

SAMPLE<sup>1</sup>  
(If Cram Down is Not Required)

**DEBTOR'S PROFFER OF EVIDENCE DEMONSTRATING COMPLIANCE WITH  
SECTION 1129 OF THE BANKRUPTCY CODE**

At a chapter 11 confirmation hearing, even if no party in interest opposes confirmation, the Debtor is required to make an offer of proof showing that all confirmation requirements have been satisfied. The offer of proof may be made by counsel or by affidavit if the witness(es) whose testimony is offered are in the courtroom.

The offer of proof should set forth facts upon which the Court may conclude that the confirmation requirements are satisfied. If a class of creditors votes to reject the plan, then the offer of proof should also set forth facts upon which the Court may conclude that Bankruptcy Code §1129(b) is satisfied as to the dissenting class.

The following is an example of an adequate offer of proof made by counsel at a hypothetical chapter 11 confirmation hearing. It is given for illustrative purposes only. In the hypothetical case, the debtor is a closely held corporation that operates a dairy. The Debtor proposes under the plan to continue its dairy operations. The plan provides that all secured and unsecured priority claims will be paid in full with interest, and that unsecured non-priority claims will be paid in part without interest. In the example, all impaired classes voted to accept the plan, so it was not necessary to give a proffer that Bankruptcy Code §1129(b) (cramdown) was satisfied as to any dissenting classes.

Sample Proffer

This offer of proof is made to demonstrate compliance with Bankruptcy Code §1129 in support of confirmation of Debtor's Plan of Reorganization filed on [insert date].

A. Sources of Evidence of Compliance with 11 U.S.C. §1129.

1. Judicial Notice. The Debtor asks the Court to take judicial notice of all documents filed in Debtor's bankruptcy case, including proofs of claim.
2. Proffered Testimony of the Debtor's president, John Doe. John Doe is in the Courtroom today. If called to testify, Mr. Doe would testify under oath as set forth below, from his own personal knowledge and information provided to him by certain of the Debtor's

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<sup>1</sup> One or more affidavits or declarations may be used as part of the offer of proof.

employees and professionals, from his review of business records maintained by the Debtor in the ordinary course of its regularly conducted business activities, from his knowledge concerning the operations and financial affairs of the Debtor, and as an expert on the financial affairs, management and operation of the dairy business.

Mr. Doe would testify that XYZ Corporation owns and operates a dairy outside of Cowtown, New Mexico. John Doe is the President of the Debtor, XYZ Corporation. Mr. Doe, along with his wife Jane Doe, owns 100% of the capital stock of XYZ Corporation. Mr. Doe has been in the dairy business for over thirty years, and has for the past 20 years had ultimate authority over the day-to-day operation, business and affairs of the Debtor. Mr. Doe is familiar with the Debtor's operations, facilities, policies and financial affairs. He is the person the Debtor designated to be responsible, in consultation with legal counsel and other court approved professionals, for the supervision of the Debtor's chapter 11 case, including compliance with the requirements of the Bankruptcy Code and with respect to the Debtor's Disclosure Statement and Plan. In addition, as manager of the Debtor's business operations, Mr. Doe's duties include, but are not limited to, long range planning, financial oversight, supervising dairy personnel, and making decisions concerning dairy operations such as decisions on purchasing and selling cows, feed rations and purchases, hedging, herd health, environmental compliance, equipment purchases, and growing crops. Mr. Doe has reviewed and is familiar with the terms and provisions of the Debtor's plan and disclosure statement.

Based upon his supervision and administration of Debtor's chapter 11 case, his review and knowledge of Debtor's books and records maintained in the ordinary course of its business, his knowledge of the Debtor's operations and financial affairs, and his review of matters with Debtor's outside professionals, Mr. Doe is familiar with and has personal knowledge of

matters relating to confirmation of the Plan.

Mr. Doe would testify that the Debtor's dairy is known as Mootown Farms. As of January 1, 201X, the dairy herd consisted of approximately 2,000 owned cows and 100 leased cows. The Debtor raises its own replacement cows, and has approximately 600 cattle from day old to springers. The dairy, without the adjoining farmland, is situated on approximately 120 acres. The dairy improvements include a milk barn, a commodity shed, two hay sheds, shades, corrals and a lagoon. The Debtor owns approximately 750 irrigated acres of farmland adjoining the dairy on which it principally grows corn silage and alfalfa to feed to the cows, and winter wheat. The Debtor has a discharge permit from the New Mexico Environment Department.

B. Compliance with §1129.

1. §1129(a)(1). A review of the Plan, together with a proffer of testimony of John Doe, will show that the Debtor has satisfied Bankruptcy Code §1129(a)(1). The plan complies with the mandatory plan requirements set forth in Bankruptcy Code §1123(a), and all plan provisions are permitted by Bankruptcy Code §1123. The plan provides for adequate means for its implementation, through among other things, re-vesting property of the estate in the Debtor, providing that the Debtor will continue its operations after the effective date of the plan free of any restrictions of the Bankruptcy Code, and providing an adequate means for the Debtor to fund the plan. The plan also complies with Bankruptcy Code §1124. Valid business, legal and factual reasons exist for the separate classification of each of the classes of claims created and treated under the plan. The claims in each class are substantially similar to the other claims in the same class. Each secured creditor is separately classified. All unsecured non-priority claims, including unsecured deficiency claims and claims arising from the rejection of executory contracts and unexpired leases, are in the same class.

2. §1129(a)(2). Mr. Doe would testify that to the best of his knowledge, the Debtor has complied with the requirements of the Bankruptcy Code while a debtor in possession. Mr. Doe would testify that after filing its chapter 11 case, the Debtor used only debtor in possession bank accounts; filed its monthly operating reports on a timely basis; used cash collateral only as permitted by court orders, borrowed money and paid professionals only pursuant to court orders; paid obligations arising before the bankruptcy filing only with court approval; sold assets outside the ordinary course of business only with prior court approval; and did not solicit votes on its plan until after court approval of the disclosure statement. This testimony, together with documents on file in this bankruptcy case, including cash collateral orders and the debtor in possession financing order, orders approving retention of professionals and approving fee applications, orders approving assumption of executory contracts unexpired leases, the monthly operating reports, the disclosure statement and plan of reorganization, the order and notice approving the disclosure statement and fixing the plan confirmation deadlines, and the certificate of service of the plan packages, establish that Bankruptcy Code §1129(a)(2) has been satisfied.

3. §1129(a)(3). Mr. Doe would testify, and the Court file reflects, that Debtor's principal indebtedness consists of approximately \$3 million owed to Land Lender, secured by a first lien against all real estate owned by Debtor, including improvements; \$1.8 million owed to Bank Lender secured by livestock, feed, equipment, and substantially all other non-real estate assets of the estate; \$200,000 owed to the Internal Revenue Service; and \$1.5 million owed to pre-petition creditors holding unsecured non-priority claims. The Debtor is current on all obligations arising after commencement of this bankruptcy case.

Mr. Doe would testify that from the beginning of this case, Debtor has worked in good

faith toward confirmation of the Plan. The Plan provisions relating to the secured creditors were formulated after good faith, arms-length negotiations with those creditors. The Plan provisions relating to treatment of unsecured non-priority claims were formulated after good faith, arms-length negotiations with the Official Unsecured Creditors Committee.

Mr. Doe would testify that the principal purpose of the Plan is to reorganize the Debtor's dairy operation, and is not to avoid taxes or any applicable securities laws. Confirmation of the Plan is consistent with the important public policy of maintaining the adequacy of the nation's supply of milk. The Debtor has proposed the Plan in good faith after negotiations with creditors and not by any means known to the Debtor that are forbidden by law. The Debtor solicited acceptances of the Plan only after approval of the disclosure statement. This testimony establishes that Bankruptcy Code §1129(a)(3) has been satisfied.

4. §1129(a)(4). Mr. Doe would testify that any payment made by the Debtor to any professional person for services or for costs and expenses in connection with the plan or incident to this bankruptcy case has been approved by this Court. The Debtor does not intend to make any further such payments without Court approval if Court approval is required. There are no persons issuing securities or acquiring property under the Plan. This testimony establishes that Bankruptcy Code §1129(a)(4) has been satisfied.

5. §1129(a)(5). Mr. Doe would testify that the Debtor has fully and accurately disclosed section \_\_\_ of the Disclosure Statement the identity and any affiliations of the all of the individuals proposed to serve as officers and directors of Debtor after the Plan is confirmed, and the compensation to be paid to such individuals after confirmation of the Plan. In Mr. Doe's opinion the appointment or continuance in office of such individuals is consistent with the interests of creditors. This testimony establishes that Bankruptcy Code §1129(a)(5) has been

satisfied.

6. §1129(a)(6). Mr. Doe would testify that he believes and is reliably informed that the Debtor does not charge any rate that is subject to the jurisdiction of any governmental regulatory commission which would require it to seek such commission's approval of any rate changes. This testimony establishes that Bankruptcy Code §1129(a)(6) has been satisfied.

7. §1129(a)(7). Mr. Doe would testify that he has been primarily responsible for directing the preparation of an estimate of the expected proceeds from a liquidation of Debtor's assets in the hypothetical event that all of Debtor's assets were to be liquidated pursuant to chapter 7 of the Bankruptcy Code. The liquidation analysis is attached to the Court approved Disclosure Statement as Exhibit (X). For purposes of the liquidation analysis, Debtor has assumed that this chapter 7 case converted to a case under chapter 7 on the plan effective date, that a chapter 7 trustee were appointed, that the trustee would abandon an asset if there is no realizable equity for the trustee after payment of claims secured by the collateral and any estate tax liabilities resulting from the sale, and that hypothetical liquidation sales for cash would be made with the assistance of professional brokers as appropriate. Mr. Doe would testify that in his opinion the liquidation analysis reflects a reasonable estimate of liquidation values; and, based on the amount of secured debt held by creditors and the nature of their collateral and the tax liabilities resulting from the sale of the collateral, holders of unsecured non-priority claims likely would receive less than 15% of the amount of their allowed claims in a chapter 7 liquidation. By contrast, under the plan, such holders are to receive at least 50% of the allowed claims over a period of years without interest. This testimony establishes that Bankruptcy Code §1129(a)(7) has been satisfied.

8. §1129(a)(8). The Plan contains seven impaired classes of claims, Classes 1, 2,

3, 4, 5, 6 and 7. As shown by the Tally of Ballots presented to the Court, all seven classes of impaired claims voted to accept the plan, including all classes of secured claims, unsecured priority claims, and unsecured non-priority claims. Therefore, the Debtor has satisfied Bankruptcy Code §1129(a)(8), and it is not necessary for the Debtor to satisfy the Bankruptcy Code § 1129(b) requirements as to any dissenting classes.

9. §1129(a)(9). Section (X) of the plan provides that each allowed administrative claim is to be paid in full in cash on the effective date of the plan, or when the claim is allowed, unless the holder of the claim agrees otherwise. The plan also provides that each tax claim will be paid the full allowed amount of its claim, monthly, over a period that ends five years after the date of commencement of the bankruptcy case, with interest at the applicable statutory rate. The plan provides that holders of allowed unsecured non-priority claims are to be paid over the same period. There are no secured tax claims, and no non-accepting classes of claims of a kind specified in Bankruptcy Code §§ 507(a)(1), (a)(4), (a)(5), (a)(6) or (a) 7). Therefore, the Debtor has satisfied Bankruptcy Code §1129(a)(9).

10. §1129(a)(10). The Tally of Ballots presented to the Court shows that all seven impaired classes of claims voted to accept the plan without including any acceptances by an insider. Therefore, Debtor has satisfied the requirement that at least one impaired classes of claims voted to accept the plan without including any acceptances by an insider. The Debtor has satisfied Bankruptcy Code §1129(a)(10).

11. §1129(a)(11). Mr. Doe would testify that the source of funds to make payments to creditors under the Plan will be from future dairy operations. The projections attached as Exhibit (Y) to the Court approved Disclosure Statement were prepared under Mr. Doe's supervision to reflect the financial restructuring contemplated under the Plan. Based upon Mr.

Doe's experience as a dairy farmer for more than 30 years and his knowledge of market conditions and his knowledge of the Debtor's dairy operations and financial affairs, and based further upon Debtor's historical performance, in Mr. Doe's opinion the assumptions that underlie the projections are reasonable and supportable. It is further Mr. Doe's opinion that the Debtor will generate sufficient funds after the effective date of the plan to fund fully its ongoing operations and to pay all obligations set forth in the Plan as and when due.

Mr. Doe would testify that the Debtor has evaluated each of the executory contracts and leases to be assumed or rejected under the Plan. Those executory contracts and leases to be assumed are important to ongoing business operations of the dairy that will continue after the effective date of the Plan. Accordingly, in the good faith exercise of its business judgment, as debtor in possession, Debtor has concluded that is in the best interest of its creditors and the estate to assume such contracts and leases.

Mr. Doe would testify that either the Debtor is not in default under the contracts and leases to be assumed under the plan, or payment of any arrearage is provided for in the Plan. Mr. Doe would testify that he expects and has good reason to believe that, after the effective date of the Plan, the Debtor will perform fully all of its obligations under the contracts and leases to be assumed under the Plan and that future performance by the Debtor is adequately assured.

In Mr. Doe's opinion consummation of the Plan is not likely to be followed by the liquidation or need for further financial reorganization of the Debtor. This testimony establishes that Bankruptcy Code §1129(a)(11) has been satisfied.

12. §1129(a)(12). Mr. Doe would testify that the Debtor is current on its payments to the United States Trustee. The Debtor intends to pay any and all additional fees



payable to the Office of the United States Trustee as and when due and payable. This testimony establishes that Bankruptcy Code §1129(a)(12) has been satisfied.

13. §1129(a)(13). Mr. Doe would testify that the Debtor did not prior to or after its chapter 11 filing provide any retiree benefits to any of its employees. This testimony establishes that Bankruptcy Code §1129(a)(13) is not applicable and therefore has been satisfied.

14. §1129(a)(14) and (15). Because the Debtor is a corporation, Bankruptcy Code §§ 1129(a)(14) and (15), which relate to domestic support obligations and required payments by individual debtors, are not applicable and therefore are satisfied.

15. §1129(a)(16). Because the plan does not provide for the transfer of property, Bankruptcy Code § 1129(a)(16) is satisfied.