

COLE SCHOTZ P.C.

1325 Avenue of the Americas, 19th Floor
New York, New York 10019

Telephone: (212) 752-8000

Facsimile: (212) 752-8393

*Attorneys for William L. Transier, Plan Administrator
for Waypoint Leasing Holdings Ltd. and its Affiliated Debtors*

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

In re:

WAYPOINT LEASING HOLDINGS LTD., *et*
al.,

Debtors.

WILLIAM TRANSIER, as Plan Administrator
for Waypoint Leasing Holdings Ltd. and its
Affiliated Debtors,

Plaintiff,

– against –

SUNTRUST BANK, MUFG UNION BANK,
N.A., DEUTSCHE BANK AG, NEW YORK
BRANCH, BARCLAYS BANK PLC, and
GOLDMAN SACHS BANK USA,

Defendants.

Chapter 11

Case No. 18-13648 (SMB)

(Jointly Administered)

Adv. Pro. No. 19-01448 (SMB)

**RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL
FACTS AND PLAINTIFF'S STATEMENT OF ADDITIONAL UNDISPUTED
MATERIAL FACTS**

Steven L. Klepper

David S. Gold

Cole Schotz P.C.

1325 Avenue of the Americas, 19th Floor
New York, New York 10019

Tel: (212) 752-8000

*Counsel for Plaintiff, William Transier, as Plan Administrator
for Waypoint Leasing Holdings Ltd. and its Affiliated Debtors*



Pursuant to Local Rule 7056-1(c), Plaintiff, William Transier (“Plan Administrator”), as Plan Administrator for Waypoint Leasing Holdings Ltd. and its Affiliated Debtors¹ (collectively, “Waypoint” or the “Debtors”) under the Third Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors, dated July 22, 2019 (the “Plan”), hereby responds to the Statement of Undisputed Material Facts In Respect Of Motion For Summary Judgment (“Defs. SOF”) of SunTrust Bank,² as administrative agent for the WAC7 Lenders and moving on behalf of all Defendants, in support of Defendants’ motion for summary judgment [Doc. 22] seeking to dismiss Plan Administrator’s Complaint [Doc. 1] in its entirety (“Defendants’ Motion”).

RESPONSE TO DEFENDANTS’ STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Paragraph 1 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Paragraph 1 is not disputed for purposes of Defendants’ Motion.

2. Paragraph 2 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Paragraph 2 is not disputed for purposes of Defendants’ Motion.

3. Not disputed for purposes of Defendants’ Motion.

4. Not disputed for purposes of Defendants’ Motion.

5. Not disputed for purposes of Defendants’ Motion.

6. Not disputed for purposes of Defendants’ Motion.

¹ A complete list of the Debtors as of the entry of the Confirmation Order is attached to the Third Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors [Case No. 18-13648 (SMB) (the “Bankr. Case”), Doc. 871] as Exhibit A.

² The capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Complaint [Doc. 1].

7. Not disputed for purposes of Defendants' Motion.

8. Not disputed for purposes of Defendants' Motion, except that Plan Administrator is without knowledge or information sufficient to respond to whether certain parties engaged in "good faith negotiations."

9. Not disputed for purposes of Defendants' Motion.

10. Paragraph 10 is not supported "by citation to evidence which would be admissible" and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, there appears to be a typographical error (double negative) in Paragraph 10. To the extent Paragraph 10 is supposed to read that "neither the methodology for calculating the interim distribution nor the amounts to be distributed were [] agreed to between the parties," Plan Administrator disputes that "neither the methodology for calculating the interim distribution nor the amounts to be distributed" were not set forth in the Macquarie Purchase Agreement and/or other documents. The Macquarie Purchase Agreement provides, in pertinent part:

The Debtors and the Supporting WAC Lenders shall negotiate in good faith a provision in the proposed Sale Order that provides for a partial distribution to the lenders to the Supporting WAC Facilities as promptly as possible after closing the sale transaction, which provision shall seek to maximize the amount of such partial distribution, while also taking into account the funding of the Winddown Account (consistent with the DIP term sheet) and providing the Debtors with a reasonable amount of additional sale proceeds (which shall constitute cash collateral of the lenders to the Supporting WAC Facilities and shall be subject to such lenders' rights under the Final DIP Order and section 363(c) of the Bankruptcy Code) in the event the funds in the Winddown Account are insufficient to fund the Supporting WAC Facilities' allocable share of the winddown and administrative costs of the Debtors' estate.

[Plan and Asset Sale Support Agreement, §10(c).]

The Macquarie Sale Order further provides, in pertinent part:

Partial Distribution to Affected Participating Lenders. Upon Closing and, with respect to the Supporting WAC Lenders, subject to the terms and conditions of the Plan & Asset Sale Support Agreement, the Debtors shall make a partial distribution to the Affected Participating Lenders, in full and final satisfaction and release of that portion of such Affected Participating Lenders' claims in an amount equal to such Affected Participating Lenders' allocable share of net proceeds (as set forth in paragraphs 38 and 39 herein), less (i) such lenders' allocable share of the Winddown Account (as set forth in paragraph 32 herein), (ii) such lenders' allocable share of the Fee Reserve Account (as set forth in paragraph 35 herein), and (iii) such lenders' allocable share of a holdback in the aggregate amount of \$22,857,000, as set forth on Schedule 1 hereto (the "**Holdback Amounts**"), which Holdback Amounts shall be deposited in such lenders' respective Cash Collateral accounts (which shall constitute cash collateral of such lenders and shall be subject to such lenders' rights under the DIP Order and section 363(c) of the Bankruptcy Code) and held for the benefit of such lenders, subject to limited rights of the Debtors to draw upon if the funds in the Winddown Account are insufficient to fund the Affected Participating Lenders' allocable share of the winddown and administrative costs of the Debtors' estates, and the amount to be withdrawn is reasonable, as determined by agreement by the relevant Affected Participating Lenders or an order of the Court. The balance of any Holdback Amounts that remain in the respective Cash Collateral accounts shall be distributed on the effective date of the chapter 11 plan. The Debtors' rights to use the Affected Participating Lenders' Cash Collateral terminates upon Closing.

[Macquarie Sale Order [Doc. 444], ¶43; *see also id.*, Schedule A (WAC Lenders Holdback Amounts).]

11. Plan Administrator disputes that that "Debtor's financial advisor" was the "primary source for information related to the required interim distribution to the WAC Lenders." The Complaint, which Defendants cite in support of this statement, does not refer to a single "advisor" or a "primary source of information." (*See, e.g.*, Doc. 1, ¶¶ 18-19 (referring to "advisors").) Paragraph 11 is therefore unsupported and should be disregarded. To the extent a response is required, Plan Administrator disputes Paragraph 11 because multiple professionals and advisors were the "source for information related to the required interim distribution to the

WAC Lenders.” (See Declaration of William Transier (“Transier Dec.”), dated April 24, 2020, ¶2.) Plan Administrator otherwise refers to the referenced “calculations of the proposed distributions” a true and accurate description of their contents.

12. Not disputed for purposes of Defendants’ Motion.

13. Paragraph 13 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Paragraph 13 is not disputed for purposes of Defendants’ Motion.

14. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (See Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

15. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

16. Plan Administrator disputes the characterization of the WAC7 Agent’s Limited Objection and refers to the WAC7 Agent’s Limited Objection for a true and accurate description of its contents.

17. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should

therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (*See* Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

18. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

19. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (*See* Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

20. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

21. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

22. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan

Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (*See* Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

23. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

24. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

25. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (*See* Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

26. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

27. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

28. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should

therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (*See* Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

29. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

30. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

31. Plan Administrator disputes that that “Debtor’s financial advisor” was the “primary source for information related to the required interim distribution to the WAC Lenders” as that statements not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the “source for information related to the required interim distribution to the WAC Lenders.” (*See* Transier Dec., ¶2.) Plan Administrator otherwise refers to the referenced distribution model for a true and accurate description of its contents.

32. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

33. Not disputed for purposes of Defendants’ Motion. Plan Administrator refers to the referenced distribution model for a true and accurate description of its contents.

34. Paragraph 34 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a

response is required, Plan Administrator disputes Paragraph 34. Although multiple models were circulated amongst the parties, the changes in those models were updates made in the ordinary course of collecting and reviewing information and responding to feedback from parties in interest. (*See* Transier Dec., ¶2.)

35. Plan Administrator disputes Paragraph 35 and refers to the referenced documents and communications for a true and accurate description of their contents.

36. Plan Administrator disputes Paragraph 36 and refers to the referenced communications for a true and accurate description of their contents.

37. Plan Administrator disputes Paragraph 37 and refers to the referenced communications for a true and accurate description of their contents.

38. Not disputed for purposes of Defendants' Motion.

39. Not disputed for purposes of Defendants' Motion.

40. Paragraph 40 is not supported "by citation to evidence which would be admissible" and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator refers to the referenced distribution models for a true and accurate description of their contents. Plan Administrator further states that although multiple models were circulated amongst the parties, the changes in those models were updates made in the ordinary course of collecting and reviewing information and responding to feedback from parties in interest. (*See* Transier Dec., ¶2.)

41. Plan Administrator disputes Paragraph 41 and refers to the Macquarie Sale Order for a true and accurate description of its contents.

42. Plan Administrator refers to the Macquarie Sale Order and the Complaint for a true and accurate description of their contents.

43. Plan Administrator refers to the SAPA for a true and accurate description of its contents.

44. Plan Administrator disputes Paragraph 44, and states that the referenced distribution models took into account a number of factors, as reflected in the referenced distribution models. Plan Administrator refers to the referenced distribution models for a true and accurate description of their contents.

45. Not disputed for purposes of Defendants' Motion.

46. Plan Administrator refers to the referenced distribution model and email (*see* Defs. SOF, n.10) for a true and accurate description of their contents. Plan Administrator disputes that that "Debtor's financial advisor" was the "primary source for information related to the required interim distribution to the WAC Lenders" as that statements not supported "by citation to evidence which would be admissible" and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes this statement because multiple professionals and advisors were the "source for information related to the required interim distribution to the WAC Lenders." (*See* Transier Dec., ¶2.)

47. Plan Administrator is without knowledge or information sufficient to respond to Paragraph 47. To the extent a response is required, Plan Administrator disputes Paragraph 47.

48. Plan Administrator refers to the referenced communication for a true and accurate description of its contents.

49. Paragraph 49 is not supported "by citation to evidence which would be admissible" and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator objects to Paragraph 49 as ambiguous insofar as "took positions" and "affected" are confusing and ambiguous. Paragraph 49 is therefore disputed.

50. Plan Administrator refers to the referenced proofs of claims for a true and accurate description of their contents.

51. Paragraph 51 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 51.

52. Plan Administrator refers to the referenced ballots and the Voting Certification for a true and accurate description of their contents.

53. Paragraph 53 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 53, and states that the claims asserted in the Complaint were expressly preserved in the Macquarie Sale Order. For example, the Macquarie Sale Order expressly reserves and preserves the Court’s exclusive jurisdiction to, among other things, “interpret, enforce, and implement the terms and provision of [the Macquarie Sale Order] and the [Macquarie] Purchase Agreement (including all amendments thereto, . . . and each of the agreements executed in connection therewith) and (ii) adjudicate disputes related to [the Macquarie Sale Order] and the [Macquarie] Purchase Agreement (including all amendments thereto, . . . and each of the agreements executed therewith).” (Macquarie Sale Order, ¶59). The claims asserted in the Complaint were also expressly preserved in the Plan. (*See, e.g.*, Plan, § 11.5(a).)

Plan Process

54. Not disputed for purposes of Defendants’ Motion.

55. Plan Administrator refers to the Transier Plan Declaration for a true and accurate description of its contents.

56. Plan Administrator disputes Paragraph 56 and refers to the Transier Plan Declaration for a true and accurate description of its contents.

57. Plan Administrator refers to the Transier Plan Declaration for a true and accurate description of its contents.

58. Plan Administrator refers to Section 11.5(a) of the Plan for a true and accurate description of the Estate Releases.

59. Plan Administrator refers to the Transier Plan Declaration for a true and accurate description of its contents.

60. Paragraph 60 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator does not dispute Paragraph 60 for purposes of Defendants’ Motion.

61. Paragraph 61 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator is without knowledge or information concerning SunTrust Bank, MUFG Union Bank, N.A., Deutsche Bank AG, New York Branch, and Barclays Bank Plc (together, “Defendants”) purported “reli[ance] on the Releases provided for in the Plan in voting in favor of the Plan and consenting to the Releases provided for therein.” To the extent a response is required, Plan Administrator disputes Paragraph 61.

62. Not disputed for purposes of Defendants’ Motion.

63. Not disputed for purposes of Defendants’ Motion.

64. Paragraph 64 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a

response is required, Plan Administrator disputes Paragraph 64. The claims asserted in the Complaint could not have been asserted prior to entry of the Confirmation Order as the overpayment to the WAC7 Lenders was not discovered until late September 2019, after the entry and effective date of the Confirmation Order. (*See* Transier Dec., ¶4.)

65. Paragraph 65 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator does not dispute Paragraph 64 for purposes of Defendants’ Motion, although Plan Administrator affirmatively states that Plan Administrator could not have been raised or otherwise disclosed the claims asserted in the Complaint prior to entry of the Confirmation Order as the overpayment to the WAC7 Lenders was not discovered until late September 2019, after the entry and effective date of the Confirmation Order. (*See* Transier Dec., ¶4.)

66. Paragraph 66 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 66. As discussed at length in the accompanying brief, Plan Administrator’s claims were expressly preserved in the Plan. (*See* Plan, § 11.5(a).)

67. Paragraph 67 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 67 because the Confirmation Order confirms the Plan which, as discussed at length in the accompanying brief, does expressly preserve Plan Administrator’s claims. Paragraph 19(h) of the Confirmation Order specifically confirms, *inter alia*, Section 11.9 of the Plan (Retention of Causes of Action/Reservation of

Rights). Plan Administrator further refers to the Confirmation Order for a true and accurate description of its contents.

Post Confirmation Demand

68. Paragraph 68 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator refers to the referenced “assert[ions]” for a true and accurate description of their contents.

69. Plan Administrator does not dispute Paragraph 69 and refers to the referenced communications for a true and accurate description of their contents.

70. Paragraph 70 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 70, and refers to Section 11.5(a) of the Plan for a true and accurate description of the Estate Releases.

71. Paragraph 71 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 71 as it calls for a legal conclusion. Plan Administrator further refers to the Complaint for a true and accurate description of its contents.

72. Paragraph 72 is not supported “by citation to evidence which would be admissible” and should therefore be disregarded. Local Bankr. R. 7056-1(e). To the extent a response is required, Plan Administrator disputes Paragraph 72 and refers to Sections 1.25 and 11.5(a) of the Plan for a true and accurate description of the Estate Releases and the Debtor Released Parties.

73. Plan Administrator does not dispute Paragraph 73 and refers to the Plan for a true and accurate recitation of its contents.

PLAINTIFF'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

The Initial Pretrial Conference and Defendants' Request For Leave to File A Motion For Summary Judgment on the Language of the Estate Releases

1. The Initial Pretrial Conference (“IPTC”) in this adversary proceeding was held on January 16, 2020. (See Transcript of IPTC, a true copy of which is attached to the Declaration of Steven L. Klepper, dated April 24, 2020 (“Klepper Dec.”) as Ex. A.)

2. At the IPTC, the Court inquired of Defendants' counsel: “Assuming you agree on the number, if it turns out you're overpaid, are you going to return the overpayment, or are you going to say tough luck?” Defendants' counsel responded: “Well, I would say tough luck, Your Honor.” (*Id.*, 7:5-9.)

3. The Court granted Defendants leave to file a motion for summary judgment solely on the issue of the release contained in the Plan:

THE COURT: Are you saying the release is a complete defense?

MR. WENDER: It is, Your Honor.

THE COURT: So make a motion for summary judgment. ... On the issue of the release.

THE COURT: ... It sounds like a very straightforward motion for summary judgment, as long as it's limited to the release. I don't have to hear all this other stuff about mistakes. You say, assuming they made a mistake, that's too bad because we got a release. That's basically what your argument is. I don't know if the release covers this payment.

[*Id.*, 9:4-8; 10:18-24.]

Relevant Admissions in Defendants' Memorandum of Law in Support

4. It is undisputed that the alleged overpayment to the WAC7 Lenders was made “in the course of performance of” the Plan and Asset Sale Support Agreement, “which was incorporated into the Macquarie Sale Order”:

Here, there are at least two written contracts governing the funds that are the subject to this dispute. First, the funds were paid to reduce the claims under the WAC7 Credit Agreement, which governs the payment and receipt of the funds at issue pre confirmation. But, even ignoring the WAC7 Credit Agreement, the funds are the subject of the partial distribution contemplated by the Plan and [Asset] Sale Support Agreement, which was incorporated into the Macquarie Sale Order. It was in the course of performance of that agreement that the Debtors rendered a calculation of the distribution, paid that distribution, and ratified the amount of that distribution as being correct.

[Defs. Br. [Doc. 22], ¶38 (internal citations omitted).]

Relevant Language of the Plan [Doc. 871], the Plan and Asset Sale Support Agreement [Doc. 383], the Macquarie Purchase Agreement [Doc. 444-1], and the Macquarie Sale Order [Doc. 444]

5. Section 1.13 of the Plan (Causes of Action) provides:

Causes of Action means any action, claim, cross-claim, third-party claim, cause of action, controversy, demand, right, lien, indemnity, guaranty, suit, obligation, liability, loss, debt, damage, judgment, account, defense, remedies, offset, power, privilege, license and franchise of any kind or character whatsoever, known, unknown, foreseen or unforeseen, existing or hereafter arising, contingent or non-contingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity or pursuant to any other theory of law (including, without limitation, under any state or federal securities laws). Causes of Action also includes: (i) any right of setoff, counterclaim or recoupment and any claim for breach of contract or for breach of duties imposed by law or in equity; (ii) the right to object to Claims or Interests; (iii) any claim pursuant to section 362 or chapter 5 of the Bankruptcy Code; (iv) any claim or defense including fraud, mistake, duress and usury and any other defenses

set forth in section 558 of the Bankruptcy Code; and (v) any state law fraudulent transfer claim.

[Plan [Doc. 871], §1.13.]

6. Section 5.4 of the Plan (Plan Administrator) appoints Plan Administrator and grants Plan Administrator “the authority and right on behalf of each of the Debtors ... to carry out and implement all provisions of the Plan, including, without limitation, to: ... (v) prepare, file, and prosecute any necessary filings and/or pleadings with the Bankruptcy Court to carry out the duties of the Plan Administrator as described herein” (*Id.*, §5.4.)

7. Section 5.9 of the Plan (Preservation of Rights of Action) provides:

Other than Causes of Action against an Entity that are waived, relinquished, exculpated, released, compromised, or settled in the Plan or by a Bankruptcy Court order, the Debtors reserve any and all Causes of Action. On and after the Effective Date, the Plan Administrator may pursue such Causes of Action, in consultation with the WAC Lenders prior to pursuit thereof. No Entity may rely on the absence of a specific reference in the Plan, the Plan Supplement, or the Disclosure Statement to any Cause of Action against them as any indication that the Debtors or the Plan Administrator will not pursue any and all available Causes of Action against them. On and after the Effective Date, the Plan Administrator, shall have, including through its authorized agents or representatives, the exclusive right, and authority to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigate to judgment any such Causes of Action and to decline to do any of the foregoing without further notice to or action, order, or approval of the Bankruptcy Court.

[*Id.*, §5.9.]

8. Section 8.6 of the Plan (Disallowed Claims) provides:

All Claims held by persons or entities against whom or which any of the Debtors or the Plan Administrator has commenced a proceeding asserting a Cause of Action under sections 542, 543, 544, 545, 547, 548, 549 and/or 550 of the Bankruptcy Code shall be deemed “disallowed” Claims pursuant to section 502(d) of the Bankruptcy Code and holders of such Claims shall not be entitled to vote to accept or reject the Plan. Claims that are deemed disallowed pursuant to this section shall continue to be disallowed

for all purposes until the avoidance action against such party has been settled or resolved by Final Order and any sums due to the Debtors or the Plan Administrator from such party have been paid.

[*Id.*, §5.9.]

9. Section 11.5(a) of the Plan (Estate Releases) provides, in its entirety:

As of the Effective Date, except as otherwise expressly provided in this Plan, the Macquarie Sale Order, or the Confirmation Order, and to the fullest extent authorized by applicable law, for good and valuable consideration, the adequacy of which is hereby confirmed, any Debtor Released Party is deemed released by the Debtors, each of the Debtors' current direct and indirect wholly-owned non-debtor subsidiaries (with respect to non-Debtors, to the extent permitted by applicable law), the respective Estates and any person or entity, seeking to exercise the rights of the Debtors or their Estates and their respective property (and each such Debtor Released Party shall be deemed released by each Debtor and its estate 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 Forbearance Agreements, the Purchase Agreements, the 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 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 Debtor Released Party, on the other hand, or any other act or omission, transaction, agreement, event, or other occurrence taking place before the Confirmation 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 Debtor Released Party, such Claim or Cause of Action shall not be so released against such Debtor 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; provided further, that any Released Parties who served the Debtors in a role described in clause (v) of the definition of “Released Parties” shall only be released by this section 11.5(a) if such Released Party served in such role on or after the Petition Date; provided further, that the releases set forth in this section 11.5(a) shall not release any conduct, Causes of Actions, or claims arising on or before June 1, 2018; provided further, to the extent that the Debtors or the Plan Administrator (as applicable) holds a Cause of Action or claim not released by this section 11.5(a), the Debtors and the Plan Administrator may only seek to recover from any Released Party to the extent of any available D&O Policy proceeds. Notwithstanding anything to the contrary in the foregoing, the releases above do not release the Debtors’ 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.

[*Id.*, §11.5(a).]

10. “Purchase Agreements” is defined in the Plan to include “the Macquarie Purchase Agreement.” (*See id.*, §1.79.) The “Macquarie Purchase Agreement” is defined in the Plan to mean “that certain Stock and Asset Purchase Agreement (as amended, supplemented or otherwise modified, including all exhibits, schedules and other attachments) dated as of December 7, 2018 by and between certain of the Debtors and Macquarie. (*Id.*, §1.58.)

11. Section 11.9 of the Plan (Retention of Causes of Action/Reservation of Rights) provides:

Except as otherwise provided in the Plan, nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, Claims, Causes of Action, rights of setoff or recoupment, or other legal or equitable defenses that the Debtor had immediately prior to the Effective Date on behalf of the Estate or itself in accordance with any provision of the

Bankruptcy Code or any applicable nonbankruptcy law, including, without limitation, any affirmative Causes of Action against parties with a relationship with the Debtor, other than the Released Parties and the Debtor Released Parties. Following the Effective Date, the Plan Administrator shall have, retain, reserve, and be entitled to assert all such Claims, Causes of Action, rights of setoff or recoupment, and other legal or equitable defenses as fully as if the Chapter 11 Cases had not been commenced, and all of the Debtor's legal and equitable rights in respect of any Unimpaired Claim may be asserted after the Confirmation Date and Effective Date to the same extent as if the Chapter 11 Cases had not been commenced.

[*Id.*, §11.9.]

12. Section 10(c) of the Plan and Asset Sale Support Agreement provides, in pertinent part:

The Debtors and the Supporting WAC Lenders shall negotiate in good faith a provision in the proposed Sale Order that provides for a partial distribution to the lenders to the Supporting WAC Facilities as promptly as possible after closing the sale transaction, which provision shall seek to maximize the amount of such partial distribution, while also taking into account the funding of the Winddown Account (consistent with the DIP term sheet) and providing the Debtors with a reasonable amount of additional sale proceeds (which shall constitute cash collateral of the lenders to the Supporting WAC Facilities and shall be subject to such lenders' rights under the Final DIP Order and section 363(c) of the Bankruptcy Code) in the event the funds in the Winddown Account are insufficient to fund the Supporting WAC Facilities' allocable share of the winddown and administrative costs of the Debtors' estate.

[Plan and Asset Sale Support Agreement [Doc. 383], §10(c).]

13. Paragraph 43 of the Macquarie Sale Order provides:

Partial Distribution to Affected Participating Lenders. Upon Closing and, with respect to the Supporting WAC Lenders, subject to the terms and conditions of the Plan & Asset Sale Support Agreement, the Debtors shall make a partial distribution to the Affected Participating Lenders, in full and final satisfaction and release of that portion of such Affected Participating Lenders' claims in an amount equal to such Affected Participating Lenders' allocable share of net proceeds (as set forth in paragraphs 38 and 39 herein), less (i) such lenders' allocable share of the Winddown

Account (as set forth in paragraph 32 herein), (ii) such lenders' allocable share of the Fee Reserve Account (as set forth in paragraph 35 herein), and (iii) such lenders' allocable share of a holdback in the aggregate amount of \$22,857,000, as set forth on Schedule 1 hereto (the "**Holdback Amounts**"), which Holdback Amounts shall be deposited in such lenders' respective Cash Collateral accounts (which shall constitute cash collateral of such lenders and shall be subject to such lenders' rights under the DIP Order and section 363(c) of the Bankruptcy Code) and held for the benefit of such lenders, subject to limited rights of the Debtors to draw upon if the funds in the Winddown Account are insufficient to fund the Affected Participating Lenders' allocable share of the winddown and administrative costs of the Debtors' estates, and the amount to be withdrawn is reasonable, as determined by agreement by the relevant Affected Participating Lenders or an order of the Court. The balance of any Holdback Amounts that remain in the respective Cash Collateral accounts shall be distributed on the effective date of the chapter 11 plan. The Debtors' rights to use the Affected Participating Lenders' Cash Collateral terminates upon Closing.

[Macquarie Sale Order [Doc. 444], ¶43; *see also id.*, Schedule A (WAC Lenders Holdback Amounts).]

14. Paragraph 52 of the Macquarie Sale Order (Binding Effect of this Order)

provides:

The terms and provisions of the Purchase Agreement and this Order shall be binding in all respects upon, or shall inure to the benefit of, the Debtors, their estates and their creditors, Macquarie and its Affiliates, successors, and assigns, and any affected third parties, including all Persons asserting Claims, notwithstanding any subsequent appointment of any trustee, examiner, or receiver under any chapter of the Bankruptcy Code or any other law, and all such provisions and terms shall likewise be binding on such trustee, examiner, or receiver and shall not be subject to rejection or avoidance by the Debtors, their estates, their creditors or any trustee, examiner, or receiver. Any trustee appointed for the Debtors under any provision of the Bankruptcy Code, whether the Debtors are proceeding under chapter 7 or chapter 11 of the Bankruptcy Code, shall be authorized and directed to (i) operate the business of the Debtors to the fullest extent necessary to permit compliance with the terms of the Transaction Documents and (ii) perform under the Transaction Documents without the need for further order of this Court.

[*Id.*, ¶52.]

15. Paragraph 53 of the Macquarie Sale Order (Conflicts; Precedence) provides:

In the event that there is a direct conflict between the terms of this Order and the terms of (i) the Transaction Documents, or (ii) the DIP Documents, the Participating WAC Loan Documents (each as defined in the DIP Order), or (iii) any other order of this Court, the terms of this Order shall control. Nothing contained in any chapter 11 plan hereinafter confirmed in these chapter 11 cases, or any order confirming such plan, shall conflict with or derogate from the provisions of the Transaction Documents or the terms of this Order and, to the extent that there is any conflict among them, the terms of the Transaction Documents and/or this Order, as applicable, shall control.

[*Id.*, ¶53.]

16. Paragraph 59 of the Macquarie Sale Order (Retention of Jurisdiction) provides:

This Court shall retain exclusive jurisdiction to, among other things, (i) interpret, enforce, and implement the terms and provisions of this Order and the Purchase Agreement (including all amendments thereto, any waivers and consents thereunder, and of each of the agreements executed in connection therewith) and (ii) adjudicate disputes related to this Order and the Purchase Agreement (including all amendments thereto, any waivers and consents thereunder, and of each of the agreements executed in connection therewith).

[*Id.*, ¶59.]

Relevant Language in the Transier Confirmation Declaration

17. The Declaration of William Transier in Support of Confirmation of the Third Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors [Doc. 874] provides, in relevant part:

41. I understand that most potential claims and Causes of Action subject to the Estate Releases (the “**Estate Released Claims**”) would likely arise under Irish law because they would relate to activities by WLIL and the WAC Group companies that conducted the Debtors’ operations, which entities are organized under the laws of Ireland. Accordingly, in early 2019, following the close of the sale of substantially all of the Debtors’ assets to Macquarie I

directed the Debtors' Irish counsel, A&L Goodbody Solicitors ("ALG"), with the assistance of Weil, Gotshal & Manges ("Weil"), to conduct an investigation into the Estate Released Claims and other claims of the Debtors, focusing the investigation on claims that the Debtors may have against present and former directors, officers and shareholders, arising out of, but not limited to, certain prepetition decisions by the various boards and the information provided to the WAC Lenders in the years leading up to the Petition Date Based on the material and documents provided to it, ALG reported that it could not identify a meritorious claim that likely would provide material value to the Debtors. Likewise, the WAC Lenders who would be principle beneficiaries of any successful Cause of Action were requested to, but have not identified any colorable claims or Causes of Action that the Debtors may have against other Debtors or their Affiliated Parties. However, to the extent further information is discovered that would change this conclusion, the Debtors have reserved their right to pursue certain Affiliated Parties for claims arising prior to June 1, 2018, only to the extent of any available D&O Policy Proceeds.

42. ... I have been advised by ALG that the Estate Released Claims could be brought by various parties but are typically brought by an Irish Liquidator on behalf of the relevant Debtor(s) in connection with the Irish Liquidation Proceedings, ... As detailed herein, because the WAC Lenders demanded a significant interim distribution of the Macquarie sale proceeds, there are no other funds in the Debtors' Estates to pay for the pursuit of the Estate Released Claims under Irish law in connection with an Irish Liquidation Proceeding.

[Doc. 874, ¶¶41-42.]

Dated: April 24, 2020
New York, New York

COLE SCHOTZ P.C.

By: /s/ Steven L. Klepper
Steven L. Klepper
David S. Gold
1325 Avenue of the Americas, 19th Floor
New York, New York 10019
Tel: (212) 752-8000
*Attorneys for William L. Transier, Plan
Administrator for Waypoint Leasing
Holdings Ltd. and its Affiliated Debtors*