11, such as . . . the disclosure and solicitation requirements of [S]ections 1125 and 1126.'" 7 COLLIER ON BANKRUPTCY ¶ 1129.02[2] (Richard Levin & Henry J. Sommer eds. 16th ed. 2021). See also In re Idearc, Inc., 423 B.R. 138, 163 (Bankr. N.D. Tex. 2009).

A. Disclosure.

Section 1125 requires a Chapter 11 disclosure statement to provide "adequate information" to creditors and interest holders in order for them to make an "informed judgment about the plan." 11 U.S.C. § 1125(a)(1). "While including false information is a more serious

[64] The language extends to "any official committees appointed in the Chapter 11 Cases and each of their respective members…" The only official committee appointed in this Chapter 11 proceeding is the UCC. No objection has been raised to inclusion of any existing member of the UCC in the defined term.

matter than a mere lack of information, . . . the determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court." Computer Task Grp., Inc. v. Brotby (In re Brotby), 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003), quoting Texas Extrusion Corp. v. Lockheed Corp. (Matter of Texas Extrusion Corp.), 844 F.2d 1142, 1157 (5th Cir. 1988).

The adequacy of disclosure statement information has been evaluated using numerous factors, including the present condition of the debtor while in Chapter 11, the classes and claims within the reorganization plan, the estimated administrative expenses (including attorneys' fees), financial information and projections relevant to the decision to accept or reject the debtor's plan, and information relevant to the risks posed to creditors under the debtor's plan. See 7 COLLIER ON BANKRUPTCY & 1125.02[2] (Richard Levin & Henry J. Sommer eds 16th ed. 2021); see also In re Reilly, 71 B.R. 132, 134-35 (Bankr. D. Mont. 1987).

As discussed at 34-35, supra, even if a disclosure statement previously has been approved, the adequacy of disclosure may be revisited at plan confirmation. As the bankruptcy court in Michelson observed:

> Compliance with the disclosure and solicitation requirements is the paradigmatic example of what the Congress had in mind when it enacted section 1129(a)(2). According to both the House and Senate Reports, that section Arequires that the proponent of the plan comply with the applicable provisions of title 11, such as section 1125 regarding disclosure.@ H.R.Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); 1978 U.S.Code Cong. & Ad.News 5787 at 5912, 6368.
>
> Reassessing the adequacy of disclosure from the vantage of the confirmation hearing is an efficient safeguard of the integrity of the reorganization process. When the adequacy of information is initially determined during the presolicitation phase, the court is acting in a context in which information may be sketchy and preliminary. The court does not conduct an independent investigation and relies upon its reading of the document for apparent completeness and intelligibility, as well as objections raised by parties in interest.
>
> By the time of the confirmation hearing, the context has changed. More information is available. The plan proponent has specific facts to prove. The plan proponent's natural enemies have had an opportunity to conduct discovery. [footnote omitted.] What once appeared to be adequate information may have become plainly so inadequate and misleading as to

> cast doubt on the viability of the acceptance of the plan and to necessitate starting over.

141 B.R. at 719. See also In re Bellows, 554 B.R. 219, 225 (Bankr. D. Alaska 2016) (after conditional approval of a Chapter 11 disclosure statement, final approval was denied at plan confirmation where adequate information had not been disclosed); In re Renegade Holdings, Inc., 2010 WL 2772504 at *3 (Bankr. M.D. N.C. 2010) ("Notwithstanding the earlier approval of a plan proponent's disclosure statement, the requirement of section 1129(a)(2) regarding compliance with section 1125 is that the court reassess at the confirmation hearing whether the disclosure contemplated by section 1125 has been provided.").

i. Present Condition of the Debtor.

The approved disclosure statement describes the events leading to the filing of the Involuntary Petition to liquidate the Debtor under Chapter 7, the conversion of the proceeding to a reorganization under Chapter 11, and the events occurring after the conversion. See Fourth Amended Disclosure Statement at Section I.A through E and Section II.A through B. In particular, the approved disclosure statement also describes the DIP Financing obtained during the Chapter 11 proceeding and its anticipated sufficiency to provide working capital after a plan of reorganization is confirmed. Id. at Section II.A(4). The approved disclosure statement also includes a copy of the Valuation Report, Liquidation Analysis, and a cashflow projection through July 2021. Id. at Exhibits B, C, and D. The information is adequate and not inconsistent with the additional information presented at the trial on plan confirmation.

ii. Classification.

The approved disclosure statement describes the classes in which holders of claims and interests will be treated under the proposed Fourth Amended Plan. See Fourth Amended Disclosure Statement at Section III.C and Section III.D. The Fourth Amended Plan designates four classes of claims and interest. Class 1 consists only of Curiam which is the source of both preconfirmation and postconfirmation Litigation Funding. Curiam is secured by an interest in the Debtor's recovery, if any, from the NC Federal Litigation and is the only secured creditor in

the case.[65] Class 2 consists only of the nonpriority unsecured Litigation Creditors that will receive the allowed amount of their claim as determined by the court, after completion of the NC Federal Litigation, from a sufficient equity interest in the Reorganized Debtor.[66] Class 3 consists of all other nonpriority unsecured creditors who also will receive an interest in the Reorganized Debtor equal to the cash value of their claims. Like the Litigation Creditors in Class 2, distribution of the monetary value of nonpriority unsecured creditors in Class 3 will be based on interests in the Reorganized Debtor.[67] Class 4 consists only of the existing equity interests in the Debtor who will receive the interests in the Reorganized Debtor that are not distributed to the nonpriority unsecured creditors in Class 2 and Class 3. The monetary value of the interest received by equity security holders in Class 4 will be determined by the projected value of the remaining interest in the Reorganized Debtor. Like the Litigation Creditors in Class 2 and the nonpriority unsecured creditors in Class 3, the value of the interest received by the equity security holders in Class 4 will be predicated on the value achieved by the Reorganized Debtor. The plan modifications do not disturb these classifications and they are adequately disclosed. The information is adequate and not inconsistent with the additional information presented at the trial on plan confirmation.

iii. Administrative Expenses.

The approved disclosure statement states in pertinent part that "The Bankruptcy Code requires that all Administrative Claimants be paid on the Effective Date of the Plan unless a particular claimant agrees to a different treatment." See Fourth Amended Disclosure Statement at Section III.B. It then provides a table of four types of administrative expenses, the estimated

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[65] Under Section 506(b), oversecured creditors may seek accrued interest if provided in an underlying agreement supporting their claims. Under Section 502(b), claims seeking unmatured interest may be disallowed upon objection.

[66] A "Litigation Creditors Equity Pool" is created to hold in reserve equity interests in the Reorganized Debtor, and which will be allocated to the Litigation Creditors if they prevail in the NC Federal Litigation. See Fourth Amended Plan at Art. I(73).

[67] The nonpriority unsecured creditors in Class 3 apparently includes any Petitioning Creditors who are not included among the Litigation Creditors specified in Class 2.

amounts owed, and proposed treatment of each administrative expense under the proposed Fourth Amended Plan. A narrative description of each type of administrative expense is provided, including the priority claim of WSF, except for professionals employed in the case. Id. at Section III.B(1, 2, and 3). The professionals employed in the case, however, are separately described. Id. at Section II.A(2). Treatment of all such administrative expense claims is provided in the proposed Chapter 11 plan, which also describes a bar date for seeking approval of such claims. See Fourth Amended Plan at Art. II. These disclosures are sufficient and not impacted by the plan modifications. The information is adequate and not inconsistent with the additional information presented at the trial on plan confirmation.

iv. Information relevant to the risks posed to creditors under the Plan.

The approved disclosure statement also provides a list of "Plan-Related Risk Factors." See Fourth Amended Disclosure Statement at Section VI.A, B, C and D. Subsection A describes the issues under bankruptcy law that may prevent or affect confirmation of the proposed Chapter 11 plan of reorganization. Subsection B describes factors that may affect recoveries received under the plan, including the possibility that the Reorganized Debtor may not achieve the projected financial results, or might not be able obtain the resources needed to meet operating expenses, working capital and other expenses. Subsection C describes five separate factors that could negatively impact the Debtor's business, including the length of the Chapter 11 process, certain tax implications, the impact of WSF's interest in the Reorganized Debtor, possible dilution of equity interests from distribution of additional shares, and uncertainty of possible public trading. Subsection D sets forth the Debtor's disclaimers that limit the information in the Fourth Amended Disclosure Statement.

The approved disclosure statement also informed all parties in interest that the proposed Fourth Amended Plan would be confirmed at a duly noticed hearing and that a deadline for objection would be established. See Fourth Amended Disclosure Statement at Section IV.B(1 and 3). Thus, beyond the information included in the Plan-Related Risk Factors, parties in interest were given notice of the trial at which additional information could be obtained. Under these circumstances, the risk information is adequately disclosed and no further information was

required by the plan modifications. The information is adequate and not inconsistent with the additional information presented at the trial on plan confirmation.

v. Financial information and projections relevant to the decision to accept or reject.

The approved disclosure statement includes five separate exhibits. Exhibit A is copy of the proposed Fourth Amended Plan. Exhibit B is a copy of a Valuation Report prepared by Allison on behalf of Portage Point that is available only upon request of a party in interest. Exhibit C is a copy of the Liquidation Analysis. Exhibit D is a copy of the Cash Flow Projection for the Debtor as of December 2020. Exhibit E consists of copies of the resumes of the board of directors for the Reorganized Debtor.

As previously discussed, all parties in interest were informed that the proposed Fourth Amended Plan would be confirmed at a duly noticed hearing and that a deadline for objection would be established. Thus, beyond the financial information and projections accompanying the Fourth Amended Disclosure Statement, parties in interest were given notice of the trial at which additional information could be obtained. Under these circumstances, the financial information and relevant projections were adequately disclosed and no further information was required by the plan modifications. The information is adequate and not inconsistent with the additional information presented at the trial on plan confirmation.

Based on the foregoing, the court concludes that adequate disclosure of information within the meaning of Section 1125(a) had been provided by the Debtor.

B. Solicitation.

The Disclosure Statement Approval Order established both the Voting Deadline and the Confirmation Objection Deadline. Both deadlines were included, respectively, in the Solicitation Notice and the Confirmation Objection Notice. Both notices also included the evidentiary hearing date on confirmation of the Fourth Amended Plan. The Disclosure Statement Approval Notice included the Voting Deadline, Confirmation Objection Deadline, and the confirmation hearing date.

As previously set forth, the record establishes that the Disclosure Statement Approval Order, the Disclosure State Approval Notice, the Solicitation Notice, and the Confirmation

Objection Notice was served by regular mail on all parties in interest. See discussion at 16-17, supra, referencing ECF Nos. 492, 500, 502, 503, and 505. Also as previously set forth, the record establishes that the Plan Modification Motion also was served on all parties in interest. See discussion at 20, supra, referencing ECF No. 579. Based on this record, the court concludes that the solicitation requirements under Section 1125(b) and Section 1126(b)(1) have been met.

Because both the disclosure and solicitation requirements have been met, the court further concludes that the requirements of Section 1129(a)(2) has been met.

3. Section 1129(a)(3): Plan proposed in good faith and not by any means forbidden by law.

Section 1129(a)(3) requires a determination that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) does not define good faith.[68] See Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza), 314 F.3d 1070, 1074 (9th Cir. 2002), cert. denied, 538 U.S. 1035 (2003); Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango), 481 B.R. 51, 68 (B.A.P. 9th Cir. 2012).

A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code. See In re Sylmar Plaza, 314 F.3d at 1074; In re Windmill Durango, 481 B.R. at 68. "Good faith" under Section 1129(a)(3) is determined on a case-by-case basis, taking into account the totality of the circumstances of the case. See In re Sylmar Plaza, 314 F.3d at 1074-75; In re Windmill Durango, 481 B.R. at 68; In re Stolrow's Inc., 84 B.R. at 172.

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[68] A legal distinction exists between the good faith that is a prerequisite to filing a Chapter 11 petition and the good faith that is required to confirm a plan of reorganization. See Pac. First Bank v. Boulders on the River, Inc. (In re Boulders on the River), 164 B.R. 99, 103 (B.A.P. 9th Cir. 1994); In re Stolrow's Inc., 84 B.R. 167, 171 (B.A.P. 9th Cir. 1988). Under Section 1112(b), a Chapter 11 petition may be dismissed for cause Aif it appears that the petition was filed in bad faith. Id. at 170. "Bad faith [in filing a Chapter 11 petition] exists if there is no realistic possibility of reorganization and the debtor seeks merely to delay or frustrate efforts of secured creditors." In re Boulders on the River, 164 B.R. at 103. In this instance, Petitioning Creditors commenced a Chapter 7 liquidation proceeding and the Debtor converted it to Chapter 11. Debtor never initiated the bankruptcy proceeding but has proposed a Chapter 11 plan of reorganization that has a realistic possibility of being confirmed.

Litigation Creditors timely filed their Joint Creditor Objection on August 6, 2021, but did not raise a good faith objection under Section 1129(a)(3) until they filed their Creditor Closing Brief on October 12, 2021. Compare Joint Creditor Objection, *passim*, with Creditor Closing Brief at 14:2 to 15:16. They now argue that there have been inconsistent representations of estimated value of the Debtor's assets as of the date "Debtor came into the case," see Creditor Closing Brief at 14:7, and the estimated values on which the Fourth Amended Plan is proposed. Id. at 14:7-21. Litigation Creditors' argument is strained at best inasmuch as the "Debtor came into the case" only because the Litigation Creditors themselves put the Debtor into the case by joining in the Involuntary Petition filed on May 29, 2019.

After Debtor's motion to convert the proceeding from an involuntary Chapter 7 liquidation to a Chapter 11 reorganization was granted on September 18, 2019, Debtor filed its initial schedules of assets and liabilities on October 14, 2019. Debtor scheduled its interest in three separate assets described as licenses, franchises and royalties having an unknown value. Thereafter, Debtor took steps to obtain a value of those very assets. It promptly sought court authorization to employ Portage Point to perform a valuation and obtained authorization shortly thereafter. The record reflects that the Debtor received a valuation analysis of certain of those assets dated as of August 30, 2020, on which the Debtor also based its Liquidation Analysis dated as of September 30, 2020. The valuation figures were included in the First Disclosure Statement that was filed on December 23, 2020,[69] and noticed to all parties in interest for an approval hearing to be held on February 17, 2021. The same valuation analysis forms the basis for the Debtor's proposed Fourth Amended Plan.

As the Debtor's current chief operating officer, May attests that the Fourth Amended Plan was proposed in good faith because it enables holders of claims and interests to receive the

[69] The inclusion of the valuation analysis results in the First Disclosure Statement is dramatized by the Litigation Creditors as "Then suddenly in January 2021, Debtor claimed its value was $442,398,000…" See Creditor Closing Brief at 14:19. Remarkably, there is no dispute that the Litigation Creditors never obtained their own independent valuation of the same assets before filing the Involuntary Petition and never offered independent valuation testimony at trial. Under the circumstances, there was nothing sudden at all about the valuation estimate being provided with the First Disclosure Statement on December 23, 2020.

highest possible recoveries. See May ADT Declaration at ¶¶ 11, 12, 22, and 26. That testimony is credible, but the optimism of the Debtor's representative must be considered in light of evidence of the liquidation value of the Debtor and evidence of the potential recoveries to all interested parties from the operation of the Reorganized Debtor as a going concern. The latter inquiries overlap the determinations of whether the proposed Fourth Amended Plan complies with the "best interest of creditors" test under Section 1129(a)(7) and whether the plan is "feasible" within the meaning of Section 1129(a)(11).

In this instance, May was subject to cross-examination by the Litigation Creditors at trial. None of his testimony supports a finding that the Fourth Amended Plan was proposed for a purpose other than to achieve the policy goals of reorganizing through Chapter 11: to preserve employment, pay creditors at least what they would receive in a Chapter 11 liquidation, and preserve investment capital. See generally United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983). In this instance, it was the Petitioning Creditors, including the Litigation Creditors, who initiated the bankruptcy proceeding by filing the Involuntary Petition. While the Litigation Creditors now disagree with the Debtor's valuation of its assets and the feasibility of its proposed plan of reorganization, they offer no persuasive evidence that the plan to emerge from a bankruptcy initiated by the Petitioning Creditors themselves is not proposed in good faith.

But beyond the best interest and feasibility inquiries going to the value of the Debtor's assets, the Litigation Creditors also suggest that the Debtor is creating separate classes of nonpriority unsecured claims solely to facilitate confirmation over their rejection of treatment in Class 2. Classification of claims is governed by Section 1122(a).[70] Bankruptcy law does not mandate that all substantially similar claims be classified together, provided that there is a reasonable basis for not doing so.[71] However, Section 1122(a) requires that dissimilar claims

[70] It provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a).

[71] "The separate classification of otherwise substantially similar claims and interests is acceptable as long as the plan proponent can articulate a 'reasonable' justification for separate classification." 7 COLLIER ON BANKRUPTCY & 1122.03[1][a] (Richard Levin & Henry J. Sommer eds. 16th ed. 2021); accord Barakat v. Life Ins. Co. of Va. (In re Barakat), 99 F.3d

cannot be placed into the same class. The bankruptcy court has broad discretion in classifying claims under Section 1122(a). See Wells Fargo Bank v. Loop 76, LLC (In re Loop 76), 465 B.R. 525, 536 (B.A.P. 9th Cir. 2012).

Here, the Debtor placed its only secured creditor, Curiam, in Class 1, while placing all its existing equity interest holders only in Class 4. All holders of non-priority unsecured claims were placed into either Class 2 or Class 3. Litigation Creditors were placed into nonpriority unsecured litigation Class 2 while all other non-priority unsecured claims were placed in Class 3. Litigation Creditors argue that placement of their unsecured claims in a separate Class 2 constitutes an impermissible "gerrymander" of their claims to create a separate, impaired Class 3 that would accept plan treatment. See Joint Creditor Objection at 18:5 to 20:6. Of course, acceptance of at least one impaired class is required to satisfy Section 1129(a)(10), thereby enabling a Chapter 11 debtor to request cramdown on any dissenting class pursuant to Section 1129(b).

In response, Debtor maintains that the separate classification of Class 2 is reasonable in view of the determinations that are ongoing in the NC Federal Litigation. See Confirmation Reply at ¶¶ 35-38; Debtor Confirmation Brief at 5:14-24; Debtor Closing Brief at ¶7. The value of the Abuse of Process Counterclaims pursued by the Litigation Creditors in the NC Federal Litigation previously were estimated at zero for voting purposes but remains subject to liquidation. See discussion at note 43, supra. The NC Federal Litigation is actively being pursued and the Litigation Creditors themselves sought and obtained relief from stay so that they could pursue their counterclaims. Instead of awaiting the outcome of that civil proceeding, the Litigation Creditors filed the Involuntary Petition that initiated this bankruptcy case.

Separation of holders of unsecured claims into litigation and non-litigation classes is common. See, e.g., Steelcase, Inc. v. Johnston (In re Johnston), 21 F.3d 323, 328 (9th Cir. 1994)(vendor's counterclaims against debtor in possession subject to liquidation in ongoing civil proceeding); In re Dow Corning, 255 B.R. 445 (E.D. Mich. 2000), aff'd and rem'd, 280 F.3d

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1520, 1526 (9th Cir. 1996) ("legitimate business or economic justification" permits separate classification of substantially similar unsecured claims).

648, 661-62 (6th Cir. 2002) (creation of separate litigation and settlement classes for breast implant claims); In re Bashas' Inc., 437 B.R. 874, 904-05 (Bankr. D. Ariz. 2010) (creation of separate class for creditor of debtor grocery store chain involved in ongoing litigation).[72] As the parties who originally commenced the instant bankruptcy proceeding for the purpose of involuntarily liquidating the Debtor, Litigation Creditor's interests and objectives are distinctly different from all other nonpriority unsecured claimants[73] who are considering whether to accept or reject a reorganization alternative.[74] Moreover, the Petitioning Creditors and the subset of Litigation Creditors are the only holders of nonpriority unsecured claims that are scheduled as disputed. See discussion at 7-9 & n.17, supra. Under these circumstances, the court concludes that the separate classifications in Class 2 and Class 3 are reasonable and proposed in good faith.

Subject to consideration of best interests and feasibility, the court therefore finds that the Fourth Amended Plan satisfies Section 1129(a)(3).

4. Section 1129(a)(4): Payments to professionals and others.

Section 1129(a)(4) requires that fees for those working on a debtor's case be submitted to the court and be approved as reasonable. See 11 U.S.C. § 1129(a)(4). To date, numerous professional fee applications have been filed, noticed for hearing to all parties in interest, and approved by the court. (ECF Nos. 191, 194, 195, 202, 221, 222, 226, 227, 259, 261, 262, 278, 279, 280, 293, 294, 295. 296, 321, 338, 345, 346, 347, 352, 365, 367, 369, 374, 389, 391, 392, 396, 450, 486, 494, 495, 672, and 673). Any compensation approved on an interim basis is

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[72] Unfortunately, the commencement of involuntary proceedings to derail existing litigation also occurs. See, e.g., In re EB Holdings II, Inc., 589 B.R. 704 (Bankr. D. Nev. 2017) (abstention ordered where involuntary Chapter 11 petition was filed by alleged claimants against Nevada corporation during the pendency of two related actions commenced in state court).

[73] Oddly, even the Litigation Creditors acknowledge that the NC Federal Litigation could expose the Debtor to substantial liabilities that no other nonpriority unsecured creditor could assert. See Green ADT Declaration at ¶72.

[74] Each of the four Class 2 claimants returned ballots rejecting the proposed plan in the total dollar amount of $2,210,678.70. See Schwartz Declaration at ¶7 at 3:9-11. Because copies of the actual ballots are not attached, however, the basis for the dollar amount of each of those ballots is unclear.

subject to approval on a final basis. The UST has reserved objections to final approval of any fees previously awarded. The proposed Fourth Amended Plan requires that final approval of professional fees must be sought no later than 60 days after the effective date of the plan. See Fourth Amended Plan at Art. II.D(1). It also provides a mechanism for objections to final fee claims and for professionals to be paid by the reorganized debtor after plan confirmation. Section 1129(a)(4) has been met.

5. Section 1129(a)(5): Debtor's future officers and directors.

A Chapter 11 plan may not be confirmed if the continuation in management of the persons proposed to serve as officers or managers of debtor is not in the interests of creditors and public policy. See 11 U.S.C. § 1129(a)(5)(A)(ii). See, e.g., In re Beyond.com Corp., 289 B.R. 138 (Bankr. N.D. Cal. 2003) (liquidation manager under proposed Chapter 11 plan insufficiently supervised). Continued service by prior management may be inconsistent with the interests of creditors and public policy if it "directly or indirectly perpetuates incompetence, lack of discretion, inexperience or affiliations with groups inimical to the best interests of the debtor." In re Linda Vista Cinemas, L.L.C., 442 B.R. 724, 735-36 (Bankr. D. Ariz. 2010), citing In re Beyond.com Corp., 289 B.R. at 145.

Section 1129(a)(5)[75] compels a number of disclosures relating to post confirmation management of a reorganized debtor. "Section 1129(a)(5)(A)(i) requires the plan proponent to disclose two attributes of post confirmation management: their identity; and their 'affiliations.'

[75] 11 U.S.C. § 1129(a)(5) provides:

> (A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
>
> (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

Identity is unambiguous, but 'affiliations' can potentially cause confusion. . . . The required disclosures must be of the 'director[s], officer[s], or voting trustee[s].' This leaves out analogous management for partnerships or limited liability companies, although some courts have extended the reach of this section to such noncorporate entities." 7 COLLIER ON BANKRUPTCY ¶ 1129.02[5][a] (Richard Levin & Henry J. Sommer eds. 16th ed. 2021).

In this instance, Debtor's proposed plan of reorganization requires the appointment of a new board of directors for the Reorganized Debtor, with the initial members to be identified in the Plan Supplement. See Fourth Amended Plan at Art. V.I. Included in the Plan Supplement is a copy of the Islet Shareholders Agreement. Schedule "B" attached to the Islet Shareholders Agreement is entitled "Initial Board" and lists 6 individuals: Charles G. Fogelgren, MBA; Mitchel K. May, Esq.; Jorg Schreiber, Ph.D.; Kevin W. Wilson, MBA; Charles E. Dupont; and John Steel, IV.[76] All of these individuals were identified as the new board members of the Reorganized Debtor as early as May 7, 2021. See Fourth Amended Disclosure Statement at Section III.E(3). Copies of the resume or curriculum vitae for each of the individuals are attached as Exhibit "E" to the proposed Fourth Amended Plan, but not for Charles E. Dupont or John Steel, IV. The affiliation information for all of the initial board members, however, is otherwise disclosed. See Fourth Amended Disclosure Statement at Section III.E(3).[77] The compensation for the board members for the Reorganized Debtor has been disclosed. Id.[78]

No objection has been raised to the qualifications or composition of the Initial Board or the compensation of the Reorganized Debtor's board of directors. Steel will assist in the transition to the Reorganized Debtor but will no longer participate thereafter. See note 76, supra. Having reviewed the background information provided in the Fourth Amended Disclosure

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[76] At trial, Steel testified that he will assist only in the transition to the Reorganized Debtor and then would no longer have any further position.

[77] Apparently, Mr. DuPont will serve on the board of the Reorganized Debtor only until the proposed Fourth Amended Plan, as amended and if confirmed, is consummated.

[78] On a quarterly basis, each member of the Reorganized Debtor's board of directors will receive payments of $5,000.00 through issuance of new shares. See Fourth Amended Disclosure Statement at Section III.E.

Statement as well as with the Fourth Amended Plan, the court finds that the Debtor has satisfied the requirements of Section 1129(a)(5).

6. Section 1129(a)(6): Regulatory bodies.

Section 1129(a)(6) requires governmental approval of any rates charged by a debtor that are subject to regulation. Although the Fourth Amended Plan contemplates that the Debtor will receive royalties in connection with the Combo Therapy and Beta-Cell Test, there is no indication that there are any rates to be charged by the Reorganized Debtor that are subject to governmental approval. No evidence has been presented to the contrary. Thus, the court concludes that this provision does not apply.

7. Section 1129(a)(7): Best interests of creditors.

Under Section 1129(a)(7), creditors with impaired claims must either accept the proposed plan of reorganization or receive as much from the proposed plan as they would under a Chapter 7 liquidation. Specifically, Section 1129(a)(7) provides in part:

> The court shall confirm a plan only if all of the following requirements are met: . . . (7) With respect to each impaired class of claims or interestsB(A) each holder of a claim or interest of such classB(i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a **value, as of the effective date of the plan, that is not less than the amount that such holder so would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date** . . . .

(Emphasis added). As previously discussed, the proposed Fourth Amended Plan designates four classes or claims and interests, all of which are identified as impaired. Classes 1, 3, and 4 have accepted the proposed plan, thereby complying with Section 1129(a)(7)(A)(i). Only impaired Class 2 has not accepted the proposed plan, thereby requiring a determination under Section 1129(a)(7)(ii) whether each holder of a claim in Class 3 will receive on the effective date a value not less than what each holder would receive or retain if the debtor is liquidated under Chapter 7.

The Liquidation Analysis accompanying the Fourth Amended Disclosure Statement includes the $442,698,000 aggregate value figure reached by Portage Point for the Combo Therapy and Beta-Cell Test. See discussion at note 20, supra. The Liquidation Analysis excludes three assets as having a neutral value for purposes of a non-market sale, described as:

Islet replacement after kidney transplant; Fatty Kidney Disease Identification and Treatment; and Remogliflozin. The Liquidation Analysis suggests an estimated value of the Combo Therapy and Beta-Cell Test at Chapter 11 plan confirmation of $442,698,000, with an estimated range of value in a Chapter 7 liquidation between $42,770,000 and $212,651,000. The Liquidation Analysis also suggests that as of the date of the analysis, $2 million was owed on the superpriority administrative claim of WSF for the DIP Financing approved by the court, and $8.9 million was owed to holders of non-priority unsecured claims. Given that the total amount of the creditor claims are far less than the lowest end of the value range in a Chapter 7 liquidation, the analysis represents that all allowed unsecured claims would be paid in full. To satisfy Section 1129(a)(7)(ii), the proposed Fourth Amended Plan therefore must provide for the Litigation Creditors to receive or retain a value not less than the allowed amount of their claims as determined by the court.

Litigation Creditors acknowledge the content of the Liquidation Analysis, but somehow argue that "Given the results of the Liquidation Analysis, the Debtor certainly will not be able to satisfy Section 1129(a)(7)." See Joint Creditor Objection at 15:11-12. Their explanation for this conclusion, however, does not address what would happen if the Debtor's interest in the Combo Therapy or Beta-Cell Test was liquidated by a bankruptcy trustee in a Chapter 7 proceeding. Instead, Litigation Creditors argue that there are risks they will not receive at least the same value from the operation of the Reorganized Debtor as a going concern. See Joint Creditor Objection at 15:12-16. Because this concern also is raised by the Litigation Creditors in connection with Section 1129(a)(11), it is sufficient to conclude that the best interests test under Section 1129(a)(7) has been met if the requirements for plan feasibility also are met in this case. The latter requirements are discussed below.

8. Section 1129(a)(8): Impairment and Acceptance.

Under Section 1129(a)(8), for a plan to be confirmed, each class of claims or interests must either be unimpaired by the proposed plan, or it must accept the treatment proposed by the plan. As previously discussed, the four designated classes of claims and interests in the proposed Fourth Amended Plan are identified as impaired. There is no dispute that at least nonpriority

unsecured Classes 2 and 3 are impaired. There is no dispute that Class 2 has rejected the proposed plan. As a result, Section 1129(a)(8) has not been met. Of course, a plan may be confirmed even where Section 1129(a)(8) is not met, if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Whether the proposed Fourth Amended Plan may be confirmed pursuant to Section 1129(b) is discussed below.

9. Section 1129(a)(9): Priority Claims.

Section 1129(a)(9) generally requires the payment of priority claims under Section 507(a) on the effective date of the proposed Chapter 11 plan unless the holder of the claim agrees to a different treatment. In this instance, the unclassified superpriority administrative claim of WSF for the DIP Financing is paid by its agreement to accept equity in the Reorganized Debtor. Postpetition administrative expense claims, including claims for professional compensation, as well as priority tax claims, also are provided for in the proposed plan. See Fourth Amended Plan at Art. II.A, B, C, and D.[79] The treatment of such claims also has been adequately disclosed by the Debtor. See Fourth Amended Disclosure Statement at Section III.B. The plan modifications reduces only the amount of equity in the Reorganized Debtor required to satisfy WSF's claim but does not affect the manner of payment for any other priority claims. Accordingly, Section 1129(a)(9) has been satisfied.

10. Section 1129(a)(10): Acceptance by at Least One Impaired Non-Insider Class.

Section 1129(a)(10) provides that if a plan proponent chooses to impair classes of claims in its proposed plan, then at least one impaired class of claims must accept plan treatment. See 11 U.S.C. § 1129(a)(10). All classes of claims and interests under the Fourth Amended Plan are identified as impaired, including the three classes of creditors. Of the latter, Class 1 and Class 3 have accepted, and Class 2 has rejected. No suggestion has been made that Class 1 or Class 3

[79] It appears that the priority, unsecured portion of the proof of claim filed by creditor Mende, see note 17, supra, would be addressed by Article II of the Fourth Amended Plan if the claim is allowed under Section 507(a)(4).

are insider classes. Moreover, even if Class 1 is not impaired, the acceptance by impaired Class 3 is sufficient to satisfy Section 1129(a)(10).

11. Section 1129(a)(11): Feasibility/Future Liquidation.

Section 1129(a)(11) requires that confirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. See 11 U.S.C. § 1129(a)(11); see also Sherman v. Harbin (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007). The Ninth Circuit Bankruptcy Appellate Panel has defined feasibility as a factual determination and "as whether the things which are to be done after confirmation can be done as a practical matter under the facts." Jorgensen v. Fed. Land Bank of Spokane (In re Jorgensen), 66 B.R. 104, 108 (B.A.P. 9th Cir. 1986), citing In re Clarkson, 767 F.2d 417 (8th Cir. 1985); see also Liberty Nat'l Enterprises v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship), 115 F.3d 650, 657 (9th Cir. 1997). While "visionary schemes" should not be confirmed, demonstration of a reasonable probability of success is sufficient. See Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1364-65 (9th Cir. 1986) ("Debtor presented ample evidence to demonstrate that the Plan has a reasonable probability of success…The Debtor provided both 'conservative' and 'best case' projections. The Debtor's expert testified that the Debtor's assets are attractive and in demand. That the Plan provides for the eventual liquidation of assets does not preclude confirmation…[W]e find no abuse of discretion in the bankruptcy court's determination that the Plan is feasible."). The plan proponent is not required to demonstrate that success is inevitable, and a relatively low threshold of proof is sufficient. See Computer Task Force v. Brotby (In re Brotby), 303 B.R. 177, 191-92 (B.A.P. 9th Cir. 2003).

Bankruptcy courts consider several factors when evaluating whether a particular plan is financially feasible, including: (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. See In re Linda Vista Cinemas, L.L.C., 442 B.R. at 738; In re Las Vegas Monorail, 462

B.R. 795, 802 (Bankr. D. Nev. 2011); see also 7 COLLIER ON BANKRUPTCY ¶ 1129.02[11] (Richard Levin & Henry J. Sommer eds 16th ed. 2021).

Because Debtor's business encompasses research, development, and commercialization of new medicines and technologies, it must demonstrate at least some potential for its medical or technological pursuits. By its nature, scientific and medical research can produce both targeted and untargeted results, any of which may become commercially viable.[80] If the Debtor meets that minimal burden, then the financial feasibility of its propose Fourth Amended Plan must be considered.

(a) Scientific Feasibility.

As previously discussed at note 5, supra, Steel describes the Debtor as a "clinical stage biotechnology company focused on research, development, and commercialization of new medicines and technologies for the treatment and diagnosis of metabolic diseases and related indication." In particular, the Debtor "focuses its efforts on the development of a robust intellectual property portfolio to facilitate fundamental advances in diabetes therapies." Through those efforts, Steel maintains that the Debtor "routinely develops new, novel, and innovative solutions to treat both Type 1 and Type 2 diabetes, which solutions are enabled by [Debtor's] proprietary diagnostic test for: (1) very early onset detection of Type 1 diabetes; and (2) beta-cell death in Type 2 diabetes." The same descriptions and information are provided in soliciting

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[80] For example, In re Trans Max Technologies, Inc., 349 B.R. 80 (Bankr. D. Nev. 2006), the debtor proposed a Chapter 11 plan of reorganization designed to raise investment capital to create a new entity that would research, develop, manufacture and sell flying cars. The court denied plan confirmation primarily because the debtor in possession failed to demonstrate that it could raise sufficient capital. The court also observed:

> "Any sane investor would have serious and legitimate questions regarding the viability of [debtor's] technology, and [debtor's] ability to provide sufficient answers to those questions reaffirms a lack of feasibility in this case. [Debtor's] technology may be promising but the idea of developing a flying car based on that technology in three years…could be considered somewhat implausible. Even more implausible is the notion that [debtor] could develop such a car without incurring a cent of debt."

Id. at 95 (emphasis added).

acceptance of the proposed Fourth Amended Plan. See Fourth Amended Disclosure Statement at Section I.A.

A significant portion of the testimony presented by the parties was devoted to addressing the viability of the solutions developed by the Debtor. The two proprietary assets described by the Debtor encompass the Combo Therapy and the Beta-Cell Test that are the subject of the valuation performed by Allison for Portage Point. Among other things, the testimony presented at trial encompassed whether the tests are subject to pre-clinical and/or clinical testing requirements needed for approval by the U.S. Food and Drug Administration ("FDA"), whether pre-clinical and/or clinical testing had been completed, whether "orphan" status could be obtained from the FDA, and whether efficacy of the tests had been demonstrated.

On behalf of the Debtor, Lakey testified that the Beta-Cell Test is accurate in predicting diabetes and hyperglycemia. On behalf of the Litigation Creditors, Wilkison testified that the Beta-Cell Test is viable, but sees no commercial value.[81] Wilkison also testified that the Combo Treatment might be scientifically viable, including efficacious in connection with Type 2 diabetes, but also questions its commercial viability. Although Green and Delmar also expressed their opinions, neither demonstrated sufficient scientific expertise or reliability as witnesses for their testimony to be afforded any weight in connection with the scientific viability of the Combo Therapy or Beta-Cell Test. Based on the testimony of Lakey and Wilkison, however, the court concludes that the Debtor has met its burden of proving that the Combo Therapy and Beta-Cell Test have viability sufficient to pursue further research, development and commercialization.[82]

(b) Financial Feasibility.

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[81] Wilkison even testified that at least some clinical trials of the Beta-Cell Test had been conducted showing that the test can detect death in beta cells.

[82] Lakey, Wilkison, Green, and Delmar are all creditors of the Debtor, but only Wilkison, Green and Delmar sought to put the Debtor into an involuntary Chapter 7 liquidation. Wilkison, Green, and the two entities for which Delmar is the chief financial officer (Brighthaven and Avolynt) are all defendants named in the NC Litigation. All of them submitted direct testimony declarations and all of them were observed by the court during their testimony at trial. Based on the record and consideration of their demeanor, the court gives greater weight to the testimony of Lakey.

The parties do not dispute certain publicly available data regarding the diabetes industry. For example, an estimated 422 million people suffer from diabetes worldwide, with more than 34 million of them in the United States. See Valuation Report at 8. Another 84 million people in the United States are considered to be pre-diabetic. Id. The annual cost to address diabetes in the United States exceeds $300 billion and has increased by over 26% over the past five years. Id. No contrary data has been presented by the Litigation Creditors or any other parties in interest.

A significant portion of the testimony presented by the parties, however, was devoted to addressing whether the Combo Therapy and Beta-Cell Test have commercial potential in the diabetes market sufficient to support the Debtor's proposed valuation. With respect to commercial potential, Allison, Wilkison, Green, Delmar and Lakey all expressed their views, but only Allison has no direct, personal financial stake in the Debtor or the outcome of the NC Federal Litigation.[83] Moreover, only Allison and Lakey qualified as witnesses whose testimony could assist in determining the relevant commercial potential.

(i) Allison.

As the Debtor's expert witness, Allison has a Bachelor of Science in commerce and an MBA in finance and accounting from DePaul University. He currently is an independent director and chair of the opioid committee for Aertio Therapeutics as well as strategic advisor to Sinai Health System of Chicago. In addition to those positions, Allison has other significant experience in the healthcare industry, including the pharmaceutical industry, through various assignments from 2004 through 2021. He previously worked at various companies as chairman, chief executive officer, chief restructuring officer, lead independent director, chief recovery officer, chief financial officer, and executive vice president. Allison has thirty years of

[83] The cross-examination of Wilkison, Green and Delmar frequently asked whether particular testimony was based on his skill, experience, and knowledge of the industry, rather than personal knowledge. If the former, then the testimony could be offered as a proposed expert witness under FRE 702; if the latter, then the testimony would be subject to the lay witness requirement under FRE 701. Whether the testimony falls under either category, however, the credibility of each witness's testimony and the weight given to each witness's testimony is determined by the trier of fact.

experience in restructuring and turnaround management, and routinely performs valuation analyses of company assets. He also has negotiated royalty agreements. See Allison ADT Declaration at ¶¶ 4, 5, 7, 11, and 13. A copy of Allison's resume is attached as Exhibit "B" to the declaration.

As senior advisor of Portage Point, Allison testified concerning the Valuation Report. He testified that roughly 385 hours were spent preparing and finalizing the Valuation Report. See Allison ADT Declaration at ¶15. On re-direct examination, Allison testified that during the course of his career as a turnaround professional, he had personally worked on 100 or more assignments requiring the valuation of assets and businesses. A lengthy list of non-governmental, independent third-party research, and academic reports used in preparing the Valuation Report is disclosed. See Valuation Report at 14-18. On cross-examination, Allison testified that he routinely performs valuations, but had not valued a company whose assets are primarily preclinical pharmaceutical products. Allison testified that he has no training in science, bioscience, or pharmaceutical development. He also testified that he actually had sold a company whose primary assets consisted of pre-pharmaceutical products. Allison's valuation concluded that as of August 30, 2020, the Combo Therapy and the Beta-Cell Test have a reorganization value of $61,772,000 and $380,626,000, respectively. Three other current projects were considered but were not assigned a particular value for reorganization purposes. See discussion at 52, supra.

Allison attested that in arriving at the values in the report, he assumed the efficacies of both products,[84] that the Debtor's licensing agreements would remain in force, that third parties would fund the costs for bringing the products to market, and that the products would be marketed in the U.S. See Allison ADT Declaration at ¶17; Valuation Report at 6.[85] He testified

[84] Allison testified that if the assumed level of efficacy is not achieved, the valuation of a product might be materially lower.

[85] May attested that a Renewed License had been reached with Yale to commercialize and market various patents. See May ADT Declaration at ¶ 21. He also testified that the KEIP was necessary to induce post-confirmation management of the Reorganized Debtor to serve on the board. Id. at ¶¶ 18 and 19.

that he made his assumptions based on his experience as a board member of a pharmaceutical company as well as conversations with associates at Portage Point. He testified that the values were based on anticipated royalty income from third parties who fund the cost of marketing the products. See Allison ADT Declaration at ¶23; Valuation Report at 13. In his report, Allison also considered the potential size of the U.S. market as well as the amounts spent to treat the subject conditions. Id. at 8, 9, and 10. He attested that he employed a Rogers Bell Curve for novel and unestablished technologies to predict acceptance of a product in the marketplace, including for a pharmaceutical product. See Allison ADT Declaration at ¶ 20; Valuation Report at 21 and 25.[86] He also testified that the valuation was limited to the Combo Therapy and Beta-Cell Test, although the Debtor's other three treatments may have potential value. See Allison ADT Declaration at ¶17; Valuation Report at 11.

Specifically with respect to the Combo Therapy, Allison assumed that FDA approval, if necessary, may be accelerated by obtaining "orphan drug" status. See Allison ADT Declaration at ¶27; Valuation Report at 13 and 21. He testified that an orphan drug application takes about 90 days. He does not know if preclinical studies of the Combo Therapy would be required by the FDA to obtain orphan drug status. He also assumed that potential diabetes patients may be interested in pursuing an alternative to existing products and therapies on the current market. Id. at 13. Allison also assumed that the Combo Therapy would gain a share in the GLP-1[87] market over time. See Allison ADT Declaration at ¶25. He assumed that the patents held by certain competitors in the GLP-1 market would begin expiring in 2020 and 2021. See Valuation Report at 10. Allison then made adjustments to a possible stream of royalties from use of the Combo

[86] Allison testified that his valuations of the products did not assume an immediate penetration of the market, but that their acceptance would increase over time. He testified that acceptance in the market may be affected by such factors as need, recommendations of treating physicians, and availability of health insurance coverage. As a result, a limited percentage of market share when a product is initially introduced does not affect the overall projected value of the product. He also testified that the discount rate includes consideration of product competition.

[87] "GLP-1" refers to "Glucagon-like Peptide 1 Receptor Agonists" that slow digestion and help to lower blood sugar levels. See Valuation Report at 9.

Therapy, which included a proposed discount rate. See Allison ADT Declaration at ¶26; Valuation Report at 21. He testified that based on his review of the contract, the Debtor had a strong relationship with Xeris that would manufacture and take the Combo Therapy to the market.[88] He testified that a discount rate was applied to reach a net present value, factoring in the risks of nonpayment and the time value of money. Allison testified that the discount rate factored in the risk of the product not going to the market. Applying the adjustments and a 26.8% discount rate, he arrived at a net present value for the Combo Therapy of $61,772,000. See Allison ADT Declaration at ¶28; Valuation Report at 22.

Specifically with respect to the Beta-Cell Test, Allison assumed that it would compete with the existing A1c Test for identifying and managing diabetes. See Allison ADT Declaration at ¶29; Valuation Report at 24.[89] He testified that the patent for the A1c test elapsed in the mid-1980s and that the Beta-Cell Test patent expires in 2037.[90] Allison testified that expiration of the A1c patent expired but did not eliminate the A1c test from the marketplace. He testified that FDA approval of the Beta-Cell Test does not appear to be required based on his independent research and discussions with the Debtor. Allison testified that he does not know the status of any preclinical studies or clinical studies being conducted on the Beta-Cell Test. He reviewed the existing licensing agreement with Yale and assumed it would remain in effect providing a royalty return of 5% of all net sales. See Valuation Report at 25. Allison also reviewed the existing contract with Quest and assumed that it would remain in effect, that the Beta-Cell Test would be used by Quest, and that Quest would maintain its control of 30% of the market share of

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[88] Allison estimated a royalty rate with Xeris of 12.8% based on the Debtor's contract with Xeris, and his prior experience in negotiating royalty rates with two entities that also sold preclinical products.

[89] Apparently, based on the average blood-sugar levels revealed by a given test, patients can be diagnosed as non-diabetic, pre-diabetic, or diabetic. Depending on the diagnosis, steps apparently can be taken to reduce the chance of a patient developing diabetes, or steps can be taken in the treatment of diabetes.

[90] The Yale patent is dated November 13, 2018. See note 41, supra. If a typical U.S. patent elapses after seventeen years, then the correct expiration date arguably is the end of 2035 rather than 2037.

lab testing in the U.S. Id. Based on his personal experience in the healthcare and pharmaceutical industries, including experience in negotiating royalty rates, Allison believes that the Beta-Cell Test would be welcomed in the market. See Allison ADT Declaration at ¶30. Based on his personal experience in managing a health maintenance organization ("HMO"), Allison believes that the HMO he managed would actively use the Beta-Cell Test. Id. at ¶31. Allison then made adjustments to a possible stream of royalties, which included a proposed discount rate. Id. at ¶32. He testified that he had an 80 to 100 certainty that his discount rate is correct. Applying those adjustments and a 19.5% discount rate, he arrived at a net present value for the Beta-Cell Test of $380,626,000. Id. at ¶33; Valuation Report at 26.

At the close of Allison's testimony, the Litigation Creditors objected to the admission of his testimony and the Valuation Report. The objection was overruled[91] and no other objections were raised by the UCC or any other parties in interest.

(ii) Wilkison[92]

As a Litigation Creditor and a Petitioning Creditor,[93] Wilkison holds a Ph.D. from Duke University Medical Center and did his postdoctoral work at Harvard Medical School. He

[91] Based on the testimony and curriculum vitae, the court finds that Allison is qualified as an expert witness under FRE 702 based on the standards discussed in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). In particular, Allison's testimony was clearly relevant to the subject of the issues presented, and based on his knowledge and experience, sufficiently reliable in his field to assist the court in understanding the matters presented. See generally Estate of Barabin v. Astenjohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014). Moreover, as an expert witness, Allison could rely on information gleaned from other sources even if the information otherwise would not be admissible. See FED.R.EVID. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.").

[92] The parties stipulated that Wilkison, Green and Delmar provided no documents in discovery to support the statements made in their respective ADT declarations.

[93] Through discovery, Wilkison, Green and Delmar were asked by the Debtor to identify and produce any documents on which their testimony might be based. All of them were at one point officers of the Debtor. Each of them responded that documents already were in possession of the Debtor, and so they produced no documents at all. (Debtor Exs. 39, 40, 45, and 46). The First Limine Motion sought to exclude testimony where the Litigation Creditors failed to

testified that his medical education was not in metabolic diseases, but that he focused on metabolic disease sometime after leaving medical school. Wilkison testified that he has published peer review manuscripts in the area of metabolic diseases and is an inventor on several patents. Wilkison also testified that he is not a finance expert or in the banking business. He testified that he is not a valuation expert, but has been requested to evaluate the science in various license transactions and whether the science could translate to a commercial product. Wilkison testified that he has no expertise in obtaining FDA approvals and is not appearing as an expert witness. He is the former chief operating officer of the Debtor from 2013 to 2015. Wilkison filed a proof of claim as a creditor in the case and also is the chief scientific officer of Avolynt, which also filed a proof of claim. He also was the chief scientific officer for a clinical stage pharmaceutical company identified as BHV Pharma (which apparently is a dba of Brighthaven). Prior to that, Wilkison spent several years at GlaxoSmithKline where he was involved in some capacity in licensing pharmaceutical products and technologies. Wilkison is a named defendant in the ongoing NC Federal Litigation. See Wilkison ADT Declaration at ¶¶ 3, 4, and 5.

Specifically with respect to the Combo Therapy, Wilkison attested that he had read literature in concluding that the Lysofylline product used in the Combo Therapy had never been approved for commercial sale. He acknowledged the existence of limited animal studies on the possible use of the Combo Therapy to reverse the onset of diabetes. Wilkison also testified that when he was the chief operating officer of the Debtor between 2013 and 2015, the Debtor lacked the financial resources to develop the product.[94] He testified, however, that the commercial value of the Combo Therapy is doubtful because more studies have to be done. Wilkison did not

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produce documents. The First Limine Motion was denied without prejudice subject to a witness's failure to produce documents being considered as a factor going to the weight given to the testimony. See note 44, supra.

[94] Wilkison testified that his conclusion that the Debtor lacked financial resources in developing its assets relied mainly on what he was told by Green and Delmar.

attest, nor was he asked whether the Combo Therapy could receive FDA approval as an orphan drug.

Specifically with respect to the Beta-Cell Test, Wilkison testified, as previously mentioned at 56 & n.81, supra, that the test is effective in detecting the death of beta cells. He questioned the usefulness of the test in detecting or treating the onset of Type 1 diabetes in view of the current use of the A1c test as the "gold standard." Wilkison also acknowledged that the Beta-Cell Test could be marketed along with the current A1c test, but believed that it would never replace the A1c test.

Specifically with respect to the Debtor's ability to market its assets under various third-party licensing agreement, Wilkison testified that in late December 2014 and early 2015, a registration statement for Avigenics was filed by Green with the SEC.[95] Wilkison acknowledges that the registration statement represented to the SEC that the Debtor, at that time, had valid license agreements in effect with Yale and UVA. He testified that the UVA had issued a letter terminating its agreement, but Wilkison did not produce a copy of the letter.

At the close of Wilkison's testimony, Debtor objected to the court's consideration of any of his testimony as an expert or lay witness. The court overruled the objection subject to the court's consideration of the weight, if any, to be given.

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[95] While still acting as the Debtor's chief executive officer, Green received a letter dated January 2, 2015, transmitted by email from the Securities and Exchange Commission ("SEC"). (Debtor Ex. 69). That letter ("SEC Letter") concerned the registration statement for the entity Avogenix, Inc., for which Green also was the president and chief executive officer. Apparently, a possible merger between the Debtor and Brighthaven was being considered to form Avogenix. (Debtor Ex. 67). A variety of information was requested including details regarding the roles of both Green and Wilkison as officers of both the Debtor and Brighthaven in the issuance of shares in Avogenix. In response to the SEC Letter and the transmittal email, Green and Wilkison exchanged an email the same day. (Debtor Ex. 68). In the latter email, both Green and Wilkison exhibited surprise as to the amount of information requested by the SEC, with Green expressing that the information requested was way too much. Although Green testified that he is not a SEC securities attorney, he believed the SEC was requesting information beyond the norm for the industry.

(iii) Green[96]

As a Litigation Creditor and a Petitioning Creditor, Green holds a bachelor's degree in business administration from the University of North Florida. He also holds an MBA in corporate finance from the University of Pittsburg. Green worked in the investment banking industry before working in the pharmaceutical industry for twenty years. He was the chief executive officer of the Debtor from November 2013 through August 2015, prior to the Debtor's commencement of the NC State Litigation against him, along with Wilkson and Brighthaven.[97] Green filed a proof of claim as a creditor in the case. He also is a named defendant in the ongoing NC Federal Litigation. See Green ADT Declaration at ¶¶ 3, 4, 5, and 6.

Green testified that he represents Greenhaven on the UCC, but is not a lawyer nor a litigation expert. Green also testified that his prior experience with a large pharmaceutical company was no different from any other employee with a similar role. He attested that he was involved in the execution of strategies for corporate growth, but did not have authority to approve or conclude a strategy. Green attested that he worked with scientists on a regular basis. He testified that he does not have a degree in any specific, professional discipline, but is a "jack of all trades, master of none." Green stated that he is not professionally trained in asset valuation. He testified that he has never been called as an expert nor ever testified as an expert.[98]

Green testified that he believed Allison's valuation analysis to be "fundamentally flawed" which "inflates the calculated value in an attempt to disadvantage all creditors for the benefit of Debtor's management and shareholder." Green ADT Declaration at ¶ 10. He testified as to certain aspects of the Debtor during his tenure as chief executive officer between 2013 and 2015.

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[96] Counsel again stipulated that Green, Wilkison and Delmar did not produce any documents in response to discovery in support of their testimony. Green testified that he did not produce any documents in connection with the plan confirmation hearing.

[97] Green testified that his factual statements about the Debtor prior to 2013 were based on what he was told by others or learned on his own, rather than from personal knowledge.

[98] Green testified that he knew of some of the risks of the pharmaceutical industry even before he ever started working in the pharmaceutical industry. He also testified that before he started working in the industry he also was very familiar with the role of the FDA in approving pharmaceutical products.

Id. at ¶¶ 17, 18, 19, 20, 21, 22, and 23.[99] Green testified as to a variety of additional matters that allegedly occurred or may have existed outside of his time with the Debtor. Id. at ¶¶ 15, 16, 24, 26, 27, and 28. Green testified in his ADT declaration, however, that the Debtor had zero value in 2017 and that he was unaware of any activity suggesting a higher value today. See Green ADT Declaration at 29. On cross-examination, Green testified that he had provided no specifics as to how Allison's calculated values had been inflated. Thereafter, the majority of Green's written testimony consisted of factual assertions to rebut the contents of the Valuation Report, the content and adequacy of the Fourth Amended Disclosure Statement, or the testimony of Allison and even Steel. See Green ADT Declaration at ¶¶ 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 73.

On examination at trial, Green reiterated most of his written testimony and again could identify no document or specific evidence in the record to corroborate any of his testimony. The absence of corroborating documents is particularly striking because Green testified, for example, as to the probability of assets reaching the market, id. at ¶32, the acquisition of a license from Yale before he ever joined the Debtor, id. at ¶34, whether Beta-Cell Test studies were conducted before he arrived, id. at ¶35, the rights held by an entity identified as L2 Diagnostics, id. at ¶41, the functions of the Beta-Cell Test itself, id. at ¶44, the Debtor's acquisition of rights to Lisofylline-related assets before he ever joined the Debtor, id. at ¶¶46, 47, 48 and 49, the process

[99] While acting as the Debtor's chief executive officer, Green executed on behalf of the Debtor various publicly filed reporting forms required by the SEC. See Green ADT Declaration at ¶¶ 20, 21, 22, and 23. For the fiscal year ending April 30, 2014, he signed a Form 10-K dated July 28, 2014. Among others, the document also is electronically signed by Wilkison, Delmar and Steel. (Debtor Ex. 33 at 001616 to 001687). For the quarter ending January 31, 2015, Green signed a Form 10-Q dated April 21, 2015. The document is electronically signed by both Green and Delmar. (Id. at 001689 to 001711). For July 22, 2015, Delmar signed a Form 8-K reporting the resignations of Delmar as chief financial officer, Green as chief executive officer, and Wilkison as chief operating officer. (Id. at 00173 to 001715). Presumably, Green could have testified about the contents of such documents that were prepared during his tenure with the Debtor, if he had personal knowledge of the contents. But Green simply did not confine his testimony concerning the Debtor to such matters.

of obtaining orphan drug status or other approval from the FDA, id. at ¶¶40, 59, 66, 67 and 68, and the royalty percentage expected for the Combo Therapy, id. at ¶ 64. In essence, Green testified as to matters for which he lacked personal knowledge as well as on matters for which he had no qualifications or demonstrated reliability. Moreover, in a bizarre act of witness self-immolation, Green actually testified on cross-examination that he considers himself to be a scientist "in some respects" even though he admittedly has no specialized education, training, doctorate or medical degree of any kind. See Debtor Closing Brief at 12:2-18.[100]

At the close of Green's testimony, Debtor objected to the court's consideration of any of his testimony as an expert or lay witness. The court overruled the objection subject to the court's consideration of the weight, if any, to be given to Green's testimony.

(iv) Delmar[101]

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[100] When asked "In what respects do you consider yourself to be a scientist?", Green testified as follows:

> I have some undergraduate training in the sciences, and I have been working in the pharmaceutical biotech space for approximately 20 years. I've been working with some of the smartest people on the planet for quite a while. I've learned a lot. I have helped write clinical protocols. I am a mentor – on certain patents. Science is a method, it is not a thing. It is not a badge. It's a process of – of asking questions, developing or designing studies, and determining answers to those questions. So I – I've – I've been involved with clinical studies. Am I an MD? No. Am I a PhD? No. Am I involved in science and the development of drugs? Yes. So I believe I am, in some respects, a scientist.

Id., citing excerpts from the trial transcript for testimony presented on August 31, 2021.

[101] All of the Litigation Creditors' witnesses conceded that they had provided no requested documents in support of their testimony. As a strategy in litigation, a reticence to produce information and documents in response to formal discovery requests may have value because it forces the propounding party to affirmatively seek judicial intervention. See FED.R.CIV.P. 37(a)(3)(B)(iv). That process is both time consuming, expensive, and requires the expenditure of judicial resources. As a strategy in presenting a witness to a factfinder, however, it can backfire. A witness who corroborates testimony by providing any actual documents on which the specific testimony is based generally is more credible: the documents themselves can be presented to the factfinder to assess the credibility of the witness. It is one thing if the witness simply attests as to what is stated in the documents; it is quite another if the witness attests as to the truth of what is stated in the documents. Without personal knowledge of the facts stated in a document, lay witnesses have capacity to do the former, but not the latter. In this instance,

As a Petitioning Creditor and a non-priority unsecured claimant, Delmar has a Bachelor of Science in accounting from Clemson University and passed the CPA exam in Maryland. He previously served as chief financial officer to the Debtor from May 2014 to July 2015, prior to the Debtor's commencement of the NC State Litigation against Brighthaven, along with Wilkison and Green. Delmar filed a proof of claim as a creditor in the case, and is the chief financial officer for both Brighthaven and Avolynt, both of which filed proofs of claim as creditors in the case. Delmar testified that both Brighthaven and Avolynt are clinical stage pharmaceutical companies developing pharmaceutical products. Brighthaven and Avolynt also are named defendants in the ongoing NC Federal Litigation. See Delmar ADT Declaration at ¶¶ 3, 4, and 5.

Delmar testified that prior to his role with the Debtor, he served as a director of operations, an executive officer, and chief financial officer for various entities in other fields. Delmar testified that he has seven years of experience in the pharmaceutical industry, apparently from when he started with the Debtor in 2014. He attested that he is not a doctor, not a scientist, not an attorney, does not perform clinical studies, is not an expert concerning the FDA, and is not a specialist in human diseases.

Delmar attested that during his time as the Debtor's chief financial officer, Debtor attempted to raise funds. He attests that at the time he left the Debtor, its publicly held stock had an implied value of $3 million. Delmar testified that he disagrees with the valuation reached by Allison. He also testified that he did not provide any documents to his counsel in support of any of his testimony. See also note 92, supra.[102]

Wilkison, Green and Delmar had positions with the Debtor for limited periods of time, but their testimony reached matters occurring or existing far outside of those periods. Their reluctance or unwillingness to identify or provide the specific documents they claim to be in the possession of the Debtor suggests that they may have no documents at all to corroborate their testimony.

[102] It is not clear whether the Litigation Creditors produced documents in connection with the NC State Litigation or the NC Federal Litigation, or whether any such documents would have been responsive to the discovery by the Debtor in this bankruptcy proceeding, or would have supported their specific testimony in the current bankruptcy proceeding.

Delmar primarily testified concerning the factual allegations apparently raised in the NC State Litigation as well as the pending NC Federal Litigation. See Delmar ADT Declaration at ¶¶ 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32. His testimony also included factual statements about events occurring in 2012 when he was not even with the Debtor or with the defendants named in the NC State Litigation.[103]

At the close of Delmar's testimony, Debtor objected to the court's consideration of any of his testimony as an expert witness. The court overruled the objection subject to the court's consideration of the weight, if any, to be given.

(v) Steel

Steel is the current chief executive officer of the Debtor and is on its board of directors. Steel was called as a witness for direct examination by the Litigation Creditors and no ADT declaration was admitted into evidence.[104] On direct and cross-examination, Steel testified that he is not an expert but has had Type 1 diabetes since 1980. Steel also attested that he has no valuation experience. He testified that he owns 9 million existing shares in the Debtor, but has no expectation of receiving any equity in the Reorganized Debtor. Steel also testified that he waives any scheduled claim for a $490,000 loan that he made to the Debtor before the bankruptcy. Steel testified that he founded the Debtor in August 2010. He testified that the Debtor has not been profitable since it was formed.

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[103] A substantial portion of Delmar's testimony was based on a "term sheet" entitled "Brighthaven Ventures L.L.C./Lakota DRAFT NON-BINDING PROPOSAL – Joint Venture Agreement for Development and Commercialization of Remogliflozin-etabonate, Summary of Non-Binding Terms, August 14, 2010." A copy of the term sheet is attached to the complaint that commenced the NC Federal Litigation. In turn, a copy of that complaint was attached to Delmar's prior declaration filed in opposition to the Debtor's third motion to extend plan exclusivity. A copy of that declaration was admitted into evidence as Debtor Ex. 53. A copy of that complaint also was admitted into evidence as Debtor Ex. 47.

[104] The Steel Declaration that previously was filed on July 19, 2019, was marked as Debtor Ex. 53, but was never offered or admitted into evidence. Other than his position with the Debtor, that declaration provides no information as to Steel's education, experience or background. Most of that declaration addressed the factual and procedural information underlying the NC State Litigation and the pending NC Federal Litigation. See Steel Declaration at ¶¶ 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31. 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41.

Steel testified that the Debtor's rights to the intellectual property underlying the Combo Therapy was acquired through the acquisition of an entity known as "DiaKine." He testified that no clinical tests of the Combo Therapy have been completed. Steel testified that the formulation work for the Combo Therapy could be completed in three or four months under the Debtor's agreement with Xeris, thereafter followed by both preclinical and clinical trials conducted concurrently. He testified that orphan drug status could be sought from the FDA and that the preclinical studies of the Combo Therapy would take two weeks. Steel also testified that clinical studies of the Combo Therapy could be conducted in one month. He testified that he could not estimate when the Combo Therapy could be on the market, but would rely on his science officers.

Steel testified that the Beta-Cell Test does not require particular approvals to be marketed because it is non-invasive. He testified that any required approvals would be obtained by Quest. Steel testified that he is very familiar with the FDA approval process. He testified that Yale University as well as the University of Miami has conducted preclinical tests of the Beta-Cell Test after the Involuntary Petition was filed. Steel testified that clinical trials of the Beta-Cell Test also have been conducted. He testified that clinical trials of the Beta-Cell Test would take two months. Steel had previous experience with clinical trials for a non-invasive diagnostic. Steel testified that the Debtor has an arrangement with Quest to market the Beta-Cell Test with the revenue percentage subject to negotiation. He testified that there is a similar arrangement with Xeris to market the Combo Therapy with the revenue percentage subject to negotiation. Steel testified that the Reorganized Debtor could start obtaining revenues from the Beta-Cell Test within six months after emerging from bankruptcy. He testified that he believes the value estimated by Allison for the Combo Therapy is much less than its actual market value.

At the close of Steel's testimony, there were no objections raised by the Debtor, the UCC, or any other party in interest, to the consideration of his testimony.

(vi) May

As the chief operating officer and member of the board of directors of the Debtor, May was hired in that capacity on February 25, 2021. See Fourth Amended Disclosure Statement at

Section II.B(4). He also is an investor in the Debtor and invested with WSF and its DIP Financing loan. Id. May is not an officer, director or control person with WSF. Id. He received a bachelor's degree in 1985 as well as a juris doctorate in 1988, and is licensed to practice law in the State of New York. See Exhibit "E" to Fourth Amended Disclosure Statement. In addition to his role with the Debtor, May is an executive vice president of an entity known as "In the Car LLC."

May testified that the Renewed License was reached with Yale to provide an exclusive license for the Debtor to commercialize and market a series of patents and related methods and products in connection with the Beta-Cell Test. See May ADT Declaration at ¶21. He attested that the Renewed License constitutes sound business judgment that will generate additional revenues and enhance the value of the Debtor's business. Id. at ¶22.

May testified on cross-examination that the Renewed License was necessary because the prior licensing arrangement with Yale had lapsed due to missed payments.[105] He also testified that a release of the estate's claims against Steel was reached after reviewing the Debtor's books and records, reviewing documents obtained, and consulting with the Debtor's legal advisors. See May Settlement Declaration at ¶¶ 4 and 5. On redirect examination at trial, May attested that he had reviewed the allegations made by the Litigation Creditors, had spoken with counsel in the NC Federal Litigation as well as bankruptcy counsel, had reviewed records of Steel's spending, had obtained renewal of the Yale license, had considered the beneficial services Steel had provided to the Debtor, had considered the legal cost of pursuing claims against Steel, and considered the impact of the multimillion dollar judgment that the Litigation Creditors already had against Steel. May testified that based on those considerations, the release of claims in exchange for Steel's removal from the KEIP was warranted.

May testified that any restriction on the transfer of shares in the Reorganized Debtor are set forth in the proposed Islet Shareholders Agreement. He testified that the Islet Shareholders Agreement, as well as the WSF Conversion Agreement, are necessary to implement the proposed

[105] Apparently, the Renewed License resolves any cure amounts owed under the prior Yale licensing agreement. See Assumption or Rejection List at n.1.

Fourth Amended Plan. See May ADT Declaration at ¶¶ 23, 24, 25, and 26. May testified that under the proposed settlement and proposed plan modifications, holders of allowed nonpriority unsecured claims would receive an aggregate interest in 9% of the Reorganized Debtor share than an aggregate interest in 1.9% of the Reorganized Debtor.

May testified that he expected the Reorganized Debtor to begin generating revenue at the end of 2022. Until that time, he testified that the Reorganized Debtor would use the balance of the existing DIP Financing and could obtain additional funding from several other sources with whom he had communicated. May testified that if additional funding sources required the receipt of shares in the Reorganized Debtor, however, it could dilute the value of outstanding shares in the Reorganized Debtor.

At the close of May's testimony, there were no objections raised to the consideration of his testimony by the Litigation Creditors, the UCC, or any other party in interest.

(vii) Lakey[106]

As a creditor and existing equity holder in the Debtor, Lakey holds a bachelor's and master's degree in science, as well as a Ph.D. in surgery from the University of Alberta. He received grants for diabetes and transplantation research while at the University of Alberta. Lakey was the president and chief science officer for the Debtor between 2007 and 2008. From 2008 to 2021, he was a professor of surgery and biomedical engineering, and director of the clinical islet transplant program, at the University of California in Irvine. During that time, Lakey remained on the Debtor's scientific advisory board. At the end of July 2021, he left the faculty at UC Irvine to return to the Debtor. He is both a creditor[107] and a current shareholder in the Debtor. See LakeyADT Declaration at ¶¶ 3, 4, 5, 14, and 15.

Lakey testified that he was terminated from his position at the University of Alberta for financial disclosure irregularities and that he also was terminated from employment at an entity

[106] At the opening of Lakey's testimony, the Litigation Creditors objected to consideration of the Lakey ADT Declaration for lack of a prior expert report. The objection was overruled subject to voir dire as to any expert testimony.

[107] On November 21, 2019, Lakey filed a POC attesting that he is owed the general unsecured amount of $315,000 for unpaid research consulting.

identified as Capital Health Region. He has testified as an expert in previous court proceedings, but he is not an expert in taking drugs to market. Lakey testified that he does not have a background in the development or commercialization of diagnostics. He previously was the president and chief scientific officer of the predecessor to the Debtor. See Lakey ADT Declaration at ¶ 12. Lakey testified that he has been involved in eight clinical, human trials, but none of them in diagnostics. He also testified that he had been involved in hundreds of non-clinical, animal trials. Lakey testified that he has received research grants approaching $65 million for research in diabetes, transplantation, and stem cells. He testified that he has received numerous honors, awards and other recognition for his research. Lakey also testified that he published over 495 scientific items over his career, most relating to diabetes or islet cells. See Lakey ADT Declaration at ¶¶ 7 and 8.

Lakey explained the relationship between beta cell death and the secretion of insulin from the pancreas to reduce blood sugar levels. He testified that one-third of patients with Type 2 diabetes go on to treatment in the same manner as Type 1 diabetes patients: with regular insulin injections. Lakey testified that the Beta-Cell Test predicts the onset of high blood sugar levels while the A1c test reports past blood sugar levels. He testified that he therefore believed that both tests would have value in the diabetes treatment market.

Lakey attested that clinical trials for the Beta-Cell Test have not been completed and that some level of trials are required for the Beta-Cell Test to go to the market. He testified that no commercial assay of tests had been developed for the Beta-Cell Test, but that an assay had been developed at the academic laboratory at Yale. Lakey also testified that the Debtor holds the license for the Beta-Cell Test that was developed at Yale. He testified that he was uncertain of the need for FDA approval, but does not believe approval of the test is required because it is non-invasive (unlike an oral or injected drug). Lakey testified that a blood sample is required to collect serum needed to be tested by a contract research organization ("CRO") laboratory. Lakey also testified that he believed the Beta-Cell Test could be available for widespread domestic use within six to twelve months based on his discussions with three certified CRO laboratories, including Labcorp, Quest, and a separate private CRO laboratory. He also testified that less than

ten percent of pre-clinical pharmaceutical diagnostics ever reach the market. Lakey also agreed that the Beta-Cell Test would not replace the A1c test.

At the close of Lakey's testimony, the Litigation Creditors objected to the court's consideration of any of his testimony as an expert witness, and also to his lay testimony. The court overruled the objection with respect to his testimony as an expert.[108] The court also ruled that both Lakey's expert testimony and lay testimony would be given the weight, if any, as determined by the court.

(c) Feasibility Conclusion

Based on the testimony presented, Debtor has met its burden of proof by a preponderance of the evidence. A guaranty of success is not required and the Debtor has met the required threshold. No one disputes the scope of the diabetes industry in the United States alone and the costs associated with treating diabetes in the United States alone. No one disputes the rate of increase in expenditures over the past five years. No one disputes the prevalence of diabetes worldwide. The scientific basis underlying the Combo Therapy and Beta-Cell Test was sufficiently established by the testimony of Lakey and conceded by the testimony of Wilkison. Zero weight is given to any scientific testimony, if any, from Green and Delmar.

The projection of commercial viability of both assets also was sufficiently demonstrated by the testimony of Allison. The Fourth Amended Plan includes the assumption of the licensing and other executory contracts with Yale, UVA, Quest and Xeris.[109] No objection to those

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[108] The court concluded that Lakey qualified as an expert witness under FRE 702 based on the standards discussed in Daubert and Kumho Tire Co. See note 91, supra.

[109] May testified that the contracts have not been cancelled or otherwise terminated. No contrary testimony has been presented. Wilkison testified that a letter of termination of the UVA agreement had been sent, but produced no copy of the alleged termination document. May also testified that the Renewed License with Yale was reached whereby the Reorganized Debtor would have an exclusive license to commercialize and market the Beta-Cell Test. See ADT Declaration at ¶¶ 21 and 22. There is no indication in the record that the Litigation Creditors ever took steps to inquire of Yale, UVA, Quest and Xeris of the continued existence of the contracts being assumed under the Fourth Amended Plan. In other words, no evidence was presented by the Litigation Creditors to challenge the credibility of May's testimony. Thus, a preponderance of the evidence supports a finding in favor of the Debtor.

assumptions have been raised by any party to those agreements nor by the Litigation Creditors.[110] The Fourth Amended Plan also includes approval of the Renewed License with Yale as previously disclosed well before plan confirmation. See discussion at note 26, supra. Allison's valuation assumed that those licenses and agreements would be assumed, and those assumptions would occur under the Fourth Amended Plan without objection by any party in interest.

The most credible evidence of the time frames for completion of any required trials, the availability of any necessary assays, the necessity of obtaining FDA approvals, and the possible market for the Combo Therapy and the Beta-Cell Test was provided by the testimony of Lakey. Although Lakey has a continuing financial and professional interest in the Debtor's reorganization, it pales in comparison to Wilkison's continuing financial, professional, legal and personal interest in the Debtor's liquidation. Similarly, Wilkison's credentials and experience in the field pales in comparison to Lakey. Moreover, the Litigation Creditors offered no evidence on any material issue in dispute other than the lay opinions of Wilkison, Green and Delmar, and many of those opinions are not based on personal knowledge.[111] For whatever reason, none of

[110] Debtor's initial Schedule "G" filed on October 14, 2019, disclosed all four of the licensing and other executory contracts. See discussion at 6, supra. It is not clear whether any discovery was sought concerning the status of those agreements and whether there would be any impediments to their assumption by the Reorganized Debtor.

[111] From the outset, Steel attests that the Debtor is a "clinical stage biotechnology company focused on research, development, and commercialization of new medicines and technologies for the treatment and diagnosis of metabolic disease and related indications." See note 5, supra. Not surprisingly, Green attests that "Debtor is not a clinical stage technology company." See Green ADT Declaration at ¶12. Delmar, however, testified at trial that both Brighthaven and Avolynt are clinical stage pharmaceutical companies developing pharmaceutical products. At one point, all of them apparently contemplated a possible merger, but the merger fell apart and litigation ensued. Apparently, the Debtor, Brighthaven and Avolynt are competitors of one another. Green, Delmar, Wilkison, and Brighthaven, along with three others, filed the Involuntary Petition to liquidate the Debtor in Chapter 7. All three witnesses are officers with or are affiliated with Brighthaven and Avolynt. All three testified that they continue to seek a liquidation of the Debtor rather than a reorganization. Liquidation apparently would result not only in the elimination of a competitor, but also a means to resolve of the NC Federal Litigation that exposes the Litigation Creditors to potentially significant personally liability. There is much at stake in pursuing this strategy. Wilkison testified, however, that he relied on Green and Delmar. Under the circumstances, it is not entirely clear why Green,

the witnesses for the Litigation Creditors produced any documents or evidence that might corroborate their testimony at the subject hearing. Thus, the court assigns no weight to their testimony, and Lakey's testimony is sufficient to satisfy the preponderance standard.

Likewise, the most credible evidence of the Reorganized Debtor reaching the projected valuations was provided by the testimony of Allison. Those valuations included a discount rate designed to accommodate the risk of error. Unlike Green and Delmar, on whose opinions Wilkison relied, Allison disclosed the sources of information on which he relied in reaching his conclusions. Unlike Green and Delmar, Allison even disclosed the time it took to reach his conclusions as well as the specific assumptions that he made. Unlike Green, Delmar and Wilkison, Allison did not offer testimony on subjects for which he had no expertise, training, experience, or personal knowledge. Unlike Green, Delmar and Wilkison, Allison provided and explained a methodology for projecting the future value of the Debtor's primary assets, which included a discount rate to account for the risk of both assets failing to reach the market. In essence, Green, Delmar and Wilkison began with the assumption that the Combo Therapy and Beta-Cell Test have no market value, but provided no reliable evidence or analysis in support of their conclusions.

Although Steel testified at length as to both the scientific basis for the Debtor's assets as well as their marketability, it is difficult to assess his testimony because his qualifications and background was never provided or even elicited. May provided uncontradicted testimony of the existence and benefit of the Renewed License, and no evidence suggests that the executory contracts and rights scheduled by the Debtor cannot be assumed for the benefit of the Reorganized Debtor. May also provided uncontradicted testimony that a substantial portion of the Litigation Funding remains available to meet the postconfirmation operating expenses of the Reorganized Debtor. Lakey provided uncontradicted testimony that three CRO laboratories are available to proceed with steps to take the Beta-Cell Test to the market. Steel, May and Lakey,

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Delmar, and Wilkison offered no scientific or valuation testimony from a credible, independent source that might carry none of the obvious professional, financial, and personal biases that they exhibited in their testimony in this bankruptcy proceeding.

like Green, Delmar and Wilkison, have varying financial interests in the reorganization or liquidation of the Debtor. Having viewed all of their live testimony and reviewed all of their written testimony, the court concludes that the credibility of the witness testimony as a whole favors the Debtor.[112] For reasons already expressed, the court assigns little if any weight to the testimony of Green, Delmar and Wilkison.[113] Under these circumstances, the credibility of Allison's testimony has been established and both the testimony and the Valuation Report are accepted by the court for their full probative value.

Based on the testimony, the court concludes that the Debtor has adequately demonstrated that the Reorganized Debtor will have sufficient funds going forward to take advantage of its licenses for both the Combo Therapy and Beta-Cell Test. Additional operational funding apparently will be available and third-parties apparently will fund the costs of bringing the Combo Therapy and Beta-Cell Test to the market. The projected royalties from both products are substantial because the projected increase in expenditures on diabetes also is substantial for the increasing United States population that confronts the malady. The qualifications and expertise of the initial board of the Reorganized Debtor has not been disputed nor the value of Steel's assistance during the transition period. Moreover, none of the Debtor's existing equity holders have rejected the path offered in the Fourth Amended Plan. The court therefore concludes that the Debtor has demonstrated by a preponderance of the evidence that confirmation of the Fourth Amended Plan, as modified, is not likely to be followed by

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[112] The court's credibility determination, of course, is based solely on the testimony of the witnesses in the current bankruptcy proceeding, taking into account the burden of proof and standard of proof applicable in this case. Whether any or all of the same witnesses will testify in connection with the NC Federal Litigation is unknown. The credibility determinations made here are based on all of the circumstances before the court, including the demeanor of the witnesses at trial, their roles in the underlying disputes, their responses to discovery, and other matters appearing in the record of this bankruptcy proceeding.

[113] Compare Carney v. Brooks (In re Brooks), 2016 Bankr. LEXIS 4697, at *55-59 (Bankr. D. Nev. 2016) (assigning little weight to alleged expert testimony of plaintiff's witnesses).

liquidation or further reorganization by the Reorganized Debtor. Feasibility under Section 1129(a)(11) has been satisfied.[114]

12. Section 1129(a)(12): Fees

Section 1129(a)(12) requires that a Chapter 11 debtor be current in payment of UST fees no later than the effective date of the proposed plan. As previously mentioned, Debtor's monthly operating report for the period ending July 31, 2021, attested that it was current on quarterly fees owed to the UST. No objection to plan confirmation has been made by the UST. The plan provides for payment of such fees to continue after plan confirmation. See Fourth Amended Plan at Art. XIII.A. Under the circumstances, the court concludes that Section 1129(a)(12) has been met.

13. Sections 1129(a)(13), (14), (15), and (16): Retirement Benefits, Domestic Support Obligations, Individual Debtors, Transfers of Property.

Section 1129(a)(13) requires retiree benefits to be paid, if any. Section 1129(a)(14) requires the plan proponent to pay all domestic support obligations required after the bankruptcy petition date. Section 1129(a)(15) requires certain treatment of allowed unsecured claims when the Chapter 11 debtor is an individual. Section 1129(a)(16) provides for the continued enforcement of any applicable nonbankruptcy restrictions on transfers by nonprofit entities in Chapter 11. There is no dispute that these provisions are not applicable in this Chapter 11 proceeding.

14. Section 1129(b): Cram down.

If a plan proponent satisfies all the provisions of Section 1129(a) except the unanimous class acceptance requirement of Section 1129(a)(8), the court may still confirm a proposed plan through the "cramdown" process as long as the plan does not discriminate unfairly against and is fair and equitable towards each impaired class that has not accepted the plan. See 11 U.S.C. § 1129(b)(1). See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 642

[114] Having determined that the proposed Fourth Amended Plan, as amended, satisfies both the best interests test under Section 1129(a)(7) and the feasibility test under Section 1129(a)(11), the court now finds that the Debtor has satisfied the good faith requirement under Section 1129(a)(3). See discussion at 44-48, supra.

(2012); Bank of America Nat'l Trust and Sav. Ass'n v. 203 North LaSalle Street P'ship, 526 U.S. 434, 441 (1999); In re Ambanc La Mesa, 115 F.3d at 653.

(a) Unfair Discrimination Against a Dissenting Class.

Discrimination is about making choices and not all choices are unfair. Similarly, not all discrimination involving a dissenting class is unfair. Rather, discrimination between classes may be fair if (1) the discrimination is supported by a reasonable basis, (2) the proposed plan could not be confirmed or consummated without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of discrimination is directly related to its basis. See In re Ambanc La Mesa, 115 F.3d at 656; In re Rexford Properties LLC, 558 B.R. 352, 365 (Bankr. C.D. Cal. 2016).

As previously discussed, the Litigation Creditors were placed into Class 2 because their nonpriority unsecured claims will be allowed as determined by the court after completion of the NC Federal Litigation. The Litigation Creditors are actively pursuing their counterclaims against the Debtor while the Debtor is actively pursuing its prepetition claims against the Litigation Creditors and affiliated parties. Resolution of the counterclaims is essential for this court to determine the allowed amount of the claims in Class 2. If those counterclaims have a separate basis, they may be subject to set off against any claims in favor of the Debtor. Without a basis for determining the allowance of the claims in Class 2, the proposed Fourth Amended Plan cannot be confirmed, nor can the disbursements be completed. The court already having found that the Fourth Amended Plan is proposed in order to achieve a result consistent with the objectives and purposes of Chapter 11, the court also concludes that the separate treatment of Class 2 is proposed in good faith. Thus, the court finds that the Fourth Amended Plan, as amended, does not discriminate unfairly against Class 2 within the meaning of Section 1129(b).

Additionally, the Fourth Amended Plan, as modified does not unfairly discriminate against holders of nonpriority unsecured claims who reject plan treatment. Under the plan modifications approved by the court, any nonpriority unsecured creditor that votes to reject the proposed Fourth Amended Plan will be subject to its terms, as modified, only if it is otherwise confirmed. Under the modification, holders of nonpriority unsecured claims who vote to reject

the proposed Fourth Amended Plan will be treated under the non-modified version if in fact the plan is confirmed. In other words, the prior allocation of a .04% interest in shares of the Reorganized Debtor would apply to that creditor's claim, rather than a share in the 9% interest allocated under the Fourth Amended Plan as modified.

Class 2 has rejected the proposed plan but still will be bound by its terms in the event it is confirmed. See 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan shall bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor [and] any equity security holder...whether or not such creditor [or] equity security holder…has accepted the plan."). Similarly, any rejecting nonpriority unsecured creditors in Class 3 will be bound. As a result, the plan modification does not change the expectations of any nonpriority unsecured creditor in either class that rejects plan treatment.

The record indicates that a total of 9 ballots were cast by holders of non-priority unsecured claims in Class 3. Only the ballots cast determine whether Class 3 accepts the plan. See 11 U.S.C. § 1126(c) (class acceptance requires a majority in number and two-thirds in dollar amount of ballots cast). Of the 9 ballots cast in Class 3, 8 ballots totaling $1,589,400 accepted plan treatment, representing 88.9% of the Class 3 ballots cast and 96.9% of the total dollar amount. See Schwartz Declaration at ¶ 7. Only 1 ballot in the amount of $51,249.98 in Class 3 rejected plan treatment, representing 11.1% of the Class 3 ballots cast and 3.1% of the dollar amount. Id. Although copies of the ballots cast were not provided, see note 74, supra, the amount of the one rejecting ballot is identical to the amount of the POC filed by Delmar. See discussion at 9, supra. In other words, the only holders of nonpriority unsecured claims objecting to the Fourth Amended Plan are the same parties who sought to liquidate the Debtor in Chapter 7 and who are defendants or affiliated parties in the NC Federal Litigation. Because an overwhelming majority in number and over 96% of the dollar amount of the ballots cast accept plan treatment, Class 3 overwhelmingly has accepted plan treatment.

Whatever may have been their expectations when they chose to commence an involuntary bankruptcy proceeding against the Debtor, the Litigation Creditors apparently have not altered their objectives during the Chapter 11 proceeding. Each of them had a choice to

accept or reject proposed plan treatment and were given the same choice available to all nonpriority unsecured creditors. Only claimants among the Petitioning Creditors chose the alternative that reduces the equity interest in the Reorganized Debtor that would be available to satisfy the allowed amount of their claims in full. Holders of all allowed nonpriority unsecured claims are given the same choice. Under these circumstances, there is no unfair discrimination in providing creditors with the option of receiving the allowed amount of their claim through a lesser equity interest in the Reorganized Debtor[115] and no unfair discrimination when they voluntarily exercise of the option.[116]

Based on the foregoing, the court concludes that the Fourth Amended Plan, as modified, does not unfairly discriminate on its face against the dissenting class, nor does it unfairly discriminate as applied.

(b) Fair and Equitable Treatment of a Dissenting Class.

As previously discussed, 100% of the four non-priority unsecured creditors in Class 2 cast ballots rejecting the proposed plan. Approximately 89% by number and 99% by dollar

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[115] Compare In re Drexel Burnham Lambert Group, Inc., 138 B.R. 714, 717 (Bankr. S.D. N.Y. 1992) ("Initially, we find the instant case factually distinguishable from the cases LBA cited above because here, the only class that is affected by its negative vote is the class itself and not any junior classes. Classes 8 and 9 are ostensibly equal. Additionally, we find no conceptual problem with senior interests offering to junior interests an inducement to consent to the Plan and waive whatever rights they have. Lastly, LBA's objection is teetering on two cases that stand for the proposition that there is 'no authority in the Bankruptcy Code for discriminating against classes who vote against the plan.' Yet we find no statutory provision that proscribes such discrimination. Indeed, § 1129(a)(3) provides that the Court shall confirm a plan only if…the plan is proposed in good faith and not by any means forbidden by law. We do not view the carrot and the stick, factually presented in this case, as forbidden by the Code or any law that we know of."). See also In re Affordable Auto Repair, Inc., 2020 WL 6991012, at *1-2 (Bankr. C.D. Cal. Sep. 2, 2020) (discussing approval of disclosure statement where plan provides for alternate treatment of rejecting classes).

[116] See, e.g., Drexel Burnham Lambert Group, Inc., 138 B.R. at 716 ("LBA's treatment under the Plan, however, is exactly the same as all other equity claimants, i.e., a vote in favor of the Plan and receive New Street Warrants; vote against the Plan and receive nothing. LBA cannot now complain that their treatment is discriminatory because they elected to receive nothing under the Plan, while other equity classes elected to receive New Street Warrants. Indeed, they elected to be treated differently."

amount of the non-priority unsecured creditors who cast ballots in Class 3, however, accepted the plan, thereby satisfying Section 1129(a)(10). To be fair and equitable with respect to a class of unsecured claims, there are two permissible alternative treatments: (1) the holder of a claim in the class receives property of a value as of the effective date equal to the allowed amount of the claims, or (2) the holder of any claim or interest junior to the dissenting class will not receive or retain any property. See 11 U.S.C. § 1129(b)(2)(B)(i and ii).[117] The first alternative is the full payment option, while the second alternative is known as the "absolute priority rule."[118]

Absent the modifications approved by the court, under Class 2 the four dissenting Litigation Creditors would receive "the Pro Rata of 0.4% of the New Equity in the Reorganized Debtor…in the amount equal to the dollar value of their Claim as set by the Bankruptcy Court." See Fourth Amended Plan at Art. III.B(2)(b) (emphasis added). The amount of the distribution is based on three possible outcomes of the NC Federal Litigation: (1) the Litigation Creditors

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[117] For cramdown of a dissenting secured class, Section 1129(b)(2)(A) provides that the holder of the secured claim retain its lien on the subject collateral and receive "deferred cash payments totaling at least the allowed amount of [the secured] claim, of a value, as of the effective date of the plan, of at least" the allowed amount of the secured claim. See 11 U.S.C. § 1129(b)(2)(A)(i)(II). Because the cash payments are deferred but must equal the allowed amount of the claim, the payments must include interest in an amount sufficient to compensate the creditor for the time value of money and to account for the risk of nonpayment. See generally Till v. SCS Credit Corp., 541 U.S. 465, 475-76 (2004) (determining cramdown interest rate for a secured claim in Chapter 13). For a dissenting unsecured class, the express language of Section 1129(b)(2)(B) does not include a deferred cash payment component at all. But see Till at 1958 & n.10 (including Section 1129(b)(2)(B)(i) in a list of bankruptcy provisions requiring a court to discount a stream of deferred cash payments back to their present dollar value).

[118] Because the second alternative addresses non-priority unsecured claims, its requires identification of what would be a junior claim or interest. Unless subordinated by agreement or court order, the only holder of an interest junior to a nonpriority unsecured claim of a creditor would be the debtor. Unless unsecured creditors are paid in full, the premise is that the debtor cannot retain property of value unless that value is protected from execution by an exemption created under applicable law. This priority scheme is mirrored in the order of distribution of non-exempt property in a Chapter 7. Section 726 governs distribution of property of a bankruptcy estate by a Chapter 7 trustee. From what remains after any exemptions are allowed, six categories of claims are paid in the order listed in Section 727(a). The last of those categories is the Chapter 7 debtor. In other words, the creditors of a debtor are to be paid before an individual debtor or the owners of a non-individual debtor are paid or allowed to retain the debtor's assets.

succeed and receive the Litigation Creditors Equity Pool, (2) the Litigation Creditors fail and the Litigation Creditors Equity Pool is distributed to Class 4 interest holders, or (3) the Litigation Creditor claims are reduced by the NC Federal Litigation and the Litigation Creditors Equity Pool is distributed to both the Litigation Creditors and Class 4 interest holders. Id. at Art. III.B(2)(b)(i, ii, and iii).[119]

Absent the modifications approved by the court, under Class 3 all other non-priority unsecured creditors will receive "the Pro Rata of 1.5% of the New Equity in the Reorganized Debtor…in the amount equal to the cash value of their Claim as set by the Bankruptcy Court." See Fourth Amended Plan at Art. III.B(3)(b) (emphasis added).

Absent the modifications approved by the court, under Class 4 all current holders of equity interests in the Debtor shall receive in exchange "their Pro Rata value of 48.1% of the shares of the New Equity Interests after satisfaction of the Allowed Claims in Classes 2 and 3, in proportion to each Holder's Equity Interest ownership on the Record Date." See Fourth Amended Plan at Art. III.B(4)(b) (emphasis added).

Absent the modifications approved by the court, the aggregate percentage of shares in the Reorganized Debtor allocated to Classes 2, 3, and 4 would be 50%. Absent the settlement and modifications approved by the court, up to 50% of the shares in the Reorganized Debtor would go to WSF in satisfaction of its superpriority unsecured administrative claim for DIP Financing.

Under the settlement and modifications approved by the court, WSF will reduce its shares in the Reorganized Debtor to 42% and contribute 7.1% of the shares to the nonpriority unsecured creditors in Classes 2 and 3. As a result, Classes 2 and 3 are allocated a total of 9.0% of the equity interests in the Reorganized Debtor. The Litigation Creditors in dissenting Class 2 filed proofs of claim totaling $1,955,221.34[120] but cast ballots rejecting plan treatment in the total

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[119] A fourth possible outcome, of course, is that the litigants simply settle.

[120] As previously discussed at 7-8, supra, each of the Litigation Creditors filed nonpriority unsecured proofs of claim in the case: (Wilkison ($758,607.51), Green ($754,271.20), Brighthaven ($442,342.63) and Avolynt (unknown). The total unsecured amount in those proofs of claim is $1,955,221.34.

dollar amount of $2,210,678.70. See discussion at note 74, supra. The remaining nonpriority unsecured creditors in Class 3 have claims totaling approximately $6,712,219. See discussion at note 17, supra. The total amount of both the Class 2 and 3 nonpriority unsecured claims is approximately $8,922,897.

Under the Valuation Report, the value of the Combo Therapy and Beta-Cell Test in a Chapter 11 reorganization is $442,698,000, with an estimated range of value between $42,770,000 and $212,651,000, in a Chapter 7 liquidation. Under a 9% distribution of shares in the Reorganized Debtor, the Chapter 11 reorganization value committed to nonpriority unsecured creditors is $39,842,820, with the value in a Chapter 7 liquidation between $3,849,300 and $19,138,590. The value of the shares distributed to nonpriority unsecured creditors under the proposed Fourth Amended Plan, as modified, far exceeds the amount of the claims asserted by the Litigation Creditors in dissenting Class 2.

As structured, each of the Litigation Creditors in Class 2 will receive the amount equal to the dollar value of their non-priority unsecured claims as determined by the court after completion of the NC Federal Litigation. As structured, each of the holders of allowed non-priority unsecured claims in Class 3 will receive the amount equal to the cash value of those claims as determined by the court. Because the holders of nonpriority unsecured claims in dissenting Class 2 will receive amounts equal to the value of their claims as determined by the court, the requirement of Section 1129)(b)(2)(B)(i) is met.

As structured, each of the holders of claims in Class 2 will receive the amount equal to the dollar value of their non-priority unsecured claims as determined by the court. As structured, each of the holders of allowed claims in Class 3 will receive the amount equal to the cash value of those claims as determined by the court. As structured, the holders of existing equity interests in the Debtor in Class 4 do not receive their pro rata value until after satisfaction of all allowed claims in Classes 2 and 3. Because the existing interest holders in Class 4 do not receive any property or retain any interest unless the holders of allowed claims in senior Classes 2 and 3 receive the value of their claims as determined by the court, the requirement of Section

1129(a)(2)(B)(ii) is met. In other words, under the structure of the Fourth Amended Plan, the absolute priority rule has been met.

Because the Fourth Amended Plan, as modified, satisfies both alternatives under Section 1129(b)(2)(B), the treatment of the Litigation Creditors in dissenting Class 2 is fair and equitable.[121]

(c) Cramdown Conclusion.

The Fourth Amended Plan satisfies all of the applicable requirements under Section 1129(a) with the exception of Section 1129(a)(8). The treatment of the Litigation Creditors under dissenting Class 2 is not unfairly discriminatory. The treatment of the Litigation Creditors under dissenting Class 2 is fair and equitable. Under these circumstances, the requirements for plan confirmation under Section 1129(b)(2)(B) have been satisfied.

In light of the foregoing, the court finds and concludes that confirmation of the Fourth Amended Plan, as modified, is warranted in this Chapter 11 proceeding.

CONCLUSION

Debtor has met its burden of proof by a preponderance of the evidence presented at trial. Accordingly, the Settlement Motion under FRBP 9019 and Plan Modification Motion under Section 1127 will be granted. Additionally, the requirements for plan confirmation under Section 1129(a) and Section 1129(b) have been satisfied, and the Fourth Amended Plan, as modified, will be confirmed.

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[121] The court also has considered the support of the Fourth Amended Plan, as amended, provided by the UCC. Acting as a fiduciary to all unsecured creditors, the UCC as a body agreed to support plan confirmation. Only the Litigation Creditors who are members of the UCC do not agree with the position taken by the UCC. No evidence has been provided nor suggestion has been made that any other member of the UCC, see discussion at 7, supra, have the conflicts reflected by the only parties who have objected to plan confirmation. Ironically, three out of the seven Petitioning Creditors have not objected at all to confirmation of the Debtor's proposed plan of reorganization and none of them appear to be involved at all in the NC State Litigation nor the NC Federal Litigation. Simply put, the position of the UCC is consistent with the court's conclusion that the plan does not discriminate unfairly and is fair and equitable to any dissenting holders of claims and interests.

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