Docket #1114 Date Filed: 03/12/2019

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
TOISA LIMITED, *et al.*,	17-10184 (SCC)
Debtors.[1]	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THIRD AMENDED JOINT PLAN OF LIQUIDATION FOR TOISA LIMITED AND CERTAIN OF ITS AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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Dated: March 12, 2019
New York, New York

[1] The Debtors in these chapter 11 cases, are as follows: Trade Prosperity, Inc.; Toisa Limited; United Courage, Inc.; Trade Vision, Inc.; United Journey, Inc.; United Kalavryta, Inc.; Trade Sky, Inc.; Trade Industrial Development Corporation; United Honor, Inc.; Trade Will, Inc.; United Leadership Inc.; United Seas, Inc.; United Dynamic, Inc.; United Emblem, Inc.; United Ideal Inc.; Trade Unity, Inc.; Trade Quest, Inc.; Trade Spirit, Inc.; Trade Resource, Inc.; United Ambassador, Inc.; Edgewater Offshore Shipping, Ltd.; United Banner, Inc.; Toisa Horizon, Inc.; and Trade and Transport Inc.

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TO THE HONORABLE JUDGE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE:

Toisa Limited ("Toisa")[2] and certain of its affiliates, as debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), hereby submit this memorandum of law (this "Memorandum of Law") in support of confirmation of the *Third Amended Joint Plan of Liquidation for Toisa Limited and Certain of its Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*, dated January 24, 2019 (as may be amended, modified, or supplemented from time to time, the "Plan") [Docket No. 1028]. In further support of confirmation of the Plan, the Debtors have filed concurrently herewith (i) the *Declaration of Jonathan Mitchell In Support of Confirmation of the Third Amended Joint Plan of Liquidation for Toisa Limited and Certain of its Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Mitchell Declaration"), and (ii) the *Declaration of Jamie O'Connell In Support of Confirmation of the Third Amended Joint Plan of Liquidation for Toisa Limited and Certain of its Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "O'Connell Declaration"), and respectfully state as follows:

PRELIMINARY STATEMENT

1. As a result of a sudden and prolonged decline in oil prices and the resulting decrease in capital expenditures by oil exploration and production companies, the Debtors filed these Chapter 11 Cases on January 29, 2017 in order to seek a path towards maximizing the value of its assets for the benefit of its creditors and other stakeholder constituencies.

2. Since the commencement of these Chapter 11 Cases, the Debtors have engaged in discussions and negotiations with prepetition lenders, the Informal

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Plan (as defined below).

Committee, and the Creditors' Committee, in an effort to reach a global resolution with respect to these cases. The Plan is the product of extensive negotiations among those parties. The purpose of the Plan is to allow the Debtors to liquidate all of their assets and address their liabilities in an orderly manner. The Plan provides for the distribution of substantially all of the Debtors' assets, including proceeds from the completed, ongoing, and future sale or assignment of substantially all of the Debtors' assets, including the Oceangoing Vessels, the Offshore Vessels, and the Newbuild Tanker Construction Contracts. The proceeds from these sales have been and will continue to be used to pay down the Debtors' prepetition secured indebtedness and fund distributions under the Plan. The Plan also provides that the Plan Administrator will continue to liquidate and wind down any remaining assets of the Debtors not sold prior to the Effective Date.

3. As set forth herein, the Plan satisfies each of the requirements for confirmation under section 1129 of the Bankruptcy Code. The Debtors believe that the liquidation contemplated by the Plan is in the best interests of its creditors. If the Plan is not confirmed and the settlements with and releases of the Debtors' various creditors and stakeholders are not approved, the Debtors believe that they will be forced to liquidate in a manner that will likely result in protracted and costly litigation with its various constituencies.

4. Of all the creditors and parties in interests in these Chapter 11 Cases, only the United States Trustee filed an objection to confirmation of the Plan. As set forth herein, that objection should be overruled in its entirety because the opt-outs for the Third Party Release (as hereinafter defined) in the solicitation materials comply with this Court's jurisprudence on consensual third party releases.

5. As demonstrated in this Memorandum of Law, the Plan satisfies all applicable requirements under the Bankruptcy Code for confirmation. Accordingly, the Debtors respectfully request that the Plan be confirmed.

FACTS

6. The factual background relevant for confirmation of the Plan is set forth in the Disclosure Statement, the Mitchell Declaration, the O'Connell Declaration, the *Certification of P. Joseph Morrow IV with Respect to the Tabulation of Votes of the Second Amended Joint Plan of Liquidation for Tisa Limited and Certain of its Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Voting Certification"),[3] and to the extent necessary, the evidence that will be presented or adduced at the hearing to confirm the Plan, all of which is incorporated herein by reference as though set forth in full.

ARGUMENT

7. To obtain confirmation of the Plan, the Debtors must establish by a preponderance of the evidence that the Plan satisfies the requirements set forth under section 1129 of the Bankruptcy Code. *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 243–44 (Bankr. S.D.N.Y. 2009) (finding that the plan proponent bears the burden of establishing compliance with the factors set forth in section 1129 by a preponderance of the evidence); *see also In re Young Broad. Inc.*, 430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010) (same). As more fully set forth below, the Debtors respectfully submit that the Plan complies with, and satisfies, each of the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.

[3] The Voting Certification will be filed in advance of the confirmation hearing.

A. The Plan Complies with Section 1129(a)(1) of the Bankruptcy Code.

8. Section 1129(a)(1) of the Bankruptcy Code provides that a plan must comply with the applicable provisions of the Bankruptcy Code—notably, those governing classification of claims and interests and the contents of a plan. *See* 11 U.S.C. § 1129(a)(1); *In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986) (noting that "[o]bjections to confirmation raised under § 1129(a)(1) generally involve the failure of a plan to conform to the requirements of § 1122(a) or § 1123"), *aff'd,* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 843 F.2d 636 (2d Cir. 1988); *In re Texaco, Inc.*, 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988) ("In determining whether a plan complies with section 1129(a)(1), reference must be made to Code §§ 1122 and 1123 with respect to the classification of claims and the contents of a plan of reorganization."). Thus, to satisfy section 1129(a)(1), the Plan must comply with sections 1122 and 1123 of the Bankruptcy Code.[4] As demonstrated below, the Plan fully complies with sections 1122 and 1123 of the Bankruptcy Code.

B. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code.

9. Under section 1122 of the Bankruptcy Code, claims or interests within a given class must be "substantially similar" to the other claims or interests in the class. 11 U.S.C. § 1122. Such claims or interests may be placed in separate classes provided a rational basis exists for doing so. *See Boston Post Rd. L.P. v. FDIC (In re Boston Post Rd. L.P.)*, 21 F.3d 477, 483 (2d Cir. 1994) (holding that a debtor may classify

[4] *See Kane v. Johns-Manville Corp.*, 843 F.2d at 648–49 (suggesting that Congress intended the phrase "'applicable provisions' in this subsection to mean provisions of Chapter 11 . . . such as section 1122 and 1123"); *see also In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) (same); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978) ("Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of plan."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977) (same).

unsecured claims in separate classes if the debtor adduces credible proof of a legitimate reason for separate classification of similar claims); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis; separate classification was based on bankruptcy court-approved settlement); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (finding that plan proponent "has considerable discretion to classify claims and interests according to the facts and circumstances of the case . . ."); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177–78 (Bankr. S.D.N.Y. 1989) (allowing classification of claims of same rank in different classes).

10. Courts in this district have identified several grounds justifying the separate classification of claims, including (a) where members of a class possess different legal rights and (b) where the debtor has good business reasons for separate classification. *See In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (finding that separate classification of similarly situated claims is appropriate where supported by credible proof to justify separate classification of unsecured claims); *In re Bally Total Fitness of Greater N.Y., Inc.*, Case No. 07-12395 (BRL), 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) (same); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 714, 715–16 (Bankr. S.D.N.Y. 1992).

11. Under the Plan, each Class contains only Claims or Interests that are substantially similar to the other Claims or Interests within that Class. *See* Plan at Art. III. Specifically, the Plan provides for the following Classes of Claims and Interests:

Class	**Designation**
Class 1	Other Priority Claims
Class 2	Existing Citi Tanker Secured Claims

Class 3	Existing Commerzbank I Secured Claims
Class 4	Existing Commerzbank II Secured Claims
Class 5	Existing Credit Agricole Tanker Secured Claims
Class 6	Existing NBG Secured Claims
Class 7	Existing DNB Tanker Secured Claims
Class 8	Existing Danish Ship Tanker Secured Claims
Class 9	Existing ING Bulker Secured Claims
Class 10	Existing Danish Ship Bulker Secured Claims
Class 11	Secured Lenders' SPV Deficiency Claims
Class 12	Existing DVB Guarantee Claim
Class 13	Existing Danish Ship Offshore Guarantee Secured Claims
Class 14	Existing Citizens I Secured Claims
Class 15	Existing Citi Offshore Secured Claims
Class 16	Existing Citizens II Secured Claims
Class 17	Existing Commonwealth Bank of Australia Secured Claims
Class 18	Existing DNB Offshore Secured Claims
Class 19	Existing ING Offshore Secured Claims
Class 20	Existing Wells Fargo Secured Claims
Class 21	Existing BNP Secured Claims
Class 22	Existing Credit Agricole Offshore Secured Claims
Class 23	Existing Danish Ship Offshore Secured Claims
Class 24	Existing DVB Secured Claims
Class 25	Newbuild Tanker Credit Facility Secured Claims
Class 26	G550 Airplane Credit Facility Claims

Class 27	Secured Lenders' Toisa GUCs
Class 28	T&T General Unsecured Claims
Class 29	Class 29 General Unsecured Claims
Class 30	Personal Injury Claims
Class 31	Intercompany Claims
Class 32	Interests in Toisa
Class 33	Intercompany Interests in Other Debtors

12. The Plan provides for the separate classification of Claims and Interests in the Debtors based upon differences in the legal nature and/or priority of such Claims and Interests in accordance with applicable law. The Claims of the various Secured Lenders[5] are classified separately where such Claims are governed by different debt documents and are secured by different collateral, which entitle the Holders of such Claims to different legal rights. Moreover, the unsecured claims held by the Secured Lenders, including their deficiency claims, are separately classified[6] from Class 29 (General Unsecured Claims) because the Secured Lenders have agreed to such separate classification to prevent dilution of the recoveries available to Holders of Class 29 (General Unsecured Claims) through the General Unsecured Claims Distribution Reserve. The unsecured claims in Class 30 (Personal Injury Claims) are separately classified from Class 29 (General Unsecured Claims) because the Holders of Personal Injury Claims may be entitled to recover from certain of the Debtors' insurance policies, the proceeds of which are not necessarily property of the estate to the extent they are subject to claims.

[5] The Classes of Secured Claims are Classes 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

[6] The Classes of unsecured claims held by the Secured Lenders are Classes 11, 12, and 27.

13. Certain Classes for particular Debtors will not contain any Claims or Interests and, accordingly, will be considered vacant and deemed eliminated under the applicable Plan for such Debtor. *See* § Plan 4.4. For example, there is only one Class of Interests with respect to the Plan for each Debtor. As such, Class 32 (Interests in Toisa) will be eliminated from the Plan of every Debtor except Toisa. Conversely, Class 33 (Intercompany Interests in Other Debtors) will be eliminated from the Plan for Toisa, but will not be eliminated from the Plan for any other Debtor.

14. Accordingly, valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, and the Plan satisfies section 1122 of the Bankruptcy Code.

C. The Plan Complies with Section 1123 of the Bankruptcy Code.

15. Section 1123(a) of the Bankruptcy Code sets forth seven requirements with which the Plan must comply. 11 U.S.C. § 1123(a). Specifically, the Plan must:

a. designate classes of claims and interests, other than administrative expense claims under section 507(a)(2) of the Bankruptcy Code, and priority tax claims under section 507(a)(8) of the Bankruptcy Code (11 U.S.C. § 1123(a)(1));

b. specify any class of claims or interests that is not impaired under the plan (11 U.S.C. § 1123(a)(2));

c. specify the treatment of any class of claims or interests that is impaired under the plan (11 U.S.C. § 1123(a)(3));

d. provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest (11 U.S.C. § 1123(a)(4));

e. provide adequate means for the plan's implementation (11 U.S.C. § 1123(a)(5));

f. provide that the debtor's organizational documents prohibit the issuance of non-voting securities (11 U.S.C. § 1123(a)(6)); and

g. contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee (11 U.S.C. § 1123(a)(7)).[7]

16. The Plan satisfies these requirements. First, the Plan designates Classes of Claims and Interests as required by section 1123(a)(1). *See* Plan at Art. III.

17. Second, as required by sections 1123(a)(2) and (3) of the Bankruptcy Code, the Plan specifies which Classes of Claims and Interests are Impaired and Unimpaired, and sets forth the treatment of such Classes. *See* Plan at Art. III.

18. Third, unless a Holder of a Claim or Interest agrees to less favorable treatment, the Plan provides for the same treatment for each Claim or Interest within a particular Class as required under section 1123(a)(4) of the Bankruptcy Code. Therefore, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

19. Fourth, the Plan provides adequate means for implementation as required under section 1123(a)(5) of the Bankruptcy Code. Section 5.1 of the Plan provides for the appointment of the Plan Administrator for the purpose of, *inter alia*, administering claims and any remaining assets, making distributions, and winding down the Debtors' estates. Section 5.2 of the Plan provides that, on the Effective Date, all of the Debtors shall be merged into Post-Effective Toisa for the Plan Administrator to liquidate and wind down. Article V of the Plan includes further provisions with respect to the means for implementation of the Plan, including: (a) that the Cash Collateral Orders shall remain binding; (b) existing securities of the Debtors shall be canceled except as otherwise set forth in the Plan; (c) payments required by the Plan for Post-

[7] Section 1123(a)(8), added with the enactment of the 2005 Bankruptcy Code amendments, is only applicable to individual debtor cases and, therefore, not addressed herein.

Effective Toisa's operations shall be made from the reserves established by the Plan; and (d) certain Causes of Action shall be preserved for the Plan Administrator to pursue at its discretion. Thus, the Plan satisfies section 1123(a)(5).

20. Fifth, with respect to section 1123(a)(6) of the Bankruptcy Code, the Plan is a liquidating plan and does not provide for the issuance of equity or other securities by the Debtors. Accordingly, the requirements of section 1123(a)(6) do not apply to the Plan.

21. Lastly, the Plan complies with section 1123(a)(7) as it contains only those provisions that are consistent with the interests of Holders of Claims and Interests and with public policy with respect to the manner of selection of any officer, director, or trustee under the Plan and any successor to such officer, director, or trustee. Pursuant to section 5.9 of the Plan, the Debtors will disclose the identity of the director and officer for Post-Effective Toisa in the Plan Supplement.

D. <u>The Plan Complies with Section 1123(b) of the Bankruptcy Code.</u>

22. In addition to the provisions required by section 1123(a) of the Bankruptcy Code, the Plan also contains numerous discretionary provisions permitted by section 1123(b) of the Bankruptcy Code. Among other things, the Plan provides for the: (a) impairment of certain Claims; (b) rejection or assumption of executory contracts and unexpired leases; (c) settlement of various Claims and controversies; (d) retention of Causes of Action, except those expressly released under the Plan; and (e) release, injunction, and/or exculpation of certain parties. *See* Plan at Arts. III, VIII, X, V, and X, respectively. Each of these provisions of the Plan is consistent with section 1123(b) of the Bankruptcy Code and permissible under applicable law.

E. The Plan Complies with Section 1123(d) of the Bankruptcy Code.

23. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). Section 8.4 of the Plan provides that "Post-Effective Toisa shall cure any monetary defaults under any Executory Contract and Unexpired Lease to be assumed . . . pursuant to this Plan with the consent of the Informal Committee . . . by paying to the non-Debtor counterparty the full amount of any monetary default in the ordinary course of business." Thus, the Plan complies with section 1123(d) of the Bankruptcy Code.

F. The Plan Complies with Section 1129(a)(2) of the Bankruptcy Code.

24. Section 1129(a)(2) of the Bankruptcy Code also requires the proponent of a chapter 11 plan to comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(2). Notably, the legislative history provides that section 1129(a)(2) is intended to encompass the disclosure and solicitation requirements contained in sections 1125 and 1126 of the Bankruptcy Code. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977) (same); *see also In re Johns-Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986) ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code."); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) ("Code § 1129(a)(2) requires that the proponent of the plan must comply with Chapter 11. Thus, the proponent must comply with the ban on post-petition solicitation of the plan

unaccompanied by a written disclosure statement approved by the court in accordance with Code §§ 1125 and 1126."). As set forth below, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including sections 1125 and 1126, as well as Bankruptcy Rules 3017 and 3018, by distributing the Disclosure Statement and soliciting acceptances of the Plan through Kurtzman Carson Consultants, LLC (the "Solicitation Agent") in accordance with the Order approving the Disclosure Statement Order [Docket No. 1027] (the "Disclosure Statement Order").

i. The Debtors Have Complied with the Disclosure and Solicitation Requirements of Section 1125 of the Bankruptcy Code and the Disclosure Statement Order.

25. Section 1125(b) of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan "unless, at the time of or before such solicitation, there is transmitted . . . the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). The Debtors satisfy section 1125(b) of the Bankruptcy Code.

26. On January 24, 2019, the Bankruptcy Court entered the Disclosure Statement Order. The Disclosure Statement Order approved, among other things, the Disclosure Statement, the contents of the Solicitation Packages (as defined in the Disclosure Statement Order) provided to Holders of Claims entitled to vote on the Plan, the non-voting materials provided to Holders of Claims and Interests not entitled to vote on the Plan, and the relevant dates for voting and objecting to the Plan.

27. Commencing January 31, 2019, the Debtors, through the Solicitation Agent, transmitted the Solicitation Packages in accordance with the Disclosure Statement Order. Voting Certification ¶ 6. Specifically, the Solicitation Agent caused copies of the following documents to be served, via overnight mail, to Classes 2, 3, 4, 5,

6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, and 30 under the Plan: (a) a flash drive containing (i) the Disclosure Statement, (ii) the Plan, and (iii) the Disclosure Statement Order without exhibits; and (b) paper copies of (i) the Confirmation Hearing Notice (as defined in the Disclosure Statement Order); and (ii) the appropriate Ballot, along with a postage-prepaid return envelope.

28. Moreover, as set forth in the Disclosure Statement Order, the Debtors sent a Notice of Non-Voting Accepting Status (as defined in the Disclosure Statement Order) to the Holders of Claims in Classes 1, 8, 9, and 10 of the Plan, which provided notice of: (i) their deemed acceptance and non-voting status with respect to the Plan, (ii) the Plan and the Disclosure Statement (and the means of obtaining a copy of same free of charge), (iii) the Confirmation Hearing and the deadline to object to confirmation of the Plan, and (iv) disclosures regarding the releases set forth in Article X of the Plan.

29. Finally, as set forth in the Disclosure Statement Order, the Debtors sent a Notice of Non-Voting Rejecting Status (as defined in the Disclosure Statement Order) to the Holders of Claims and Interests in Classes 11, 12, 27, 28, 31, 32, and 33 of the Plan, which provided notice of: (i) their deemed rejection and non-voting status with respect to the Plan, (ii) the Plan and the Disclosure Statement (and the means of obtaining a copy of same free of charge), (iii) the Confirmation Hearing and the deadline to object to confirmation of the Plan, and (iv) disclosures regarding the releases set forth in Article X of the Plan, along with a box to opt out of the release in section 10.4(b) of the Plan.

30. The Debtors also caused the Confirmation Hearing Notice to be published on February 8, 2019 in both the *Wall Street Journal* and *Tradewinds*. *See* Docket No. 1065.

31. The Voting Certification demonstrates that the Debtors served the Solicitation Packages in accordance with the requirements of Bankruptcy Rules 2002(b) and 3017(d)–(f) and the Disclosure Statement Order. The Debtors, through their Solicitation Agent, also have complied in all respects with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code. Furthermore, the Debtors satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. *See* 11 U.S.C. § 1125(c). Here, the Debtors caused the same Disclosure Statement to be transmitted to all parties entitled to vote on the Plan. Finally, the Debtors did not solicit acceptances of the Plan from any creditor or interest holder prior to the transmission of the Disclosure Statement. As such, the Debtors have complied with section 1125 of the Bankruptcy Code.

ii. The Debtors Have Satisfied the Plan Acceptance Requirements of Section 1126 of the Bankruptcy Code.

32. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan and provides which holders of claims or interests are entitled to vote on the plan. *See* 11 U.S.C. § 1126. Specifically, section 1126 of the Bankruptcy Code details the requirement for acceptance of a plan, providing, in relevant part, that only holders of allowed claims in impaired classes that will receive or retain property under a plan on account of such claims may vote to accept or reject a plan. *See id.*

33. Section 1126(f) of the Bankruptcy Code provides that a class that is not impaired under a plan is conclusively presumed to have accepted the plan. *See* 11 U.S.C. § 1126(f); *see also SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 290 (2d Cir. 1992) (noting that an unimpaired class is

presumed to have accepted the plan); S. Rep. No. 989, 95th Cong., 2d Sess. 123 (1978) (same). Accordingly, the Debtors did not solicit votes on the Plan from Classes 1, 8, 9, and 10, which are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan.

34. Section 1126(g) of the Bankruptcy Code provides that "a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests." 11 U.S.C. § 1126(g). Accordingly, the Debtors did not solicit votes from Classes 11, 12, 27, 28, 31, 32, and 33 of the Plan, because such Classes are deemed to reject the Plan.

35. The Debtors solicited votes from Holders of Claims in Classes 2, 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, and 30 (each, a "Voting Class," and collectively, the "Voting Classes") because the Holders of Claims in these Classes are Impaired and are entitled to receive a distribution under the Plan. Therefore, the Debtors submit that the solicitation of votes on the Plan was conducted in compliance with sections 1125 and 1126 of the Bankruptcy Code and the Disclosure Statement Order.

G. The Plan Complies with Section 1129(a)(3) of the Bankruptcy Code.

36. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts in the Second Circuit have found that the good faith standard requires "a showing that the plan [was] proposed with honesty, good intentions and with a basis for expecting that a reorganization can be effected." *In re Granite Broad. Corp.*, 369 B.R. 120, 128 (Bankr. S.D.N.Y. 2007) (alteration in original) (internal quotation marks omitted); *Argo Fund Ltd. v. Bd. of Dirs. of Telecom Argentina, S.A. (In re Bd. of Dirs.*

of Telecom Argentina, S.A.), 528 F.3d 162, 174 (2d Cir. 2008) (same) (citing *In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984)); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988) (quoting *Koelbl*).

37. Additionally, good faith is to be determined "in light of the totality of the circumstances surrounding" formulation of the plan. *Pub. Fin. Corp. v. Freeman (In re Pub. Fin. Corp.)*, 712 F.2d 219, 221 (5th Cir. 1983); *see also In re Oneida Ltd.*, 351 B.R. 79, 85 (Bankr. S.D.N.Y. 2006) ("Good faith should be evaluated in light of the totality of the circumstances surrounding confirmation."); *In re Lionel L.L.C.*, Case No. 04-17324 (BRL), 2008 Bankr. LEXIS 1047, at *15–16 (Bankr. S.D.N.Y. Mar. 31, 2008) (looking to the totality of the circumstances in order to determine that a plan was proposed in good faith under section 1129(a)(3)).

38. Here, the Plan is the product of extensive arm's-length negotiations between the Debtors, the Debtors' prepetition Secured Lenders, the Informal Committee, and the Creditors' Committee. It is beyond dispute that the Plan formulation process was conducted in good faith, and all participants in the process were independently represented by counsel. Thus, the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

H. <u>The Plan Complies with Section 1129(a)(4) of the Bankruptcy Code.</u>

39. Section 1129(a)(4) of the Bankruptcy Code requires that a payment "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved, or is subject to approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). This section has been construed to require that all payments of professional fees that are made from assets of a debtor's estate be subject to bankruptcy court review and approval as to their reasonableness. *See In re WorldCom, Inc.*, Case No. 02-13533 (AJG), 2003 WL 23861928, at *54 (Bankr.

S.D.N.Y. Oct. 31, 2003) ("Section 1129(a)(4) has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval as to their reasonableness by the Court."); *see also In re Johns-Manville Corp.*, 68 B.R. at 632 (holding that a bankruptcy court is not required to rule on fees paid by individual creditors to their counsel, but only those fees that affect the administration of a debtor's estate).

40. Pursuant to the order entered by the Bankruptcy Court establishing compensation and expense reimbursement procedures for Professionals established in these Chapter 11 Cases under section 331 of the Bankruptcy Code [Docket No. 37], the Bankruptcy Court has authorized and approved the payment of certain fees and expenses of Professionals retained in the Chapter 11 Cases. All Professional Fee Claims through the Effective Date remain subject to final review by the Bankruptcy Court under the applicable provisions of the Bankruptcy Code. *See* Plan § 2.3. Moreover, Section 2.3 of the Plan provides that all Professionals shall submit final fee applications seeking approval of all Professional Fee Claims no later than thirty (30) days after the Effective Date. *See id.* Section 2.3 of the Plan further provides that, on the Effective Date, with the consent of the Informal Committee, Post-Effective Toisa will establish and fund the Professional Fee Escrow Account with Cash in an amount equal to the Professional Fee Reserve Amount, which shall be used to pay Professional Fee Claims. Therefore, the Plan satisfies section 1129(a)(4) of the Bankruptcy Code.

I. <u>The Plan Complies with Section 1129(a)(5) of the Bankruptcy Code.</u>

41. Section 1129(a)(5) of the Bankruptcy Code requires the proponent of a plan to disclose the identity and affiliation of any individual proposed to serve as a director or officer of the debtor, or a successor to the debtor under the plan. *See* 11 U.S.C. § 1129(a)(5)(A)(i). Section 1129(a)(5)(A)(ii) further requires that the appointment

or continuance of such officers and/or directors be consistent with the interests of creditors and equity security holders and with public policy. *See* 11 U.S.C. § 1129(a)(5)(A)(ii). Finally, section 1129(a)(5)(B) requires the plan proponent to disclose the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider. *See* 11 U.S.C. § 1129(a)(5)(B).

42. Pursuant to section 5.9 of the Plan, the Debtors will disclose the identity of the director and officer of Post-Effective Toisa in the Plan Supplement. Thus, the Plan complies with section 1129(a)(5) of the Bankruptcy Code.

J. Section 1129(a)(6) of the Bankruptcy Code Is Inapplicable to the Plan.

43. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the plan. *See* 11 U.S.C. § 1129(a)(6). As the Debtors are not charging rates that are the subject of any regulatory commission jurisdiction, section 1129(a)(6) of the Bankruptcy Code is inapplicable.

K. The Plan Complies with Section 1129(a)(7) of the Bankruptcy Code.

44. Section 1129(a)(7) of the Bankruptcy Code provides that a plan must be in the "best interests" of creditors and interest holders. *See* 11 U.S.C. § 1129(a)(7). The "best interests" test requires that each holder of a claim or interest either accept the plan or receive or retain property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated in a hypothetical liquidation under chapter 7 of the Bankruptcy Code. *See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1167 (5th Cir. 1993); *In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 759 (Bankr. S.D.N.Y. 1995); *In re Best Prods. Co., Inc.*, 168 B.R. 35, 72 (Bankr. S.D.N.Y. 1994); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr.

S.D.N.Y. 1990); *In re Ne. Dairy Coop. Fed'n, Inc.*, 73 B.R. 239, 253 (Bankr. N.D.N.Y. 1987); *In re Victory Constr. Co., Inc.*, 42 B.R. 145, 151 (Bankr. C.D. Cal. 1984).

45. Importantly, section 1129(a)(7) of the Bankruptcy Code applies only to Holders of Claims or Interests that have not accepted the Plan. *See* 11 U.S.C. § 1129(a)(7). Pursuant to section 1126(f) of the Bankruptcy Code, a Class that is Unimpaired under the Plan is deemed to have accepted the Plan and, therefore, the "best interests" test does not apply to Holders of Claims or Interests as to those Classes. *See id*; 11 U.S.C. § 1126(f). Accordingly, the "best interests" test does not apply to Holders of Claims in Classes 1, 8, 9, and 10 because those Classes are Unimpaired.

46. Here, the "best interests" test is satisfied as to each member of an Impaired Class that has rejected or is deemed to reject the Plan. Notably, the Plan already provides for the liquidation of the Debtors. Liquidation under chapter 7 of the Bankruptcy Code would only increase administrative costs in the form of statutory chapter 7 trustee's fees and other professional fees while delaying the administration of these cases and delaying distributions to Holders of Allowed Claims. Moreover, the various settlements reached under the Plan that enhance distributions to Holders of Claims would not be available in a chapter 7 case. As such, the General Unsecured Claims Distribution Reserve would be unavailable outside the context of the Plan. For these reasons, the Debtors submit that the Plan satisfies the "best interests" test under section 1129(a)(7) of the Bankruptcy Code.

L. The Plan Can Be Confirmed Notwithstanding Section 1129(a)(8) of the Bankruptcy Code.

47. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a debtor's plan or be unimpaired under the plan. *See* 11 U.S.C. § 1129(a)(8). Pursuant to section 1126(c) of the Bankruptcy Code, a

class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the claims in that class actually vote to accept the plan. *See* 11 U.S.C. § 1126(c). Pursuant to section 1126(d) of the Bankruptcy Code, a class of interests accepts a plan if holders of at least two-thirds in amount of the allowed interests in that class actually vote to accept the plan. *See* 11 U.S.C. § 1126(d). A class (and each holder of a claim or interest in such a class) that is unimpaired under a plan is conclusively presumed to have accepted the plan. *See* 11 U.S.C. § 1126(f); *see also SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 290 (2d Cir. 1992) (noting that an unimpaired class is presumed to have accepted the plan); S. Rep. No. 989, 95th Cong., 2d Sess. 123 (1978) (section 1126(f) of the Bankruptcy Code "provides that no acceptances are required from any class whose claims or interests are unimpaired under the Plan or in the order confirming the Plan"). A class is deemed to have rejected a plan if the plan provides that the claims or interests of that class do not receive or retain any property under the plan on account of such claims or interests. *See* 11 U.S.C. § 1126(g).

48. Notwithstanding that Classes 11, 12, 27, 28, 31, 32, and 33 of the Plan are deemed to reject the Plan and Class 29 with respect to Debtor Toisa has rejected the Plan,[8] the Plan may still be confirmed under section 1129(b) of the Bankruptcy Code, as more fully set forth below.

[8] The only creditor to have voted with respect to Class 29 as to Debtor Toisa is Banco Nacional de Desenvolvimento Econômico e Social ("BNDES"), which caused Class 29 as to Debtor Toisa to reject the Plan. Based on discussions between the Debtors and BNDES regarding certain modifications to the Plan, BNDES may change its vote to accept the Plan.

M. The Plan Complies with Section 1129(a)(9) of the Bankruptcy Code.

49. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. *See* 11 U.S.C. § 1129(a)(9). In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. *Id.* Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—which generally include domestic support obligations, wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). *See* 11 U.S.C. § 1129(a)(9)(B). Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—*i.e.*, priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim. 11 U.S.C. § 1129(a)(9)(C).

50. In accordance with section 1129(a)(9), the Plan provides that each Holder of an Allowed Administrative Claim will receive payment in full in Cash on, or as soon as reasonably practical after, the later of the Effective Date, the date on which the Administrative Claim becomes Allowed, or the date on which an Allowed Administrative Claim becomes payable under any agreement relating thereto. *See* Plan § 2.1. In addition, the Plan provides that each Holder of an Allowed Priority Tax Claim

shall receive Cash in an amount equal to such Claim on, or as soon as is reasonably practicable after, the later of the Effective Date, the date such Allowed Priority Tax Claim is due and payable in the ordinary course, or as otherwise permitted under section 1129(a)(9) of the Bankruptcy Code. Here, however, there are no Allowed Priority Tax Claims against the Debtors. Any recovery on account of tax liability under the Plan, if any, shall be limited to distributions solely out of the General Unsecured Claims Distribution Reserve.

51. *See* Plan § 2.2. Furthermore, the Plan provides that Holders of Other Priority Claims will receive an amount in Cash equal to the unpaid portion of such Allowed Other Priority Claim. *See* Plan § 3.4(a)(ii). Finally, the Plan provides that each Holder of a Secured Lenders' Superpriority Claim shall receive payment in full in Cash in the amounts set forth on Exhibit 1 annexed to the Plan, and each Secured Lender has agreed to such treatment even though it may result in less than payment in full. *See* Plan § 2.4. On the Effective Date, there will be sufficient Cash to pay Allowed Administrative Claims, Allowed Secured Lenders' Superpriority Claims, Allowed Priority Tax Claims, and Allowed Other Priority Claims and to fund the Professional Fee Escrow Account. *See* Mitchell Declaration ¶ 35. Accordingly, the Plan satisfies section 1129(a)(9) of the Bankruptcy Code.

N. <u>The Plan Satisfies Section 1129(a)(10) of the Bankruptcy Code.</u>

52. Section 1129(a)(10) of the Bankruptcy Code requires that at least one impaired class of claims, excluding acceptances of insiders, accept the Plan. 11 U.S.C. § 1129(a)(10). Here, there is at least one Impaired accepting Class with respect to each of the Debtors, which is evident from the Voting Certification. Exhibit A to the Voting Certification includes a table setting forth each of the Debtors and the voting results with respect to each Voting Class for each Debtor. Each of the Debtors either has

(i) a Voting Class that affirmatively accepts the Plan, or (ii) a Voting Class where no member voted. Paragraph 23(p) of the Disclosure Statement Order provides that if "no votes to accept or reject the Plan are received with respect to a particular Voting Class, such class shall be deemed to have voted to accept the Plan." As such, an Impaired accepting Class exists for each of the Debtors. Thus, section 1129(a)(10) of the Bankruptcy Code is satisfied.

O. The Plan Complies with Section 1129(a)(11) of the Bankruptcy Code.

53. Section 1129(a)(11) of the Bankruptcy Code requires that the Bankruptcy Court find that the Plan is feasible as a condition precedent to confirmation. *See* 11 U.S.C. § 1129(a)(11). To demonstrate that a plan is feasible, it is not necessary that success be guaranteed. *See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."). "In making determinations as to feasibility . . . a bankruptcy court does not need to know to a certainty, or even a substantial probability, that the plan will succeed. All it needs to know is that the plan has a reasonable likelihood of success." *In re Adelphia Bus. Solutions, Inc.*, 341 B.R. 415, 421–22 (Bankr. S.D.N.Y. 2003); *see also In re One Times Square Assocs. Ltd. P'ship*, 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993) ("It is not necessary that the success be guaranteed, but only that the plan present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success.") (internal quotations and citations omitted).

54. The feasibility standard is greatly simplified when a liquidating chapter 11 plan is tested against section 1129(a)(11). In the context of a liquidating plan, feasibility is established by demonstrating that the debtor is able to satisfy the conditions precedent to the plan effective date and otherwise has sufficient funds to

meet its post confirmation obligations to pay for the costs of administering and fully consummating the plan and closing the chapter 11 cases. *In re Finlay Enterprises, Inc.*, 2010 WL 6580629, at 2-6 (Bankr. S.D.N.Y. May 18, 2010). As set forth in the Mitchell Declaration, the Debtors will have sufficient funds to administer and consummate the Plan and to close the chapter 11 cases. *See* Mitchell Declaration ¶ 35. Accordingly, the Plan satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code.

P. The Plan Complies with Section 1129(a)(12) of the Bankruptcy Code.

55. Section 1129(a)(12) of the Bankruptcy Code requires that either all fees payable under section 1930 of title 28 of the United States Code, as determined by the Bankruptcy Court at the confirmation hearing, have been paid or that the Plan provides for the payment of all such fees on the Effective Date. *See* 11 U.S.C. § 1129(a)(12). Section 12.1 of the Plan provides for the payment of all statutory fees by the Debtors on or before the Effective Date. The Plan thus satisfies section 1129(a)(12) of the Bankruptcy Code.

Q. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code.

56. Section 1129(a)(13) provides that a plan shall provide for the "continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of [the Bankruptcy Code], . . . for the duration of the period the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). Here, the Debtors do not have retiree benefit obligations. Therefore, the Plan complies with section 1129(a)(13) of the Bankruptcy Code.

R. Sections 1129(a)(14), (15) and (16) of the Bankruptcy Code Are Not Applicable to the Plan.

57. Section 1129(a)(14) of the Bankruptcy Code requires the payment of certain domestic support obligations. *See* 11 U.S.C. § 1129(a)(14). The Debtors have

none and, therefore, section 1129(a)(14) is inapplicable here. Section 1129(a)(15) of the Bankruptcy Code imposes certain payment obligations on individual debtors. *See* U.S.C. § 1129(a)(15). The Debtors are not individuals and, therefore, section 1129(a)(15) is inapplicable here. Section 1129(a)(16) of the Bankruptcy Code applies to transfers by "a corporation or trust that is not a moneyed, business, or commercial corporation or trust." 11 U.S.C. § 1129(a)(16). The legislative history of section 1129(a)(16) of the Bankruptcy Code demonstrates that this section was intended to "restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust." *See* H.R. Rep. No. 31, 109th Cong., 1st Sess. 145 (2005); *In re Sea Launch Co., L.L.C.*, Case No. 09-12153 (BLS), 2010 Bankr. LEXIS 5283, at *41 (Bankr. D. Del. July 30, 2010) ("Section 1129(a)(16) by its terms applies only to corporations and trusts that are not moneyed, business, or commercial.") (internal quotation marks and citation omitted). For the reason that the Debtors are not nonprofit entities, section 1129(a)(16) is inapplicable here.

S. Section 1129(b) of the Bankruptcy Code Is Satisfied as to the Plan.

58. Section 1129(b) of the Bankruptcy Code permits confirmation of a plan in circumstances where not all impaired classes of claims and interests accept a plan, as required by section 1129(a)(8). This mechanism is known colloquially as "cram down."

59. Section 1129(b) provides in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph 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).

60. Thus, under section 1129(b), the Bankruptcy Court may "cram down" a plan over the rejection or "deemed rejection" of a plan by impaired classes of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. See, e.g., *Johns-Manville Corp*., 843 F.2d at 650.

61. Here, Holders of Claims and Interests in Classes 11, 12, 27, 28, 31, 32, and 33 of the Plan are deemed to reject the Plan. Further Class 29 with respect to Debtor Toisa has voted to reject the Plan.[9] Accordingly, the Debtors invoke section 1129(b) with respect to these Classes.

i. Section 1129(b)(1): The Plan Does Not Discriminate Unfairly.

62. The unfair discrimination standard of section 1129(b)(1) ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes. *See In re LightSquared Inc*., 513 B.R. 56, 99 (Bankr. S.D.N.Y. 2014). Generally, a plan unfairly discriminates, in violation of section 1129(b)(1) of the Bankruptcy Code, only if similar classes are treated differently without a reasonable basis for the disparate treatment. *See In re Buttonwood Partners, Ltd*., 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990). Accordingly, as between two classes of claims or two classes of interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, see, e.g., *In re Johns-Manville Corp*., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988), or (ii) taking

[9] See footnote 8, *supra*.

into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment, see, e.g., *In re Buttonwood Partners Ltd.*, 111 B.R. at 63.

63. To determine whether a plan discriminates unfairly, courts consider "whether (1) there is a reasonable basis for discriminating, (2) the debtor cannot consummate the plan without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of discrimination is in direct proportion to its rationale." *In re Genco Shipping & Trading Ltd.*, 513 B.R. at 241-42 (internal citation omitted).

64. Here, Claims and Interests have been classified under the Plan in accordance with section 1129(a) of the Bankruptcy Code, and the Plan does not "discriminate unfairly" with respect to any of the rejecting classes. The Classes of Claims that are deemed to reject the Plan are Classes 11 (Secured Lenders' SPV Deficiency Claims), Class 12 (Existing DVB Guarantee Claim), Class 27 (Secured Lenders' Toisa GUCs), Class 28 (T&T General Unsecured Claims), and Class 31 (Intercompany Claims). Moreover, Class 29 (General Unsecured Claims) at Debtor Toisa has currently voted to reject the Plan.[10] There is a reasonable basis for the separate classification and treatment of each of those Classes from other Classes of unsecured claims. Classes 11, 12, 27, and 28 are comprised of unsecured deficiency claims and other unsecured claims held by the Secured Lenders. The Secured Lenders participated in the formulation of the Plan and the classification of those Claims. Those Classes are separately classified from Class 29 (General Unsecured Claims) so that there would not be dilution of the recoveries available to Holders of Class 29 from the General

[10] See footnote 8, *supra*.

Unsecured Claims Distribution Reserve. Conversely, there is no unfair discrimination as to Class 29 (General Unsecured Claims) because it was separately classified to enhance the distributions to the members therein.

65. Similarly, the Plan does not unfairly discriminate against any Class of Interests. With respect to the Plan for each Debtor, there exists only one Class of Interests. With respect to Toisa, the sole Class of Interests is Class 32 (Interests in Toisa). For each of the other Debtors, the sole Class of Interests is Class 33 (Intercompany Interests in Other Debtors). Inasmuch as there is only one Class of Interests with respect to the Plan for each Debtor, it is axiomatic that there cannot be unfair discrimination as between Classes of Interests for that Debtor.

66. Therefore, the Plan does not unfairly discriminate within the meaning of section 1129(b).

ii. Section 1129(b)(1): The Plan is Fair and Equitable.

67. Pursuant to section 1129(b)(2) of the Bankruptcy Code, a plan must be fair and equitable with respect to each class that rejects the Plan. The definition of "fair and equitable" varies based on the priority of the claim or interests of the class.

68. To be "fair and equitable" as to holders of unsecured claims, section 1129(b)(2)(B) of the Bankruptcy Code requires a plan to provide either (i) that each holder of the nonaccepting class will receive or retain on account of such claim property of a value equal to the allowed amount of such claim, or (ii) that a holder of a claim or interest that is junior to claims of the nonaccepting class will not receive or retain any property under the plan. 11 U.S.C. § 1129(b)(2)(B). Here, the "fair and equitable" requirement is satisfied as to each of the Classes of unsecured Claims that have not accepted the Plan because none of the Classes of Claims or Interests that are junior to such nonaccepting Classes will receive or retain any property under the Plan.

Moreover, while Class 29 (General Unsecured Claims) at Debtor Toisa has voted to reject the Plan,[11] absent the agreement of the Secured Lenders to establish the General Unsecured Claims Distribution Reserve, there is an insufficient amount of distributable assets for Holders of Class 29 to receive any distribution in these cases. O'Connell Declaration ¶ 18-19.

69. To be "fair and equitable" as to Holders of Interests, section 1129(b)(2)(C) of the Bankruptcy Code requires a plan to provide either (i) that each holder of an equity interest will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled, or the value of the interest or (ii) that a holder of an interest that is junior to the nonaccepting class will not receive or retain any property under the plan. Here, the "fair and equitable" requirement is satisfied as to Holders of Interests because no Interests junior to such Classes will receive or retain any property under the Plan on account of such junior Interests. There exists only one Class of Interests with respect to the Plan for each Debtor. Therefore, the requirements of section 1129(b) are satisfied.

T. Section 1129(c) of the Bankruptcy Code Is Not Applicable to the Plan.

70. Section 1129(c) of the Bankruptcy Code provides that the court may confirm only one plan. The Plan is the only plan filed in these Chapter 11 Cases and, therefore, section 1129(c) of the Bankruptcy Code does not apply.

U. The Plan Complies with Section 1129(d) of the Bankruptcy Code.

71. Section 1129(d) of the Bankruptcy Code states that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the

[11] See footnote 8, *supra*.

avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. § 1129(d). The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no party that is a governmental unit, or any other entity, has requested that the Court decline to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. For these reasons, the Plan satisfies the requirements of section 1129(d).

V. The Plan Appropriately Provides for the Settlement of Claims and Causes of Action.

72. The Plan incorporates a settlement among the Debtors, the Creditors' Committee, the Informal Committee and the Secured Lenders with respect to an allocation of the assets between Holders of Allowed Existing SPV Secured Tanker Claims, Existing SPV Oversecured Claims, Secured Lenders' SPV Deficiency Claims, the Secured Lenders' Superpriority Claims, Existing DVB Guarantee Claim, Toisa Credit Facility Claims, Newbuild Tanker Credit Facility Secured Claims, Secured Lenders' Toisa GUCs, T&T General Unsecured Claims, and Class 29 General Unsecured Claims for Distribution purposes, which amounts are set forth on Exhibits annexed to the Plan (the "Global Settlement").

73. When evaluating plan settlements pursuant to section 1123(b) of the Bankruptcy Code, courts in the Second Circuit typically consider the standards used to evaluate settlements under Bankruptcy Rule 9019, *i.e.*, the settlement must be "fair and equitable" and in the best interests of the estate. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a

proposed compromise forming part of a reorganization plan is fair and equitable."); *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 256 (Bankr. S.D.N.Y. 2016) ("Courts analyze settlements under section 1123 by applying the same standard applied under Bankruptcy Rule 9019, which permits a court to 'approve a compromise or settlement.'"); *In re Best Prods. Co., Inc.*, 168 B.R. 35, 50 (Bankr. S.D.N.Y. 1994) ("[W]hether the claim is compromised as part of the plan or pursuant to a separate motion, the standards for approval of the compromise are the same. The settlement must be 'fair and equitable,' . . . and be in the best interest of the estate.") (internal citation omitted). The benchmark is whether or not the terms of the proposed compromise "fall[] below the lowest point in the range of reasonableness." *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983); *see also In re Sabine Oil & Gas Corp.*, 555 B.R. at 256-257 (noting that "[i]n assessing whether a settlement is in the best interests of the estate, '[i]t is not necessary for the court to conduct a 'mini-trial' of the facts or the merits underlying [each] dispute.'") (internal citations omitted); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 239 (Bankr. S.D.N.Y. 2007)) (explaining that the court will "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness") (citation omitted).

74. In determining whether a settlement is fair and equitable and in the best interests of the estate, courts in the Second Circuit apply seven interrelated factors:

> (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement; (6) the nature and breadth of releases to be obtained by

> officers and directors; and (7) the extent to which the settlement is the product of arm's length bargaining.

In re Iridium Operating LLC, 478 F.3d 452, 462 (2d Cir. 2007) (internal quotation marks omitted).

75. When evaluating a settlement, courts look to "whether the settlement as a whole is reasonable." *In re Wash. Mut., Inc.*, 442 B.R. 314, 329 (Bankr. D. Del. 2011) ("[T]he Court recognizes that there are benefits to be recognized by a global settlement of all litigation . . . that may recommend a settlement that does not quite equal what would be a reasonable settlement of each part separately."); *see also In re NII Holdings, Inc.*, 536 B.R. 61, 105 (Bankr. S.D.N.Y. 2015) (evaluating the settlement's individual parts and as an integrated whole).

76. In addition, a bankruptcy court should evaluate a settlement "in light of the general public policy favoring settlements." *In re Hibbard Brown & Co.*, 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998). "As a general matter, settlements and compromises are favored in bankruptcy as they minimize costly litigation and further parties' interests in expediting the administration of the bankruptcy estate." *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 640 (Bankr. S.D.N.Y. 2012) (internal citations and quotations omitted); *see also Conn. Ry. & Lighting Co. v. N.Y., N.H. & H.R. Co.*, 190 F.2d 305, 307 (2d Cir. 1951) ("The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues.") (citation omitted).

77. The Global Settlement arises from the joint determination by the Debtors, the Creditors' Committee, the Informal Committee and the Secured Lenders that there are risks to all parties if the legal and factual issues regarding the allocation of assets under the Plan were fully litigated. To avoid those risks, a compromise on those issues is appropriate and in the best interest of all economic stakeholders.

78. Without the Global Settlement, each of the Debtors, the Creditors' Committee, the Informal Committee and the Secured Lenders would be subject to protracted and costly litigation to resolve, among other things, (i) the valuation of the Secured Lenders' vessel collateral, (ii) the Debtors' payment of certain administrative claims under the Court's "Protocol" order entered on July 26, 2018 [Docket No. 727], for which the Creditors' Committee asserted should have been paid by the relevant vessel holding companies out of the respective Secured Lenders' collateral upon sale, and (iii) the funding of the General Unsecured Claims Distribution Reserve.

79. When the *Iridium* factors are applied to the present case, it is clear that the Global Settlement should be approved:

a. The Debtors weighed the costs and benefits of litigating with the Secured Lenders, the Informal Committee and the Creditors' Committee and determined, in the exercise of their business judgment, that a consensual resolution was the best means to maximize the value of their Estates because it would significantly reduce the expense of the Chapter 11 Cases, avoid confirmation and litigation risk, and avoid undue delay.

b. The settlement embodied in the Plan serves the paramount interest of the Debtors' creditors, as is evidenced by the fact that the Global Settlement facilitates the funding of the General Unsecured Claims Distribution Reserve, without which the Holders of Class 29 (General Unsecured Claims) would not receive any distribution in these cases. The General Unsecured Claims Distribution Reserve is comprised of funds that are otherwise subject to the adequate protection claims of the Secured Lenders.

c. All major creditor constituencies, including the Creditors' Committee, support the Plan, as demonstrated by the Voting Certification. No party, except the United States Trustee, objected to the Plan.

d. The parties' experienced restructuring professionals support the Plan, including the legal and financial advisors for the Debtors and each of the major constituencies.

e. As discussed below, the release provisions contained in the Plan are appropriately circumscribed and are supported by adequate consideration.

f. The Plan results from months of hard-fought, good faith, and arm's-length bargaining.

80. Accordingly, the record of these cases demonstrates by the preponderance of the evidence that the Global Settlement is within the settlement standards established by section 1123(b) of the Bankruptcy Code, Bankruptcy Rule 9019, and prevailing case law.

W. The Plan's Injunction, Release, and Exculpation Provisions Are Appropriate and Should Be Approved.

81. Section 1123(b) of the Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan. 11 U.S.C. § 1123(b)(1)–(6). As set forth below, the Plan includes certain of these discretionary provisions, which the Debtors have determined, as fiduciaries of the Estates and in the exercise of their reasonable business judgment, are appropriate in these Chapter 11 Cases.

82. Article X of the Plan sets forth the Plan's injunction, release, and exculpation provisions. As described below, these injunctive, release, and exculpation provisions are proper in the Second Circuit and should be approved.

i. Debtor Release.

83. Section 10.4(a) of the Plan contains releases by the Debtors, Post-Effective Toisa, and the Estates of certain claims[12] against the Released Parties[13] and the Management Company Released Parties[14] (the "Debtor Release").

[12] As more fully set forth in section 10.4(a) of the Plan, except for the claims against Sealion that are referenced in paragraphs 2-3 of the *Stipulation and Agreed Order* [Docket. No. 1109], the claims that are released are those relating to the Debtors, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the Plan Supplement, or the business or contractual arrangements between any Debtor, Estate or non-Debtor Affiliate, any Released Party or Post-Effective Toisa, the reconciliation of Claims and Interests before or during the Chapter 11 Cases, the negotiation, formulation or preparation of the Plan, the Disclosure Statement, the Plan

84. Claims held by a debtor against third parties are property of the estate and may be released in exchange for settlement. *See MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 91–92 (2d Cir. 1988). When reviewing releases in a debtor's plan, courts consider whether such releases are in the best interest of the estate. *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 257 (Bankr. S.D.N.Y. 2009) (analyzing a plan and embodied settlement under a best interests standard); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (finding debtor releases appropriate where they represented a valid exercise of the debtors' business judgment and were in the best interests of the estate), *rev'd in part on other grounds sub nom. Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 627 F.3d 496 (2d Cir. 2010); *In re Bally Total Fitness,* Case No. 07-12395 (BRL), 2007 WL 2779438, at *12 (Bankr. S.D.N.Y. Sept. 17, 2007) (same). Debtors have considerable leeway in issuing releases of their own claims, and such releases are considered non-controversial. *See In re Adelphia Commc'ns Corp.*, 368 B.R. at 263 n.289. Courts in this

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Supplement, or related agreements, instruments, or other documents, or any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date; *provided, however* that nothing in Section 10.4(a) shall be construed to release any party or entity from gross negligence, intentional fraud, willful misconduct, or criminal conduct, as determined by a Final Order of a court of competent jurisdiction.

[13] The Released Parties are: (a) the Debtors, (b) the Reconstituted Toisa Board, (c) the Informal Committee, (d) the Creditors' Committee, and (e) each of the Secured Lenders, and with respect to each of the Persons referred to in clauses (c), (d), and (e) hereof, such Person's current and former subsidiaries, Affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity Holders, representatives, and other professionals, in each case, only in their capacity as such.

[14] The Management Company Released Parties are Sealion, Marine Management Services M.C., Marine Management Bulk Services Inc., Brokerage and Management, Inc., and Trade and Transport (UK) Ltd., and each of their employees, officers and directors, agents, financial advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, representatives, and other professionals, in each case, only in their capacity as such. In the current version of the Plan, Sealion do Brasil Navegação Ltda. ("SBN") is no longer a Management Company Released Party.

District and others recognize that releases by debtors are often in the best interests of the estate where "the costs involved [in pursuing the released claims] likely would outweigh any potential benefit from pursuing such claims." *In re Lear Corp.*, Case No. 09-14326 (ALG), 2009 WL 6677955, at *7 (Bankr. S.D.N.Y. Nov. 5, 2009); *see also In re Cano Petroleum, Inc.*, Case No. 12-31549 (BJH), 2012 WL 2931107, at *15 (Bankr. N.D. Tex. July 18, 2012) (same); *In re Calpine Corp.*, Case No. 05-60200 (BRL), 2007 WL 4565223, at *9 (Bankr. S.D.N.Y. Dec. 19, 2007) (same).

85. Here, the Debtor Release constitutes a sound exercise of the Debtors' business judgment and meets the applicable legal standard—the Debtor Release is fair, reasonable, and in the best interests of the Debtors' Estates. Mitchell Declaration ¶ 17. During the course of negotiations for the Plan, it was clear that the Debtor Release would be necessary to the Plan. *Id.* In exchange for such releases, the Debtors were able to obtain under the Plan an allocation of Claim amounts and assets for distribution between the Secured Lenders and other creditors, including the formation and funding of the General Unsecured Claims Distribution Reserve.

ii. Third-Party Release.

86. Section 10.4(b) of the Plan contains releases by the Releasing Parties[15] of certain claims[16] against the Debtors, Post-Effective Toisa, the Estates, the

[15] The Releasing Parties are: (a) each Holder of a Claim or Interest that is Unimpaired under the Plan, (b) each Holder of a Claim or Interest that votes to accept the Plan, (c) each Holder of a Claim or Interest whose vote to accept or reject the Plan is solicited but that does not vote to accept or reject the Plan, (d) each Holder of a Claim or Interest that is deemed to reject or votes to reject the Plan but does not opt out of granting the releases set forth in the Plan, and (e) the Creditors' Committee, and with respect to each of the Persons referred to in clauses (a) through (e), such Person's current and former subsidiaries, Affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity Holders, representatives, and other professionals, in each case, only in their capacity as such.

[16] As more fully set forth in section 10.4(b) of the Plan, except for claims of the Debtors against the Management Company Released Parties that are referenced in paragraphs 2-3 of the *Stipulation and*

Released Parties, and the Management Company Released Parties (the "Third Party Release").

87. The Third Party Release is appropriate, is an integral component of the Plan and is consistent with the principles articulated by the Second Circuit in *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005). Courts in the Second Circuit typically approve releases of third-party claims against non-debtors where (a) there is consent of the releasing party, or (b) other circumstances in the case justify granting the release. *Id.* at 142. In determining whether the circumstances of a case justify the approval of third-party releases, courts will consider a host of factors, including:

a. whether the estate received substantial consideration;

b. whether the enjoined claims were channeled to a settlement fund rather than extinguished;

c. whether the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; and

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Agreed Order [Docket. No. 1109], the claims that are released are those relating to the Debtors, the Debtors' restructuring or liquidation efforts, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan or the Plan Supplement, the business or contractual arrangements between any Debtor, Estate or non-Debtor Affiliate, Post-Effective Toisa and any Released Party, the reconciliation of Claims and Interests before or during the Chapter 11 Cases, the negotiation, formulation, or preparation of the Plan, the Disclosure Statement, the Plan Supplement, or related agreements, instruments, or other documents, or any other act or omission, transaction, agreement, event or other occurrence including or pertaining to the Debtors and taking place on or before the Effective Date; *provided*, *however*, that nothing in Section 10.4(b) shall be construed to release any party or entity from gross negligence, intentional fraud, willful misconduct, or criminal conduct, as determined by a Final Order of a court of competent jurisdiction; *provided further*, *however*, that Section 10.4(b) shall not release the Debtors, Post-Effective Toisa, the Estates, or the Released Parties from any Cause of Action held by a governmental entity existing as of the Effective Date based on (i) the Internal Revenue Code or other domestic state, city, or municipal tax code, (ii) the environmental laws of the United States or any domestic state, city, or municipality, (iii) any criminal laws of the United States or any domestic state, city, or municipality, (iv) the Securities and Exchange Act of 1934 (as now in effect or hereafter amended), the Securities Act, or other securities laws of the United States or any domestic state, city, or municipality, (v) the Employee Retirement Income Security Act of 1974, as amended, or (vi) the laws and regulations of the Bureau of Customs and Border Protection of the United States Department of Homeland Security.

d. whether the plan otherwise provided for the full payment of enjoined claims.

Id.

88. Assessing third-party releases is not a "matter of factors and prongs." *Id.* Rather, courts must examine the full set of circumstances when making a determination. Courts have approved third-party releases where (a) the releases were essential to the debtor's plan and (b) the released parties substantially contributed to the debtor's reorganization. *See, e.g., In re Sabine Oil & Gas Corp.*, 555 B.R. at 288-92; *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 271–72 (Bankr. S.D.N.Y. 2014); *In re MPM Silicones, LLC*, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y. Sept. 11, 2014) [Docket No. 1001]; *In re Residential Cap., LLC*, Case No. 12-12020 (MG), at *27–28 (Bankr. S.D.N.Y. Dec. 11, 2013) [Docket No. 6065]; *Rosenberg v. XO Commc'ns, Inc. (In re XO Commc'ns, Inc.)*, 330 B.R. 394, 437–38 (Bankr. S.D.N.Y. 2005); *In re Nine West Holdings, Inc.*, Case No. 18-10947 (SCC) (Bankr. S.D.N.Y. February 5, 2019).

89. First, the Third Party Release is consensual because it was conspicuously disclosed in the Plan, the Disclosure Statement and on the Ballots, which provided parties in interest with sufficient notice of such Third Party Release. Therefore, the Third Party Release was consented to by all parties that voted in favor of the Plan or did not opt out of the Third Party Release. Second, the Third Party Release specifically identifies the parties granting and receiving the Third Party Release and the claims being released thereby. Third, the Third Party Release is integral to the Plan and a condition of the settlement embodied in the Plan because the Third Party Release (i) facilitated participation in development of, and consent to, the Plan by the Secured Lenders and (ii) is an essential component of the implementation of the Plan pursuant to section 1123(a)(5) of the Bankruptcy Code. The Third Party Release was a critical

negotiation point in developing the Plan supported by the Secured Lenders and was a material inducement for the Secured Lenders to make substantial contributions to the Plan, including consenting to the use of cash collateral and consenting to the transactions contemplated by, and the Global Settlement embodied in, the Plan. Finally, the Third Party Release was given for fair, sufficient and adequate consideration. Accordingly, the Third Party Release is an integral and important part of the Plan, is appropriate and should be approved.

iii. Third-Party Releases by the Management Companies.

90. Section 10.4(c) of the Plan contains releases by the Management Company Released Parties of certain claims[17] against the Debtors, Post-Effective Toisa, the Estates, the Released Parties, and the other Management Company Released Parties (the "Management Company Release").

91. As set forth above, the Management Company Release should be approved because it is entirely predicated upon the consent of the Management Company Released Parties.

[17] As more fully set forth in Section 10.4(c) of the Plan, except for the claims against Sealion that are referenced in paragraphs 2-3 of the *Stipulation and Agreed Order* [Docket. No. 1109], the claims that are released are those relating to the Debtors, the Debtors' restructuring or liquidation efforts, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan or the Plan Supplement, the business or contractual arrangements between any Debtor, Estate, or non-Debtor Affiliate, Post-Effective Toisa and any Management Company Released Party, the reconciliation of Claims and Interests before or during the Chapter 11 Cases, the negotiation, formulation, or preparation of the Plan, the Disclosure Statement, the Plan Supplement, or related agreements, instruments, or other documents, or any other act or omission, transaction, agreement, event, or other occurrence including or pertaining to the Debtors and taking place on or before the Effective Date; *provided*, *however*, that nothing in Section 10.4(c) shall be construed to release any party or entity from gross negligence, intentional fraud, willful misconduct, or criminal conduct, as determined by a Final Order of a court of competent jurisdiction.

iv. Release of Shareholder.

92. Section 10.4(d) of the Plan contains releases by the Debtors, the Informal Committee (and the individual lender members thereon), and the Creditors' Committee of certain claims[18] against the Shareholder (the "Shareholder Release").

93. The Shareholder Release was previously memorialized in a term sheet (the "Term Sheet"), which was approved by the Bankruptcy Court pursuant to Bankruptcy Rule 9019 on January 22, 2018 [Docket No. 457], whereby the Debtors, the members of the Informal Committee, and the Creditors' Committee agreed to grant the Shareholder Release as part of the Plan in exchange and in consideration (a) for the Shareholder's agreement to facilitate (i) corporate governance changes at the Debtors and (ii) the settlement, collection, and recovery of funds on account of vessel construction contracts or account receivables, and (b) for his reasonable cooperation with and assistance of Toisa's Chief Restructuring Officer through the effective date of a Chapter 11 plan.

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[18] As more fully set forth in Section 10.4(d) of the Plan, the claims that are released are those relating to the Debtors, the Debtors' liquidation, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in a plan of reorganization or liquidation in the Chapter 11 Cases, any Cause of Action, the business or contractual arrangements (including, but not limited to, agreements with any of the Management Companies or SBN) between any Debtor, Post-Effective Toisa (as applicable), or Estate and the Shareholder, the reconciliation of Claims and Interests before or during the Chapter 11 Cases, including, but not limited to, the negotiation, formulation, or preparation of any plan of reorganization or liquidation in the Chapter 11 Cases, including any supplements or a disclosure statement related thereto or any other related agreements, instruments, or other documents, or any other act or omission, transaction, agreement, event, or other occurrence pertaining to the Debtors and taking place on or before the Effective Date; provided, however, that nothing contained herein shall release the Shareholder from any Causes of Action arising from or related to any act or omission that constitutes gross negligence, fraud, willful misconduct, or criminal conduct, and any and all such Causes of Action are expressly preserved; provided further, however, that solely with respect to the dividends paid (either directly or indirectly) to the Shareholder by Toisa Limited on or about May 31, 2016, in an amount totaling $20,000,000 (the "Dividends"), the Debtors, the Informal Committee and the individual lender members thereon, and the Creditors' Committee and the individual members thereon, shall be deemed to have released, and may not assert against the Shareholder or any immediate, mediate or subsequent transferee, any Cause of Action for actual fraudulent conveyances under sections 544 and 548 of the Bankruptcy Code or other applicable law.

v. Exculpation Provisions.

94. The exculpation provision in Section 10.6 of the Plan is limited to estate fiduciaries and parties who have meaningfully and substantially contributed to the success of these Chapter 11 Cases, is appropriately circumscribed and is proper. Indeed, even after *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005), appropriate exculpation provisions for case fiduciaries in chapter 11 plans remain standard practice and have been approved in large chapter 11 cases in this District. *See, e.g., In re Oneida Ltd.*, 351 B.R. 79, 94 n.22 (Bankr. S.D.N.Y. 2006) (approving exculpation provision releasing claims relating to any "pre-petition or post-petition act or omission in connection with, or arising out of, the Disclosure Statement, the Plan or any Plan Document . . . the solicitation of votes for and the pursuit of Confirmation of [the] Plan, the Effective Date of [the] Plan, or the administration of [the] Plan or the property to be distributed under [the] Plan," where, as here, no release was provided for "gross negligence, willful misconduct, fraud, or criminal conduct, and the release cover[ed] only conduct taken in connection with Chapter 11 cases"); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 501 (S.D.N.Y. 2005) ("*Enron II*") (citing Bankruptcy Court's finding that plan's exculpation provision was "appropriately limited to a qualified immunity for acts of negligence and [did] not relieve any party of liability for gross negligence or willful misconduct" and that such clause was "reasonable and customary").

95. Indeed, the Court in *Oneida* found that the "language of the [exculpation] clause, which generally follows the text that has become standard in this [D]istrict, is sufficiently narrow to be unexceptionable." *Oneida*, 351 B.R. at 94 n.22; *see also In re Granite Broad. Corp.*, 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (citing *Oneida* and *Enron II* and approving provision "'follow[ing] the text that has become standard in this

[D]istrict,'" which exculpated the debtors and their pre- and postpetition lender and their respective representatives "for actions in connection, related to, or arising out of the Reorganization Cases") (quoting *Oneida*, 351 B.R. at 94 n.22).

96. Similarly, under the facts and circumstances of these Chapter 11 Cases, the Court should approve the exculpation of third parties who meaningfully contributed to the success of the Chapter 11 Cases. Importantly, *Metromedia* did not overrule the principle underlying the Second Circuit's prior decisions affirming releases of nondebtor parties, *i.e.*, "[i]n bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *see also MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93 (2d Cir. 1988).

97. The Exculpated Parties have participated in good faith negotiations on a Plan that facilitates the expeditious administration of these cases. The exculpation provision is an essential inducement to cause parties to participate collaboratively and constructively in the formulation and negotiation of the Plan. The exculpation provision in the Plan is appropriately tailored to protect the Exculpated Parties from disgruntled, litigious stakeholders seeking an avenue for a recovery to which they are otherwise not entitled. The exculpation provision is also supported by substantial consideration and was critical and indispensable to obtaining the support of the Debtors' key stakeholders, including the Secured Lenders. Thus, the exculpation provision should be approved.

vi. Injunction.

98. The injunction set forth in Section 10.5 of the Plan (the "Plan Injunction") provides that all Persons that have held, currently hold, may hold, or allege

that they hold, claims that are released or are the subject of the exculpation provision under Article X of the Plan are permanently enjoined from commencing or continuing the prosecution of those claims. The Plan Injunction is a necessary part of the Plan precisely because it enforces the release and exculpation provisions that are centrally important to the Plan and the public policy underlying chapter 11. Further, the Plan Injunction is consensual as to any party that did not specifically object thereto. The Plan Injunction is appropriate under sections 1123(b)(6) and 1123(a)(5) of the Bankruptcy Code and should be approved.

X. The Assumption and Rejection of Executory Contracts and Unexpired Leases Should Be Approved.

99. Section 1123(b)(2) of the Bankruptcy Code allows a plan, subject to section 365 of the Bankruptcy Code, to provide for the assumption, rejection, or assignment of any executory contract or unexpired lease not previously assumed or rejected under section 365 of the Bankruptcy Code. 11 U.S.C. § 1123(b)(2). In accordance with section 1123(b)(2), except as otherwise provided in the Plan, Section 8.1 of the Plan provides for the rejection of the Debtors' Executory Contracts and Unexpired Leases (a) not previously assumed or assigned by order of the Bankruptcy Court, (b) not subject to a motion to assume or assign filed on or before the Effective Date, (c) not identified as an Executory Contract or Unexpired Lease to be assumed or assigned pursuant to the Plan Supplement, or (d) that have expired or terminated pursuant to their terms. Pursuant to Section 8.1 of the Plan, the Plan Supplement includes a schedule of Executory Contracts and Unexpired Leases to be assumed. Further, the Debtors will comply with the requirements of section 365 of the Bankruptcy Code and Article VIII of the Plan in conjunction with those agreements that will be

assumed. Accordingly, the assumption and rejection of Executory Contracts and Unexpired Leases should be approved.

RESPONSE TO OBJECTION TO CONFIRMATION

A. The United States' Trustee's Objection Should be Overruled.

100. The United States Trustee filed an objection (the "UST Objection") [Docket No. 1093] on the following bases: (i) the Court should not approve the payment of professional fees for the Informal Committee under the Plan because they are not authorized under section 503(b) of the Bankruptcy Code, (ii) the Plan improperly deems consent to the Third Party Release, and (iii) the Debtors must pay quarterly fees to confirm the Plan. The first and last of those bases of objection have been resolved. As such, only the objection relating to the Third Party Release remains.

i. The Objection Regarding the Professional Fees for the Informal Committee Has Been Resolved.

101. The provision in the Plan providing for the payment of professional fees to the Informal Committee has been removed. The Informal Committee consents to the removal of such provision because the professional fees for the Informal Committee are already authorized under the Cash Collateral Orders, which the Informal Committee has explained to the United States Trustee.

ii. The Third Party Releases Are Consistent With Those Previously Approved by this Court.

102. The United States Trustee asserts that the Third Party Release is not consensual with respect to certain of the Releasing Parties.[19] Specifically, the United

[19] The Releasing Parties are: (a) each Holder of a Claim or Interest that is Unimpaired under the Plan, (b) each Holder of a Claim or Interest that votes to accept the Plan, (c) each Holder of a Claim or Interest whose vote to accept or reject the Plan is solicited but that does not vote to accept or reject the Plan, (d) each Holder of a Claim or Interest that is deemed to reject or votes to reject the Plan but does not opt out of granting the releases set forth in the Plan, and (e) the Creditors' Committee, and with

States Trustee asserts that "creditors or parties in interest that are unimpaired, do not vote to accept or reject the plan, are deemed to reject the Plan, or vote to reject the Plan and do not opt out of the release should not be deemed to have consented to the third-party releases in the Plan."[20]

103. However, this Court has repeatedly deemed such releases to be consensual. *See, e.g.*, *In re Cumulus Media, Inc.*, No. 17-13381 (SCC) (Bankr. S.D.N.Y. May 1, 2018) [Docket No. 749] Hr'g Tr. 158: 11–13 ("I have stated before in a number of contexts my belief that, under the appropriate circumstances inaction is, in fact, action."); *In re BCBG Max Azria Global Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 25, 2017) [Docket No. 624] Hr'g Tr. 139:20–140:7) ("[T]he third-party release is consensual . . . . The Ballots distributed to holder of claims entitled to vote on the plan quoted the entirety of the third-party release and related provisions and definitions of the plan, clearly informing holders of claims entitled to vote of the steps they should take if they disagreed with the scope or the grant of the release. Thus, affected parties were on notice of the third-party release, including the option to opt out of the third-party release . . . ."); *In re Tops Holding II Corp.*, No. 18-22279 (RDD) (Bankr. S.D.N.Y. Nov. 8, 2018) [Docket No. 783] Hr'g Tr. 35:10–12 (noting that "opt-out clauses . . . have long been held to be perfectly appropriate, as long as there's due process").

104. The United States Trustee concedes as much in its objection, which provides that "on February 25, 2019, the Court overruled the United States Trustee's

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respect to each of the Persons referred to in clauses (a) through (e), such Person's current and former subsidiaries, Affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity Holders, representatives, and other professionals, in each case, only in their capacity as such.

[20] UST Objection, at 8.

objections regarding third-party releases similar to the ones set forth here in *Nine West Holdings, Inc.*, 18-10947 (SCC)."[21]

105. Here, the Third Party Release is consensual as to Holders of Claims and Interests that (i) do not vote to accept or reject the plan, (ii) are deemed to reject the Plan and do not opt out of the release, or (iii) vote to reject the Plan and do not opt out of the release. This is so because the Debtors' solicitation materials conform to accepted opt-out procedures approved by this Court. *In re Cumulus Media, Inc.*, No. 17-13381 (SCC) (Bankr. S.D.N.Y. Feb 1, 2018) [Docket No. 434] Hr'g Tr. 32: 7–16 ("So what I would like . . . is literally on the first page in bold a two- line statement that says your rights will be affected if you fail to act."). Each of the Ballots provide the following in conspicuous bold face language on the first page:

> **CAREFULLY READ AND FOLLOW THE ENCLOSED VOTING INSTRUCTIONS FOR COMPLETING THIS BALLOT. IF YOU REJECT THE PLAN, YOU CAN OPT OUT OF THE RELEASE (AS DEFINED HEREIN) BY CHECKING THE BOX ON PAGE 5 HEREIN. IF YOU DO NOT PROPERLY AND TIMELY OPT OUT OF THE RELEASE, YOU WILL BE IRREVOCABLY BOUND BY THE RELEASE.**

Further, each Ballot provides the full language of the Third Party Release, as set forth in Section 10.4(b) of the Plan, in conspicuous bold font.

106. Similarly, each of the Notices of Non-Voting Rejecting Status[22] provides that the following in conspicuous bold face language on the first page:

> **PLEASE TAKE NOTICE THAT YOU MAY OPT OUT OF THE RELEASE IN SECTION 10.4(B) OF ARTICLE X OF THE PLAN BY CHECKING THE BOX ON PAGE 5 OF THIS NOTICE. IF YOU DO NOT PROPERLY AND TIMELY OPT OUT OF THE**

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[21] UST Objection, at 2 n.1.

[22] The Notices of Non-Voting Rejecting Status were sent to Holders of Claims and Interests that are deemed to reject the Plan.

RELEASES, YOU WILL BE DEEMED TO HAVE UNCONDITIONALLY, IRREVOCABLY, AND FOREVER RELEASED AND DISCHARGED THE RELEASED PARTIES (AS DEFINED IN THE PLAN) FROM, INTER ALIA, ANY AND ALL CAUSES OF ACTION (AS DEFINED IN THE PLAN) EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THE PLAN.

Each of the Notices of Non-Voting Rejecting Status also provides the full language of the Third Party Release in conspicuous bold font.

107. The Third Party Release is also permissible with respect to Holders of Claims that are Unimpaired under the Plan. Such claimants did not have the ability to opt out of the Third Party Release.[23] However, Courts have upheld third party releases as to holders of unimpaired claims. *In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("[T]he third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases."); *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co.* (*In re Spansion, Inc.*), 426 B.R. 114, 144 (Bankr. D. Del. 2010), *appeal dismissed*, Civil Nos. 10-369, 10-385 (RBK), 2011 WL 3420441 (D. Del. Aug. 4, 2011) (overruling U.S. Trustee's objection to deemed consent to third party release by non-voting, unimpaired class where no member of the class objected).

108. Moreover, the Secured Lenders that comprise the Classes of Unimpaired claims consent to the Third Party Release and have not objected to the Plan. The classes of Unimpaired claims are Class 1 (Other Priority Claims), Class 8 (Existing Danish Ship Tanker Secured Claims), Class 9 (Existing ING Bulker Secured Claims), and Class 10 (Existing Danish Ship Bulker Secured Claims).

[23] The Notices of Non-Voting Accepting Status, which were sent to Holders of Claims and Interests that are deemed to accept the Plan, did not contain an opt-out box as to the Third Party Release.

109. However, even if the Court finds that the Third Party Release cannot be supported by consent, they should still be approved as nonconsensual releases under the standard set forth in *Metromedia*, 416 F.3d at 142. The Released Parties (including the Secured Lenders, the Debtors, the Reconstituted Toisa Board, the Informal Committee, and the Creditors' Committee) have made substantial contributions to these Chapter 11 Cases. Specifically, the Secured Lenders have agreed to the establishment of the General Unsecured Claims Distribution Reserve out of funds that would otherwise be distributed to the Secured Lenders. The Secured Lenders' Superpriority Claims, which are the adequate protection claims under the Cash Collateral Orders for the diminution in value of the Secured Lenders' collateral, exceed the amounts available for distribution in these cases. O'Connell Declaration ¶ 18-19. Therefore, Holders of General Unsecured Claims would not receive a distribution in these cases without the substantial contributions of the Secured Lenders. Additionally, the Debtors, the Reconstituted Toisa Board, the Informal Committee, and the Creditors' Committee have worked diligently to achieve a global resolution to maximize value for the benefit of all parties in interest in these cases.

110. Similarly the Management Company Released Parties, have made substantial contributions to the Debtors and their estates, by among other things, (i) managing and maintaining the Oceangoing Vessels and Offshore Vessels while the Debtors were exploring restructuring alternatives prior to the appointment of the Chief Restructuring Officer; (ii) assisting and facilitating the Debtors with the marketing and sale of substantially all of their assets, including the Oceangoing Vessels, Offshore Vessels, G-IV Aircraft, and Newbuild Tanker Construction Contracts; (iii) forgoing the assertion of substantial contribution and/or other administrative expense claims, which would in all likelihood been contested, leading to substantial litigation; and

(iv) consenting to provide the Management Company Release in section 10.4(c) of the Plan to the Debtors, Post-Effective Toisa, the Estates, and the Released Parties, which resolves, among other things, certain potential Claims, including Administrative Claims, that may otherwise be asserted against the Debtors.

111. Finally, the United States Trustee asserts that this Court does not have subject matter jurisdiction to release the Management Company Released Parties' or the Released Parties' "current and former subsidiaries, affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity holders, representatives, and other professionals, in each case, only in their capacity as such."[24]

112. A Bankruptcy Court has subject matter jurisdiction over "all civil proceedings arising under title 11, or arising in or ***related to cases*** under title 11." 28 U.S.C. § 1334(b) (emphasis supplied). "Related to" jurisdiction has been interpreted by Courts as being extremely broad and encompassing any action that might have a conceivable effect on the debtors' estate. *See In re SPV OSUS Ltd. v. UBS AG (Luxembourg) S.A.*, 882 F.3d 333, 340 (2d. Cir. 2018) ("In this Circuit, 'a civil proceeding is related to a title 11 case if the action's outcome might have any conceivable effect on the bankrupt estate.'") (citations omitted). Courts in this Circuit have determined that they have "related to" jurisdiction to approve third-party releases where the claims to be released may give rise to indemnification or similar claims of reimbursement against the debtor. *See e.g., In re Sabine Oil and Gas Corp.*, 555 B.R. at 290 (concluding there was jurisdiction to grant third-party releases where debtors had contingent indemnification

[24] UST Objection, at 8.

obligations to creditors); *In re Residential Capital, LLC*, 497 B.R. 720, 745–46 (Bankr. S.D.N.Y. 2013) (holding that "related to" jurisdiction exists where it is premised on a contractual indemnification obligation by a bankrupt entity and finding that the court has such jurisdiction in this case because the third parties hold broad indemnification rights against the debtors); *In re BCBG Max Azria Global Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. Jul. 25, 2017) *Hr'g Tr.* at 136, (Docket No. 624) ("Because such contingent indemnification obligations could have a conceivable effect on the r[es] of the estate, the Court finds that it has subject matter jurisdiction over the third-party releases contained in the plan.").

113. Here, it is clear that the claims that are subject to the Third Party Release could have a conceivable effect on the Debtors' estates. Many of the Secured Lenders have indemnification rights against the Debtors' estates under various credit facility documents. Similarly, the Debtors' organizational documents provide indemnities to the Debtors' current and former directors and officers in connection to defending claims and causes of action arising out of the performance of their duties as directors and officers. *See, e.g.*, *In re BCBG Max Azria Global Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. Jul. 25, 2017), at *Hr'g. Tr.* 135:22-136:6 (Docket No. 624) ("Many of the release parties have indemnification rights against the Debtors' estates pursuant to the terms of the term loan credit agreement, the DIP term loan credit agreement, the ABL credit agreement, the DIP ABL credit Agreement, the plan support agreement, and the Debtors' organizational documents as applicable. Because such contingent indemnification obligations could have a conceivable effect on the [res] of the estate, the Court finds that it has subject matter jurisdiction over the third-party releases contained in the plan."). Further, each of the Management Companies Released Parties have potential claims that can be asserted against the Debtors' estates. Specifically, Sealion

and Marine Management Bulk Services Inc., are wholly-owned non-debtor subsidiaries of Toisa, and Brokerage and Management, Inc., Marine Management Services, M.C., and Trade and Transport (UK) Ltd each could assert that they have claims against the Debtors.

114. Moreover, courts in the Second Circuit routinely confirm chapter 11 plans that contain third party releases similar in form and substance to those in the Plan. *See e.g., In re Nine West Holdings, Inc.*, Case No. 18-10947 (SCC) (Bankr. S.D.N.Y. February 27, 2019); *In re Cumulus Media, Inc.*, Case No. 17-13381 (SCC) (Bankr. S.D.N.Y. May 10, 2018); *In re ARO Liquidation Inc.,* Case No. 16-11275 (SHL) (Bankr. S.D.N.Y. March 30, 2018); *In re BCBG Max Azria Global Holdings, LLC*, Case No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 26, 2017); *In re Gawker Media LLC*, Case No. 11700 (SMB) (Bankr. S.D.N.Y. Dec. 22, 2016). Therefore, the Debtors respectfully submit that the United States Trustee's contention that this Court lacks subject matter jurisdiction is unfounded.

iii. The Objection Regarding the Quarterly Fees Has Been Rendered Moot.

115. At the time the UST Objection was filed, the Debtors informed the United States Trustee that payment for the fees for the fourth quarter of 2018 had already been sent by the Debtors. The United States trustee has since confirmed that the payment was received.

116. For all of the foregoing reasons, the UST Objection should be overruled in its entirety.

REQUEST FOR WAIVER OF BANKRUPTCY RULE 3020(e)

117. The Debtors request that the Confirmation Order be effective immediately upon its entry notwithstanding the 14-day stay imposed by operation of

Bankruptcy Rule 3020(e). Under Bankruptcy Rule 3020(e), "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). As the Advisory Committee notes to Bankruptcy Rule 3020(e) state, "[t]he court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately." Fed. R. Bankr. P. 3020(e), Advisory Comm. Notes – 1999 Amendment. Under the circumstances, it is appropriate for the Court to exercise its discretion with respect to the stay imposed by Bankruptcy Rule 3020(e) and permit the Debtors to consummate the Plan and commence its implementation without delay after entry of the Confirmation Order. A waiver of the 14-day stay is in the best interests of the Estates and all other parties in interest and will not prejudice any party in interest.

CONCLUSION

The Debtors submit that the Plan is the best means to maximize stakeholder value in a manner that fairly reflects creditor priorities. The Plan satisfies all applicable requirements under the Bankruptcy Code and the Bankruptcy Rules. Accordingly, the Plan should be confirmed.

Dated: New York, New York
March 12, 2019

TOISA LIMITED, *on behalf of itself and its affiliated Debtors and Debtors in Possession*

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