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*Attorneys for SunTrust Bank,  
as administrative agent under the WAC7 Credit Agreement*

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

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:  
In re: : Chapter 11  
:  
WAYPOINT LEASING :  
HOLDINGS LTD., *et al.*, : Case No. 18-13648 (SMB)  
:  
: (Jointly Administered)  
Debtors. :  
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**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF  
SUNTRUST BANK, AS WAC 7 ADMINISTRATIVE AGENT, TO  
DEBTORS' MOTION FOR ORDER APPROVING DISCLOSURE STATEMENT**

SunTrust Bank ("SunTrust"), as (I) administrative agent (in such capacity, "WAC7 Administrative Agent") in respect of that certain Amended and Restated Credit Agreement dated as of April 28, 2017 (the "WAC7 Credit Agreement") entered into and among those certain lenders under the WAC7 Credit Agreement (the "WAC7 Lenders") as lenders and Waypoint Leasing Holdings Ltd., an exempted company incorporated under the laws of the Cayman Islands



(“Holdings”), Waypoint Leasing (Luxembourg) S.à r.l., a Luxembourg private limited liability company (société à responsabilité limitée) (“Luxco”), and Waypoint Leasing (Ireland) Limited, a company incorporated under the laws of Ireland (“Manager”), Waypoint Asset Co 4 Limited, a company incorporated under the laws of Ireland (“WAC4”) and Waypoint Asset Co 5 Limited, a company incorporated under the laws of Ireland (“WAC5”, and together with Holdings, Luxco, Manager, and WAC4, the “Guarantors” and each a “Guarantor”), as guarantors, Waypoint Asset Co 7 Limited, a company incorporated under the laws of Ireland (“WAC7”) and Waypoint Asset Euro 7A Limited, a company incorporated under the laws of Ireland (“WAC7A”, and together with WAC7, the “Borrowers”, and each a “Borrower”, and together with WAC4 and WAC5, the “Segregated WAC7 Obligors”), hereby presents its *Limited Objection and Reservation of Rights* to the *Disclosure Statement for Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors* filed April 26, 2019 (Docket No. 732; the “Proposed Disclosure Statement”) with respect to the Amended Chapter 11 Plan of Liquidation (Docket No. 731; the “Proposed Plan”).<sup>1</sup> In support of the Limited Objection, SunTrust respectfully submits as follows:

### **LIMITED OBJECTION**

1. The WAC7 Administrative Agent files this Limited Objection to bring to the Court’s attention two significant issues it has identified with the Proposed Disclosure Statement and Proposed Plan. First, the Proposed Plan includes broad releases and exculpations of claims between non-debtor third-parties without any justification or support in the Proposed Disclosure Statement or elsewhere. Second, the Debtors propose to appoint an insider of the Debtors, William

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<sup>1</sup> Unless otherwise defined, all capitalized terms shall have the same meaning attached to the terms of the Proposed Disclosure Statement and Proposed Plan.

Transier, as Plan Administrator to liquidate remaining assets and claims without any oversight by creditor constituencies or any reporting requirements. The WAC7 Administrative Agent has raised these and several other issues it has identified with the Proposed Plan and Disclosure Statement with the Debtors and has engaged in conversations with the Debtors to in an attempt to work though these issues. The WAC7 Administrative Agent files this limited objection and reservation of rights to apprise the Court of these serious issues in the event the Court wishes to address them at the disclosure statement approval stage.

**A. The Proposed Releases and Exculpation Provisions Cannot be Approved**

2. As this Court is well-aware, there are numerous hurdles for the approval of non-consensual third-party releases under a bankruptcy plan in this and other Circuits. First, a plan proponent must establish that the bankruptcy court has subject matter jurisdiction over the third-party claims being released. *See In re SunEdison, Inc.*, 576 B.R. 453 (Bankr. S.D.N.Y. 2017) (citing *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 65 (2d Cir. 2008)) (bankruptcy court must assess “whether it has jurisdiction over the attempts to enjoin the creditors’ unasserted claims against the third party”). Next, even if jurisdiction is established, a plan proponent must also establish that the proposed releases and exculpations meet the high bar for approval set by the Second Circuit Court of Appeals in *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) (“*Metromedia Fiber*”). In *Metromedia Fiber*, the Second Circuit made clear that nonconsensual third-party releases may only be approved in “rare” and “unusual” circumstances and there must be a showing that the proposed releases “play[] an important part in the debtor’s reorganization plan.” *Id.* at 142; *see also Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657-58 (6th Cir. 2002) (“Such an injunction is a dramatic measure to be used cautiously . . . .”); *Gillman v. Cont’l Airlines (In re*

*Cont'l Airlines*), 203 F.3d 203, 212-13 (3d Cir. 2000) (recognizing that nondebtor releases have been approved only in “extraordinary cases”).

3. In considering whether to approve a third-party release, courts consider “whether the estate has received a substantial contribution, whether the enjoined claims are channeled to a settlement fund rather than extinguished, whether the enjoined claims would indirectly impact the debtor’s reorganization through claims of indemnity or contribution, whether the plan otherwise provides for payment in full of the enjoined claims and whether the creditor has consented.” *In re SunEdison, Inc.*, 576 B.R. 453, 462 (Bankr. S.D.N.Y. 2017) (citing *Metromedia Fiber* at 142). Simply “doing positive things in a restructuring case . . . is not enough.” *In re Aegean Marine Petroleum Network, Inc.*, 2019 Bankr. LEXIS 1076, \*21 (Bankr. S.D.N.Y. 2019). “Nonconsensual releases are not supposed to be granted unless barring a particular claim is ***important in order to accomplish a particular feature of the restructuring.***” *Id.* (emphasis added) (citing *Metromedia Fiber* at 143). Further, while proponents of third-party releases oftentimes argue that the releases are not harmful because the claims being released are nuisance claims with little or no value, such rationale does not satisfy the rigorous standard set by *Metromedia Fiber* and, instead, supports denial of the proposed releases. *See id.* at \*22-\*23 (“[I]f the claims that are the subject of the proposed releases would be without merit, that begs the question of why they should be released at all. The teaching of *Metromedia* is that releases should be given only when they are an important part of a reorganization. ***By definition, it cannot be said that the release of a meritless or nuisance claim is essential or integral to anything.***”) (emphasis added).

4. In the Proposed Plan, the Debtors seek approval of broad releases and injunctions of claims between non-debtor third-parties. Section 11.5(b) of the Proposed Plan provides:

Effective as of the Effective Date, the Releasing Parties shall be deemed to provide a full release to the Released Parties and their respective property from any and all

Claims, obligations, suits, judgments, damages, demands, debts, remedies, Causes of Action, rights of setoff, other rights, and liabilities whatsoever, whether for tort, contract, violations of federal or state securities laws, avoidance actions, including any derivative claims, asserted or that could possibly have been asserted directly or indirectly, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity, or otherwise, and any and all Causes of Action asserted or that could possibly have been asserted, based on or in any way relating to, or in any manner arising from, in whole or in part, the Debtors, their estates or their Affiliates, the conduct of the Debtors' business, the formulation, preparation, solicitation, dissemination, negotiation, or filing of the Forbearance Agreements, the Purchase Agreements, the Disclosure Statement or Plan or any contract, instrument, release, or other agreement or document created or entered into in connection with or pursuant to the Purchase Agreements, Disclosure Statement, this Plan, the filing and prosecution of the Chapter 11 Cases, the pursuit of consummation of this plan, the subject matter of, or the transactions or events giving rise to, any claim or equity interest that is treated in this Plan, the business or contractual arrangements between the Debtors, their Estates or their Affiliates, on the one hand, and any Released Party, on the other hand, or any other act or omission, transaction, agreement, event, or other occurrence taking place before the Effective Date; provided that, to the extent that a Claim or Cause of Action is determined by a Final Order to have resulted from fraud, gross negligence or willful misconduct of a Released Party, such claim or cause of action shall not be so released against such Released Party and a party alleging fraud, gross negligence, or willful misconduct on the part of a Debtor Released Party shall not be prevented from pursuing such an action. Notwithstanding anything to the contrary in the foregoing, the releases set forth above (i) do not release any post-Effective Date obligations of any party or Entity under the Plan; (ii) are applicable only to the maximum extent permitted by law; and (iii) do not release any Releasing Party's Claims, obligations, suits, judgments, damages, demands, debts, remedies, Causes of Action, rights of setoff, other rights, and liabilities under any of the Purchase Agreements, the Transition Services Agreement, or any other agreements entered into by the Debtors after the Petition Date.

5. "Released Parties" under the Proposed Plan is defined to include the Debtors and their "current and former officers, directors, principals, shareholders, members, managers, partners, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, and other professionals." Proposed Plan § 1.80.

6. The definition of “Releasing Parties” include “the WAC Agents” and their “predecessors, successors and assigns, subsidiaries, and Affiliates, and . . . their current and former officers, directors, principals, shareholders, members, managers, partners, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, and other professionals, and such persons’ respective heirs, executors, Estates, servants and nominees.” Proposed Plan § 1.81.

7. The Proposed Plan also includes a broad exculpation provision. Section 11.6 of the Plan provides:

To the extent permitted by section 1125(e) of the Bankruptcy Code, notwithstanding anything herein to the contrary, and to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and *each Exculpated Party is hereby released and exculpated from, any Claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for any Claim in connection with or arising out of the administration of the Chapter 11 Cases; the negotiation, formulation, preparation, and pursuit of the Forbearance Agreements, the Purchase Agreements, the Disclosure Statement, the Plan, and the solicitation of votes for, and confirmation of, the Plan; the funding and consummation of the Plan, and any related agreements, instruments, and other documents; the solicitation of votes on the Plan; the making of Distributions under the Plan; the occurrence of the Effective Date; negotiations regarding or concerning any of the foregoing, or the administration of the Plan or property to be distributed under the Plan, except for actions determined by Final Order to constitute willful misconduct or fraud.* This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations and any other applicable law or rules protecting such Exculpated Parties from liability. Notwithstanding anything to the contrary in the foregoing, the exculpation shall not release any party’s Claims, obligations, suits, judgments, damages, demands, debts, remedies, Causes of Action, rights of setoff, other rights, and liabilities under any of the Purchase Agreements or the Transition Services Agreement or this Plan. Nothing in the Plan shall limit the liability of attorneys to their respective clients pursuant to Rule 1.8(h) of the New York Rules of Professional Conduct. (emphasis added.)

8. The proposed third-party releases under section 11.5(a) of the Proposed Plan do not meet the requirements established in the Second Circuit and therefore cannot be approved. Neither the Proposed Disclosure Statement nor the Proposed Plan provide any indication of the

jurisdictional basis for the proposed third-party releases, what, if any, impact the releases would have on the Debtors' reorganization, or any other justification to support the proposed releases. Instead, the Debtors' have proposed broad general releases and exculpations which are not tailored to address any particular circumstance.

9. Further, the proposed releases are non-consensual with respect to the WAC7 Administrative Agent and the WAC7 Lenders. "Releasing Parties" is defined to include all "WAC Agents" including the WAC7 Administrative Agent. While "Releasing Parties" otherwise includes only creditors voting in favor of the Proposed Plan, by binding the WAC7 Administrative Agent, the proposed release provision arguably binds all of the WAC7 Lenders regardless of how they vote because the WAC7 Administrative Agent is the party empowered to assert and prosecute claims on behalf of the lenders. Thus, even if WAC7 Lenders vote against the Proposed Plan, they would nevertheless arguably be bound by the proposed release provisions.

10. Moreover, the WAC7 Administrative Agent notes that, while the Debtors are expressly assuming all D&O insurance policies (*see* Proposed Plan § 9.5), they also seek to release and exculpate their current and former directors and officers from nearly all claims that could be covered by such insurance policies. The WAC7 Administrative Agent believes that this is inappropriate and not in the best interest of the Debtors' estates or their creditors. Potential claims covered by insurance policies paid for by the Debtors should be preserved so that insurance proceeds which may help fund creditor recoveries in this liquidation are not lost.

**B. Plan Administrator's Appointment is Against the Interest of Creditors**

11. The WAC7 Administrative Agent also has concerns regarding the Debtors' proposal to appoint William Transier as Plan Administrator. Mr. Transier, of Transier Advisors LLC, was appointed in June 2018, prior to the commencement of the Debtors' chapter 11 cases,

to serve as an independent director on the board of Debtor Waypoint Leasing Holdings Ltd. and to help guide the Debtors' restructuring process. *See, e.g.,* Declaration of William Transier (Docket No. 171, p. 36-37, ¶ 10).

12. Under section 5.3 of the Proposed Plan, the Plan Administrator will be vested with broad authority to, among other things, "control and effectuate the Claims reconciliation process," "direct and control the winddown, liquidation, sale and/or abandoning of the remaining assets of the Debtors," and "prosecute all Causes of Action on behalf of the Debtors" or "elect not to pursue any Causes of Action."

13. The WAC7 Administrative Agent is concerned that Mr. Transier's status as an insider that was involved in the Debtors' restructuring process would invariably color his positions regarding that process. Part of the Plan Administrator's duties will be to evaluate potential claims arising from and relating to events leading to the Debtors' commencement of these cases and to decide whether or not to pursue such claim for the benefit of creditors. Accordingly, the WAC7 Administrative Agent has proposed an oversight and reporting regime to help ensure such assessments are made in a disinterested manner.

14. Finally, the WAC7 Administrative Agent has raised certain other issues concerning the Proposed Plan and Proposed Disclosure Statement with the Debtors on an informal basis. In the event these or other issues are not adequately resolved, the WAC7 Administrative Agent reserves its right to raise such issues at the hearing to approve the Proposed Disclosure Statement and/or the Proposed Plan.



Dated: May 9, 2019

Respectfully submitted,

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