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**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

)		Chapter 11
)		
In re:)		Case No. 18-13648
)		
WAYPOINT LEASING HOLDINGS, LTD,)		Jointly Administered
et al.,)		
)		Related Docket No. 180
Debtors.)		
)		

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF
OHI FINANCE II S.A., OMNI HELICOPTERS INTERNATIONAL, S.A.,
AND OMNI TAXI AEREO, S.A. REGARDING
PROPOSED CURE AMOUNT AND RELATED ITEMS**

OHI Finance II, S.A., Omni Helicopters International, S.A., and Omni Taxi Aereo, S.A. (collectively, “OHI”), by and through its undersigned counsel, submits this limited objection and reservation of rights (the “Limited Objection”) regarding the *Notice of Assumption, Assignment and Cure Amount with Respect to Executory Contracts and Unexpired Leases of Debtors* (the “Cure Notice”) [Doc. No 180] filed by the above-captioned debtors (together, the “Debtors”), and related items. In support of this Limited Objection, OHI respectfully states as follows:¹

¹ OHI’s counsel contacted Debtors’ counsel prior to filing this Limited Objection. OHI will continue to work in good faith in an effort to resolve the issues raised in this Limited Objection.

BACKGROUND

1. The Debtors filed petitions for relief under Chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”) on November 25, 2018 (the “Petition Date”). The Debtors are operating their business and managing their properties as debtors in possession under to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors, along with their non-debtors affiliates, operate a helicopter leasing business, leasing and acquiring helicopters throughout the world, with a specific focus on leasing helicopters to service providers servicing the offshore oil and gas industry.

2. Relevant to this Limited Objection, Debtors MSN 41511 Trust, MSN 89007 Trust, MSN 760538 Trust, MSN 760539 Trust, MSN 760541 Trust, MSN 760542 Trust, MSN 760734 Trust, MSN 920119 Trust, and Waypoint Asset Company Number 1 (Ireland) Ltd. are parties to certain Helicopter Operating Lease Agreements (each a “Lease” and, together the “Leases”), under which OHI leases nine helicopters owned by the Debtors.² The Leases designate either Wells Fargo Trust Company, National Association (formerly known as Wells Fargo Bank Northwest, National Association) or the Bank of Utah as the Lessor, and one of the Debtors as an “Owner Participant” which may exercise any and all of the rights to which the Lessor is entitled to under the Leases. The lease arrangements are governed by various documents, including, the Leases, security agreements, and side agreements. A table of all of the Leases, including those that are specifically

² It appears that the Debtors do not intend to assume and assign the Lease associated with the helicopter bearing serial number EC225 – 2905. OHI includes that Lease in this Limited Objection out of an abundance of caution in the event the Lease is eventually assigned.

discussed below in this Limited Objection, with the additional corresponding documents, is set forth in the attached Exhibit A.³

3. Under the terms of the Leases, and with respect to seven of the nine leased helicopters, OHI was required to remit security deposits (collectively, the “Security Deposits”) to the Debtors.⁴ Under such Leases, if there is no default or event of default during the term, the Security Deposits must be returned to OHI within five business days of the date on which the parties satisfy the terms of the Lease. The specific Security Deposits paid under each such Lease are as follows:

	Lease /Serial No.	Security Deposit
1.	SK-76C+ - 760541	\$130,000
2.	SK-76C+ - 760542	\$130,000
3.	SK-76C+ - 760538	\$130,000
4.	SK-76C+ - 760539	\$130,000
5.	EC225 – 2905	\$600,000
6.	AW189 – 89007	€600,000 (\$684,576)
7.	AW139 - 41511	\$170,000
	Total:	\$1,974,576

³ OHI is continuing to analyze the Debtors’ pleadings and its own records. The documents listed in Exhibit A are not intended to be an exhaustive list of the relevant documents, and OHI will supplement as necessary.

⁴ The seven helicopters are: (1) Sikorsky S-76C+ Helicopter, Serial No. 760538; (2) Sikorsky S-76C+ Helicopter, Serial No. 760539; (3) Sikorsky S-76C+ Helicopter, Serial No. 760541; (4) Sikorsky S-76C+ Helicopter, Serial No. 760542; (5) Airbus Helicopters EC225 Helicopter, Serial No. 2905; (6) Leonardo AW189 Helicopter, Serial No. 89007; and (7) Leonardo AW139 Helicopter, Serial No. 41511.

4. All of these Leases provide that the Security Deposits must be returned to OHI at the conclusion of the Lease, so long as certain conditions are met. With respect to the first five Leases identified in the chart above, the respective Lessor, Owner Participant, and OHI entered into separate security deposit side letters (the “Side Letters”). Under the Side Letters, if the Lessor or Owner Participant transfers or assigns its interests in the helicopters, the Debtor, as Owner Participant, must procure that “(i) its obligations and rights are novated and assigned to the New Owner Participant, and (ii) the Security Deposit is transferred to the New Owner Participant.”

5. In addition, with respect to the helicopter bearing serial number EC225 – 2905, the Lease required OHI to remit an additional Security Deposit in the aggregate amount of \$600,000 (in addition to the \$600,000 identified in the chart above). The applicable Lessor of such helicopter is required to periodically refund the additional Security Deposit in the following increments: (a) \$200,000 on September 14, 2017, (b) \$200,000 on June 14, 2018, and (c) \$200,000 on March 14, 2019.⁵

6. OHI and Waypoint Asset Company Number 1 (Ireland) Limited also entered into an Additional Helicopter Security Deposit Side Letter, under which OHI paid a separate security deposit (also referred to as a “Security Deposit” in this Limited Objection) in the amount of \$2,000,000 in exchange for the parties’ agreement to enter into four new operating lease agreements in the future (the “Future Leases Agreement”). Under the terms of the Future Leases Agreement, Waypoint agreed to return the Security Deposit on the earlier of “(i) the date of execution of the relevant [new operating lease agreement] and (ii) three months following the date of the binding term sheet if Waypoint fails to sign a [new operating lease agreement] on the

⁵ On information and belief, the first two refunds have been made to OHI and only the March 14 payment remains.

commercial terms set out in the binding term sheet and such failure is due to Waypoint's bad faith." On information and belief, no less than \$1,500,000 remains outstanding for this Security Deposit associated with the Future Leases Agreement. It is unclear to OHI at this time whether the Debtors intend to assume and assign the Future Leases Agreement.

7. As of the Petition Date, the total amount of Security Deposits being held by the Debtors was no less than approximately \$3,674,576.

8. On December 27, 2018, the Debtors filed the Cure Notice ahead of their anticipated sale listing a proposed aggregate cure amount for each of the Leases of \$0 (the "Proposed Cure Amount").⁶

9. The Proposed Cure Amount, however, fails to consider the Security Deposits set forth above. For example, and without limitation, the Proposed Cure Amount does not consider the foreseeable default at least under the Side Letters that will be realized on assignment of the corresponding Leases if the Debtors do not transfer those Security Deposits to a purchaser on assignment. The Proposed Cure Amount also does not consider the possibility that an assignee of any Lease or the Future Leases Agreement may not honor the obligations to refund the Security Deposits to OHI, if, for example, the Debtors do not transfer cash in an amount of the Security Deposits to the applicable assignee on the effective date of the assignment.

ARGUMENT

10. Section 365(b)(1) of the Bankruptcy Code provides, in pertinent part, that if there is a default under an executory contract or unexpired lease, a debtor may not assume such contract or lease unless the debtor:

⁶ As mentioned above, the Debtors did not list the Lease corresponding with helicopter EC225 – 2905, and the Future Leases Agreement in the Proposed Cure Notice, so it is unclear whether or not those will be assumed and assigned.

(A) cures, or provides adequate assurance that the [debtor] will promptly cure, such default . . .; (B) compensates, or provides adequate assurance that the [debtor] will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1). Accordingly, the proposed assumption (and subsequent assignment) of the Leases and the Future Leases Agreement requires payment to OHI of all amounts due under all documents that govern such agreements, including the Side Letters.

11. Furthermore, upon assumption of the Leases and the Future Leases Agreement, the Debtors must assume and assign them in their entirety, including the Debtors' obligation to transmit Security Deposits to a purchaser and the obligation to refund the Security Deposits to OHI. *See In re CellNet Data Systems, Inc.*, 327 F.3d 242, 249 (3d Cir. 2003) (“[t]his election [to assume] is an all-or-nothing proposition — either the whole contract [or lease] is assumed or the entire contract [or lease] is rejected.”). The unexpired lease must be assumed *cum onere*, with its benefits and its burdens. *See In re LRP Mushrooms, Inc.*, 2010 WL 2772510, *5 (Bankr. E.D. Pa. July 13, 2010) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531-32 (1984)); *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007) (explaining that “an assignment is intended to change only who performs an obligation, not the obligation to be performed”) (internal quotations omitted).

12. The Debtors may take the position that the Proposed Cure Amount is accurate as of the Petition Date. But that would not be accurate at the time of assignment if (i) the Debtors do not transfer the Security Deposits to a buyer contemporaneously with the assignment of the Leases or the Future Leases Agreement, and/or (ii) a prospective buyer of either the Leases or the Future Leases Agreement takes the position at the time of, or subsequent to, the assignment, that there are no Security Deposits refundable because of the bankruptcy. In particular, a buyer may argue in

another applicable forum after the bankruptcy that no Security Deposit is refundable because the Proposed Cure Amount was \$0.

13. In addition, it is OHI's understanding that transfers of the Leases or Future Leases Agreement may occur through one or more equity transfers. OHI's position and its concerns are the same regardless of whether a transfer is by direct assignment or by an equity transfer.

14. OHI raises these issues now in order to avoid any uncertainty regarding the Security Deposits, and further to avoid any arguments, whether in or outside the context of these bankruptcies, that certain obligations under the Leases or the Future Leases Agreement have been eliminated due to the bankruptcy proceedings.

15. Any order providing for assumption and assignment of the Leases and the Future Leases Agreement by direct assignment or an equity sale, must require the assumption and cure of all monetary obligations under the Leases and Future Lease Agreement (and governing documents listed in Exhibit A), including any obligations whose accrual or amount is currently unknown to the Debtors. For example, any order must be clear regarding the assignee's obligations to refund Security Deposits to avoid any uncertainty and future disputes. That is consistent with assumption of a lease under the Bankruptcy Code, which is a *de facto* reinstatement of the lease as if no bankruptcy of the debtor had occurred. *See* 3 Collier on Bankruptcy ¶ 365.06[3][b] (16th ed. rev. 2017) ("The idea of cure in the [Bankruptcy] Code is to provide the other party to the contract with the benefit of its economic bargain."); *see also In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996) ("Congress's intent in imposing [the] conditions on the ability of the debtor to assume the contract was to insure that the contracting parties received the full benefit of their bargain . . ."). Such a result is also consistent with section 365(b) only being applicable "[i]f there has been a

default” other than one based on a debtor’s bankruptcy filing or financial condition. 11 U.S.C. § 365(b)(1).⁷

RESERVATION OF RIGHTS

16. OHI reserves all rights regarding the Leases and the Future Leases, including, without limitation, its rights to oppose a sale of the Debtors’ assets and all rights and remedies available to it under the Bankruptcy Code and applicable law. OHI further reserves the right to supplement, modify, and/or amend this Limited Objection in any way as and when it deems necessary or appropriate, including, without limitation, to assert other amounts owed with respect to the Leases and Future Leases.

NOTICE

17. This Limited Objection has been served automatically through the Court’s ECF system and on the Objection Notice Parties, as set forth in the Bidding Procedures Order.

CONCLUSION

WHEREFORE, OHI respectfully requests that the Court: (a) condition any assumption and assignment of the Leases and the Future Leases Agreement, whether by direct assignment or an equity purchase, on the entry of an order requiring, among other standard terms contained in orders governing the assumption and assignment of executory contracts, the following: (i) the immediate transfer of the applicable Security Deposit to the respective purchaser; and (ii) the

⁷ OHI also has concerns regarding the assignment of the Leases and Future Leases Agreement due to the absence of information demonstrating adequate assurance of future performance of the Lessors’ obligations. *See* 11 U.S.C. § 365(f)(2). The Debtors seek to assume and assign agreements to a prospective buyer, but OHI has not yet been provided any adequate assurance of future performance information relating to the prospective buyer(s). This is especially important in regards to the Security Deposits and refund of same under the terms of the applicable documents, as well as purchase options that OHI has with respect to certain of the helicopters and Leases. OHI reserves all rights with respect to adequate assurance of future performance and other issues it may have regarding the proposed assignment of the Leases and Future Leases Agreement, and sale of Debtors’ assets.

prospective purchaser of the Leases and the Future Leases Agreement to acknowledge and agree to the provisions of all governing documents listed in Exhibit A, including, without limitation, the refund provisions regarding the Security Deposits; and (b) grant OHI such other and further relief as the Court may deem just and proper.

Dated: January 16, 2019

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EXHIBIT A⁸

<p><u>Sikorsky S-76C+ Serial No. 760542</u></p>	<ul style="list-style-type: none"> • Helicopter Operating Lease Agreement (September 6, 2016) • Security Deposit Side Letter (December 15, 2016) • Purchase Option Side Letter (December 15, 2016)
<p><u>Sikorsky S-76C+ Serial No. 760541</u></p>	<ul style="list-style-type: none"> • Helicopter Operating Lease Agreement (June 24, 2016) • Helicopter Operating Sublease Agreement (June 24, 2016) • Security Deposit Side Letter (December 15, 2016) • Purchase Option Side Letter (December 15, 2016)
<p><u>Sikorsky S-76C+ Serial No. 760539</u></p>	<ul style="list-style-type: none"> • Helicopter Operating Lease Agreement (December 12, 2016) • Security Deposit Side Letter (December 15, 2016) • Purchase Option Side Letter (December 15, 2016)
<p><u>Sikorsky S-76C+, Serial No. 760538</u></p>	<ul style="list-style-type: none"> • Helicopter Operating Lease Agreement (December 12, 2016) • Helicopter Operating Sublease Agreement (December 12, 2016) • Security Deposit Side Letter (December 15, 2016) • Purchase Option Side Letter (December 15, 2016)
<p><u>Sikorsky S-92A Serial No. 920119</u></p>	<ul style="list-style-type: none"> • Helicopter Operating Lease Agreement (March 17, 2017) • Helicopter Operating Sublease Agreement (March 30, 2017)
<p><u>Sikorsky S-76C++ Serial No. 760734</u></p>	<ul style="list-style-type: none"> • Amendment and Restatement Agreement to Aircraft Operating Lease Originally Dated March 17, 2017 (December 19, 2017) • Helicopter Operating Sublease Agreement (March 30, 2017)

⁸ The documents referenced herein are not intended to be an exhaustive list of the existing lease documents. OHI is actively collecting all relevant documents and can provide copies to the Debtors upon request.

<u>Airbus EC225, Serial No. 2905</u>	<ul style="list-style-type: none">• Helicopter Operating Lease Agreement (November 11, 2016)• Security Deposit Side Letter (November 11, 2016)• Side Letter (November 25, 2016)• Netting Letter (October 3, 2018)
<u>Leonardo AW189 Serial No. 89007</u>	<ul style="list-style-type: none">• Helicopter Operating Lease Agreement (November 3, 2017)• Helicopter Operating Sublease Agreement (November 3, 2017)
<u>Leonardo AW139 Serial No. 41511</u>	<ul style="list-style-type: none">• Helicopter Operating Lease Agreement (August 31, 2018)• Helicopter Operating Sublease Agreement (September 27, 2018)
	<ul style="list-style-type: none">• Additional Security Deposit Side Letter (October 29, 2015)