UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY Caption in Compliance with D.N.J. LBR 9004-2(c)	
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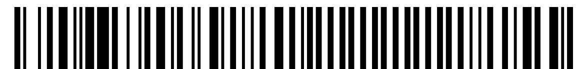
In Re: **THRASIO HOLDINGS, INC., *et al.*** Debtors.[1]	Case No.: **24-11840 (CMG)** (Jointly Administered) Chapter: 11

ESR, LLC'S OBJECTION TO DISCLOSURE STATEMENT FOR THE JOINT PLAN OF REORGANIZATION OF THRASIO HOLDINGS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

ESR, LLC ("ESR"), by and through its undersigned counsel, files this objection (the "Objection") with respect to approval of the *Disclosure Statement for the Joint Plan of Reorganization of Thrasio Holdings, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the*

[1] The last four digits of Debtor Thrasio Holdings, Inc.'s tax identification number are 8327. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.kccllc.net/Thrasio. The Debtors' service address in these chapter 11 cases is 85 West Street, 3rd Floor, Walpole, MA, 02081.



Bankruptcy Code [Doc. No. 41] (the "Disclosure Statement"). In support of the Objection, ESR respectfully states as follows:

PRELIMINARY STATEMENT

1. ESR is a general unsecured creditor of Debtor Frosty Dream[2] and is owed $2 million. The Disclosure Statement does not contain information that would enable ESR or the Court to determine whether Frosty Dream is solvent or insolvent. Upon information and belief, Frosty Dream remains profitable and is a marquee performer among the Debtors' various brands and entities.

2. The Debtors' Disclosure Statement describes a patently unconfirmable plan because the Plan runs afoul of the Third Circuit's mandate in *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2007). Specifically, the Plan represents a "deemed consolidation" of all Debtors because the Plan consolidates Frosty Dream with all of the other (mostly poorly performing) Debtors for the purpose of valuing and satisfying creditor claims and making distributions for allowed claims under the Plan. Despite the fact that the Debtors are seeking to substantively consolidated the Debtors through the Plan, which, if confirmed, would pay ESR approximately .001% of its claim, the Debtor has not—and cannot—make the necessary showing to consolidate the Debtors and incorrectly denies that it is consolidating the Chapter 11 Cases.

3. Furthermore, the Plan violates the classification provisions of 11 U.S.C. § 1122 by grouping all of the Debtors' general unsecured creditors into one class for purposes of distribution even though the Chapter 11 Cases are not substantively consolidated.

4. The Disclosure Statement does not provide adequate information to allow ESR to determine (a) the solvency of Frosty Dream or (b) whether the Plan unfairly discriminates against

[2] Capitalized terms not otherwise defined in this Preliminary Statement shall have the meanings ascribed to them elsewhere in this Objection.

the general unsecured creditors by treating the First Lien Claims (which may be undersecured) differently than the general unsecured creditors.

5. Finally, the Debtors have not filed schedules and statements of financial affairs, which will provide critical insight into the Debtors' financial situation, including that of Frosty Dream. As a result, the Disclosure Statement hearing should be adjourned until this information is provided and parties are given sufficient time to evaluate the information. As currently proposed, the Disclosure Statement does not provide adequate information as required under 11 U.S.C. § 1125.

6. For these reasons, as further detailed below, the Court should not approve the Disclosure Statement at this time.

BACKGROUND

A. The Chapter 11 Cases

7. On February 28, 2024 (the "Petition Date"), Thrasio Holdings, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the "Debtors"), commenced the above-captioned cases (collectively, the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

8. Pursuant to this Court's *Order Directing Joint Administration of Chapter 11 Cases* [Doc. No. 64] (the "Joint Admin Order"), the Chapter 11 Cases are jointly administered for procedural purposes only under the above-captioned case number. As made explicit in the Joint Admin Order, the Chapter 11 Cases are ***not*** substantively consolidated.

B. ESR's claim against Frosty Dream, Inc.

9. On January 14, 2022, ESR, doing business as The Hate Stains Company ("Hate Stains") entered into an Asset Purchase Agreement (the "APA") with Debtor Frosty Dream, Inc.

("Frosty Dream"). Two million dollars ($2,000,000) remains due and owing to ESR under the APA.

10. Following the purchase, the Hate Stains brand continued to succeed for its new owner, Frosty Dream. Within the first year following the purchase, the Hate Stains brand achieved the $12 million net-revenue threshold provided in the APA—a 100% increase on the previous year's net revenue.

11. The second year after the purchase was even more successful than the first for the Hate Stains Brand. Upon information and belief, the Hate Stains brand achieved the $15 million net-revenue threshold provided by the APA that entitles ESR to the remaining $2 million of the purchase price. ESR will file proofs of claim against Frosty Dream and Thrasio, LLC asserting an unsecured claim in the amount of $2 million based on the amount of the unpaid Second Stabilization Payment (the "Claim").[3]

12. Upon information and belief, Hate Stains remains one of the Debtors' top-performing brands. It is the top-selling stain remover on Amazon and, upon information and belief, continues to bring in approximately $2.5 million in revenue per month. The Debtors' approved budget contemplates total collections of approximately $97 million for the first thirteen weeks of the Chapter 11 Cases. If Hate Stains continues to earn approximately $2.5 million in monthly revenue, it will earn around $7.5 million or $8 million in net revenue for that thirteen-week period and account for approximately 8% of the Debtors' net revenue.

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[3] On March 6, 2024, the Debtors filed *Debtors' First Omnibus Motion for Entry of an Order Authorizing (I) Rejection of Certain Executory Contracts and Unexpired Leases and (II) Abandonment of Certain Personal Property, If Any, Each Effective as of the Rejection Date* [Doc. No. 107] (the "Rejection Motion") seeking to reject, among other contracts, the APA. A hearing on the Rejection Motion is set for April 3, 2024. Should the Court find that the APA is an executory contract and grant the Rejection Motion, ESR asserts that it would hold a claim for rejection damages in the same amount as the Second Stabilization Payment.

13. Upon further information and belief, the Hate Stains brand continues to enjoy high profit margins and is frequently referenced by the Debtors as a marquee performer and an inducement to other entrepreneurs to sell their brands to the Debtors. Because of Frosty Dream's financial performance, it is possible that Frosty Dream up-streams excess cash to the other Debtors. Because the Debtors have not yet filed their statements, schedules, or Rule 2015.3 reports, there is no public information currently available to any party or to the Court to determine Frosty Dream's current finances or for ESR or the Court to determine whether, on a standalone basis, creditors of Frosty Dream would be treated better than they are treated under the Plan, which substantively consolidates the Debtors.

14. Furthermore, upon information and belief, Frosty Dream has a small number of other unsecured creditors, some if not all of which may have been suppliers that may have been paid in full pursuant to this Court's *Interim Order (I) Authorizing the Debtors to Pay Certain Prepetition Claims of (A) Lien Claimants, (B) Foreign Vendors, (C) 503(b)(9) Claimants, and (D) Critical Vendors and (II) Confirming Administrative Expense Priority of Outstanding Orders* [Doc. No. 71] (the "Interim Critical Vendors Order"). If that is the case, then some or all of the other unsecured creditor of Frosty Dream are being satisfied in full while ESR remains unpaid—without sufficient disclosure that this may be occurring. For this and the other reasons set forth herein, Frosty Dream should have its own standalone plan in order for ESR and the Court to assess whether a confirmable plan can be proposed for that entity.

C. The Disclosure Statement

15. On the Petition Date, the Debtors filed the Disclosure Statement and the *Joint Plan of Reorganization of Thrasio Holdings, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Doc. No. 40] (the "Plan").

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16. The Disclosure Statement sets out the classes of claims and the treatment each will receive as provided for in the Plan. General Unsecured Claims such as that of ESR are sorted into Class 4.[4] Per the Disclosure Statement and the Plan, holders of allowed General Unsecured Claims ("GUCs") shall receive their pro rata share of the GUC Recovery Pool, which the Plan defines as "the total Cash available to Holders of General Unsecured Claims in an amount equal to $250,000." General Unsecured Claims are listed as impaired and are thus entitled to vote on the Plan.

17. The only other impaired class of claims are the First Lien Claims, as defined in the Plan. First Lien Claims have been sorted into Class 3 and will receive their pro rata share of 100% of the New Common Stock, subject to dilution by the (i) DIP Exit Fee, (ii) Backstop Payment, and (iii) Management Incentive Plan, as each of those terms is defined in the Plan.[5]

OBJECTION

18. ESR objects to the approval of the Disclosure Statement on the basis that the Plan is patently unconfirmable because (a) the Debtors effectively treat the Debtors' separate Chapter 11 Cases as substantively consolidated under the Plan; and (b) the Plan violates the classification provisions of 11 U.S.C. § 1122 by grouping the GUCs into one class for purposes of distribution even though the Chapter 11 Cases are not substantively consolidated. ESR further objects to the

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[4] The Disclosure Statement provides that a General Unsecured Claim is:

> any Claim against any of the Debtors that is not Secured and is ***not***: (a) a DIP Facility Claim, (b) an Administrative Claim, (c) a Priority Tax Claim, (d) an Other Secured Claim, (e) an Other Priority Claim, (f) a First Lien Claim, (g) an Intercompany Claim or Intercompany Interest, (h) a Series X Redeemable Preferred Stock Interest, (i) a Series D Preferred Stock Interest, (j) a Series C Preferred Stock Interest. For the avoidance of doubt, all (i) claims resulting from the rejection of Executory Contracts and Unexpired Leases . . . are General Unsecured Claims.

(emphasis added). Regardless of whether ESR's Claim stems from the APA or from the Debtors' rejection of the APA, ESR holds a General Unsecured Claim in the amount of $2 million.

[5] The Plan defines "New Common Stock" as "the common stock or common equity of Reorganized Thrasio to be issued on the Effective Date."

Disclosure Statement on the basis that it lacks adequate information to determine whether the Plan unfairly discriminates against the GUCs.

A. The Disclosure Statement should not be approved because the Plan is patently unconfirmable.

19. Courts recognize that disapproval of a disclosure statement is appropriate if it appears there is a defect that makes a plan inherently or patently unconfirmable. *In re Am. Cap. Equip.*, 688 F.3d 145, 154 (3d Cir. 2012) (collecting cases). Considering and resolving such issues at the disclosure stage before requiring parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing allows the parties to avoid the time-consuming and expensive proposition of hearings on a disclosure statement and plan when the plan may not be confirmable because it does not comply with confirmation requirements. *Id.* (first quoting *In re Kehn Ranch, Inc.*, 41 B.R. 832, 832–33 (Bankr. D.S.D. 1984); and then citing *In re Dakota Rail, Inc.*, 104 B.R. 138, 143 (Bankr. D. Minn. 1989)). A plan is patently unconfirmable where (1) confirmation defects cannot be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing. *Id.* at 154–55 (citing *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987)).

20. The Plan described by the Disclosure Statement is patently unconfirmable, and thus should not be approved, for the following reasons: (i) the Plan effectively treats the Chapter 11 Cases as substantively consolidated without requesting substantive consolidation or proving that substantive consolidation is appropriate under the circumstances; and (ii) the Plan violates the Bankruptcy Code's classification provision by classifying the GUCs of all Debtors together for the purposes of distribution.

a. The Debtors effectively, and improperly, treat the Chapter 11 Cases as substantively consolidated under the Plan.

21. The Joint Admin Order makes clear, in no uncertain terms, that "[n]othing contained in the Motion[6] or this Order shall be deemed or construed as directing or otherwise effecting a substantive consolidation of these chapter 11 cases, and this Order shall be without prejudice to the rights of the Debtors to seek entry of an order substantively consolidating their respective cases." Joint Admin Order ¶ 3. To date, the Debtors have not sought an order substantively consolidating the Chapter 11 Cases. Despite this, the manner in which the Plan groups the GUCs of all 241 Debtors into one consolidated class effectively treats the Chapter 11 Cases as substantively consolidated.

22. This process—effectively treating the Chapter 11 Cases as substantively consolidated without ever actually seeking or receiving an order granting substantive consolidation—is akin to what the Third Circuit has dubbed a "'deemed consolidation,' under which a consolidation is deemed to exist for purposes of valuing and satisfying creditor claims and making distributions for allowed claims under it," yet there is no merger, transfer, or commingling of any assets of any debtors. *In re Owens Corning*, 419 F.3d at 202.

23. Under Third Circuit law, substantive consolidation, deemed or otherwise, is only appropriate if it can "be proven (absent consent) concerning the entities for whom substantive consolidation is sought . . . that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Id.* at 211. "Proponents of substantive consolidation have the burden of

[6] *Debtors' Motion for Entry of an Order Directing Joint Administration of Chapter 11 Cases* [Doc. No. 16].

showing one or the other rationale for consolidation." *Id.* at 212. The Debtors have not shown either rationale, and neither applies to the Debtors' state of affairs either prepetition or postpetition.

24. There is no indication that, prepetition, the Debtors disregarded separateness so significantly that creditors treated them as one legal entity. In fact, the manner in which the Debtors' prepetition loans were structured, with Thrasio, LLC serving as borrower and certain subsidiaries serving as guarantors, indicates that both the Debtors and their prepetition lenders treated the Debtors as separate entities. *See id.* at 212–13 ("[O]btaining the guarantees of separate entities, made separate by [the debtor's] choice of how to structure the affairs of its affiliate group of companies, entitles a lender, in bankruptcy or out, to look to any (or all) guarantor(s) for payment when the time comes. As such, the . . . conclusions of 'substantial identity' of [the debtor] and its subsidiaries . . . are incorrect."). Furthermore, upon information and belief, prepetition each of the individual Debtors represented individual brands with their own Amazon accounts and profit-and-loss statements. Maintaining separate brand registries and Amazon accounts is an important aspect of the business model, as combining the individual businesses or brands would result in a loss of product reviews left by customers on Amazon, which would negatively affect the prioritization of the Debtors' brands in search results on Amazon's platform. As such, the Debtors had a vested interest in maintaining separate legal entities to maximize the value of each brand.

25. Likewise, the Debtors' assets and liabilities are not so scrambled that separating them is prohibitive and hurts all creditors. The Third Circuit has clarified that the phrase "all creditors" in this sentence means ***all*** creditors, as it has explained that "commingling justifies consolidation only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of *every* creditor—that is, when every creditor will benefit from the

consolidation." *Id.* at 214. "Moreover, the benefit to creditors should be from cost savings that make assets available rather than the shifting of assets to benefit one group of creditors at the expense of another. Mere benefit to some creditors, or administrative benefit to the Court, falls far short." *Id.*

26. The Debtors' Plan clearly does not meet this rationale, as GUCs such as ESR stand to recover effectively nothing for their claims as a result of their consolidation into one class for purposes of distribution. The Plan provides for a pro rata distribution of the GUC Recovery Pool, an amount of $250,000, to the GUCs of 241 separate Debtors. ESR, to serve as merely one example,[7] holds an unsecured Claim primarily against one Debtor, Frosty Dream, in the amount of $2 million.[8] Under the Plan as proposed, as a member of the consolidated General Unsecured Claims class, ESR likely will be fortunate to recover even .001% of its Claim. Conversely, if the Plan were to treat the Debtor entities separately with regard to the GUCs, as it should, it is possible ESR would recover substantially more of its Claim.

27. However, the Debtors have not provided sufficient information for ESR to conduct this important analysis. Specifically, the Debtors have not provided a balance sheet for Frosty Dream such that ESR, among other things, can determine the amount of secured debt that is allocated to Frosty Dream. As a result, a fulsome analysis of ESR's treatment vis-à-vis Frosty Dream is impossible.

28. More importantly, the Debtors cannot show that either rationale for substantive consolidation applies to these Chapter 11 Cases, and thus an effective substantive consolidation vis-à-vis the General Unsecured Claims for purposes of valuing and satisfying their claims and

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[7] Given that the Rejection Motion seeks to reject approximately 139 asset purchase agreements, including the APA between ESR and Frosty Dream, it seems unlikely that ESR is the only such example.
[8] ESR also has an unsecured Claim for the same amount against Debtor Thrasio, LLC, which guaranteed the amount owed to ESR by Frosty Dream.

making distributions for allowed claims under it is inappropriate and renders the Plan patently unconfirmable as proposed, and the Disclosure Statement should not be approved on this basis.

b. The Plan violates the Bankruptcy Code's classification provision.

29. Section 1129 of the Bankruptcy Code provides that a plan must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). This includes § 1122, which provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). "To determine whether claims are 'substantially similar,' the proper focus is on 'the legal character of the claim as it relates to the assets of the debtor.'" *In re W.R. Grace & Co.*, 729 F.3d 311, 326 (3d Cir. 2013) (first quoting *In re AOV Indus., Inc.*, 792 F.2d 1140, 1150 (D.C. Cir. 1986); then citing *In re Tribune Co.*, 476 B.R. 843, 855 (Bankr. D. Del. 2012); and then citing *In re Quigley Co.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007)). Claims are substantially similar "if they have 'substantially similar rights *to the debtor's assets*." *In re Quigley Co.*, 377 B.R. at 116 (emphasis in original) (first quoting *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992); and then citing *AOV Indus.*, 792 F.2d at 1150).

30. Absent substantive consolidation of the Chapter 11 Cases—which has not occurred and, as discussed above, is inappropriate under the circumstances—the claims of the various GUCs are not substantially similar insofar as they relate to different Debtors. That is, a GUC of one specific Debtor is not substantially similar to a GUC of a different specific debtor because those creditors do not have similar rights to the Debtors' assets—the creditor of a separate entity Debtor has rights only to the former Debtor's assets of such debtor absent the stringent findings required for substantive consolidation.

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31. By consolidating all GUCs into one class for purposes of distribution, regardless of which Debtor entity may be liable for a given claim, the Plan places dissimilar claims against completely different Debtors and assets into one class. This does not comply with the Bankruptcy Code's classification requirements. This renders the Plan patently unconfirmable, and thus approval of the Disclosure Statement is not warranted.

B. The Disclosure Statement does not contain adequate information sufficient for the Debtors to meet their burden under 11 U.S.C. § 1125.

32. Section 1125 of the Bankruptcy Code requires that a disclosure statement must be "approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). The Bankruptcy Code defines "adequate information" as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, . . . that would enable . . . a hypothetical investor of the relevant class to make an informed judgment about the plan . . . ." 11 U.S.C. § 1125(a)(1).

a. The Disclosure Statement does not provide sufficient information to determine if the Plan unfairly discriminates against the GUCs.

33. Section 1129 of the Bankruptcy Code requires that, if an impaired class votes to reject the plan, the court nevertheless "shall confirm the plan . . . if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). The term "discriminate unfairly" is "a horizontal comparative assessment applied to similarly situated creditors . . . where a subset of those creditors is classified separately, does not accept the plan, and claims inequitable treatment under it." *In re Tribune Co.*, 972 F.3d at 232 (citing Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L.J. 227, 227–28 (1998)). The Third Circuit

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has adopted the following test, under which a rebuttable presumption of unfair discrimination exists where there is:

> (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.

Id. at 241 (first citing *Markell*, *supra*, at 228, 249; and then citing *In re Dow Corning Corp.*, 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)).

34. The Disclosure Statement provides that the First Lien Claims are ***not*** General Unsecured Claims. *See* Disclosure Statement § III.L. ("General Unsecured Claim means any Claim against any Debtors that is not Secured and is not . . . a First Lien Claim . . . ."). Despite this proclamation in the Disclosure Statement, all the First Lien Claims may, in fact, be undersecured claims in an amount that cannot be determined given the dearth of information provided. Specifically, the Disclosure Statement estimates the First Lien Claims at approximately $855,200,000. The Debtors have obtained interim approval for a new senior secured credit facility in an aggregate amount of $360 million, which consists of a new money term loan of $90 million and a "roll-up" in the amount of $270 million (the "New Facility"). Disclosure Statement § VI.F. The Debtors have not provided sufficient information to allow holders of claims to determine the value of the collateral securing the First Lien Claims. To the extent that the value of the collateral does not equal or exceed the amount of the First Lien Claims, the First Lien Claims are undersecured claims. If the First Lien Claims are even partially undersecured, then it appears that the holders of First Lien Claims may be receiving a portion of the equity in the Reorganized Debtors on account of their unsecured deficiency claim. If that is the case, then the holders of First Lien Claims are receiving different treatment (through the issuance of equity in the Reorganized

Debtors) than the GUCs, who are receiving a ratable share of $250,000, and the Plan discriminates unfairly. In any case, the Debtors have not provided sufficient information in the Disclosure Statement for the holders of claims and, more importantly, the Court to make this determination.

b. The lack of schedules or statements of financial affairs results in the holders of claims having inadequate information.

35. The Debtors have not yet filed schedules and statements, and the deadline for them to do so, March 29, 2024, coincides with the deadline to object to the Disclosure Statement. As such, creditors will not have vital information regarding the Debtors' financial state of affairs until it is too late for that information to be useful for purposes of timely objecting to the Disclosure Statement.

36. At this time, the Disclosure Statement lacks too much vital information necessary for creditors to fully evaluate the Plan. As such, the Disclosure Statement should not be approved at this time.

WHEREFORE, based on the foregoing, ESR respectfully requests that this Court deny approval of the Disclosure Statement and grant such other relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, a copy of the foregoing Notice of Appearance was filed in the CM/ECF filing system, which caused a true copy to be served on all counsel of record.

In addition, on March 29, 2024, a copy of the foregoing Notice of Appearance was emailed to proposed counsel to the Debtors and counsel to the U.S. Trustee listed below:

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Dated: March 29, 2024

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