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WAC7 Lenders and as a WAC 7 Lender*

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

In re:)	Chapter 11
)	
WAYPOINT LEASING HOLDINGS LTD., <i>et</i>)	Case No. 18-13648 (SMB)
<i>al.</i> ,)	
)	(Jointly Administered)
Debtors.)	
)	
WILLIAM TRANSIER, as Plan Administrator)	
for Waypoint Leasing Holdings Ltd. and its)	
Affiliated Debtors,)	
)	
Plaintiff,)	Adv. Pro. No. 19-01448 (SMB)
v.)	
)	
SUNTRUST BANK, MUFG UNION BANK,)	
N.A., DEUTSCHE BANK AG, NEW YORK)	
BRANCH, BARCLAYS BANK PLC, and)	
GOLDMAN SACHS BANK USA,)	
)	
Defendants.)	
)	

**STATEMENT OF UNDISPUTED MATERIAL FACTS
IN RESPECT OF MOTION FOR SUMMARY JUDGMENT**



Truist Bank, successor by merger to SunTrust Bank, as administrative agent for the WAC7 Lenders¹ (acting in such capacity, “**WAC7 Agent**”), on behalf of all Defendants, hereby submits this statement of undisputed material facts in respect of its motion for summary judgment as to all counts in the *Complaint* (Doc. 1) and states as follows:

1. WAC7 Agent is administrative agent and collateral agent in respect of that certain Amended and Restated Credit Agreement dated as of April 28, 2017 (the “**WAC7 Credit Agreement**”) between the lenders thereunder (the “**WAC7 Lenders**”)² 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 the Guarantors, the “**WAC7 Obligors**”).

¹ Any capitalized term not otherwise defined herein, shall have the meaning ascribed to such term in the Complaint.

² The WAC7 Lenders are Defendants SunTrust Bank, MUFG Union Bank, N.A., Deutsche Bank AG, New York Branch, Barclays Bank Plc, and Goldman Sachs Bank USA.

2. On November 25, 2018, (the “**Petition Date**”), the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) each filed a voluntary case under chapter 11 of the Bankruptcy Code.

3. On December 10, 2018, Debtors filed their motion (the “**Sale Motion**”) for the entry of an order authorizing and approving the sale of substantially all of the Debtors’ assets and the assumption of and assignment of certain executory contracts and unexpired leases of the Debtors in connection therewith pursuant to the terms of that certain Stock and Asset Purchase Agreement, dated as of December 7, 2018, by and between certain of the Debtors and Macquarie (as amended, supplemented or otherwise modified, the “**Purchase Agreement**”). [ECF No. 64.]³

4. On December 21, 2018, the Bankruptcy Court entered its order approving bidding procedures for the sale of substantially all of the Debtors’ assets. [ECF No. 159.]

5. The Debtors’ sale process yielded four proposed sale transactions: (i) a sale of the assets in the WAC1 Group, WAC3 Group, WAC6 Group, WAC7 Group, and WAC8 Group to Macquarie (the “**Macquarie Sale**”); (ii) a separate sale of the equity of the WAC9 Group via streamlined credit bid; (iii) a separate sale of the equity of the WAC12 Group via streamlined credit bid; and (iv) a sale of the assets of the WAC2 Group via a credit bid under section 363(k) of the Bankruptcy Code. *See* Declaration Of Robert A. Del Genio in Support of Proposed Sale [ECF No. 418] ¶ 8.

6. The WAC7 Agent submitted a Plan Support Agreement (the “**PSA**”) to the Debtors. *See* Supplemental Declaration of Matthew R. Niemann in Support of Proposed Sale [ECF No. 404] ¶ 9 (the “**Niemann Declaration**”).

³ “ECF No.” refers to the main bankruptcy docket, case no. 18-13648, Bankr. S.D.N.Y.

7. Because the PSA and a separate plan support agreement submitted by the Agent to the WAC8 Credit Facility implicated collateral constituting fewer than 110 of the Debtors' aircraft, Macquarie had an option of deeming the "Conversion Condition" satisfied and proceeding with a sale under a chapter 11 plan with the lenders under the WAC7 Facility and WAC8 Facility (the "**Supporting WAC Lenders**"), or electing to proceed with a sale under section 363 of the Bankruptcy Code for the collateral of those lenders, thereby triggering the rights of the Support WAC Lenders to credit bid for their collateral. Niemann Declaration ¶ 9.

8. After good faith negotiations, and to resolve outstanding issues among the parties regarding the Supporting WAC Lenders' credit bidding rights and potential objections to the Macquarie Sale Transaction, the Debtors executed that certain Plan and Asset Sale Support Agreement (the "**Plan and Asset Sale Support Agreement**") between and among the Debtors, Macquarie and the Supporting WAC Lenders. Niemann Declaration ¶ 11; *see also* ECF No. 383.

9. The Plan and Asset Sale Support Agreement required, among other things, that the Debtors include a provision in the proposed sale order requiring an interim distribution to the Supporting WAC Lenders. Niemann Declaration ¶ 11.

10. Notwithstanding the Plan and Asset Sale Support Agreement, neither the methodology for calculating the interim distribution nor the amounts to be distributed were not agreed to between the parties.

11. Leading up to the Closing of the Debtors' sale to Macquarie, the Debtors' financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated calculations of the proposed distribution to the WAC7 Agent. *See* Complaint ¶ 18.

12. The Debtors' calculations were distributed to (or made available via a dataroom accessible to) the WAC Agent and each of the WAC7 Lenders. *See* Complaint ¶ 18.

13. In response to comments and questions raised by the WAC7 Agent and other WAC Agents, the Debtors circulated multiple "revised" distribution models.

14. On or around February 3, 2019, the Debtors' financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated a distribution model setting forth the Debtors' Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/15/19) (the "**February 3, 2019 Distribution Model**"). The February 3, 2019 Distribution Model is attached to the Wender Declaration as Exhibit 1.

15. The February 3, 2019 Distribution Model expressly provided that "**THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.**" February 3, 2019 Distribution Model, p. 1.

16. On February 5, 2019, the WAC7 Agent filed its limited objection to the Debtors' proposed sale order because, among other things, the Debtors failed to include an amount reflecting a reasonable amount of sale proceeds to be held by the Debtors. *See* WAC7 Agent's Limited Objection Reservation Of Rights With Respect To Proposed Sale Order [ECF No. 337].

17. On or around February 6, 2019, the Debtors' financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated a revised distribution model setting forth the Debtors' modified Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/15/19) (the "**February 6,**

2019 Distribution Model”). The February 6, 2019 Distribution Model is attached to the Wender Declaration as Exhibit 2.

18. The February 6, 2019 Distribution Model expressly provided that **“THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.”** February 6, 2019 Distribution Model, p. 1.

19. On or around February 11, 2019, the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated a further revised distribution model setting forth the Debtors’ again-modified Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/15/19) (the **“February 11, 2019 Distribution Model”**). The February 11, 2019 Distribution Model is attached to the Wender Declaration as Exhibit 3.

20. The February 11, 2019 Distribution Model expressly provided that **“THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.”** February 11, 2019 Distribution Model, p. 2.

21. The February 11, 2019 Distribution Model also expressly provided that “the DRAFT numerical data and other information set forth herein have been provided by the Company and are preliminary and subject to material change.” February 11, 2019 Distribution Model, p. 1.

22. On or around March 2, 2019, the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated a further revised distribution model, setting forth the Debtors’ again-modified Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/15/19) (the

“March 2, 2019 Distribution Model”). An excerpt from the March 2, 2019 Distribution Model is attached to the Wender Declaration as Exhibit 4.⁴

23. The March 2, 2019 Distribution Model expressly provided that **“THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.”** *See* March 2, 2019 Distribution Model.

24. The March 2, 2019 Distribution Model also expressly provided that “the DRAFT numerical data and other information set forth herein have been provided by the Company and are preliminary and subject to material change.” *See* March 2, 2019 Distribution Model.

25. On or around March 11, 2019, the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated a further revised distribution model setting forth the Debtors’ again-modified Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/13/19) (the **“March 11, 2019 Distribution Model”**). An excerpt from the March 11, 2019 Distribution Model is attached to the Wender Declaration as Exhibit 5.⁵

26. The March 11, 2019 Distribution Model expressly provided that **“THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.”** *See* March 11, 2019 Distribution Model.

⁴ The full “native” file will be provided upon request.

⁵ The full “native” file will be provided upon request.

27. The March 11, 2019 Distribution Model also expressly provided that “the DRAFT numerical data and other information set forth herein have been provided by the Company and are preliminary and subject to material change.” *See* March 11, 2019 Distribution Model.

28. On the morning of March 13, 2019, the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated a further revised distribution model setting forth the Debtors’ again-modified Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/13/19) (the “**March 13, 2019 Distribution Model**”). An excerpt from the March 13, 2019 Distribution Model is attached to the Wender Declaration as Exhibit 6.⁶

29. The March 13, 2019 Distribution Model expressly provided that “**THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.**” *See* March 13, 2019 Distribution Model.

30. The March 13, 2019 Distribution Model also expressly provided that “the DRAFT numerical data and other information set forth herein have been provided by the Company and are preliminary and subject to material change.” *See* March 13, 2019 Distribution Model.

31. In the late afternoon on March 13, 2019, the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders circulated an “(updated)” further revised distribution model setting forth the Debtors’ again-modified Illustrative WAC Recoveries Analysis - Based on Macquarie Purchase Price Allocations and a Close Date of (3/13/19) (the “**March 13, 2019 (Updated) Distribution Model**”). An excerpt from

⁶ The full “native” file will be provided upon request.

the March 13, 2019 (Updated) Distribution Model is attached to the Wender Declaration as Exhibit 7.⁷

32. The March 13, 2019 (Updated) Distribution Model expressly provided that “**THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS.**” *See* March 13, 2019 (Updated) Distribution Model.

33. The March 13, 2019 (Updated) Distribution Model also expressly provided that “the DRAFT numerical data and other information set forth herein have been provided by the Company and are preliminary and subject to material change.” *See* March 13, 2019 (Updated) Distribution Model.

34. The “revised” models proposed distributions to the WAC7 Agent that changed in almost every iteration and, at times, changed materially between versions.

35. As reflected in the WAC7 Agent’s Limited Objection Reservation Of Rights With Respect To Proposed Sale Order [ECF No. 337] and in numerous emails and calls, the WAC7 Agent, counsel for the WAC7 Agent (Mr. David Wender) and the WAC7 Agent’s financial advisor (Carl Marks) raised concern, disagreement, and objection to the Debtors’ methodology and the resulting proposed Partial Distribution calculations. *See* Wender Declaration ¶ 9; *see also*, Wender Declaration, Exhibit 8.

36. The emails reflect a frustration raised by the WAC7 Agent with the lack of transparency in the process, with a specific emphasis on the WAC7 Agent’s concern that the model was not appropriately addressing the WAC7 Parties’ cash collateral. *See* Wender Declaration, Exhibit 8.

⁷ The full “native” file will be provided upon request.

37. The issues included (i) that the WAC7 Parties' cash collateral, which was not technically part of the sale proceeds from the Macquarie sale, appeared to be "used" to some unclear degree in the Macquarie sale proceeds distribution mechanics (i.e., the "waterfall"), (ii) the Debtors' unwillingness to distribute the WAC7 Parties' cash collateral, (iii) the Debtors' failure to provide full information underpinning their proposed distributions and (iv) that the Debtors could never confirm that their figures were accurate or final.⁸

38. Upon the Closing of the Sale Transaction, on March 14, 2019, the Debtors made two sets of distributions to the WAC7 Agent. *See* Wender Declaration ¶ 10.

39. One set of distributions to the WAC7 Agent constituted the initial distribution of proceeds (as required under the Macquarie Sale Order and the Plan and Asset Sale Support Agreement, totaling approximately \$40,728,439 (the "**Initial Macquarie Sale Proceeds Distribution**"). *See* Complaint ¶ 23.

40. The Initial Macquarie Sales Distribution did not match any previously provided proposed distribution set forth in the Debtors' Distribution Models.

41. The provisions of the Macquarie Sale Order for Partial Distributions only dealt with the distribution of the net proceeds of the Sale Transaction. *See* Macquarie Sale Order and related attachments (the "**Macquarie SAPA**"), attached as Exhibit 18 to the Wender Declaration.).

42. Paragraph 43 of the Macquarie Sale Order, cited at paragraph 17 of the Complaint, expressly provided that Initial Macquarie Sale Proceeds Distribution made upon closing was to

⁸ In fact, as admitted in the Plan Administrator's Complaint and the Distribution Models referenced above, the Debtors maintained at every juncture their proposed distributions were "preliminary and subject to material change."

be “in an amount equal to such Affected Participating Lenders’ allocable share of *net proceeds*” (emphasis added).⁹

43. The net proceeds of the Macquarie Sale Transaction did not include the WAC7 Lenders’ cash collateral. (*See* Macquarie SAPA, § 2.02(b)(iv) (clarifying that “Cash” is an “Excluded Asset”)).

44. Although the Macquarie Sale Transaction did not require a distribution of the WAC7 Agent’s cash collateral, the Debtors’ proposed distribution models took into account the WAC7 Agent’s cash collateral and non-sale proceeds associated with the other WAC Lenders. *See* Wender Declaration ¶¶ 6-9; *see also*, Wender Declaration, Exhibit 8.

45. Contemporaneous and in connection with the Initial Macquarie Sale Proceeds Distribution, the Debtors made a second and separate set of distributions to the WAC7 Agent representing a distribution of WAC7’s “Excess Cash Collateral,” totaling approximately \$4,135,572 (the “**Excess Cash Collateral Distribution**” and collectively with the Initial Macquarie Sales Distribution, the “**Distributions**”).

46. The Distributions were each reflected as a specifically-identified “External Transfer” in the March 13, 2019 (Updated) Distribution Model. (*See* chart below, heading “F. Waypoint Makes Interim Disbursement to Lenders,” showing an “External” transfer (i.e., wire) to SunTrust Bank in the amount of \$40,731,110.73), *the immediately preceding heading shows an additional “External” transfer to SunTrust Bank for \$4,138,243.57* and, heading: “E. Waypoint Makes True-Up Transfers to Cash Collateral Accounts for Holdback Amount,”

⁹ Other paragraphs of Macquarie Sale Order further clarify that the “net proceeds” were the net proceeds of the Macquarie Sale Transaction. *See, e.g.*, Macquarie Sale Order, ¶¶ 32 (“net sale proceeds of the Sale Transaction” used to fund “Winddown Account”), 35 (“portion of the net sale proceeds of the Sale Transaction” used to fund unfunded portion of “Carve Out”); 36 (“portion of the net sale proceeds of the Sale Transaction” used to fund sale transaction fees).

subheading: “Cash Collateral in Excess of Holdback Amount, showing an “External” transfer (i.e., wire) to SunTrust Bank in the amount of \$4,138,243.57”).¹⁰ This portion of the flow of funds spreadsheet is replicated, with these two rows highlighted, below:

E. Waypoint Makes True-Up Transfers to Cash Collateral Accounts for Holdback Amount						
Detail	Sender	Amount		Beneficiary / Contact	Routing Information	Notes
Cash Collateral True-Up for Holdback Amount						
WAC1	Waypoint Leasing (Ireland) Limited	7,838,564.53	Internal	WAC1 Cash Collateral Account	See [J] on 'Routing Information' tab	See 'Cash & DIP' tab for calculation
WAC3	Waypoint Leasing (Ireland) Limited	3,711,073.64	Internal	WAC3 Cash Collateral Account	See [J] on 'Routing Information' tab	See 'Cash & DIP' tab for calculation
WAC6	Waypoint Leasing (Ireland) Limited	1,060,997.07	Internal	WAC6 Cash Collateral Account	See [J] on 'Routing Information' tab	See 'Cash & DIP' tab for calculation
WAC8	Waypoint Leasing (Ireland) Limited	3,427,630.69	Internal	WAC8 Cash Collateral Account	See [J] on 'Routing Information' tab	See 'Cash & DIP' tab for calculation
		<u>\$16,038,265.93</u>				See Note 1 below
Cash Collateral in Excess of Holdback Amount						
WAC7	WAC7 Cash Collateral Account	4,138,243.57	External	SunTrust Bank	See [J] on 'Routing Information' tab	See 'Cash & DIP' tab for calculation
F. Waypoint Makes Interim Disbursement to Lenders						
Detail	Sender	Amount		Beneficiary / Contact	Routing Information	Notes
WAC1 Lenders	Waypoint Leasing (Ireland) Limited	105,478,099.49	External	Macquarie PF Inc.	See [J] on 'Routing Information' tab	See 'APA Waterfall' and 'Distributions by Lender' tabs
WAC3 Lenders	Waypoint Leasing (Ireland) Limited	53,519,320.62	External	Glas Trust Company LLC	See [J] on 'Routing Information' tab	See 'APA Waterfall' and 'Distributions by Lender' tabs
WAC6 Lenders	Waypoint Leasing (Ireland) Limited	11,358,421.03	External	Bank of Utah	See [J] on 'Routing Information' tab	See 'APA Waterfall' and 'Distributions by Lender' tabs
WAC7 Lenders	Waypoint Leasing (Ireland) Limited	40,731,110.73	External	SunTrust Bank	See [J] on 'Routing Information' tab	See 'APA Waterfall' and 'Distributions by Lender' tabs
WAC8 Lenders	Waypoint Leasing (Ireland) Limited	59,962,022.80	External	Wells Fargo Bank, National Association	See [J] on 'Routing Information' tab	See 'APA Waterfall' and 'Distributions by Lender' tabs
		<u>\$271,048,974.65</u>				

47. Against this backdrop (i.e., the shifting figures), Mr. David Wender, as counsel to the WAC7 Agent, called the Debtors’ counsel (Weil Gotshal & Manges LLP) to confirm the wire transfers, particularly the second set of transfers totaling \$4 million. See Wender Declaration ¶ 10.

48. Debtors’ counsel (Weil Gotshal & Manges LLP) responded to Mr. Wender’s inquiry that day with the following email: “The additional \$4 million is due to the Excess Cash

¹⁰ See also, email from the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders, dated March 12, 2019 at 3:44 pm responding in red to questions raised by counsel to the WAC7 Agent:

Q (Wender): “Why isn’t the cash balance listed on the Cash and DIP Tab reflected in the sources of monies available for use in the waterfall?”

A (Debtors’ financial advisor): “The cash balance is first used towards funding the holdback amounts, with the remaining funds to be distributed to Lenders. Only WAC7 has excess cash over its holdback amounts, that is why you see a \$4.1mm distribution.”

Collateral in WAC 7,” referencing the following table in an email forwarded to her from the Debtors’ financial advisor:

	Final Funds Flow	Initial Distribution		Total	Variance
		A	B		
WAC 1	\$105,478,099.49	\$102,233,565.71	\$3,244,533.78	\$105,478,099.49	\$0.00
WAC 3	\$53,519,320.62	\$51,869,814.99	\$1,649,505.63	\$53,519,320.62	\$0.00
WAC 6	\$11,358,421.03	\$7,916,417.59	\$3,442,003.44	\$11,358,421.03	\$0.00
WAC 7	\$40,731,110.73	\$34,160,084.84	\$6,571,025.89	\$40,731,110.73	\$0.00
WAC 8	\$59,962,022.80	\$58,744,424.85	\$1,217,597.95	\$59,962,022.80	\$0.00
<u>Excess Cash Collateral</u>					
WAC 7	\$4,135,571.85	\$4,070,053.00	\$65,518.85	\$4,135,571.85	(\$0.00)

See Email from Weil Gotshal & Manges LLP (forwarding an email from the Debtors’ financial advisor and primary source for information related to the required interim distribution to the WAC Lenders) (the “**Confirmatory Email**”). See Wender Declaration ¶ 12; see also, Wender Declaration, Exhibit 9.

49. After the WAC7 Agent received the Distributions, and obtained confirmation from the Debtors’ professionals, the WAC7 Agent, on behalf of itself and the WAC7 Lenders, took positions *vis-à-vis* the Debtors and their estates that affected the WAC7 Agents and WAC7 Agents’ claims against the estates.

50. On May 7, 2019, the WAC7 Agent filed seven substantially identical proofs of claims against the liable Debtors. These proofs of claim all stated in their attachments that:

Pursuant to the Final DIP Order entered January 9, 2019 (Dkt. No. 231), the Debtors admitted, acknowledged, agreed and stipulated that as of the Petition Date, the WAC7 Borrowers were indebted to the WAC7 Secured Parties (as defined in the Final DIP Order) without defense, counterclaim or offset of any kind, in respect to loans made under the WAC7 Documents in an amount of not less than \$103,174,920 (the “WAC7 Prepetition Amount”). . . .

On March 13, 2019, the Court entered an Order (the “Macquarie Sale Order”) (Docket No. 159), wherein, among other things, the WAC7 Lenders would receive a partial distribution

On March 14, 2019, the WAC7 Agent received, for the benefit of the WAC7 Lenders, a partial distribution totaling \$44,866,682.58 (the “WAC7 Partial Distribution”). . . . Following receipt of the WAC7 Partial Distribution, the remaining amount owing to WAC7 Lenders amounted to not less than \$58,308,237.42.

The WAC7 Agent also presently holds not less than \$2,840,569.83 in two segregated accounts (the “WAC7 Segregated Accounts”) Provided . . . the amounts on deposit in the WAC7 Segregated Accounts is applied to reduce the WAC7 Obligations, the total liquidated amount of the WAC7 Lenders’ claim as of the Petition Date will be \$55,467,667.59.¹¹

51. Moreover, when the Debtors requested that the WAC7 Agent provide a calculation of amounts owing under the WAC7 Facility during the voting process, the WAC7 Agent confirmed that claims owing totaled \$55,467,667.59, as stated in the proofs of claim (i.e., reflecting a reduction to claim of the entire amount included in the Distribution, \$44,866,682.58).

52. Thereafter, the Debtors’ counsel and their claims agent used these numbers in preparing and sending out the ballots and in the vote tabulation process. (*See* ballots attached to Wender Declaration as Exhibit 12, and *Certification of Leticia Sanchez with Respect to the Tabulation of Votes on the Second Amended Modified Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors*, Bankr. Case, Doc. 861 [attached as Exhibit 13 to the Wender Declaration, the “**Voting Certification**”], p. 19.

53. The claims asserted in the Complaint were not expressly preserved in the Macquarie Sale Order.

Plan Process

54. The Debtors’ sought and obtained confirmation of their Third Amended Chapter 11 Plan of Liquidation (the “**Plan**”). *See* Findings of Fact, Conclusions of Law, and Order

¹¹ Copies of these proofs of claim are attached as Exhibit 10 to the Wender Declaration. [NTD: these proofs of claim can be found at <http://www.kccllc.net/waypointleasing/creditor/search/result/1>]

Confirming Third Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors [ECF No. 871] (the “**Confirmation Order**”).

55. Pursuant to the Plan, each Debtor entity would be wound down, liquidated, or otherwise terminated pursuant to applicable non-bankruptcy law in the relevant jurisdiction. 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 [ECF No. 874] (the “**Transier Plan Declaration**”) ¶ 9.

56. The Plan incorporate a release (the “**Release**”) “that both (i) preserves value and (ii) minimizes Winddown expenses, was a key negotiation point between the Debtors and the WAC Lenders, and an important aspect of the formulation of the Debtors’ business judgment with respect to the Plan.” Transier Plan Declaration ¶ 10.

57. “The Plan (and the release provisions therein) . . . were the subject of extensive, good faith negotiations between the Debtors (including [Mr. Transier]) and certain of the WAC Lenders.” Transier Plan Declaration ¶ 13.

58. Under Article 11.5(a) of the Plan (the “**Estate Releases**”), the Debtors and the Debtors’ estates released the “Debtor Released Parties,” of all:

Causes of Action, rights of setoff, other rights, and liabilities whatsoever, whether for tort, contract, . . . avoidance actions, . . . that could possibly have been asserted directly or indirectly, whether . . . known or unknown . . . existing or hereafter arising, in law, equity, or otherwise, and any and all Causes of Action¹² . . . that could possibly have been

¹² Under Article 1.13 of the Plan:

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

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.

59. In respect of the Estate Releases, Mr. Transier declared that

The Debtors and their advisors carefully considered and crafted important limitations on the breadth and scope of the Estate Releases. These limitations support the Debtors' sound business judgment in determining to give the Estate Releases.

...

after extensive diligence and analysis, the Debtors do not believe any valid claims for conduct after June 1, 2018

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.

against the Debtor Released Parties exist; accordingly, the release of such claims is a sound exercise of the Debtors' business judgment. . . .

the Estate Releases apply to the WAC Lenders who voted in favor of the Plan and the WAC Agents all of whom agreed to the Forbearance Agreements prepetition, worked with the Debtors throughout the Chapter 11 Cases, and are consenting to provide the Accepting Claimant Release, as discussed below. . . .

After a thorough investigation (as detailed below) that revealed no colorable claims or Causes of Action, I do not believe that the claims or Causes of Action released pursuant to the Estate Releases represent material value to the Debtors and the Debtors' Estates. . . . Accordingly, given the absence of any claim or Cause of Action, the Estate Releases are supported by the Debtors' sound business judgment. . . .

The Debtors benefit from the Estate Releases for several reasons. First, the Debtors could not receive a release from holders of Claims, the WAC Lenders, and the WAC Agents, without agreeing to provide a mutual release. This mutual release reduces the extent of potential liabilities on the Debtors' respective balance sheets and allows for a more efficient winddown of such entities. . . .

The Estate Releases, along with the Bylaws and the Plan Administrator Contract, were heavily negotiated collectively between the Debtors and the WAC Lenders and are integral to the Plan and the Winddown. . . .

Transier Plan Declaration ¶¶ 33, 35, 37, 40, 43, and 49 (footnotes not included).

60. SunTrust Bank (in its capacity as WAC7 Lender), MUFG Union Bank, N.A., Deutsche Bank AG, New York Branch, and Barclays Bank Plc voted in favor of the Plan and consented to the Releases provided for therein.

61. SunTrust Bank (in its capacity as WAC7 Agent and WAC7 Lender), MUFG Union Bank, N.A., Deutsche Bank AG, New York Branch, and Barclays Bank Plc relied on the Releases provided for in the Plan in voting in favor of the Plan and consenting to the Releases provided for therein and no Defendant objected to the Plan.

62. The Confirmation Order was entered on July 31, 2019.

63. The Confirmation Order went effective on August 9, 2019. [ECF No. 914.]

64. The claims asserted in the Complaint could have been asserted prior to entry of the Confirmation Order.

65. The claims asserted in the Complaint were not raised or otherwise disclosed prior to entry of the Confirmation Order.

66. The claims asserted in the Complaint were not expressly preserved in the Plan.

67. The claims asserted in the Complaint were not expressly preserved in the Confirmation Order.

Post Confirmation Demand

68. On or about October 7, 2019, almost seven months after the WAC7 Agent received the Distributions and more than two months after confirmation, the Plan Administrator and the Debtors (acting through the Plan Administrator) asserted for the first time that the Excess Cash Collateral Distribution to the WAC7 Agent was an improper overpayment and demanded that the payment be returned (“**Plan Administrator’s Demand**”).

69. The WAC7 Agent disputed the Plan Administrator’s contention that the Debtors were entitled to recover monies from the WAC7 Agent and the WAC7 Lenders orally and in writing. *See* Wender Declaration ¶ 25; *see also*, Wender Declaration, Exhibit 21.¹³

70. The Estate Releases release all Causes of Action except as otherwise expressly provided in the Plan, the Macquarie Sale Order, or the Confirmation Order.

¹³ Though transmitted as a confidential settlement communication protected under Rule 408 of the Federal Rules of Evidence, the Complaint cites to a November 20, 2019 letter from counsel to the WAC7 Agent that: (i) denied that the Excess Cash Collateral Distribution was improper; (ii) ensured that confirmed that the Plan Administrator had seen the Confirmatory Email; and (iii) reminded the Plan Administrator of the Estates’ Releases.

71. The claims in the Complaint constitute claims under Chapter 5 of the Bankruptcy Code.

72. The Estate Release is a release of all Causes of Action against the Debtor Released Parties.

73. The SunTrust Bank (in its capacity as WAC7 Agent and WAC7 Lender), MUFG Union Bank, N.A., Deutsche Bank AG, New York Branch, and Barclays Bank Plc are Debtor Released Parties.¹⁴

Dated: March 13, 2019

Respectfully Submitted,

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By: /s/ David Wender

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-and-

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Lender*

¹⁴ The “Debtor Released Parties” [Plan, Article 1.24] include the “Released Parties,” [Plan, Article 1.81] which include the “WAC Agents (except to the extent the Required Lenders under each applicable WAC Facility vote to reject the Plan)” and “the WAC Lenders that vote to accept the Plan.” As stated in footnote 3 of the Confirmation Order, the “Required Lenders under each applicable WAC Facility . . . voted to accept the Plan;” WAC7 Agent is a “WAC Agent” [Plan, Article 1.136, 1.182]. SunTrust Bank voted its claims in favor of the Plan. *See Certification of Leticia Sanchez with Respect to the Tabulation of Votes on the Second Amended Modified Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors*, Bankr. Case, Doc. 861 [attached as Exhibit 13 to the Wender Declaration, the “**Voting Certification**”], p. 19.

CERTIFICATE OF SERVICE

I, David Wender, hereby certify that on March 13, 2020, I caused a copy of the foregoing *STATEMENT OF UNDISPUTED MATERIAL FACTS IN RESPECT OF MOTION FOR SUMMARY JUDGMENT* to be served on all parties who are scheduled to receive notice through the Court's ECF system.

By: /s/ David Wender

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