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13 **UNITED STATES BANKRUPTCY COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN FRANCISCO DIVISION**

16 In re:

CASE NO.: 08-32514

17 HELLER EHRMAN LLP,

Chapter 11

18 Post Confirmation  
19 Liquidating Debtor.

**MEMORANDUM OF POINTS AND  
20 AUTHORITIES IN SUPPORT OF POST  
21 CONFIRMATION LIQUIDATING  
22 DEBTOR HELLER EHRMAN LLP'S  
23 MOTION FOR AUTHORITY TO MAKE  
24 FINAL DISTRIBUTION TO THE  
25 EMPLOYEE AND PBGC GENERAL  
26 UNSECURED CREDITORS PURSUANT  
27 TO 11 U.S.C. §105(a) AND JOINT PLAN OF  
28 LIQUIDATION OF HELLER EHRMAN  
LLP (AUGUST 9, 2010) AND NOTICE OF  
OPPORTUNITY FOR HEARING**

**[No hearing will be held unless affected party  
responds to this Motion – Bankruptcy Local  
Rule 9014-1]**

**TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY  
JUDGE:**

Pursuant to 11 U.S.C. § 105(a), Federal Rules of Bankruptcy Procedure 3009 & 3021, and the Confirmed Plan in this bankruptcy case, the post-confirmation liquidating debtor Heller Ehrman L.L.P., by and through its Chapter 11 Plan Administrator, Michael K. Burkart, submits this Memorandum of Points and Authorities (“M.P.A.”) in support of its Motion for entry of an order authorizing the Debtor to make a final (sixth) distribution of 4% to the Debtor’s former

1 employee and Pension Benefit Guaranty Corporation general unsecured claimants and for related  
2 relief as set forth in the Motion.<sup>1</sup>

### 3 **I. FACTUAL BACKGROUND**

4 The Factual Background has been set forth in the accompanying Motion, and those facts are  
5 fully incorporated into this M.P.A.

### 6 **II. LEGAL ARGUMENT**

7 Federal Rule of Bankruptcy Procedure 3021 provides that, “after a plan is confirmed,  
8 distribution shall be made to creditors whose claims have been allowed...” The rule “does not  
9 provide guidance concerning when distribution should occur,” but “[d]istribution is made in  
10 accordance with the terms of the confirmed plan. Thus, the timing of distribution and manner of  
11 distribution may be covered in the plan. Rule 3021 allows **maximum flexibility to the drafter  
12 of the plan in the area of distribution.**” 9 Collier on Bankruptcy ¶ 3021.01 (A. N. Resnick and  
13 H. J. Sommer, eds. 16<sup>th</sup> ed. 2018) (emphasis added).

14 Here, the Confirmed Plan at section 5.20 states, *inter alia*, that:

15 “Distributions to holders of Allowed Claims in Classes 7 through 9 **shall be made as soon as**  
16 **practicable as determined by the business judgment of the Plan Administrator** based  
17 upon the amount of funds to be distributed relative to the administrative costs of making a  
distribution;”

18 and,

19 “Except as otherwise agreed by the holder of a particular Claim...all amounts to be paid by  
20 the Liquidating Debtor under the Plan **shall be distributed in such amounts and at such**  
21 **times as is reasonably prudent, in the form of interim and/or final distributions,** with  
22 sufficient reserves established to satisfy the reserve requirements for Disputed Unsecured  
Claims, Professional Fees and anticipated Plan Expenses.”

23 Plan at § 5.20 (Emphasis added).

24 Thus, the Plan provides that the Plan Administrator may make “interim and/or final  
25 distributions” at such times and in such amounts that he deems “reasonably prudent” and  
26 according to his “business judgment.”

27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise noted, all capitalized terms shall have the same meaning as set forth in the  
Motion.

1 In addition, the Plan provides that the Court has jurisdiction over this matter and shall retain  
2 jurisdiction, *inter alia*, “To approve interim and/or final distributions to creditors, including the  
3 approval of any publication notices, which the Plan Administrator in his sole discretion believes  
4 should be noticed to creditors.” See Plan, Article IX, Retention of Jurisdiction, at (xiii).

5 11 U.S.C. § 105(a) provides, “The court may issue any order, process, or judgment that is  
6 necessary or appropriate to carry out the provisions of this title.” Interim distribution orders are  
7 authorized under section 105(a). *In re Frantz*, 2020 U.S. Dist. LEXIS 51778 at \*38 (citing *In re*  
8 *Bird*, 565 B.R. 382, 400 (Bankr. S.D. Tex. 2017) (“The Code does not bar an interim distribution,  
9 and when it benefits the estate to do so, the Court is authorized to approve any interim  
10 distribution using its authority pursuant to § 105(a). Here, the interim distribution will maximize  
11 distribution to the creditors because it will decrease the amount lost to bank fees. Stated  
12 differently, an interim distribution right now is in the best interests of the estate.”). The Plan also  
13 provides that the Court has jurisdiction over this matter and shall retain jurisdiction, *inter alia*,  
14 “To approve interim and/or final distributions to creditors, including the approval of any  
15 publication notices, which the Plan Administrator in his sole discretion believes should be noticed  
16 to creditors.” See Plan, Article IX, Retention of Jurisdiction, at (xiii).

17 In addition, although Bankruptcy Rule 3009 provides for payment of dividends to creditors in  
18 a Chapter 7 case, a bankruptcy court, by order, may provide for distributions under Rule 3009,  
19 superseding the rule’s contemplation of a Chapter 7 case. See 9 Collier on Bankruptcy ¶ 3009.02  
20 (A. N. Resnick and H. J. Sommer, eds. 16<sup>th</sup> ed. 2018) (“Rule 3009 does not eliminate court  
21 participation in the distribution process, and circumstances may require a court order in  
22 connection with distributions (e.g., to approve interim distributions or when the trustee fails to  
23 act.”).

24 Bankruptcy courts have granted similar requests to make an estimated one-time final  
25 distribution to employees. See, e.g., Order Authorizing One-Time Distribution to Debtor’s  
26 Employees (Union and Non-Union), Dkt. No. 5136 in *Tri Valley Growers*, Bankruptcy Case No.  
27 00-44089 in the United States Bankruptcy Court for the Northern District of California, a true and  
28 correct copy of which is attached as Exhibit 4 to the Request for Judicial Notice filed herewith.

1 Because of the time-consuming and expensive process involved, the Plan Administrator is  
2 requesting to make a final distribution of 4% to the Employee and PBGC claimants now, ahead of  
3 the final distribution that soon will be made to non-employee general unsecured creditors in this  
4 case. The proposed 4% distribution percent roughly approximates the anticipated distribution  
5 percentage that will be paid to the other, non-employee general unsecured creditors in the final  
6 distribution on their claims, although it is possible that the actual distribution percentage  
7 ultimately paid to the non-employee general unsecured creditors may be slightly higher or lower  
8 than 4%.

9 Nevertheless, the Plan Administrator believes that the benefits of obtaining authorization for,  
10 and making, this final distribution to the Employee and PBGC claimants now outweighs the risk  
11 of any potential discrepancy that may occur. Approving this final distribution will not only allow  
12 the Debtor to close the case by year's end, but it will avoid the need to make a second distribution  
13 to Employees, and PBGC claimants should the actual final distribution percentage differ, which  
14 will result in the avoidance of substantial additional costs and expenses to the estate. Therefore,  
15 the Plan Administrator believes that approval of the proposed Final Employee and PBGC  
16 Distribution is in the best interests of creditors.

17 As discussed in the First, Second, Third, and Fourth Distribution Motions (hereafter  
18 collectively referred to as the Prior Distribution Motions), and approved in the Orders thereto,  
19 and/or consistent with Articles 1.54, 1.58, 1.137, 4.8, 4.9, 4.10, 5.20, 5.21, 5.22(i), (iv), (vi) &  
20 (vii), 5.26 and 5.31 of the Plan, no distribution will be made with respect to De Minimis Claims,  
21 disallowed Disputed Claims, Unliquidated Claims, Late-Filed Claims, or Subordinated/Interest  
22 Claims (as defined and discussed in Prior Distribution Motions and their exhibits/amended  
23 exhibits). Burkart Decl. at ¶ 25.

24 A reserve account has been established with respect to De Minimus Claims and Disputed  
25 Claims consistent with the Plan. Claims that are no longer De Minimus as of the Final Employee  
26 and PBGC Distribution have been included on Exhibit 1 and/or Exhibit 2 and will be paid in this  
27 final distribution. Employee Claims that are still De Minimus as of the Final Employee and  
28 PBGC Distribution will not receive a distribution, and the funds once reserved for those claims

1 will be redistributed to the holders of allowed general unsecured claims consistent with the Plan.  
2 See Plan, Articles 5.26 & 5.28. Burkart Decl. at ¶ 26.

3 A thorough review of all scheduled and filed claims has been conducted, and all of the  
4 Debtor's claim objections to Disputed Claims have now been fully resolved, except for the  
5 Paravue claim. Disputed Claims that have been allowed, if any, have been included on Exhibit 1  
6 and/or Exhibit 2 and will be paid in the Final Employee and PBGC Distribution. For Disputed  
7 Claims that have been disallowed, the funds once reserved for those claims will be redistributed  
8 to the holders of allowed general unsecured claims consistent with the Plan. See Plan, Articles  
9 5.20, 5.21, 5.22(i), (iv), (vi) & (vii). Burkart Decl. at ¶ 27.

10 No reserve account was ever established with respect to Unliquidated Claims, and no order  
11 was ever entered by the Court requiring such a reserve. There will be no distribution on such  
12 claims. See Plan, Articles 1.54, 1.137, & 5.22(iii). Burkart Decl. at ¶ 28.

### 13 **III. CONCLUSION**

14 WHEREFORE, based upon the Motion, the M.P.A., the Burkart Declaration, and the  
15 Exhibits attached to the Burkart Declaration, the Debtor requests that the Court enter an order  
16 granting the relief requested in the Motion.

17 Dated: August 13, 2020

18 FELDERSTEIN FITZGERALD  
19 WILLOUGHBY PASCUZZI & RIOS LLP

20 By: /s/ Thomas A. Willoughby  
21 THOMAS A. WILLOUGHBY  
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