

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

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<b>IN RE:</b>	§	<b>Chapter 11</b>
	§	
<b>TMT USA SHIPMANAGEMENT LLC, et</b>	§	<b>Case No. 13-33740</b>
<b>al.,<sup>1</sup></b>	§	
	§	
<b>DEBTORS.</b>	§	<b>(Joint Administration Requested)</b>

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**DEBTORS' EMERGENCY MOTION FOR THE ENTRY OF AN ORDER PURSUANT  
TO SECTIONS 105(a), 362 AND 365 OF THE BANKRUPTCY CODE ENFORCING  
AND RESTATING AUTOMATIC STAY AND IPSO FACTO PROVISIONS**

**IF YOU WANT A HEARING, YOU MUST REQUEST ONE IN WRITING AND YOU MUST RESPOND SPECIFICALLY TO EACH PARAGRAPH OF THIS PLEADING. YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY ONE (21) DAYS FROM THE DATE YOU WERE SERVED AND GIVE A COPY TO THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF.**

**IF A PARTY REQUESTS EMERGENCY CONSIDERATION, THE COURT MAY ACT EXPEDITIOUSLY ON THE MATTER. IF THE COURT ALLOWS A SHORTER RESPONSE TIME THAN TWENTY ONE (21) DAYS, YOU MUST RESPOND WITHIN THAT TIME. IF THE COURT SETS AN EMERGENCY HEARING BEFORE THE RESPONSE TIME WILL EXPIRE, ONLY ATTENDANCE AT THE HEARING IS NECESSARY TO PRESERVE YOUR RIGHTS. IF AN EMERGENCY HEARING IS NOT SET, YOU MUST RESPOND BEFORE THE RESPONSE TIME EXPIRES.**

**THE DEBTORS HAVE REQUESTED THAT THIS MOTION BE CONSIDERED AT THE DEBTORS' FIRST DAY HEARINGS.**

TMT USA Shipmanagement LLC, *et al.*, the above-captioned debtors and debtors in possession (together, the "Debtors"), by and through their undersigned proposed attorneys,

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<sup>1</sup> The Debtors in these chapter 11 cases are: (1) A Whale Corporation; (2) B Whale Corporation; (3) C Whale Corporation; (4) D Whale Corporation; (5) E Whale Corporation; (6) G Whale Corporation; (7) H Whale Corporation; (8) A Duckling Corporation; (9) F Elephant Corporation; (10) F Elephant Inc.; (11) A Ladybug Corporation; (12) C Ladybug Corporation; (13) D Ladybug Corporation; (14) A Handy Corporation; (15) B Handy Corporation; (16) C Handy Corporation; (17) B Max Corporation; (18) New Flagship Investment Co., Ltd; (19) RoRo Line Corporation; (20) Ugly Duckling Holding Corporation; (21) Great Elephant Corporation; (22) TMT Procurement Corporation; and (23) TMT USA Shipmanagement LLC.

hereby file this Emergency Motion For the Entry of an Order Pursuant to Sections 105(a), 362 and 365 of the Bankruptcy Code Enforcing and Restating Automatic Stay and Ipso Facto Provisions (the "Motion"), and in support thereof, respectfully represent as follows:

### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of these chapter 11 cases in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested in this Motion are §§ 105(a), 362 and 365 of Title 11 of the United States Code (the "Bankruptcy Code").

### **II. BACKGROUND**

2. On June 20, 2013 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11, Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Court"). Pursuant to Bankruptcy Code §§ 1107(a) and 1108, the Debtors are operating their businesses and managing their property as debtors in possession. The Debtors have requested joint administration of these chapter 11 cases by motion filed concurrently herewith. No trustees or examiners have been appointed in these cases.

3. Together, the Debtors are known in the industry as the TMT Group ("TMT") based on the original company known as Taiwan Marine Transport Co. Ltd. (a non-debtor), which was founded in 1958 as a banana boat operator with inter-Asia routes.<sup>2</sup> Since then, the TMT Group has grown into a provider of worldwide sea borne transportation services. The Debtors' fleet consists of 17 vessels (the "Vessels"), each held by an individual ship owning company (a common corporate structure in the industry). The TMT fleet is diversified to span

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<sup>2</sup> The "TMT" acronym was changed from Taiwan Marine Transport to Today Makes Tomorrow in 2007 as the TMT Group expanded operations throughout the world.

several sectors of maritime transportation, such as the bulk sector, vehicle sector, ore sector, and oil sector. Vessels range in size from approximately 27,000 dead weight tons (dwt) to approximately 320,000 dwt. The Debtors' total dwt capacity is approximately 3.2 million dwt, and the average age of the fleet is younger than two and a half years (excluding *M/V A Duckling*, which is 14 years old, and *F Elephant*, which is 23 years old). Vessels are variously flagged in Liberia, Panama, and the Marshall Islands.

4. TMT generates revenues by employing its fleet of Vessels on time charters as well as in the spot market. Additionally, TMT charters out its "Whale" and "Elephant" vessels to the affiliated non-debtor Blue Whale Corporation under bareboat charters. Technical and commercial management of the Vessels are carried out by various non-debtor affiliate entities.

### **III. RELIEF REQUESTED**

5. Pursuant to §§ 105(a), 362 and 365 of the Bankruptcy Code, the Debtors request the entry of an order enforcing and restating the automatic stay and *ipso facto* provisions of the Bankruptcy Code.

### **IV. BASIS FOR RELIEF**

6. The Debtors' business operations are conducted worldwide with significant assets moving through international waters at any given time. As a result, the Debtors have many foreign creditors and counterparties to contracts who may not be well versed in the restrictions of the Bankruptcy Code. Many of these creditors do not transact business on a regular basis with companies that have filed for chapter 11, or are unfamiliar with the scope of a debtor in possession's authority to conduct its business. These creditors may be unfamiliar with the operation of the automatic stay and other provisions of the Bankruptcy Code.

7. Thus, various interested parties may attempt to seize assets located outside of the United States to the detriment of the Debtors, their estates and creditors, or take other actions in

contravention of the automatic stay of § 362 of the Bankruptcy Code. In particular, the several of the Debtors' Vessels are currently under arrest by bank lenders and maritime lien claimants, and those same Vessels may be subject to pending sheriffs' sales. In addition, upon learning of the Debtors' bankruptcy, counterparties to leases and executory contracts may attempt to terminate those leases or contracts pursuant to *ipso facto* provisions in contravention of § 365 of the Bankruptcy Code.

8. Accordingly, by this Motion, the Debtors seek entry of an order, pursuant to §§ 105(a), 362 and 365 of the Bankruptcy Code, enforcing and restating the automatic stay and *ipso facto* provisions of the Bankruptcy Code. The Debtors intent is that a specific and explicit order from this Court will protect the Debtors from improper actions by foreign creditors and also actions from unwitting parties in foreign jurisdictions who are not familiar with the Bankruptcy Code or its protections and who might otherwise violate those sections.

**Automatic Stay and *Ipsa Facto* Provisions of the Bankruptcy Code**

9. As a result of the commencement of this case, and by operation of law pursuant to § 362 of the Bankruptcy Code, the automatic stay enjoins all persons from, among other things, taking any action to obtain possession of property of the estate or to exercise control over property of the estate. The injunction contained in § 362 of the Bankruptcy Code constitutes a fundamental protection for debtors, which, in combination with other provisions of the Bankruptcy Code, provides these Debtors with a "breathing spell from [their] creditors" that is essential to the Debtors' ability to reorganize successfully. *See e.g., Browning v. Navarro*, 743 F.2d 1069, 1083 (5th Cir. 1984) (citations omitted).

10. Given its fundamental importance to a debtor's reorganization, courts broadly construe the stay provisions of § 362. As such, the stay has been held to preclude unilateral actions by non-debtor parties to terminate contracts without court order. *See, e.g., Bonneville*

*Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238 (5th Cir. 2006) (noting that non-debtor termination of agreement was prohibited by the automatic stay and required court approval under § 362(d)). Section 362 of the Bankruptcy Code has also been held to apply extraterritorially. *See Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998) (“Given this clear expression of intent by Congress in the express language of the Bankruptcy Code, we conclude that Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate.”); *Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (“Based upon the applicable Code sections [and] other indicia of congressional intent, ... the automatic stay applies extraterritorially.”); *In re McLean Indus.*, 74 B.R. 589, 601 (Bankr. S.D.N.Y. 1987) (“[t]he automatic stay applies extraterritorially”).

11. In addition, § 365(e)(1)(B) prohibits counterparties to contracts with a debtor from terminating contracts because of a debtor’s bankruptcy filing. Section 365(e)(1)(B) of the Bankruptcy Code provides, subject to certain limited exceptions, that:

[n]otwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on . . . the commencement of a case under this title.

11 U.S.C. § 365(e)(1)(B). Thus, § 365(e) of the Bankruptcy Code invalidates so-called “*ipso facto*” provisions, which provide for the termination of a contract upon a bankruptcy filing.

12. The application of the protections afforded a debtor by §§ 362 and 365 of the Bankruptcy Code is automatic with the filing of a chapter 11 petition. *See* 11 U.S.C. § 362 (“a petition filed under section 301 . . . of this title . . . operates as a stay applicable to all entities, of [among other things,] any act to obtain possession over property of the estate or property of the

estate or to exercise control over property of the estate”); 11 U.S.C. § 365 (“any right or obligation under [an executory contract or unexpired lease of the debtor] may not be terminated or modified, at any time after the commencement of the case solely because of” an *ipso facto* provision).

**Relief Requested Should Be Granted Under § 105(a) of the Bankruptcy Code**

13. Section 105(a) of the Bankruptcy Code authorizes the Court to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105(a) therefore authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction *United States v. Sutton*, 786 F.2d 1305, 1307 (5th Cir. 1986).

14. Notwithstanding the fundamental nature of the automatic stay and *ipso facto* protections, and the fact that they arise as a matter of law upon the commencement of a chapter 11 case, not all parties affected or potentially affected by the commencement of a chapter 11 case are aware of the aforementioned Bankruptcy Code provisions. Nor are all parties cognizant of the significance and impact of these provisions. Experience has shown that it is often necessary to advise third parties of the existence and effect of the automatic stay and the invalidation of *ipso facto* provisions, particularly in cases in which the debtor conducts significant business in foreign jurisdictions. Occasionally, it is necessary to commence proceedings in the bankruptcy court to enforce these provisions. Accordingly, it is not uncommon for a bankruptcy court to issue an order embodying and restating the provisions of §§ 362 and 365 of the Bankruptcy Code.

15. Thus, even though an order of the sort sought by this Motion is not necessary to trigger the protections afforded the Debtors by §§ 362 and 365 of the Bankruptcy Code, the entry of such an order will be helpful for the Debtors in persuading their creditors, particularly their

foreign creditors, of the existence and broad scope of these protections. The granting of the relief requested will help ensure that (i) the non-debtor parties to unexpired leases and executory contracts with the Debtors will continue to perform and will not unilaterally terminate their contracts, and (ii) creditors do not seize the Debtors' assets or take any other action in violation of the automatic stay. Accordingly, the Debtors respectfully request that this Court issue an order which substantially restates the applicable provisions of sections 362 and 365 of the Bankruptcy Code as applicable to all creditors and parties-in-interest. Granting the relief requested herein will facilitate a smooth and orderly transition into chapter 11 and minimize the disruption of the Debtors' business affairs.

#### **V. NOTICE**

16. Notice of this Motion has been or will be provided to (a) the Office of the United States Trustee for the Southern District of Texas, (b) all known or alleged secured creditors, (c) the 30 largest unsecured non-insider creditors of the Debtors (on a consolidated basis), (d) all known shareholders holding over 5% of a class of equity interests in any of the Debtors, (e) all Debtor professionals, (f) the United States Attorney's Office for the Southern District of Texas, (g) the Internal Revenue Service, (h) any persons who have filed a request for notice pursuant to Bankruptcy Rule 2002, and (i) any such other government agencies to the extent required by the Bankruptcy Rules and Local Rules. The Debtors submit that no further notice of this Motion is required.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form filed herewith, granting the relief requested in this Motion, and such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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